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EDWARD VI.

PHILIP and MARY.

Aſſignees of Reverſions—Conditions and Limitations—Of Feoffees to an Uſe.—Covenants to raiſe Uſes—Origin of Truſts—Whether Remitter by an Uſe—What Jointures will bar Dower—Aſſumpſit againſt Executors—Witneſſes in Treaſon—Diſtinction between Murder and Manſlaughter—Burglary to be by Night—Trial of Principal and Acceſſary—Reformation of the Eccleſiaſtical Law—Of Marriage—Of Wills—King and Government—New Commiſſions—Trial of the Duke of Somerſet—Of Sir Nicolas Throckmorton—Bills of Attainder—Judicial Proceedings on Account of Religion—Staunforde—Printing of Law-Books—Miſcellaneous Facts.

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THE new points of learning that had lately engaged the attention of the courts received an acceſſion from the ſtatutes of the laſt reign. Theſe, whether they related to property or to crimes, furniſhed freſh objects of litigation, and new topics of argument, and drew from the judges ſeveral deciſions of importance during theſe two ſhort reigns.

MANY queſtions aroſe upon leaſes granted by religious corporations. Theſe bodies, having ſeen the deſtruction of ſome of their brother ſocieties, were reſolved to make the moſt of their property while they had it; and therefore granted long leaſes to their friends, and their former leſſees. The ſtat. 31 Hen. VIII. c. 13. for the diſſolution of

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of monaſteries, amongſt other regulations on this head, had declared all leaſes void, if made within a year before the beginning of that parliament; with a proviſo, that where the leſſee was at the time in poſſeſſion under a former leaſe for years, there the ſecond, if made for that time, or more, ſhould be good for twenty-one years. The caſe of *Fulmerſtone* verſus *Steward* aroſe upon this proviſo[1], and many others of the ſame kind were agitated in theſe two reigns; but as the ſubject of them was temporary, they furniſh no enquiry that can engage the curioſity of the modern lawyer.

ANOTHER proviſion, occaſioned by the diſſolution of monaſteries, had a greater and more laſting influence. The ſtat. 31 Hen. VIII. c. 13. abovementioned, had permitted the king to take advantage of all covenants and conditions to which the religious ſocieties had been parties; and which it was convenient ſhould go to the crown along with the reverſions which were given to it by parliament. But this benefit not extending to the king's patentees and grantees, the parliament took it into conſideration, and by ſtat. 32 Hen. VIII. c. 34. gave the ſame power to them: this was thought a good opportunity to correct an old defect in the law, and to include alſo common perſons as well as the king's grantees. It was accordingly permitted to all grantees of reverſions to avail themſelves of covenants made to their grantors; and leſſees in the ſame manner were meant to have a reciprocal claim upon ſuch grantees, as they before had on their leſſor. But this was done in ſuch an obſcure way, that it was difficult to ſay, whether the whole benefit of the act was not confined to grantees of the king, and of abbey-lands. This doubtful wording of the act gave occaſion to the caſe of *Hill* verſus *Grange*, where this matter was fully canvaſſed,

Aſſignees of reverſions.

[1] 1 and 2 Ph. and Ma. Plowd. 102.

and

and it was reſolved by all the judges of the common-pleas, that the act extended to all grantees of reverſions; a conſtruction which it has borne ever ſince.

THE rules that had been long laid down, and adhered to for the government of limitations in remainder, had not ſo preciſely defined the boundaries of theſe eſtates, but that on ſome occaſions arguments were found to diſpute their authority, or at leaſt to weaken their operation by endleſs diſtinctions. This may be ſeen by the diſcuſſion which was raiſed in *Colthirſt* verſus *Bejuſhin*, where a limitation that ſeemed to be well ſupported by the example of former times, was conteſted with ſome ſhew of reaſon and law. It was a leaſe from a religious houſe to a man and his wife for their lives, remainder to *A.* their ſon for his life; and if he died during the life of the huſband and wife, then remainder to *B.* another of the ſons for life, *ſi ipſe vellet inhabitare, &c.* which was a common condition in the leaſes of eccleſiaſtical perſons, who in this manner provided not only for keeping their poſſeſſions in tenantable order, but likewiſe bound their tenants to perform a duty which was incumbent upon churchmen in all inſtances, namely, to preſerve ſome appearance of that hoſpitality which was one principal conſideration of gifts in mortmain.

THE objections raiſed to this remainder to *B.* were theſe. It was ſaid, that a remainder could not commence on condition; becauſe if ſo, it would not paſs at the firſt livery, which was required in every remainder. Again, it was incompatible with the preceding eſtate; for if it was to commence *then*, namely, when the eldeſt ſon died before the huſband and wife, it muſt, in taking effect itſelf, deſtroy the particular eſtate; which was a repugnancy and contrariety that the law would not ſuffer. Theſe ſeem to be the chief points relied on, and theſe were ſuppoſed to be ſanctioned by the authority of adjudged caſes. But all the judges

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judges of the common-pleas were clear that this was a good remainder.

THEY ſaid, this remainder was perfectly agreeable with the principles of law already eſtabliſhed: they denied, firſt, that a remainder ought to paſs out of the leſſor preſently; for if I make a leaſe for years remainder for life, upon condition that if he in remainder do not ſuch an act, the remainder ſhall be void; here before the condition broken, the remainder is good; but when the condition is broken, the remainder is out of him, and paſſes again to the leſſor; which proves that a freehold may, by agreement at the time of the livery, paſs from one to another by matter *ex poſt facto*. Thus, if a leaſe for life is granted, with remainder to the king, and livery of ſeiſin is made, the remainder does not paſs till the deed is inrolled. In *Pleſſington's caſe*, in the time of Richard II. [k], where one condition was, that if the leſſor died within the term, the leſſee for years ſhould have the land for life, the condition was held good. So in the preſent caſe, the remainder to *B.* did not paſs out of the leſſor till *A.* was dead, and then it paſſed by virtue of the original words annexed to the livery. But it was not to take effect till after the death of the huſband and wife, for that is the plain and obvious ſenſe of "then;" and they agreed, that if it was to be conſtrued in the ſenſe given by the counſel, the remainder ſhould be void.

Conditions and limitations.

IT was ſaid by *Hinde*, juſtice, that this remainder did not depend upon a *condition*, as had been argued, but on a *limitation*; for the words to make a condition are ſuch as reſtrain the thing given; as upon condition that he ſhall not do ſuch an act: but here the words only *limit* the time when the remainder ſhall commence, and no ways reſtrain the thing. The common caſe of an eſtate tail is, that if the donee die without iſſue, it ſhall remain to a ſtranger; which is not a condition, but a limitation. *The*

[k] 6 Rich. II. Fitz. Quid juris 20.

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chief-juſtice Montague agreed with him entirely in this idea; and added, that whether it was called a *condition* or *limitation*, yet he thought the remainder good; for the lawful owner of land, he contended, might give it to what perſon, at what time, and in what manner he pleaſed, ſo as it was not repugnant to law; and this in queſtion he thought perfectly agreeable to ancient and modern precedents. Of the former kind, he quoted one of thoſe common caſes in the reign of Edward III. where, for the aſſurance of a leſſee for years, it was uſual to make a charter of feoffment on condition that if the leſſee was diſturbed in his term, he ſhould have the fee. And he called to their mind a caſe which was mentioned in the reign of Henry VIII. of a fine to paſs lands in tail, with condition to bear the conuſor's ſtandard; and on failure, that the land ſhould remain to a ſtranger [l]. He ſaid, he was counſel in that caſe; and though *Fitzherbert* expreſſed ſurprize at a fine being levied on condition, yet the remainder was not conſidered as any thing remarkable. He was of opinion, that the remainder in the preſent caſe did paſs out of the leſſor at the time of the livery, although it did not veſt in *B.* till the death of *A.*; and he held it in abeyance until the performance of the condition, upon the poſſibility that it might be performed. Thus if land was given to a married man and to a married woman, and the heirs of their two bodies, the fee tail paſſed out of the donor immediately by reaſon of the poſſibility that they might marry; and in the mean time the inheritance was in abeyance. In the ſame manner, he ſaid, the remainder here was in abeyance, till the event on which it was limited, had happened.

UPON ſuch reaſons, the judges agreed in holding this to be a good remainder [m]. The arguments and adjudication on this occaſion tended to ſet in a better light the learning of remainders depending on a contingency; and the diſtinction

[l] Vid. ant. 336. [m] 4 Ed. VI. Plowd. 25.

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ſtinction between a condition and a limitation afforded a new idea, which was afterwards made great uſe of, in the conſtruction of reſtrictive clauſes in deeds and deviſes of land.

WHATEVER doubts might be entertained on conditions that were deſigned by the parties to operate in deſtruction of eſtates, there was one condition created by the legiſlature, which infallibly annihilated an eſtate, whether for life or entail, and gave a right of entry to the perſon next intitled in remainder or reverſion. This was the alienation of a woman who had an eſtate from her huſband, which by ſtat. 11 Hen. VII. induced a forfeiture. A caſe came before the court of common-pleas in 4 Ed. VI. which gave occaſion to this ſtatute being fully examined and explained; and as it contains ſome argument upon the new learning of uſes, it is on that account deſerving of notice. This was *Wimbiſh* verſus *Talbois*, where a feoffment had been made by ſir George Talbois to the uſe of himſelf and wife in ſpecial tail; after which came ſtat. 27 Hen. VIII. They had iſſue Thomas and William; and then ſir George died. Thomas died, leaving iſſue Elizabeth, who married to Wimbiſh. Afterwards William by covin with his mother lady Talbois, brought a formedon *in deſcendre* againſt her; ſhe appeared at the firſt day, and William recovered by *nient dedire*: upon this Wimbiſh and his wife Elizabeth, as heir to ſir George, entered by virtue of the ſtat. 11 Hen. VII. c. 20.

IT was contended that this entry was not lawful, for ſeveral reaſons. They ſaid, that lady Talbois did not hold ſuch an eſtate as was deſcribed by the act; for, by the firſt branch of the act, ſhe ſhould have an eſtate in dower for life, or in tail jointly with her huſband, or ſolely to herſelf, or to her own uſe in any lands, tenements, or other hereditaments, of the inheritance or purchaſe of her huſband. Now, admitting her to have an eſtate tail jointly with her huſband, they ſaid it was not *in lands*, but only *in uſe*: and

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thoſe were two different things. Again, it was not of the inheritance or purchaſe of the huſband, for the *uſe* was neither, being a new thing, not in being before, and ſo never in the huſband; ſo that ſhe was not within the firſt branch. The ſecond branch ſpeaks of the like eſtates when they came from any anceſtor of the huſband, which was not pretended to be the caſe here. And the third branch is, where the eſtate comes by any perſon ſeiſed to the uſe of the huſband or his anceſtors; and they ſaid, ſhe was not within this branch, for the uſe was appointed by the huſband at the time of the eſtate of the feoffees, therefore ſhe could not claim from them. It was concluded, therefore, that lady Talbois not being within the terms of the act, no forfeiture could enſue. Further, they contended, that admitting ſhe was, yet the heir in her life-time could have no right to enter; for the conſtruction of the two clauſes relating to the forfeiture was, that the recovery in caſe of tenant in tail was merely void, and that the iſſue ſhould enter as if no recovery had been ſuffered, after the death of the tenant, for then, and not till then, had an heir any right or title; and it was only where the woman was tenant in dower, or for life, that the reverſioner, or he in remainder, might enter immediately.

THESE were the points upon which it was endeavoured, ingeniouſly enough, to take this caſe out of the ſtatute; but it was held by the whole court of common-pleas, that this caſe was within the words of the act; and if not, that it was at leaſt within the equity of it, and that the entry was lawful immediately, in the life of the tenant in tail.

As to the firſt point, whether *ceſtui que uſe* was within the act; it was admitted by *Hales*, juſtice, that an eſtate in uſe is mentioned but once in the premiſes of the ſtatute; *ſolely to herſelf or to her own uſe*; but if that clauſe ſpeaks only of *ceſtui que uſe*, and what follows relative to recoveries had againſt women, *or any ſeiſed to their uſe*, is only

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to be referred to that, it could not be denied but the preſent caſe was clearly within the words of the ſtatute. It is to be obſerved, ſays he, that this act was made within fifteen years after ſtat. 1 Rich. III. which makes the acts of *ceſtui que uſe* binding on his feoffees; and perhaps ſome of the makers of that ſtatute were alſo at the making of ſtat. 11 Hen. VII. and muſt have conſidered the effect of the firſt ſtatute, by which a recovery was good only during the life of tenant in tail: and ſo, if ſtat. 11 Hen. VII. did no more than make the recovery void againſt the iſſue, it would provide only for that which needed no proviſion. The ſtatute muſt be deſigned to make that unlawful which was lawful before; and as it was meant to have this effect with regard to a tenant in tail in poſſeſſion, it was equally reaſonable, becauſe it was in equal miſchief, that it ſhould be conſtrued to have the ſame effect againſt *ceſtui que uſe* in tail. This latter conſideration had always been a reaſon in our law for extending a ſtatute by equity to ſuch caſes as were not within the letter of it. Of this there were many examples. Thus, the ſtat. Marlb. c. 6. tho' it ſpeaks only of eſtates for years and feoffments, yet is conſtrued to include a gift for life, or in tail to the iſſue, for the purpoſe of defrauding the lord of his ward. The ſtat. *de donis* ſpeaks only of three eſtates tail, but has been extended to many others. Stat. Weſtm. 2. c. 3. which directs him in reverſion to be received to defend a ſuit, has been conſtrued to include thoſe in remainder. An action of account given by ſtatute to executors has been extended to adminiſtrators[a]; and many other inſtances were given of ſtatutes conſtrued by equity. From all this it appeared, that a like grievance ſhould by equity be taken to be within the purview of the act.

In all this the *chief-juſtice Montague* concurred; and with regard to the words of the act, which required it to be

[a] Plowd. 53.

of

of the inheritance or purchaſe of the huſband, he ſaid, that being ſuch as the heir might inherit, was the true legal idea of an inheritance; and he treated with contempt the diſtinction made between an inheritance and purchaſe, which had been quoted from *Britton*, whoſe book he ſaid contained many errors. For himſelf, he profeſſed to follow Littleton, which he called the trueſt and ſureſt regiſter of the grounds and principles of our law; and Littleton ſays, that not only what a man has by diſcent, but alſo what he has by purchaſe, is an inheritance. Thus, he concludes, the words of the ſtatute are ſatisfied; for ſhe has an eſtate in an hereditament (namely, in a uſe) jointly with her huſband, to her own uſe, of the inheritance of the huſband, which is all required by the firſt disjunctive ſentence of the ſtatute.

But if ſhe was not within that, ſhe was within the ſecond disjunctive ſentence, *or given to the huſband and wife in tail by any perſon ſeiſed to the uſe of the huſband:* for the feoffees being ſeiſed to the uſe of the huſband and wife, were ſeiſed to the uſe of the huſband (the huſband and wife each having the entire uſe, for there are no moieties between them), and the feoffees were the donors of the eſtate, after the execution of the poſſeſſion to the uſe by ſtat. 27 Hen. VIII. for the parliament could not be ſaid to be the donors, the act being only the conveyance of the land from one to another. He ſaid, it had been long ſince held, where *ceſtui que uſe* and his feoffees joined in a feoffment, that it ſhould be conſtrued to be the feoffment of the feoffees; for they had the greateſt authority to give it, even after the ſtat. Rich. III. [a] So if one who was ſeiſed in fee, and one who had nothing in the land, joined in a feoffment, it ſhall be ſaid to be the feoffment of him who has right, and the confirmation of the other. Thus, he concluded, it ſhould here be ſaid to be the feoffment of the

[a] M. 21 Hen. VII. 32. pl.

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feoffees by parliament, and the aſſent and confirmation of all others; and if it was conſtrued otherwiſe, it would be attributing to the ſtatute the power of doing wrong to the feoffees, by taking a thing from them and making another the donor of it. Thus, the feoffees were the donors; but if they were not, yet ſir George was, unleſs it ſhould be thought a repugnancy to ſay he was a donor to himſelf; and therefore the feoffees more properly were the donors, and then the whole of the ſtatute was ſatisfied. However, if this caſe was not within the words, he agreed with the other judges in thinking it within the equity of the ſtatute; and to obviate the objection, that the proviſion being in reſtraint of the tenant in tail ſhould be conſtrued ſtrictly, he ſaid it was for the benefit of the common-weal, and in advancement of juſtice; and every ſtatute which is conſtrued by equity, reſtrains, and is penal to ſomebody; and he ſeemed to think the rule of conſtruction was to turn on the ſtatute being beneficial to the greater number [p].

THOUGH no judgment was here given, it was of great importance that the judges concurred unanimouſly in ſo ſolemn opinion to bring this caſe within the terms of the act; for, ſince moſt eſtates in the kingdom were conveyed to a uſe, this proviſion would otherwiſe have become almoſt wholly abortive. The anxiety they felt to compaſs this by a literal conſtruction, led them into ſome ſubtlety and refinement; and though there can be very little doubt what the makers of the act intended, yet the wording of it being liable to ſome cavil, it ſeemed a ſafe and ſenſible reſolution to ſupply the defects of it by equity.

Of feoffees to a uſe.

IN theſe two reigns ſome deciſions were made on uſes, which tended to ſhew the effect the late ſtatute had upon them. It ſeemed a doubt, when that ſtatute had ordained that *ceſtui que uſe* ſhould thenceforward be ſeiſed of the land and freehold, as he before was of the uſe, whether any

[p] Plowd. 42.

ſeiſin

ſeiſin of the freehold remained in the feoffees. The courts ſeemed inclined to think the feoffees ſtill poſſeſſed of the ſame eſtate and power they had before the act; ſo that both the *ceſtui que uſe* and the feoffee having a freehold, and both having an equal power over the ſame freehold, the difficulties of that ſort, which were experienced after the ſtat. 1 Rich. III. were felt after the ſtat. 27 Hen. VIII.

THE following are ſome inſtances where this point was debated. A man made a feoffment in fee to the uſe of *W.* and his heirs, till *A.* paid 40l. to *W.* and then to the uſe of *A.* and his heirs. *A.* paid to *W.* the 40l. There was a difference of opinion as to the concluſion to be founded on theſe facts. Some ſaid, that if *A.* entered, he would become *ipſo facto* ſeiſed in fee; for *W.* being ſeiſed in fee by the ſtatute of uſes, *A.* would be able to diveſt that fee, and transfer it to himſelf under the condition of the deed. Others, on the contrary, were of opinion, that the payment and entry of *A.* had no effect without an entry by the feoffees. Between theſe two opinions *Brooke* has ſtruck out a middle courſe, as an expedient to ſalve difficulties: he thought that it would be beſt for *A.* to enter in the name of the feoffees, and then, *quâcunque vitâ datâ*, the entry muſt be good, and he would become ſeiſed according to the terms of the deed. To this he added, that a uſe might change from one to another by ſome act or circumſtance, *ex poſt facto*, as well ſince as before the ſtatute [s].

ANOTHER queſtion aroſe reſpecting the intereſt of feoffees, in the caſe of *Stephen Davis*. A tenant for life, and the tenant in tail next in remainder in uſe, had levied a fine of the land, which had afterwards been conveyed to the king; the feoffees to the uſe preſented a petition of right: and here two points were made in arreſt of judgment on the petition. Firſt, that the fee ſimple of the uſe was legally conveyed by the fine, and was now in the king; and

[s] 6 Ed. VI. New Caſes, 136.

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if it was the caſe of a common perſon, he could not enter; becauſe not being ſeiſed of a fee ſimple, as he was before the alienation, of what eſtate could he be in? Secondly, they ſaid that all intereſt and right of the feoffees, which was not to their own uſe, was taken away by the ſtatute. There does not appear to be any deciſion of theſe points at this time[r]; and it will afterwards be ſeen, that all theſe poſitions received ſome qualification.

Covenants to raiſe uſes.

THE rigid opinions maintained in the laſt reign againſt *covenants to convey uſes*, were beginning to be ſomewhat tempered. A queſtion aroſe upon a covenant of this ſort in the reign of Philip and Mary. Sir Thomas Seymour, the lord-admiral, who was attainted in the laſt reign, had covenanted and granted to one Andrew, in conſideration that the ſaid Andrew had conveyed, after his death, divers lands in fee ſimple to the ſaid ſir Thomas, that he would levy a fine to certain perſons of lands whereof the ſaid admiral was then ſeiſed, to himſelf for life, remainder to the ſaid Andrew in tail. No ſuch fine was levied; and it now became a queſtion, whether the covenant of itſelf had changed the uſe. It was debated at Serjeant's-Inn; and it there appeared to *Bromley the chief-juſtice*, *Portman*, *Brown*, *Sanders*, *Brooke chief-baron*, *Whiddon*, *and Griffin* the attorney, and *ſir James Dyer*, that no uſe could be preſently altered by this covenant; for it was future, and the covenant could not now by any poſſibility be performed. But they, in a manner, agreed that if I covenant in conſideration of marriage, or for a ſum of money paid to me, that *A.* ſhould have certain lands, this would change the uſe preſently, becauſe there the eſtate was not to be made afterwards, as in the caſe before the judges. It was alſo agreed, that if *ceſtui que uſe* willed that his feoffees ſhould make an eſtate to *J. S.* in tail or in fee, and then died, yet the uſe would be completely changed before the eſtate was actually executed by the feoffees[s].

[r] 7 Ed. VI. Dyer 88. 109. [s] 1 Mar. Dyer 96. 41.

THESE

THESE conceſſions were a ſufficient foundation for the ſuperſtructure that was afterwards raiſed upon them. Two years after the following caſe happened: A covenant was made that the ſon of *A.* ſhould marry the daughter of *B.* for which *B.* ſhould give to *A.* an hundred pounds; and *A.* covenanted with *B.* that if the marriage did not take place, then *A.* and his heirs ſhould be ſeiſed of certain lands to the uſe of *B.* and his heirs *quouſque*. *A.* and his heirs or executors repaid the hundred pounds: after this *B.* died, and ſomething happened to prevent the marriage taking effect; ſo that it became a queſtion, whether the uſe was changed by the above covenant. And it was held, that the uſe was executed by the ſtatute in the heir of *B.* notwithſtanding *B.* was dead before the refuſal of the marriage; for the covenant bound the land with the uſe in the life of *B.*[1]

A COVENANT was made upon conſideration of love, favour, and other good conſiderations, to ſuffer a recovery to ſir Anthony Wingfield, to the uſes mentioned in a deed; which uſes were contained in a clauſe, wherein the ſaid ſir Anthony covenanted and granted for himſelf and his heirs, that within eight months after the aſſurance ſo made, he would make, or cauſe to be made, an eſtate to his own mother for life, remainder to himſelf and his wife in ſpecial tail, remainder to his wife in fee. A recovery was ſuffered, but no eſtate made by ſir Anthony; and it became a doubt, whether the uſe was changed by the deed, and the operation of the ſtatute upon it. And it ſeemed to the two chief-juſtices, juſtice *Stamford* and *ſir James Dyer*, that no uſe was changed by the indenture and recovery only, without an eſtate being properly executed; for if ſo, a conſtruction of law would be allowed which might make it impoſſible for the covenantor to perform his covenant: they not only held no uſe to be changed under the ſtatute and the deed, but they alſo added, that no *ſubpœna* would lie to compel

[1] 3 Mar. New Caſes, 137.

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ſir Anthony to carry it into execution, *becauſe* there was a remedy at common law by action of covenant [u].

It was not only in the inſtance of theſe covenants that the courts of common law entertained ſcruples of allowing a uſe to be conveyed, where a plain and obvious intention of the parties to raiſe a uſe was diſcoverable from the tranſaction and terms of the deed; but we have ſeen in the former reign, where it was directed that the feoffees ſhould take the profits and pay them over to another, that the judges held this not to be a uſe executed by the ſtatute in the perſon to whom the profits were to be paid [x]. The judges did not then go ſo far as they did on the preſent occaſion, and declare that no *ſubpœna* would lie. It muſt be confeſſed, that the preſent is not ſo ſtrong a caſe as the former; this being an *executory* covenant, and, as ſuch, plainly within the rule which had been laid down upon that head, in the repeated deciſions of this and the former reigns. However, it will be ſeen, notwithſtanding the court of chancery might at this time join with the courts of law, and deny relief in theſe executory covenants, that in after-times perſons were enabled moſt completely to ſubſtantiate theſe claims in equity as *truſts*, which ought in conſcience to be fulfilled.

Origin of truſts.

The like obſervation may be made on a deciſion in the latter end of Philip and Mary. It was reſolved by the whole court of common-pleas, in the caſe of *Jane Tyrrell*, that a uſe could not be limited on a uſe. *Jane Tyrrell* bargained and ſold land for a ſum of money, *habendum* to the bargainee and his heirs for ever, to the uſe of the bargainor *Jane Tyrrell*, for life, and after her deceaſe to the bargainee in tail, remainder to the uſe of the heirs of the bargainor in fee. It was objected, that the uſes beyond the *habendum* were all void and impertinent; for a uſe could not be reſerved, or raiſed out of a uſe; and by the nature

[u] 4 and 5 Phil. and Mar. Dyer, 162, 40. [x] Vid. ant. 351.

of

of this conveyance, by bargain and ſale, a uſe was firſt transferred to the bargainee, before any freehold or inheritance was veſted in him by the enrollment. The court had before conceived ſome doubt, whether all the uſes beyond the firſt were not mere nullities; and now it was ſo adjudged by *Sanders*, chief-juſtice, and the reſt of the court [x]. Here was another occaſion for the aid of a court of equity to temper the conſtruction of the courts of common law. In this manner, after the making of the ſtatutes of uſes, did the ſtrictneſs of the judges, in conſtruing thoſe conveyances, drive uſes back into the courts of equity. The chancery once more, as in the reign of Henry VI. took up uſes where the common law rejected them; and all ſuch uſes, with moſt or all of their conſequences, became peculiar objects of that court's juriſdiction, under the idea and conſideration of *truſts*; which ought, in conſcience, to be eſtabliſhed and fulfilled, tho' they were not wholly conſonant to the rules and courſe of the common law.

IT ſeemed to be in conſequence of the ſtatute of uſes, that the judges agreed to conſider a recovery where a *ceſtui que* uſe in tail was vouchee, to be a ſufficient bar of the iſſue [y]. As the ſtatute had put the *ceſtui que uſe* in complete ſeiſin of the freehold, he was in the condition of other tenants in tail, and entitled to every advantage which a recovery could furniſh for diſpoſing of his eſtate.

NOTWITHSTANDING the determination in the reign of Henry VIII. that no remitter was worked by the execution of the poſſeſſion to the uſe [z], this point was brought forward again, and argued in the court of wards, in 1 and 2 Phil. and Mar. in *Townſend's* caſe. There *ſir Roger Townſend* being ſeiſed in tail in right of his wife, made a feoffment to the uſe of himſelf and his wife for life. Upon the occaſion of one of *Roger's* deſcendants leaving at

[x] 4 and 5 P. and M. Dyer, 155, 20.
[y] Ed. VI. New Caſes, 137.
[z] Vid. ant. 359, 360.

his

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his death a minor, an office was found, and amongſt other things, the jury found that the wife was in her remitter. It was argued in ſupport of this verdict, not as in the former caſe, that the remitter was wrought by the ſtatute, but that it was a remitter before the act, and the act ought to be no hindrance to it now. They ſaid there were two clauſes in the ſtatute of uſes; the firſt of which diveſts the eſtate out of the feoffees, and gives it to the *ceſtui que uſe* in the ſame quantity the feoffees had it; the other veſts it in ſuch quality as *ceſtui que uſe* had the uſe. So that notwithſtanding the ſtatute put the eſtate in the wife according to the quantity and quality of the uſe, yet when it came to the wife, they ſaid, the poſſeſſion was afterwards changed by reaſon of her former right: for though the ſtatute gives the ſeiſin in the ſame quality as the uſe, it does not ſay it ſhall continue ſo; the ſtatute relating only to the firſt conveyance, not to the continuance of the uſe. For ſuppoſing the wife had been infeoffed, the poſſeſſion would have paſſed by the feoffment, and the remitter come afterwards; ſo here the poſſeſſion is given by the ſtatute, and then comes the remitter; for they repeated that the execution of the uſe ought not to hinder the remitter.

Whether remitter by a uſe.

But it was underſtood in a different manner by the other ſide, and was accordingly ſo decreed by the court of wards. They ſaid that the feoffment made by the huſband in 29 Hen. VIII. was a diſcontinuance to the wife, for the purging whereof ſhe was driven to her *cui in vitâ*, and could not avoid it by entry, as ſhe might ſince ſtat. 32 Hen. VIII. c. 28*. And when ſhe had an action given her to recontinue the poſſeſſion, which ſhe waived, and came to the poſſeſſion by other means, ſhe ought to take it with ſuch appendages as the law limits to thoſe means, and no otherwiſe: the means by which ſhe came to that poſſeſſion, which her huſband had taken from her, was the ſtatute of uſes; and in whatſoever manner the ſtatute gives her the poſſeſſion, ſo it ought to be adjudged to her, notwithſtand-

* Vid. ant. 233.

ing

ing ſhe is a feme covert; for neither coverture nor infancy are excepted in the ſtatute. Now the eſtate limited in uſe to the wife was only for life jointly with her huſband; and as by the ſtatute ſhe could only be in ſuch ſeiſin of the land as ſhe was of the uſe, therefore ſhe could not be ſeiſed in tail. Again, the clauſe of the ſtatute which limits the ſeiſin to be according to the *quality*, *manner*, *and form* of the *uſe*, will not ſuffer the wife to be remitted; for ſhe had the uſe of a new *purchaſe*; therefore ſhe muſt have the land as a purchaſer. But if ſhe was adjudged in her remitter, ſhe would be adjudged in by deſcent, which would be contrary to the ſtatute: and the affirmative words of the ſtatute muſt, as in all acts, be conſtrued to imply a negative; namely, that the eſtate can take effect in no other poſſible manner.

THEY held, that if the firſt poſſeſſion did not work a remitter, there never ſhould be any, where the entry of the party was taken away. But they ſtated this difference: if a diſſeiſor made a feoffment in fee to the uſe of the diſſeiſee, and afterwards the diſſeiſee entered, there he ſhall be remitted by his entry, though before his entry he was not, but was in poſſeſſion only by virtue of the ſtatute; and when he enters he is adjudged in, not in reſpect of the ſtatute, but in reſpect of the diſſeiſin. But in the preſent caſe, the entry was taken away by the diſcontinuance; ſo that if the firſt eſtate did not remit her, her entry or continuance afterwards could not. They reminded them, that when the ſtatute of uſes paſſed, there were many *ceſtui que uſe* in fee, who had a right of eſtate tail; and when the poſſeſſion was conveyed to them by the ſtatute, it was the opinion of all the judges that they were not thereby remitted [a].

THUS it was held very early after the ſtatute, that execution of the poſſeſſion to the uſe did not work a remitter. The

[a] Vid. ant. 521.

counſel

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counſel in the preſent caſe ſeemed to be aware of this; and, not venturing now, as in the reign of Henry VIII. to argue the contrary, they were content to admit ſuch adjudication to be right: but they contended further, that if the ſtatute did not give, it ought not to hinder a remitter. The above reaſoning, however, of thoſe who were againſt the remitter, went the length of ſaying, that no remitter could be worked in ſuch caſe where the entry was taken away. Yet the decree went no further than to ſay, generally, that the wife was not remitted by force of the uſe, and the execution of the poſſeſſion by the ſtatute [b].

THE clauſe in the ſtatute of uſes relating to jointures was another new ſubject of judicial diſcuſſion. The ſtatute is particular in deſcribing what eſtate ſhall be allowed a ſufficient bar of dower. But we ſhall ſee the courts went further, and admitted many others, as within the equity of the act. No deciſion upon this part of the ſtatute in the reign of Henry VIII. has come down to us, unleſs that may be called one, which is reported on the will of *Whorewood*, the attorney-general. *Whorewood* left eſtates of the value of 360l.; of which, to the amount of 60l. his wife was joint-purchaſer with him: by his will he declared that his wife ſhould have, during her life, a third part of all his lands and tenements, together with thoſe ſhe had in jointure, to be aſſigned by his executors, *if it was not contrary to law*. The widow refuſed her jointure of 60l. and demanded 120l. as the third part of the whole, in light of a legacy by the will; and alſo 80l. as a third of the reſidue for her dower. All this appeared in the court of wards; but no regular deciſion ſeems to have been made upon the point of law; for we are told it was by *agreement* decreed and ordered, that ſhe ſhould have the legacy of 120l. and 40l. of the reſidue in lieu of her dower [c]: ſo

What jointures will bar dower.

[b] 1 and 2 Fin. and Mo. Plowd. 311. [c] 38 Hen. VIII. Dyer, 61, 31.

that

that this case proves nothing. But it is said, that in a similar case in 5 Ed. VI. where a manor was devised to enlarge the wife's jointure, and she relinquished her jointure, it was determined she should not have the manor; because, as it was given for *enlargement* of her jointure, the intention of the testator could not be fulfilled [d].

Respecting the nature of the estate given in jointure, we find it laid down positively *per justitiarios* in 6 Ed. VI. that wherever a man makes his wife joint-purchasor with him, after the coverture, of an estate of freehold (except it is in fee-simple) it shall bar the dower, if she agrees to it after his death. A fee-simple would not answer, because it was not named in the act; and further, they held a devise of land to the wife was no bar of dower; for that was a benevolence, and not a jointure [e]. It was agreed, that any joint-estate of freehold was sufficient, though not named in the act: and in conformity with this opinion, it was decided in the case of the duchess of Somerset, in the beginning of the next reign, that an estate to a man and his wife, and the heirs male of their bodies, was a good jointure: and yet that is not one of the five estates mentioned in the act; and the duchess had there brought a writ of dower, under the idea that such an estate was no bar [f].

The remainder of what we have to add of the decisions of courts during these reigns, will relate to the nature and conduct of certain actions, and the alterations that took place in criminal proceedings. Hitherto we have considered actions upon the case as supplying the place of several ancient writs. In the last reign, there is an intimation of one being used instead of the action of debt, in matters of simple contract: this was called an *assumpsit*, from the suggestion of an *assumption* or *promise* made by

[d] Dyer 61. 32. in the notes.
[e] B. N. C. 95.
[f] 1 Mar. Dyer, 96, 42, and 97, 48.

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the defendant, for the breach of which the action was brought. We ſhall now ſee this liberal action applied to another object with the ſame ſucceſs. It was as deſirable to deviſe ſome action in the room of *detinue*, as it had been to ſubſtitute one in the place of that of debt, the wager of law being a legal method of defence in both. We intimated in the laſt reign, that a new writ to this effect had been made [a]. We have now authority to ſpeak more particularly of its nature. A writ upon the caſe had been framed, which ſurmiſed, that the plaintiff being poſſeſſed of the thing in queſtion, loſt it; and that the defendant *found it*, and *converted it* to his own uſe, upon which the action accrued. This, from the ſuggeſtion which gave the cue to the demand, was called an action *ſur trover et converſion*, or an *action of trover*; that is, grounded upon a ſuppoſed *trover* by the defendant of the thing demanded, and *converting* it to his own uſe.

THE firſt action in this preciſe form, to be found in our books, is in the fourth year of Edward VI[c]. Again, in 2 and 3 Ph. and Ma. [b] there is an action of trover; and from the kind of exceptions taken to the declaration, it ſhould ſeem that the action was conſidered as a novelty, and as if it had not been long, or not generally, in uſe: though it muſt be allowed, that (beſide the caſe in Edward VI.) the actions upon the caſe above alluded to, in the reign of Henry VIII. are very ſimilar to it. However, it was not till this period that this action was ſubſtituted in the place of that of detinue; which, from thenceforward, became gradually leſs frequent.

THE manner of pleading to this new action of trover, was framed like that uſed in the infancy of other actions upon the caſe. The plea was drawn ſpecially, pointing at ſome material allegation, as it was then conceived, in the declaration; and ſo concluded either to the court, or the

[a] Vid. ant. 385.

[b] Dyer, 121. 14. 16.

[c] Bro. *act. ſur le caſe*, 113. Vide ibid. 109.

country.

country. The declaration in the caſe juſt beforementioned was this: that the plaintiff was in poſſeſſion of a chain of gold, which he loſt; and that it came *by finding* to the defendant's hands, who ſold it, and *converted it* to his own uſe. To this the defendant pleaded, by traverſing the ſelling *modo et formâ*, as ſuppoſed in the declaration; and then concluded with an averment, and judgment of the action. To this the plaintiff demurred; and it was held by the court, that the plea was good [k]; tho' it was ſaid, that it would have been better to have pleaded *non culpabilis*; which would have anſwered, ſaid the court, all the miſfeaſance alledged in the declaration. In like manner, in the action in 20 Hen. VII. which was againſt an executor for goods bailed to his teſtator, the converſion was traverſed.

THE reaſon upon which this kind of pleading was founded, we have before ſhewn, is to be looked for in the old action of detinue. In an action of detinue, in 27 Hen. VIII. [l] it was held, that if a perſon came to the poſſeſſion of goods by bailment, he was anſwerable upon the bailment merely; but if by *finding*, he was chargeable no longer than while he was actually in poſſeſſion of them: therefore, in an action of detinue, where a bailment was ſuggeſted, the bailment was traverſable: and it was the opinion of *Shelley*, that, by the ſame rule, the trover (and the converſion was the ſame) was traverſable. As the action of trover was grounded upon that of detinue, it was natural that ſome of its peculiarities in pleading ſhould be copied from the ſame original.

THE debated queſtion *, whether *aſſumpſit* would lie againſt executors, was again brought forward in 4 and 5 Ph. and Ma. It then received a final determination in the affirmative; and that judgment has governed the courts ever ſince. This was in the caſe of *Norwood* verſus *Read*.

[k] Dyer, 121. 122.
[l] 27 Hen. VIII. 13.
* Vid. ant. 380.

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Aſſumpſit againſt executors.

The plaintiff there declared, that the teſtator, in conſideration of ſo much money to him paid by the plaintiff, promiſed and aſſumed to deliver to the plaintiff, certain quantities of wheat at different days; that the teſtator outlived the laſt day; and altho' the plaintiff was ready at the time and place agreed to receive the wheat and to pay for it, the teſtator did not deliver it according to his aſſumption; nor did the defendants (to whoſe hands ſufficient of the teſtator's goods came to ſatisfy this and all other demands) ſince his death, deliver it, but wholly refuſed. This was the declaration; and to this the defendant's counſel, relying on the laſt determination, demurred in law.

In ſupport of this demurrer, it was argued, that the aſſumption of the teſtator was no other than a *ſimple contract*; and if the executors ſhould be charged with it, on the ſame reaſon ſhould they be charged by every contract executory, as well for debt as for other things; for every contract executory is an *aſſumpſit* in itſelf. They ſaid, it would be inconvenient to charge them as well by contracts *in pais*, as by ſpecialties; for of the former they could have no knowledge. The court had directed that precedents might be looked for; many were found, and ſhewn to the court: but the counſel for the defendants ſaid, that in all theſe the executors had pleaded in bar, and upon the pleas being tried for the plaintiffs, they had recovered; ſo they contended this proved nothing againſt *them*, for they had demurred, and ſo brought the point directly in iſſue. They ſaid, it was adjudged in 13 Hen. VI. that if the executor pleaded in bar, where he might have waged his law, he ſhould not have advantage of it in arreſt of judgment, or in error; the preſumption of the law being, that the executor is ignorant of the debt; but when he takes upon him the knowledge of it, by pleading in diſcharge thereof, it is reaſonable he ſhould loſe the favor the law intended him: whereas by this demurrer, they ſaid, they took upon them-

themſelves no knowledge of the contract, but prayed the benefit the law gave them on account of their preſumed ignorance. Thus, not being within any of the precedents, there was but one caſe againſt them, and that was in 12 Hen. VIII. [m]; and there it does not appear whether the executors demurred, or not; and if they pleaded in bar, it was no more againſt the preſent caſe, than the precedents beforementioned. But admitting judgment to have been given on demurrer, they then alledged the opinion of *Fitzherbert*, in 27 Hen. VIII. who, as we have before ſeen, pronounced it not to be law [n].

To this it was anſwered, that in this action of treſpaſs upon the caſe, the teſtator could not have waged his law; and they contended it to be a rule of law, that where the teſtator would not be allowed this privilege, the action would lie againſt the executors. They ſaid it was not reaſonable, if they had aſſets to pay debts and legacies, and alſo to pay the plaintiff, that they ſhould retain the reſt of the goods to their own uſe, being only put in truſt for the benefit of the teſtator's eſtate: that the judgment in 12 Hen. VIII. being given by the court, was not ſo eaſily to be rejected on the mere *dictum* of *Fitzherbert*. They admitted there might be ſome weight in the objection to the declaration not averring that there were aſſets after paying the *legacies*; and they thought the juſtices had better give judgment upon this, than on the principal matter. Upon ſearching the record of the caſe in 12 Hen. VIII. it appeared, that the averment of aſſets did not extend to *legacies*, as the report ſays, but only to debts, and to ſatisfy the plaintiff alſo; which exactly correſponded with the preſent declaration.

THESE were the arguments on both ſides; and the juſtices were ſo eaſily ſatisfied on the ſubject, that they gave judgment for the plaintiff, as Plowden ſays, without any

[m] Vid. ant. 381. [n] Vid. ant. 381.

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ſolemn argument. We are informed from the ſame authority, that many learned perſons had entertained doubts upon the deciſion in 12 Hen. VIII. not thinking that caſe to be well adjudged; and that ſuch action was not maintainable by the antient law, but *that conſcience had encroached the caſe upon the common law.* He himſelf, however, was of another opinion; and he even judged the action to be good, without ſurmiſing that the executors had aſſets to pay debts, and ſatisfy the plaintiffs alſo *: ſo far was he from agreeing with thoſe who would have had the averment to include *legacies*.

Witneſſes in treaſon.

We ſhall now conſider what was done by our courts in addition to the many alterations that had been made by the legiſlature in our criminal law. The ſtatutes relating to witneſſes in treaſon are the moſt ſtriking part of the penal laws in this period; and very few years elapſed before the judges were called upon to come to ſome reſolutions on the conſtruction of them, as has already been hinted when we ſpoke of thoſe ſtatutes. At Serjeant's-Inn, in the fourth year of Philip and Mary, the judges came to the following reſolution on the ſtatutes concerning witneſſes: That on the trial of treaſon and miſpriſion of treaſon, there were required by the ſtatutes two accuſors or witneſſes to the indictment, or ſayings and accuſations in writing under their hands, or the teſtimony of others to ſuch accuſation, which ſhould be read to the jury on the indictment. Should the accuſors happen to be dead at the time of the indictment, they held it ſufficient if the accuſation was there teſtifying the fact, for then there were two accuſors. They held likewiſe, that for any treaſon under ſtat. 25 Ed. III. there needed no accuſors at the trial, becauſe it was enacted by ſtat. 1 and 2 Ph. and Ma. c. 10. that all trials of treaſon ſhould be by the order of the common law, and not otherwiſe; and the trial by common law was

* Plowd. 180.

by

by jury and witneſſes, and not by accuſors. The ſame of treaſon in coining, there needed no accuſors at the arraignment, but only at the indictment. But they held, that in all treaſons under ſtat. 1 and 2 Ph. and Ma. c. 10. there ought to be witneſſes or accuſors, as well at the indictment as at the arraignment, purſuant to a clauſe at the end of that act. Again, in miſpriſion of treaſon, there ought to be witneſſes or accuſors, as well upon the indictment as the arraignment, by ſtat. 1 Ed. VI. c. 12. at the end; for ſtat. 1 and 2 Ph. and Ma. before-mentioned, repeals accuſors at the trial in caſes of treaſon only, and not in miſpriſion. They agreed alſo, that petit-treaſon ought to be tried as high-treaſon, namely, by accuſors at the indictment, but that there needed no accuſors at the trial. In theſe reſolutions the following perſons concurred; namely, *ſir William Portman*, chief-juſtice; *Mr. Hare*, maſter of the rolls; *ſir Robert Brook*, *ſir David Brook*, *ſir Humphrey Brown*, *ſir John Whiddon*, *ſir Edward Saunders*, *ſir William Staunforde*, and *maſter Daliſon*, juſtices; *Dyer*, ſerjeant; and *Griffin* and *Cordell*, attorney and ſolicitor-general. They agreed alſo, that counſellors who give evidence againſt traitors are not accuſors; which was a reſolution more in favour of the ſubject, than thoſe which allowed the written accuſations to ſupply the place of *vivâ voce* teſtimony. It may be added here, from *ſir Robert Brook*'s own words, that by the civil law accuſors were as parties, and not witneſſes; for witneſſes ought to be indifferent, and not come till they are called; but accuſors offer themſelves to accuſe; and conformably with this idea, our law had allowed it as a good challenge to a witneſs to alledge, that he was one of the priſoner's accuſors [p].

THE judges in the above reſolutions went no further than to agree upon the number of accuſors; and to ſay

[p] We have before obſerved, that what is here ſaid of accuſors is wholly conſonant to the principle of criminal proceeding in the canon law. Vid. ant. 505. New Caſes, 76.

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that their written accuſation would be received as equally legal with their verbal evidence. In a formal trial, in the firſt year of the queen, it had been held, with regard to the credibility of the accuſation, that it was ſufficient for one of the accuſors to ſpeak of his own knowledge, or own hearing; and then having related the fact to another, that other perſon might be a good accuſor under the act. Thus ſir Nicholas Arnold, who accuſed William Thomas of treaſon in ſpeaking words tending to the death and deſtruction of the queen, and made this accuſation upon his own hearing, had, at the requeſt of William Thomas, reported the ſame to ſir James Croftes; ſir James Croftes reported them to John Fitzwilliam, who was ſuppoſed a proper perſon to be employed to kill the queen; and he told them to ſir Thomas Wiatt: here the court held every one of theſe perſons to be a proper accuſor: a determination, which made it wholly unneceſſary to repeal the ſtatutes of Edward VI. it being after this in vain to require fifty witneſſes; for the ſame principle would have ſupplied any number from the knowledge of one alone [q].

In the ſame year it was declared, at the arraignment of ſir Nicholas Throckmorton, and was repeated in the ſtar-chamber to the jury (who were arraigned there for their verdict of acquittal), by the opinion of the juſtices, that where two or more conſpired to levy war, or commit any other treaſon, and one of them executed it, this was treaſon in all [r].

It ſeemed to be a determination to ſtrain the law of treaſon, as well private as public. It was laid down this ſame year, that if a ſon or daughter-in-law kill a father or mother-in-law, who furniſhes board or lodging, and to whom they do neceſſary ſervices, ſuch a perſon, if indicted *proditorie*, ſhould be found guilty of petit-treaſon, though there were no wages paid [s]. A caſe happened where a

[q] 1 Mar. Dyer, 99. 68. [r] 1 Mar. Dyer, 98. 56. [s] Dal. 14. 1.

female

female ſervant and a ſtranger conſpired to rob the maſter, and at the appointed time ſhe admitted him into the houſe, and conducted him with a candle to her maſter's bed, where he killed him, the ſervant doing and ſaying nothing, but only holding the candle: it was a queſtion, whether the ſervant was guilty of petit-treaſon, conſidering the ſtranger was principal actor, and only guilty of murder. The judges were divided upon it. *Portman* and *Brook*, the two chief-juſtices, with *Hare*, the maſter of the rolls, conſidered it as treaſon; *Brook*, chief-baron, with *Daliſon* and *Staunforde*, juſtices, maintained the negative [t]. A ſimilar queſtion had been decided in the affirmative in the time of Richard III. A man having ſeized on the ſea ſome goods of an enemy, took them into a houſe, where he was attacked by a perſon pretending to have an authority from the admiral, and ſupported by a multitude of perſons: a woman, without any weapon, iſſued out of the houſe, and was killed by one of the perſons who came to take the goods, and had thrown a ſtone at another in the gate. It being a queſtion whether this was murder, the juſtices and ſerjeants were divided; ſome thinking, that if ſhe came out in defence of the houſe, it was murder in all the perſons attacking the houſe; others, among whom were *Brook*, *Staunforde*, and *Dyer*, thought otherwiſe; for (ſay they) no malice was prepenſed againſt the woman, and the imputation of murder cannot be extended further than the party's deſign. The former ſupported their concluſion by ſaying, that if two were fighting, at an appointed time and place, and a ſtranger interfering to part them, was killed by one of them; this conformably with ſome opinions as old as the reign of Edward III. was murder in the ſlayer; and ſome thought it was murder in both [u].

A CASE very much like this ſuppoſed one, had really happened in the firſt year of queen Mary's reign. This

[t] 2 and 3 Ph. and Mar. Dyer, 128. 57. [u] 2 and 3 Ph. and Ma. Dyer 128. 60.

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was *Salisbury*'s case. The jury upon the trial put this question, with relation to one of several that were indicted for murder, Whether if the defendant was in company with them who of malice prepense killed the deceased, and when he saw them combating together took part with them suddenly, without any malice prepense, and struck the deceased, together with the others, he was guilty of murder or manslaughter? to which the court answered, if he had no malice prepense, but suddenly took part with those who had, it was manslaughter, and not murder. The fact upon the evidence being, that the intention was not to kill the deceased, but his master, the judge laid down the law upon that head, namely, that killing one man upon a malice conceived against another is murder. There arose another point in this case, which must startle a modern reader, and is well worthy of observation.

Distinction between murder and manslaughter.

We have seen in the reign of Henry VIII. that a man found guilty of manslaughter, on an indictment of murder, was by all the judges held guilty of the whole indictment, and was accordingly executed [z]. In the present case, the jury found that *Salisbury* killed the deceased, but not of malice prepense; and so they acquitted him of the murder, and found him guilty of the manslaughter. Upon this, it was privately debated upon the bench, whether he should be intirely acquitted by this verdict, inasmuch as he was arraigned of murder, and was acquitted thereof; or whether he should have judgment to be hanged for the manslaughter; or, thirdly, whether this verdict should serve for an indictment of manslaughter, or what else should be done: and it was clearly the opinion of the whole court, that they might give judgment against him to be hanged for the manslaughter. In support of this, they said, that the jury might give a verdict at large, and find the whole matter; as if one was arraigned of the death of a man, and he pleaded not guilty, the jury might find that he killed

[z] Vid. ant. 393.

him

him in his own defence. In this caſe, therefore, where he was arraigned for killing a man with malice prepenſe, the ſubſtance of the matter was, whether he killed him or not; and the malice prepenſe was but matter of form, or the circumſtance of killing. And though the malice prepenſe makes the fact more odious, and for this cauſe the offender ſhall loſe ſeveral advantages which he would otherwiſe have, as ſanctuary, clergy, and the like; yet it is nothing more than the manner of the fact, and not the ſubſtance. The ſubſtance and manner being both put in iſſue together, if the jury find the ſubſtance, and not the manner, judgment ſhall be given according to the ſubſtance. Though the court were clear in this opinion, they thought it better, as they were on the circuit, to take the opinion of the ſages of the law, and in the mean time they granted a reprieve[7]. What was finally done in this caſe does not appear.

THIS difficulty was occaſioned by the late ſtatutes of Hen. VIII. and Ed. VI. that had taken clergy from thoſe convicted or attainted of murder of malice prepenſe; ſince which a diſtinction had ariſen in point of privilege, and ſo of puniſhment, between felonious manſlaughter, and felonious murder with malice prepenſe. Before theſe acts, if the jury had acquitted a priſoner of murder, and of the malice, yet there was ſtill a felonious killing contained in the indictment, which could only be qualified by finding it to be *ſe defendendo*, or *per infortunium*. It appears from our oldeſt writers upon criminal law, that the only object in proſecutions of this ſort, was to fix on the defendant the charge of felonious killing; namely, *nequiter et in feloniâ et præmeditato aſſultu fecit plagam mortalem, &c.*: this was therefore moſt truly the ſubſtance of the charge. Murder was in former times ſo very diſtinct a crime from felonious killing, that they could hardly be enquired of together; at leaſt murder could never have been a ſubject

[7] Plowd. 100.

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of enquiry before the jury who were to try the felonious killing; being always to be enquired of by a preſentment of Englithery[a]. We have before ſeen, that when theſe preſentments were aboliſhed by law, the term *murder* had loſt all legal meaning or uſe; till, by degrees, it crept into indictments, and was adopted, at firſt, merely to aggravate the charge, which was thought then to ſound more malignant, tho' it was not heightened in the eye of the law. However, ſuch efficacy was attributed to this term, that in time it became, in its adopted ſenſe, as technical as in its old one, and every indictment for felonious killing was required to alledge *quòd murdravit*. At length this became the principal charge and gift of every indictment: in the laſt reign it had been determined to *imply* malice; ſo that *murdravit* was ſufficient, without the addition *ex malitiâ præcogitatâ*[b]; a ſuggeſtion which was more antiently the indiſpenſible requiſite of all appeals and indictments for homicide.

WHEN, therefore, *murder with malice prepenſe* had taken the place, as it were, of felonious homicide, and became the ſting of ſuch indictments, the common apprehenſion muſt be, that an acquittal of the murder and malice was an acquittal of the felonious killing. But when the ſtatutes of Hen. VIII. and Ed. VI. had ſingled out *murder with malice prepenſe* as a mode and circumſtance of killing which ſhould no longer enjoy the benefit of clergy, the judges began once more to ſeparate the legal ideas of murder and felonious homicide; and to ſay, as on this and another occaſion which has been mentioned, that there ſtill remained a felony in the indictment; and tho' the priſoner was acquitted of the murder, yet if the jury convicted him of killing (without adding the qualification of *ſe defendendo*, or *per infortunium*), they convicted him of a felony, for which he ſhould have judgment to

[a] Vid. ant. vol. II. 22. [b] 5 Ed. VI. Dyer, 69. a.

die;

die; and to this felonious killing they gave the name of *manſlaughter*, and ſometimes *chance-medley*. The former of theſe words, it is obvious, was only another term for homicide; the latter was to expreſs a ſudden affray, or ſcuffle, *chaud-melée*; it being under ſuch circumſtances that the killing here meant to be ſignified moſt uſually happened. Conformably with this new conſtruction of the judges, homicide is thus divided by Staunforde, who wrote three or four years after the time of which we are now ſpeaking. He ſays, that killing a man is either *juſtifiable*, or *ſe defendendo*, or *per miſadventure*; and if it is not one of theſe three, it is *voluntary homicide*, which he ſubdivides into two; the more heinous ſpecies, called *murder*; the leſs heinous, called *chance-medley*[b].

THE judges ſeem to have been governed in their conſtruction of theſe ſtatutes by technical reaſons like thoſe abovementioned; but, however artificial it might be in its commencement, the diſtinction between murder and manſlaughter has been ſince upheld and explained upon the beſt and wiſeſt principles of penal juſtice. A conviction of the frail ſtate of humanity induces one to pronounce it a great defect in our old law, that no allowance was made for the paſſions of men: if a man was killed in a quarrel, or on a ſudden affray, it was equally felonious as if by a deliberate act. But ſince the time of the above diſtinction, ſuch an act, which could not be excuſed under the idea of ſelf-defence, or miſadventure; nor could, conſiſtent with the feelings of the mind, as well as the dictates of plain ſenſe, be ſtigmatized with the name of premeditated murder, might yet be ſubjected to a proportionate puniſhment, under the name of *manſlaughter*, or *chance-medley*. It follows, that after this change of ſentiment, much of what is delivered in our earlier writers and reports on queſtions of homicide, muſt be read with

[b] Staunf. 19. a.

great

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great caution, as inapplicable to, and irreconcileable with, the notions which began to prevail from this time to the preſent day. This is remarkable not only in points that ariſe about a killing on a ſudden affray, but more particularly in queſtions of *ſe defendendo*; the old law upon which is become almoſt unintelligible.

To return to the doubt of the judges upon the caſe before them. Notwithſtanding the explicit manner in which they delivered their opinion, that the ſubſtance of the indictment was found, and that judgment of death ſhould be given, they could not mean that the manſlaughter of which he was convicted, and the murder of which he was acquitted, were the ſame degree of offence, and were to be equally puniſhed by hanging; for they had themſelves ſtated this difference, that murder was deprived of clergy, but manſlaughter was not. It ſhould ſeem then that the difficulty intirely aroſe from one of theſe circumſtances; either that the party had deferred demanding his clergy till after judgment of death had been paſſed, or that he was not a clerk; or that the judges heſitated, not about the fate of the priſoner, but the form of entering the judgment. It is only in one of theſe ways, that the judgment of death here ſpoken of can be accounted for.

IT is remarkable that the definition of *larceny* given by *Staunforde*, is that which *Bracton* had formed ſo many centuries before; and this is laid down and commented on by *Staunforde* as the law of his time; though this offence, in its legal conſideration, had been much altered from the time of Henry III. and an entire new deſcription was made of it, at leaſt by the time of Edward IV. as we have ſeen in the former part of this Hiſtory [e].

ROBBERY is defined by this writer to be, when a man takes any thing from the perſon of another feloniouſly, though the thing taken be not worth a penny [f]; a defini-

[e] Vid. ant. vol. III. 410. [f] Staunf. 27. a.

tion

tion which later writers have narrowed, by reſtricting it to a taking with force, and a putting in fear. It was an opinion of juſtice *Hales* in 7 Ed. VI. that it was no felony to take a diamond, ruby, or other ſtone (not ſet in gold, or otherwiſe) becauſe they are not of price with every one, though ſome hold them valuable and precious.

IT was held in 4 Ed. VI. [g] that the breaking of a houſe ſhall not be burglary, unleſs it is by night. This is the firſt paſſage in any book where burglary is confined to a breaking by night [h]. In the old books it is ſaid to be the ſame, whether by night or by day. According to this late determination *Staunforde* has formed his deſcription of this crime, collected from the many deciſions ſince the time of *Britton* and *The Mirrour*, which is to this effect: "*Burglars* "are thoſe who felonioufly, in time of peace, break a houſe, "church, walls, or towers, though they take nothing from "thence; but then it muſt be done with intent to commit a "felony, and in the night [i]." As to the circumſtance and kind of *breaking*, the following point was reſolved in 3 Ed. VI [k]: A perſon was taken in the night putting back the leaf of a window with a dagger: this was held to be burglary. The like was reſolved where a man was found drawing the latch of a door, which was not otherwiſe faſtened [l]. It was held, that *fregit* alone in an indictment was not ſufficient, but it ſhould be *fregit et intravit* [m].

ACCORDING to *Staunforde*'s definition, the breaking might be either of a houſe, church, wall, or tower. It was held, in 2 Ed. VI. that where a ſtable was near a houſe, and inheritable as parcel of a houſe, and it was broke by night with intent to rob, this was a burglary [n].

THE law of principal and acceſſary always furniſhed ſome ſubject of argument and difficulty. In a caſe which

Trial of principal and acceſſary.

[g] Bro. Cor. 185.
[h] Vid. ant. 472.
[i] *Nedtaster.* Staunf. 30. a.
[k] Lamb. Irenarch. 258.
[l] Ibid.
[m] 1 Mar. Dyer, 99. 58.
[n] New Caſes, 75.

happened

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happened at Shrewſbury at the ſame time with the above caſe of *Saliſbury*, it happened that ſeveral were indicted for murder, and ſeveral others for being preſent aiding and abetting. The latter were the only perſons in cuſtody; and it was ſubmitted by ſir Thomas Bromley, the chief-juſtice, to the others in the commiſſion with him, whether theſe men ſhould be arraigned; for although they were principals as well as thoſe who ſtruck the blow, yet they were principals only in the ſecond degree, in reſpect of the act of the others; and if it ſhould happen that theſe ſhould be convicted, and then the others be tried and acquitted, a new difficulty and inconvenience would follow; for they would be found guilty of abetting a fact that was never done; and when it is recollected that in the old law perſons preſent aiding and aſſiſting were deemed to be acceſſaries and not principals, he thought it deſerved ſome conſideration. After two days heſitation, the other juſtices were of opinion, that thoſe who were aiding and aſſiſting were in truth and fact, to all intents, as much principals as thoſe who did the fact; for they cauſed a terror in the party, and thus diſabled him from reſiſting and defending himſelf, which was the ſame as giving the ſtroke; it was therefore not proper to ſay, that the one were principals in deed, and the others in law, but they are all principals in deed and in the ſame degree. They ſaid, therefore, that ſhould the jurors give a ſpecial verdict, and find that the deceaſed was ſtruck by another than the perſon alledged in the indictment to have ſtruck him, and find theſe guilty of aiding and being preſent, the verdict would be a ſufficient conviction. The ſame if thoſe who gave the wound ſhould die, the aiders who were preſent might be arraigned; which ſhews they were equally principals, and not in the ſecond degree. In this the chief-juſtice and the reſt agreed, and the priſoners were accordingly tried [a].

[a] Plowd. 97.

A MAN

A MAN was indicted as acceſſary both to the principals abſent and thoſe preſent; and *Bromley* ſtarted a doubt, whether he ſhould be arraigned as acceſſary to the principals now preſent; for he could not be arraigned as acceſſary to thoſe abſent. If he was arraigned in this way, he might be acquitted of being acceſſary to thoſe preſent, and yet he might really be acceſſary to thoſe who were abſent; but could not be a ſecond time arraigned for the ſame fact; for though being acceſſary to one is not being acceſſary to another, yet the fact, which is the death of the deceaſed, is all one. The juſtices did not agree to this as a cauſe for deferring the arraignment: for they ſaid, though he was arraigned as acceſſary to thoſe preſent, and ſhould be acquitted, he might well by law be arraigned as acceſſary to the others; but in conformity with the general practice, and the authority of a caſe in the book of Aſſiſes [p], they deferred the arraignment till he could be arraigned as acceſſary to all the principals together [q]. *Plowden* remarks upon this practice of deferring the arraignment of the acceſſary till he could be arraigned as acceſſary to *all* the principals together, that it was more out of good diſcretion than neceſſity: it is, ſays he, to ſave the country the trouble of furniſhing two or three juries, when one might do the whole; and he agrees with thoſe who ſaid the acceſſary if acquitted as acceſſary to one, might afterwards be tried as acceſſary to the others [r]. We find in 4 Ed. VI. two caſes, where a man who had been acquitted as acceſſary, was afterwards indicted of the ſame felony as principal; and notwithſtanding his former acquittal, he was arraigned, convicted, and hanged. It does not appear whether this was an acceſſary before or after the fact [s].

WHERE five priſoners were arraigned together, and they did not join in their challenges, it was held, that tho'

[p] 40 Aſſ. pl. 25.
[q] Plowd. 98.
[r] 7 Hen. IV. 107. Plowd. ibid.
[s] New Caſes, 75.

the

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the arraignments were ſeveral, yet as one *venire*, and upon that a *tales*, was awarded for all, therefore a juror challenged by one was held to be drawn againſt all. But the bench perceiving that the priſoners by thus ſevering in their challenges, would each have the liberty of challenging twenty jurors, which would exhauſt a greater number than thoſe ſummoned and in the town, and ſo prevent a trial taking place; they were going to ſever the pannel, upon the authority of a precedent in the time of Ed. IV.[t]: ſo that the ſame men might ſerve for five ſeveral inqueſts. The priſoners ſeeing this, were induced to agree in their challenges[u]. It was ſaid, that a man could not abjure for high-treaſon; there was ſome doubt, whether an offender in petit-treaſon might abjure. There is mention in a Chronicle of Henry VI. of a woman abjuring who had killed her miſtreſs; but ſuch writings are deceitful authorities for points of law[w].

Reformation of the eccleſiaſtical law.

IN the ſhort reign of Ed. VI. ſome ſteps were taken towards effecting the intended reformation in our eccleſiaſtical laws. We have ſeen that Henry VIII. was empowered by ſtatute to appoint commiſſioners to reform the eccleſiaſtical laws then in force. A commiſſion was iſſued under that act, and the perſons appointed to execute it had met, and made ſome progreſs in the undertaking; but after the ſtatute of the ſix articles, the reformation of the eccleſiaſtical law dropt with that of religion; and Cranmer, in a letter, dated 1545, ſpeaks of this ſcheme as then almoſt forgotten, and quite laid aſide[x].

WE have ſeen there was an act of Edward VI. to empower thirty-two perſons, named by the king, to undertake this ſame work, which it was intended ſhould be finiſhed in three years. But this alſo was retarded by various changes in affairs; and it was not till November 1551, that a commiſſion was iſſued to eight perſons, to pre-

[t] 9 Ed. IV.
[u] Plowd. 190.
[w] New Caſes, 78.
[x] Burn. Ref. vol. II. 185, 186.

pare

pare the matter for the reviſion of the thirty-two; a method which was thought more likely to expedite the undertaking, than if it had been left to the greater number. Theſe eight conſiſted of ſome biſhops and doctors of divinity, two doctors of the civil and canon law, and two common-lawyers. As two of the three years had elapſed before they ſet about executing the commiſſion, they prayed to have longer time; and they had three years more offered them by act of parliament, to which act, however, the king never gave his aſſent; owing, as it is thought, to the forwardneſs in which the work was believed to be, and that a further continuation of time was not neceſſary. The work was prepared by February 1552, and a commiſſion was granted to thirty-two perſons, of whom the former eight were a part. It conſiſted of eight biſhops, eight divines, eight civilians, and eight common-lawyers. They were to reviſe, correct, and perfect the work; and then preſent it to the king. For this purpoſe they divided themſelves into eight claſſes, four in a claſs: every one of theſe was to prepare his corrections, and communicate them to the reſt. Thus was the work carried on and completed; but before it received the royal confirmation, the king died, and the project died with him. It was not afterwards revived, nor has any thing of the kind been attempted ſince. The old canons ſtill remained in force by uſage and the ſtatute of Henry VIII. and ſo they continue to this day[r].

However, this compilation was printed in the reign of queen Elizabeth, under the title of *Reformatio Legum Eccleſiaſticarum*. In the preface it is ſaid, that *Cranmer* executed almoſt the whole volume himſelf; which juſtified the opinion before entertained of him, that he was one of the beſt canoniſts in the kingdom. *Sir John Cheek* and *Dr. Haddon* had been employed to put it into

[r] Burn. Ref. vol. II. 185, 186.

Latin;

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Latin; in performing which they imitated the ſtile of the Roman laws with a happineſs far beyond the compoſers of the pontifical law [s].

[s] AFTER the taſte we have already had of the law and practice of the eccleſiaſtical courts, we feel ſome curioſity to ſee what were the ideas of the reformers upon the ſame ſubject. On a view of their ſcheme of reformation, it appears that they worked upon the old materials, and were not precipitate in making any alterations of conſequence. The canon and civil law, and the provincial and legatine conſtitutions, were ſtill to be the ground-work of our eccleſiaſtical law. But theſe underwent ſome change and modification in certain articles.

Of marriage.

THE law of matrimony, adultery, and divorce, was intended to be almoſt wholly altered by the new ſcheme. For this purpoſe, in the firſt place, it was expreſsly laid down, that no promiſe or contract ſhould be binding, but ſuch as was made in the following way. The miniſter was to publiſh the intended marriage on three Sundays, or at leaſt feaſt-days; at the end of which the man and woman were to be preſent in the church while the ceremony, lately ordained, was performed: ſo that all the canonical learning about eſpouſals and pre-contracts was at once done away. But to prevent the ill conſequences that might follow to young women who had yielded to the promiſes and ſolicitations of men, the penalty of excommunication was denounced againſt thoſe who were guilty of violating a woman's chaſtity: and if they would not conſent to marry the woman, the eccleſiaſtical judge was to give to her a third part of his goods: if the goods could not be divided in that manner, he was to condemn him to take care of the child, and to undergo ſuch penance as the judge thought neceſſary to expiate the ſcandal.

[s] Burn. Ref. vol. II 185, 186. [t] Vid. ant. 1, &c. 45, &c.

THE

THE marriage of children and orphans was declared void, if not contracted with the consent of their parents and guardians; but if these with-held their consent without sufficient reason, recourse might be had to the ecclesiastical judge, who was to decide on the propriety of the matter. A woman at twelve, and a man at fourteen, and not before, might marry. Marriage might be celebrated at all seasons; but it was to be in the parish where one of the parties inhabited, or the minister would be excommunicated. At the time of the ceremony any one might interpose, and shew cause why the marriage should not take place; and upon giving security to prove the cause within a month, or make satisfaction for all the expence of preparation for the marriage, the ceremony was to be delayed for that time; and neither party was to contract marriage during that month, under pain of excommunication, and compensation to the party so deserted. If there was a secret inability for the marriage-state in either party, the marriage was deemed to be null; otherwise if it was known. Deaf and dumb persons might marry, and those who were mad, in a lucid interval. There was to be no marriage with infidels. With these exceptions marriage was, upon this new scheme, allowed to all persons of what condition soever, and might be repeated. But this was not to give licence to polygamy; for it directs, if any person had more wives than one, he should retain only the first, if he would have him for a husband, and dismiss all the others with their dower, and make satisfaction to the church for his offence. The women also were to be punished, if they were conscious of the man having more wives than one.

AFTER the marriage was concluded, if quarrels and bickerings arose between them, and they were unwilling to continue together, they were to be compelled by ecclesiastical censures to accommodate differences, and live in matrimonial harmony, unless those differences were of

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ſuch a nature as we ſhall hereafter ſee were grounds of a divorce. It was laid down, that any marriage contracted under the influence of force or fear ſhould be void. Thus far of marriage in general [a].

THE degrees within which marriage was prohibited, were thoſe contained in Leviticus, ch. xviii. and xx. which they ſaid was a rule not confined to the Jewiſh nation; but, like the decalogue, was to have authority with all Chriſtian men. They therefore declared it to be impiety in the Roman pontiff to arrogate to himſelf the power to diſpenſe with theſe divine prohibitions. As to the conſtruction of theſe prohibitions, they ſaid, many were only put for examples, and we muſt ſupply others, which ſtand in preciſely the ſame ſituation: thus, for inſtance, if a ſon is not to marry his mother, ſo a daughter is not to marry a father. They therefore laid down two rules: firſt, that wherever males were mentioned, the ſame ſhould be underſtood of females in the ſame degree of propinquity: ſecondly, that huſband and wife made but one fleſh; ſo that in whatſoever degree of conſanguinity a perſon was related to the one, he was related in the ſame degree of affinity to the other. They retained the old notion of the canon law, and conſidered any illicit connexion as creating an affinity the ſame as marriage; and they held the impediment of affinity to continue after the death of the party. But they declared that all ſpiritual cognation was an invention not authoriſed by ſcripture, and therefore ſhould no longer be an impediment to marriage [b].

THE reformers of our eccleſiaſtical law preſcribed very heavy penalties in caſe of adultery; founding this ſevere meaſure on the Jewiſh law, which directed ſuch offenders to be ſtoned to death; and on the civil law, which puniſhed them capitally. When a miniſter was convicted of adultery, fornication, or inceſt, his goods, if he was married, were all to devolve to his wife and children; if he had no

[a] Reform. Leg. Eccleſ. 37. to 43. [b] Ibid. 44. to 47. Vid. ant. 52, &c.

wife

wife nor children, they were to be diſtributed to the poor, or applied to other purpoſes, at the diſcretion of the eccleſiaſtical judge: if he had any benefice, he was to forfeit it, and to be incapable of taking another: he was likewiſe to be ſent to perpetual exile or impriſonment. A layman convicted of adultery was to reſtore to his wife her *dower* *, and alſo half his goods; he was likewiſe to be condemned to perpetual exile or impriſonment. A wife, in like manner, if convicted of adultery, was to forfeit her *dower*, and all claim ſhe had by law, or promiſe, on the effects of her huſband; and was to ſuffer perpetual exile or impriſonment. Moreover, in ſuch caſe the innocent party might contract another marriage: this ſecond marriage they thought juſtified by the words of Chriſt, who made an exception of the caſe of adultery. However, they recommended that the guilty party ſhould in charity be invited by the innocent to return to the conjugal ſtate; and at no rate ſhould be allowed to marry again. None was to put away his wife for adultery, and take another, till the eccleſiaſtical judge had heard and determined the matter; and if he did, he loſt all right of proceeding againſt his wife. The judge, when he condemned the one of adultery, was to pronounce a liberty to the other to marry again: there was to be a time limited for ſuch ſecond marriage, as a year, or ſix months; during which if he did not return to his firſt wife, he might take another. If one of the parties withdrew from the other, and, after intreaty and remonſtrance, would not ſubmit to cohabit, the other might, upon authority of the eccleſiaſtical judge, have liberty to marry. If the abſent perſon could not be found, then proceſs was iſſued, and a term of two or three years was to be fixed by the eccleſiaſtical judge for him to appear and ſhew good cauſe of his abſence; which if not done, the other party was abſolved from the tie, and might marry again; and if he afterwards appeared, he was to be confined to perpetual

* The word in the original is *dos*; and as ſuch is ambiguous in this paſſage, but leſs ſo in the following.

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impriſonment. The eccleſiaſtical judge might proceed in the ſame manner, where the abſence was on ſome lawful calling, if nothing had been heard of him for ſome time; and the other party might, in like manner, marry: however, if the abſentee could give good reaſon for his being detained, his wife would be obliged to receive him again: if he could not ſhew good cauſe of abſence, he would be puniſhed with perpetual impriſonment, and the ſecond marriage would be good.

If there was irreconcileable enmity between two married perſons, ſo that one had plotted the other's deſtruction, it was a cauſe of divorce. If a huſband treated his wife with ſeverity, the eccleſiaſtical judge might uſe remonſtrances, and then compel him to give ſecurity to treat her well. If this did not ſucceed, it muſt be attributed to irreconcileable enmity, and was therefore a good cauſe of divorce. The judge might proceed in like manner with women who were obſtinate and rebellious. In all theſe caſes the innocent party might marry; but the offender would be committed to perpetual impriſonment.

The reformers laid it down, that an incurable diſeaſe contracted by either party, ſhould not be a cauſe of divorce. During a ſuit with his wife on the ground of adultery or ill-treatment, the huſband was required to ſupport her according to her condition. If the huſband failed in a ſuit againſt his wife for adultery, he was to forfeit to her half his goods, and was afterwards to have no power to diſpoſe of the goods ſo forfeited: the wife, if ſhe failed, was to loſe her *dower*, and all claim ſhe had upon the huſband's effects. If ſuch action was brought by any ſtranger, he would not be admitted to church till he made compenſation to the party calumniated. If the party convicted of adultery could prove the other to be equally ſo, they would both ſuffer the ſame puniſhment, and the marriage would continue ſtill in force. The ſeparation *a menſâ et*

toro

toro was entirely taken away by the reformers, as productive of great abuſes and ſcandal in the marriage-ſtate [c].

WHILE the reformers were projecting this change of the old law of ſeparation *a menſâ et toro*, an incident happened reſpecting a diſtinguiſhed perſonage, that led to the public diſcuſſion and deciſion of this very point. The marquis of Northampton had been ſeparated from his wife on account of her adultery. This happened in the reign of Henry VIII. when it was conſidered, whether ſome relief might not be contrived for the innocent party, to whom ſeparation was but a very partial, and ſometimes a hazardous, redreſs. In the firſt year, therefore, of Edward VI. a commiſſion of delegates was directed to ten perſons, of whom ſome were biſhops, to try whether the marchioneſs was not by the word of God ſo lawfully divorced, that ſhe was no more the marquis's wife; and whether he might not thereupon marry again. As this was a new caſe, the delegates, to inveſtigate it thoroughly, took longer time to give their judgment than that nobleman choſe to wait; for he, in the mean while, was ſolemnly married again. As the firſt marriage ſtill ſubſiſted in law, this gave great ſcandal, and he was put to anſwer for it before the council; where he defended what he had done by ſaying, that all ties between him and his former wife were diſcharged by the law of God; that making marriages indiſſoluble, was a popiſh contrivance to get money; that ſeparation only led to temptations; and the like. However, he was by that tribunal enjoined to part from his new wife till the delegates had given ſentence, and then further order ſhould be made in it. To this the marquis conſented. In concluſion, after a long enquiry, the delegates, in the ſpirit of the deſigned reformation, actually determined in favour of the ſecond marriage. Upon this the marquis was ſuffered again to cohabit with his wife; but afterwards to

[c] Reform. Leg. Eccle. 47. to 56.

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make all ſure, he thought it adviſeable to get this ſentence confirmed by a ſpecial act of parliament [d].

THIS was a ſevere blow upon the canon law; and it was thought proper, in queen Mary's reign, to repair the breach that had thereby been made. An act was brought in to repeal the ſtatute made to confirm this marriage [e]. It was much debated in the houſe of commons; and was at laſt, by various alterations, ſo qualified, that it threw no imputation on the parties, but only declared, that, in that particular caſe, the divorce was unlawfully made. The act at firſt probably contained a clauſe againſt all divorces of the ſame kind; many of which, no doubt, had been made in conſequence of this precedent [f].

Of wills.

THE reformers deſigned ſome alterations in the law of wills [g], the principal of which conſiſted in the following particulars. They allowed the liberty of making a will to all perſons of either ſex, and of every condition; but they excepted from this general authority all wives, *ſervi*, and minors under fourteen years, heretics, and thoſe condemned to death, or perpetual exile, or chains; which two latter puniſhments we have ſeen were very commonly inflicted in this new ſyſtem of juriſprudence. Thoſe who did not diſmiſs their concubines before they were *in extremis*; thoſe who had two wives, or two huſbands; thoſe convicted of *famoſi libelli*; thoſe who were proſtitutes or procureſſes, unleſs they had undergone temporal puniſhment for their crimes; thoſe guilty of uſury, unleſs they had refunded or made ſatisfaction, or taken meaſures for ſo doing; all theſe were prohibited from making wills. However, they allowed perſons who kept their concubines, or had two wives, or two huſbands, to diſpoſe of their goods *in pias cauſas*; and the like indulgence was given to uſurers who had made no reſtitution, and to thoſe who had been proſtitutes or procureſſes.

[d] Burn. Ref. vol. II. 53, 54. [e] Ibid. 237. [f] Vid. ant. 66.

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THE articles which they reckoned within the deſcription of *piæ cauſæ* were theſe: in addition to the relief of priſoners, and of the poor, the aſſiſtance of orphans, widows, and afflicted perſons of all ſorts, as was required by our old law, they particularly preſſed theſe objects; to promote the marriage of young women, the ſupport of ſtudents in the univerſities, and the reparation of highways. If any diſpoſition rather of a ſuperſtitious than pious nature was made, the biſhop was to interpoſe his authority, and ſee that it was applied to ſome *piæ cauſæ**.

THE diviſion of the deceaſed's goods, whether by will or without †, was required to be in this manner. If he had a wife and children, a third was to go to the wife, a third to the children, and the other third was to be at his own diſpoſal. If he left no will, the wife and children were to take their thirds, and the adminiſtrator diſtribute the other third. If there were no children, the widow had half, and the other was to be at his own diſpoſal; or, if he died inteſtate, at the diſpoſal of the adminiſtrator; the ſame if he left children, but no wife. The children were all to take equally, unleſs the father had ordered it otherwiſe in his will. If the child died, then his ſhare was to go to his children, if he had any. Thus was the law of diſtribution, which had been ſubject to much doubt and difference of opinion and practice, in a fair way of being aſcertained, if this ſcheme of reformation had ever taken place; for it is laid down, that even in caſe of a will the children were intitled to a third, or a half, which was to be divided equally between them; but the father might, if he pleaſed, apportion that third, or half, between them as he liked.

THEY went on to declare, that no ſon ſhould be paſſed over in his father's will, unleſs he was expreſsly diſinherited in plain terms; and ſuch diſheriſon would not be good, unleſs it mentioned ſome juſt cauſe for ſuch a meaſure. Theſe cauſes were thus enumerated by our legiſlators: if

* Vid. ant. 80. † Vid. ant. 79.

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a ſon had laid violent hands upon his father; if he had injured him in any ſignal manner; if he had proſecuted him for a crime, through malice, and not for the good of the ſtate; if he had laid ſnares for the life of his father or mother; committed inceſt with his ſtep-mother, or father's concubine; if he had calumniated his father's good name, or waſted his property; if he had refuſed to be ſecurity for his father. A daughter might be paſſed over in a will, if ſhe had become a common proſtitute while the father was offering her a reputable marriage; for if a father neglected his daughter till ſhe was twenty-five years old, without preparing her a proper match, this omiſſion in the parent would abſolve the daughter, ſay theſe reformers, from any imputation of offence, ſo as to preclude him from putting her out of his family, or paſſing her over in his will.

In like manner, a wife was not to be excluded from the huſband's will, without ſome delinquency on her part; as if ſhe had uſed violence againſt him; had contrived any ill againſt him; had attacked his fame or fortune by calumny and falſe accuſations; had expoſed his daughter to temptations; or had abſented herſelf from him. Both wives and children, if they obſtructed the father and huſband in making or altering his will; if they did not protect him when afflicted with diſeaſe, nor ranſom him when captured; or if they became heretics; they might be paſſed over, as objects unworthy to enjoy any part of his property.

They declared that the following perſons ſhould not be qualified either to become executors, or to take any benefit under a will: heretics; thoſe condemned to death, perpetual exile, or impriſonment; thoſe who kept concubines; thoſe who had two wives, or two huſbands; thoſe convicted of procuring or publiſhing *libelli famoſi*; procureſſes and common proſtitutes, and uſurers: and the delinquency of the above perſons was not to be eſtimated at the

the time of making the teſtament, or the death of the teſtator, but at the time of taking the executorſhip, or receiving the legacy [g].

THERE had always been a latitude in the deſcription of perſons to whom the ordinary was to commit adminiſtration. We have ſeen [h], that this was reduced to ſome ſort of preciſion by a ſtat. of Henry VIII. and the intended regulation ſeems to have this laſt proviſion in view. For it ſays, that when a perſon died inteſtate, the wife ſhould be the firſt to have the adminiſtration; in the next place, thoſe who were neareſt of blood; and if the judge pleaſed, he might unite theſe with the wife in the adminiſtration. If there were ſeveral in the ſame degree of propinquity, the judge was at liberty to appoint one or more as he pleaſed.

SEVERAL directions are given for the granting of adminiſtration, the payment of legacies, the fees of ordinaries, and the like; moſt of which ſeem to correſpond with the practice of the eccleſiaſtical court in former times: and finally this new ſcheme directs, that in all matters of controverſy, upon the numberleſs queſtions to which wills were liable, and which were not here aſcertained or provided for, recourſe ſhould be had to the body of Imperial law.

THE other great object of eccleſiaſtical cogniſance, the payment of tythes, does not ſeem to have undergone any conſiderable change in this intended reformation; the compilers appear to have proceeded, in what they ordained, wholly upon the ideas of our provincial conſtitutions, many of which are copied almoſt in the very words. Among other regulations, it requires the late ſtatute of Ed. VI. [i] concerning the payment of tythes, and the old act about *ſylva cædua*, to be obſerved [k]. There is only

[g] Reform. Leg. Eccle. 129 to 135.
[h] Vid. ant. 206.
[i] Stat. 2 and 3 Ed. VI. c. 13. Vid. ant. 458.
[k] Reform. Leg. Eccle. 105, 106 to 114.

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one more article of eccleſiaſtical juriſdiction which we ſhall mention, and that is *fidei læſio*, that has been ſo often conſidered in the various diſputes between the ſpiritual and temporal courts [k]. It ſeems to have been intended by the reformers, that no conſideration ſhould be had of the object in queſtion; but that, whether it was of a lay or a clerical nature, ſuit for the breach of faith ſhould be entertained in this court. They declare, that whatſoever agreements and promiſes were not fulfilled nor performed, whether there was an oath taken by the parties, or only a ſtrong affirmation made, thoſe who did not keep their faith ſhould be purſued with eccleſiaſtical cenſures, and compelled to make ſatisfaction to the parties who were deceived by their perfidy [l].

WITHOUT entering any further into the detail of this projected reformation of our eccleſiaſtical law, it may ſuffice to ſubjoin a brief enumeration of ſuch cauſes as they meant ſhould be conſidered as eccleſiaſtical, and to be heard and determined no where but in this court: cauſes beneficiary, matrimonial, and of divorce; cauſes teſtamentary, and for the adminiſtration of inteſtates' effects; for ſubtraction of legacies, mortuaries, tythes, oblations, and other eccleſiaſtical rights; for uſury, hereſy, inceſt, adultery, fornication, ſacrilege, perjury, blaſphemy, *fidei læſio*, defamation, and ſcandal; laying violent hands on a clerk; diſturbance of divine ſervice; for correction and reformation of manners; accounts of churches and church-wardens [m]; dues owing to churches and their miniſters; reparation and dilapidation of churches, church-yards, and other eccleſiaſtical edifices. In theſe cauſes, and their incidents ariſing from or depending upon them, and in all other cauſes relating to the correction of ſins, the eccleſiaſtical judge, and no other, was to have juriſdiction to hear and determine [n].

[k] Vid. ante, 98.
[l] Reform. Leg. Eccle. 208.
[m] *Computus eccleſiarum et arcuariorum.*
[n] Reform. Leg. Eccle. 195.

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No period in the Engliſh hiſtory furniſhes more inſtances of an irregular and undefined conſtitution than the reigns of Edward VI. and Mary. Many of the extravagant proceedings of Henry VIII. are rather to be attributed to wilfulneſs, and a tyrannical ſpirit. Theſe incentives no longer operated; yet, under the gentle ſway of his ſon and the Protector, the ſame prerogatives were exerciſed, with no other difference than that of their motives and objects. The acts of the council ſeem to have been received with the ſame acquieſcence as thoſe of Henry; and the commons, tho' not held in the ſame awe as during his reign, did not however ſhew greater ſpirit in aſſerting their privileges, or diſcover any better ſenſe of what extent thoſe privileges were.

King and government.

So prevailing was the opinion of the great prerogative poſſeſſed by our monarchs at this time, that the Scots made it one of the principal objections to marrying their young queen with Edward VI. that all their privileges would be ſwallowed up by the great prerogatives of the Engliſh crown. This notion had ſo ſpread abroad, that the emperor, in converſation with the Engliſh ambaſſador, maintained the king of England's prerogative to be greater than that of the king of France.

The firſt act of the regency appointed by Henry VIII. was to alter the government which that king, under authority of an act of parliament, had made by his will. They delegated all their power to the duke of Somerſet, under the title of Protector. This, however, was thought not ſufficient foundation for his authority; and a patent was procured from the young king, by which this revolution was conſidered as completely confirmed and legal. The duke was thereby inveſted with regal power, and a council was appointed, with whom he was to adviſe. This uſurpation was acquieſced under by parliament and the nation, without any ſcrutiny into its validity.

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THE act of Henry which gave the force of laws to the king's proclamations, was made to have force during the young king's minority. Of this the Protector availed himself; and proclamations were issued on many occasions, where they could be applied to promote the great design of the Reformation. By one proclamation the jurisdiction of the bishops was suspended; while commissioners were appointed, part clergy and part lay, to make a general visitation in every diocese[p]. After this law had been repealed[q], the Protector still issued proclamations, which, in their nature, could hardly be considered as less than new laws; such as forbidding many ancient superstitions, and making material alterations in the national worship.

PROCLAMATIONS had, from very early times, been the usual method by which our kings had signified their commands, and enforced their authority. They were framed for the purposes of government and of the state. They seemed a necessary part of the executive magistrate's power; and having grown up with the monarchy, they might in those times be looked on with reverence by the people, without discovering how nearly they approached to acts of legislation. But the dispensing with positive laws was an act of a more unequivocal kind; and this power was exercised by Edward VI. or rather by the Protector, in more instances than one. The Protector procured a patent, enabling him to sit upon the throne, and enjoy those honours and privileges usually bestowed on princes of the blood: this was a plain dispensation with the statute made in the last reign to settle precedency[r]. On another occasion, when the convocation found themselves restrained in their debates by the statute of the six articles, the king granted them a dispensation of that law before it was repealed, as was actually done soon after[s].

[p] By stat. 1 Ed. VI. c. 2. [q] Vid. ant. 233. [r] Hum. vol. IV. 308.

THE

THE laſt act of this king's reign had an extraordinary appearance: he was prevailed on to alter the ſucceſſion of the crown (founded on an act of the laſt, and confirmed by one of the preſent, reign) by patent. The judges were required to draw an inſtrument to this effect; but knowing the penalty of treaſon was denounced on thoſe who aided in changing the ſucceſſion, they at firſt refuſed. The king ſaid he meant it ſhould be ratified by parliament; which, no doubt, would have been accompliſhed, if the king had ſurvived long enough[s].

AT the beginning of this reign the biſhops were conſtrained to take out new commiſſions, of the ſame kind as thoſe they had in the latter part of the laſt reign; by which they ſubmitted to hold their biſhopricks during the king's pleaſure, and were to exerciſe the epiſcopal function as his delegates, in his name, and by his authority[t]. This alteration was deſigned to forward the Reformation, by keeping in dependence thoſe biſhops who ſtill adhered to the old ſuperſtition.

UPON occaſion of the inſurrections about incloſures, and other ſubjects of complaint among the people, *Somerſet*, who always aimed at popularity, appointed a new ſort of commiſſioners, whom he ſent every where with unlimited power to hear and determine all cauſes about incloſures, highways, and cottages[u]. This created ſome clamour among the gentry, who looked on it as illegal and arbitrary. It was in the ſame ſpirit that *Somerſet* had erected a court of requeſts in his own houſe, for the relief of poor ſuitors[w]. There he uſed to hear complaints; and, in conſequence of what paſſed there, it ſometimes happened that he would intercede with the judges in matters depending before them. This raiſed more ſcandal than the commiſſion above-mentioned; and though he by ſuch

[s] Hom. vol. IV. 363.
[t] Burn. Ref. vol. II. 5.
[u] Hum. vol. IV. 329.
[w] Id. ibid. 335.

means

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means grew into great favour with the populace, he drew upon himſelf a proportioned degree of odium from the nobility, who ſoon ſhewed him how able they were to defeat all the ſupport he might hope from the people.

WITH ſo many precedents of extraordinary prerogatives before her, it cannot be wondered that Mary, who had in contemplation to aboliſh the late innovations, ſhould make uſe of ſuch ready inſtruments to effectuate it. Governed as ſhe was by a natural ſourneſs of temper, heightened by her bigotry to the catholic religion, it is not more ſurpriſing that ſuch deſigns were followed with many oppreſſive acts of ſovereign authority.

To ſupply the ſcantineſs of her parliamentary grants, Mary revived the irregular method of raiſing money by loans; projects which there had been no need of attempting during the reign of Edward. She levied at one time, in this way, 60,000l. upon a thouſand perſons, who, ſhe thought, would moſt readily comply. At another time, ſhe levied the ſame ſum on 7000 yeomen, and 36,000l. on the merchants. She publiſhed a proclamation, prohibiting, for a certain time, the exportation of cloths; intending by this practice to induce ſuch to comply, whoſe intereſt would be thereby affected in the foreign markets[x]. She uſed to levy ſubſidies, granted by parliament, before the ſtated time. She iſſued privy-ſeals for the ſame purpoſe of raiſing money; and ſeized corn to victual her ſhips, without paying for it.

PROCLAMATIONS of an arbitrary import were often iſſued. One of theſe was, to enjoin thoſe whoſe circumſtances had been affected by the loans, and who on that account had diſcharged ſome of their ſervants, to take them back to their ſervice, becauſe they had become vagrants and thieves[y]. Others were iſſued againſt books of ſedition, treaſon, and hereſy. Thoſe who had any of theſe

[x] Hum. vol. IV. 423, 424. [y] Id. ibid.

books,

books, and did not presently burn them, without reading or shewing them to any person, it was declared by proclamation should be esteemed *rebels*, and without any further delay should be executed by martial law[1].

New commissions.

As an auxiliary to the bishops' court, a special commission was appointed by the queen's prerogative, with extraordinary powers. It consisted of twenty-one persons, and any three had the authority of them all. The commission says, "That since many false rumours were "published among the subjects, and many heretical "opinions were also spread among them; therefore the "commissioners, or any three of them, were to make en-"quiry, either by presentment, by witnesses, or any "other *politic* way they could devise; and to search after "all heretics, the bringers in, the sellers, or readers of "all heretical books. They were to examine and punish "all misbehaviour or negligences in any church or cha-"pel; and to try all priests that did not hear mass, or "come to their parish-church to service; that would not "go in procession, or did not take holy bread or holy wa-"ter: and if they found any that obstinately persisted in "such heresies, they were to put them into the hands of "the ordinaries, to be proceeded against according to law; "giving them full power to proceed as their discretions "and consciences should direct them, and to use all such "means as they could invent for the searching of the pre-"mises; empowering them also to call before them such "witnesses as they pleased; and to force them to make "oath of such things as might discover what they sought "after[2]."

Instructions were also given to justices of the peace, "That they should call secretly before them one or two "honest persons within their limits, or more, at their dis-"cretion, and command them by oath or otherwise, that

[1] Hum. vol. IV. 419. [2] Burn. Ref. vol. II. 323.

"they

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"they shall secretly learn and search out such persons as "shall evil-behave themselves in church, or shall despise "openly by words the king's or queen's proceedings, or "go about to make any commotion, or tell any seditious "tales or news; and also that the said persons, so to be ap- "pointed, shall declare to the same justices of the peace "the ill-behaviour of lewd disorderly persons, whether it "shall be for using unlawful games, or such other light "behaviour of such suspected persons. And that the said "information shall be given secretly to the justices; and "the same justices shall call such accused persons before "them, and examine them, without declaring by whom "they were accused. And that the same justices shall, "upon their examination, punish the offenders according "as their offences shall appear upon the accusement and "examination, by their discretion, either by open punish- "ment or by good abearing [b]." Thus were justices directed to stretch the limits of their jurisdiction, in order to punish facts which were no crimes, after a trial authorised by no law.

To carry the execution of these designs still further, letters were written to the *Lord North*, and others, to put such obstinate persons as would not confess, to the *torture*, and there to order them *at their discretion*; and a letter was written to the lieutenant of the Tower to the same effect. Whether this pretended obstinacy was a concealing of heretics, or of the reporters of false news, does not appear. Whatever the pretence was, the putting people to the *tortare*, because they were thought obstinate and would not confess; and the leaving the degree of it to the discretion of those appointed for their examination; were great steps towards the most rigorous part of the proceedings of the inquisition [c].

[b] Burn. Ref. vol. II. 247. [c] Ibid. 243.

WHILE

WHILE informers and ſpies were encouraged, the priſons were filled with perſons of all deſcriptions, who had incurred the diſpleaſure of the court. When ſome of Mary's oppreſſions in raiſing men and money had created an uneaſineſs and clamour in the nation, ſhe endeavoured to prevent ſuch ill-humours from getting to any height, by throwing into the Tower ſome of the moſt conſiderable gentry. That ſuch priſoners might not be known, they were, ſome of them, carried thither in the night-time; others were hood-winked and muffled by the guards who conducted them [d]. To prevent any one from daring to reflect on ſuch proceedings, ſhe ſtruck a terror into the houſe of commons, always obedient enough to the court, by impriſoning their members for freedom of ſpeech: and when ſome had ſeceded from parliament, ſhe directed them to be indicted for it in the king's bench [e].

THE few trials for offences which have come down to us, muſt be taken as evidences of the practice of our courts in thoſe times, and, as ſuch, are very ſtriking events in the hiſtory of our law.

Trial of the duke of Somerſet.

THE proceedings againſt the duke of Somerſet in the reign of Edward VI. are worthy of notice. The indictment was for treaſon and felony. Upon the trial, the proſecution was ſupported, as uſual, by depoſitions, without confronting one witneſs with the priſoner; a conduct which was at length thought ſo extremely repugnant to common juſtice, as to become the immediate cauſe of ſtat. 5 and 6 Ed. VI. which we have already ſo often mentioned. This proſecution is on other accounts worthy of obſervation. The duke was acquitted of the high-treaſon; and that part of the indictment is held by lord Coke to be ill, becauſe the overt act was laid only generally. The other part was grounded upon the late ſtatute 3 and 4 Ed. VI. c. 5. which made it felony to call

[d] Hum. vol. IV. 432. [e] Ibid. 403. Vid. ant. 403.

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together persons to the number of twelve, with the intent to commit certain acts of violence therein mentioned; among which, that of imprisoning a privy-counsellor is one. The charge was, for attempting in this manner to imprison the earl of Warwick.

THE common stories of this proceeding inform us, that he was acquitted of the treason, and found guilty of the felony; so it is related in king Edward's journal; and he was upon that attainder beheaded. Lord Coke remarks upon this attainder and execution, that the truth concerning it is contrary to some of our chronicles, and the vulgar opinion; and *in some points contrary to law*. First, as to the notion that he was wrongfully executed, and ought, by law, to have had his clergy; he says, that clergy is expressly taken away by this statute. Secondly, as to the opinion that he was indicted on stat. 3 Hen. VII. c. 14. for going about to *procure the death* of the earl of Warwick; he says, he was indicted for endeavouring to *take and imprison* that nobleman, as plainly appears from the indictment[f]. Again he remarks, that being attainted but for felony, he could not, by law, be beheaded[g]. Those who thought the duke was wrongfully deprived of his clergy, or rather (as it was said) that he never demanded it, and that it was not to be granted by the court but upon prayer, founded their remark upon a supposition that the indictment was upon the above-mentioned statute of Henry VII. which makes that offence only single felony.

Of sir Nicholas Throckmorton.

ON the trial of *sir Nicholas Throckmorton*, in the next reign, the counsel for the crown proceeded in reading confessions of absent persons, and putting the prisoner to answer to them severally, as they were read. This kept him constantly engaged, through the whole trial, in a sort of altercation with the crown-lawyers; whose de-

[f] Co. 3 Inst. 13. [g] 3 Inst. 12. 13.

portment,

portment, it ſhould ſeem, very ill correſponded with the decorum to be obſerved on ſuch occaſions. Only one of the deponents was produced, and that was to ſwear him to the truth of his depoſition. The priſoner did not object to this mode of proof, any otherwiſe than that ſince ſtat. 5 and 6 Ed. VI. there ſhould be two witneſſes to prove a treaſon; which remonſtrance, for reaſons which have been conſidered, was on this and all other occaſions diſregarded [b]. The only witneſs produced to give evidence *vivâ voce*, was called by Throckmorton himſelf, and was rejected by the court.

THE priſoner, who was very able to cope with the lawyers on the part of the proſecution, prayed that he might have the uſe of a ſtatute-book; which was denied him, notwithſtanding he preſſed on them the plain injunction of the queen, lately delivered to her judges, to adminiſter juſtice indifferently. He alſo reminded them of her direction, that, in criminal proſecutions, they ſhould break through the antient uſage; and always hear witneſſes examined in behalf of priſoners, as well as againſt them. The harſhneſs he experienced both from the bench and the counſel, had not the intended effect; but, on the contrary, perhaps prejudiced the jury in favour of an oppreſſed man: they acquitted him of the indictment. But the virulence of the proſecutors did not end here; for other circumſtances, that deſerve to be remembered, attended this tranſaction. The attorney-general, after the acquittal, prayed the court that the jury might be bound in recogniſances to anſwer for their verdict. They were ſoon after fined and impriſoned by a ſentence in the ſtar-chamber: they were to pay one hundred marks a-piece, and to be impriſoned till further order. It was ſome months before they were releaſed, and then not without paying different compoſitions, according

[b] Vid. ant. 494.

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to the value of their effects; which had, in the mean time, been all inventoried and appraiſed by the ſheriff for the purpoſe [1]. Such was the ſecurity which might be repoſed in this boaſted privilege of trial by a jury of equals; and ſuch the perils under which a jury exerciſed its own judgment, in oppoſition to the inclinations of the ſovereign. During the reign of the ſtar-chamber, the perſons of jurors were no more exempted from animadverſion than thoſe of common individuals; every thing was reduced to the ſame level of ſubordination.

Bills of attainder.

THE proceedings againſt *lord Seymour*, in the reign of Edward VI. ſhew how the opinions of men were now altered reſpecting bills of attainder. Articles were drawn up againſt that nobleman; which, it appears by the council-book, were fully proved by witneſſes, and by letters under his own hand. He was ſent to and examined by ſome of the council; but he refuſed to give any *direct* anſwer, or to ſign ſuch as he had given. It was then reſolved, that the whole council ſhould go to the Tower and examine him. When they attended him, the anſwer he made was, that he expected an open trial, and his accuſors to be brought face to face. After this fruitleſs attempt, it was determined to proceed in a parliamentary way. Accordingly a bill was brought into the houſe of lords for attainting him of treaſon. This the peers eaſily paſſed, in the manner they had been accuſtomed to in the reign of Henry VIII. However, ſome ſhow of juſtice was obſerved. All the judges and the king's counſel delivered their opinion, that the articles were treaſon: then ſome of the lords were produced as witneſſes, who gave their teſtimony ſo fully, that all the reſt with one voice aſſented to the bill.

WHEN the bill was ſent to the commons, it was accompanied with a meſſage, that, if they deſired to proceed as the lords had done, ſuch of them as had given evidence

[1] Ste. Tri. vol. I. p. 78.

before

before the upper-houſe, ſhould come down and declare it to the commons. In this houſe the bill met with ſome oppoſition. Many argued againſt attainders in the party's abſence: they ſaid it was a ſtrange way of proceeding, that two or three peers ſhould riſe up in their places, and ſay ſomewhat to the ſlander of another, and that he ſhould be thereupon attainted. It was preſſed, therefore, that there ſhould be ſomething like a trial; that the lord-admiral ſhould be brought to the bar, and be heard for himſelf. But here the king interpoſed; and informed the commons by meſſage, *that there was no neceſſity of ſending for the admiral.* The commons, as uſual, gave ready obedience to the pleaſure of the court, and paſſed the bill with four hundred voices for it, and not more than ten or twelve againſt it [k]. However, a view of this proceeding againſt lord Seymour ſhews, that this extraordinary way of condemning was not entirely reliſhed by the parliament.

AFTERWARDS, when the bill of attainder of miſpriſion of treaſon againſt *Tunſtall* biſhop of Durham was ſent by the lords to the commons, with all the evidences, which were depoſitions exhibited to the lords, the commons reſolved to diſcountenance ſuch a practice, and would not, at that time, proceed upon it. At another day, they ordered the privy-counſellors in their houſe, to move the lords, that his accuſors and he might be brought face to face (from which we may conclude, that the examinations which produced the depoſitions had been, as they generally were, *ex parte* in the ſtar-chamber); but that not being complied with, *they would not paſs the bill* [l].

IN the reign of queen Mary, the attainder of the *duke of Norfolk*, which had paſſed in the latter end of Henry VIII. was repreſented as null and void; as well on account of other informalities, as *becauſe* no ſpecial matter was alledged againſt him, except the wearing of a coat of arms

[k] Burn. Ref. vol. II. 93, 94. [l] Ibid. 185.

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which his anceſtors had, many years before him, worn without offence [m]. However ſanguinary this reign was in criminal proceedings for hereſy, the court never received any aſſiſtance in its ſchemes of reſentment from the parliament; which paſſed no bills of this kind, except the following may be conſidered in that light.

THE ſtatute of Edward VI. which took away clergy from principals in murder, had left acceſſaries to enjoy the impunity they derived at common law from the benefit of clergy. It happened in 3 and 4 Phil. and Ma. that one *Rufford* had hired two perſons to murder one *Bennet Smith*. This is ſaid by the act in queſtion, to be one of the moſt deteſtable murders ever known in England. The wife of Rufford petitioned the houſe of commons, that Smith might by act of parliament be deprived of his clergy. Upon this, the commons ſent to the queen, praying that ſhe would order Smith to be brought from his confinement in the Tower to the bar of the houſe. He was accordingly brought, when the other parties confeſſing the whole of the matter, and Smith, at length, doing the ſame, the bill was paſſed. But when it was ſent up to the lords, it was there ſtrongly oppoſed, particularly by the clergy, who would not readily conſent to any diminution of their antient privileges: however, at laſt it got through that houſe, and received the royal aſſent. The next year, we have ſeen, there was a general law made, taking clergy away from acceſſaries before the fact, in murder, and other crimes [n].

THERE had been before, in this reign, an inſtance of an *ex poſt facto* law. It being ſuggeſted to the parliament, that the congregations in the city had prayed God to convert or confound the queen; it was thereupon enacted, that whoſoever had ſo prayed, or ſhould ſo pray in future, ſhould be taken for a traitor.

[m] Hum. vol. IV. 374. [n] Stat. 4 and 5 Ph. and Ma. Vid. ant. 491.

THE

THE principal oppreſſions in theſe two reigns, whether by ſummary and illegal trials, by impriſonment, confiſcation, execution, or otherwiſe, were occaſioned by the alterations in religion; and theſe were carried to extraordinary, tho' not to equal, lengths, both by proteſtants and catholics, according as each party had, in its turn, the aid of the executive power.

Judicial proceedings on account of religion.

IN the reign of Edward VI. when the king's councils, in matters of religion, were principally directed by the candid and gentle ſpirit of *Cranmer*, the government was ſometimes tranſported, by zeal for their new opinions, beyond the bounds of moderation.

THE proceedings againſt *Gardiner, biſhop of Wincheſter*, were very ſevere, and on very ſlight grounds. He had been enjoined by the council to inculcate, in a ſermon, the duty of obedience to a king during his minority. He neglected to comply with this; and had, on that account and no other, been thrown into priſon, where he lay two years. At the end of that period, the lord-treaſurer, and other privy-counſellors, went to him at the Tower, and preſented him with certain articles, containing moſt of the points of the reformed religion, to which they required his aſſent. With all theſe he promiſed an entire compliance, if he was ſuffered to be at large, excepting only one article, which contained an acknowledgment of his own delinquency: but they perſiſted in requiring his ſubſcription abſolutely to the whole. He ſtill refuſed. Upon this the income of his biſhopric was ſequeſtered, and he was required to conform himſelf to their orders within three months, under pain of deprivation, and being confined to a cloſer cuſtody.

ALL this was much cenſured at the time, as illegal and inquiſitorial. A man ſhut up in priſon upon a complaint only; and without any further enquiry, after two years, required to give his aſſent to articles of faith! However, ſome reaſoning from the canon law, and the way of pro-

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ceeding *ex officio*, were thought to give a colour to this tranſaction; and in ſome degree to excuſe, if not to juſtify, the hard meaſure this prelate ſuffered [o].

AT the end of three months, a commiſſion was directed to ſome biſhops and others, clergy, laymen, and lawyers, to try Gardiner. As there had been no regular charge at firſt, this was a ſhort buſineſs. He appealed from the commiſſioners to the king, objecting to this tribunal as illegal. The appeal was diſregarded, and ſentence of deprivation was paſſed upon him by the commiſſioners. His books and papers were ſeized; he was ſecluded from all company; and was not allowed to ſend or receive any letters or meſſages [p]. Tunſtall and other biſhops were deprived by commiſſioners of the ſame kind; which prelates were all again reſtored by a like act of power in the reign of Philip and Mary, by a ſentence of commiſſioners appointed to review the proceſs and condemnation [q]; and the ſentence was juſtified, as under a regular proceeding *ex officio*.

THE method of proceeding in the biſhops' court for hereſy, was, to the laſt degree, oppreſſive and inſidious. They uſed to exhibit to the accuſed perſon certain articles, conſiſting of ſuch points of faith which they knew he had his doubts about, or was reputed to deny; and if he did not declare his aſſent to them, there was an end of the enquiry: he was condemned and executed.

THERE were two executions for what was called hereſy, in the reign of Edward VI. Theſe ſufferers were anabaptiſts; but thoſe in queen Mary's reign were ſo numerous, as to render the ſhort time in which this perſecution raged, one of the bloodieſt in the hiſtory of the church. The cruelties exerciſed on the living have filled volumes with melancholy relations; but the proſecution of the dead, which was inſtituted by the viſitors of the univerſity of Oxford, is a ſingular piece of legal proceſs.

[o] Burn. Ref. vol. II. 114. [p] Hum. vol. IV. 345. [q] Ibid. 375.

Bucer

Bucer and *Fagius*, two foreign reformers, there buried, were cited, in the true ſpirit of the canon law, to appear and defend themſelves; and after three citations, the dead bodies not riſing to ſpeak for themſelves, and none coming to plead for them, for fear, as *biſhop Burnet* obſerves, of being ſent after them, the viſitors proceeded *ex parte*. They examined witneſſes concerning the hereſies they had taught, and adjudged them obſtinate heretics; ordered their bodies to be taken out of their graves, and to be delivered over to the ſecular arm. A writ iſſued out of chancery for the execution of this ſentence; their bodies were taken up, and, being carried in coffins, were tied to the ſtakes, with many of their books and heretical writings, and all burnt together[r].

THE deciſions of courts in the reigns of Edward VI. and queen Mary, are to be found in *Dyer*, who reports all through theſe two reigns; as alſo do *Benloe* and *Daliſon*. Some few caſes are to be found in the collectors *Jenkins* and *Keilway*; ſome in *Moore*; and a few, but thoſe very important, in *Plowden*. There are ſome caſes of theſe two reigns in *Leonard*, and ſome, towards the latter end of Philip and Mary, in *Owen*.

STAUNFORDE'S *Pleas of the Crown* was the firſt work which treated the ſubject of criminal law profeſſedly, and in detail. This book is written in French: the method of it is perſpicuous; and the matter diſpoſed with learning and accuracy. The author is uncommonly full in his quotations; the ſtatutes are generally given at length; and whole pages are frequently tranſcribed from *Bracton*. Notwithſtanding the alterations we have ſeen the criminal law undergo ſince the reign of Henry III. yet Staunforde has ventured perpetually to recur to this ancient writer as an authority, and has condeſcended to take from him many complete chapters. This is in general done with ſucceſs and propriety; though ſometimes his author has failed him; Staunforde.

[r] Burn. Ref. vol. II. 321.

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him; as, among other inſtances, may be obſerved of Bracton's definition of larceny, which, as we before obſerved, was not law at the time Staunforde wrote *.

In the account which this writer gives of crimes, his method is to begin by ſtating what they were in *Bracton*'s time, and then to add the ſubſequent deciſions which had affected the old law: at other times he entirely relies on his favourite author. This is done in a compendious way, without enlarging much on any parts of the ſubject. On the whole, he ſeems to aim at nothing more than digeſting in a clear manner what could be collected from others.

As Staunforde has the praiſe of being our earlieſt writer on pleas of the crown; ſo has his merit been acknowledged by thoſe who have followed him in the ſame walk; they having, in general, adhered to the arrangement and diviſions of his work. He divides his ſubject, as falling under three conſiderations: firſt, of crimes; next, of the method of bringing delinquents to juſtice; and laſtly, of trials and puniſhment. The ſeveral titles into which theſe are ſubdivided, have furniſhed the heads of every book which has been written ſince his time, on the ſame ſubject. This treatiſe is not voluminous; and when the quotations out of Bracton, and the ſtatutes, are taken from it, the book is diminiſhed more than half.

We cannot but feel a ſecret pleaſure when we find an author, to whom we have before been under ſuch obligations, in repute with a judge of eminence and learning upon points of modern practice. After the lapſe of three centuries, it was hardly to be expected that we ſhould be called upon to renew our acquaintance with Bracton; and Staunforde is intitled to our acknowledgments for the ſtrong teſtimony he has given in later times to the intrinſic merit of this father of the Engliſh law. Bracton ſeems to have been a great authority with *Staunforde*; for it appears from the reports, that he ventured to cite and argue from him upon the bench, at a time when it was the faſhion to con-

* Vid. ant. 538.

ſider

ſider Bracton and Glanville not as authors in our law, but to be quoted, if at all, only for ornament in diſcourſe[t]; and for conſonancy and order, where they agreed with better authorities[t].

Printing of law books.

THE preſs was not idle during theſe two reigns, but produced ſeveral works of uſe to the practiſing lawyer. William Raſtell publiſhed, in 1559, a collection, in Engliſh, of the ſtatutes now in force, from *Magna Charta* to the 4th and 5th of Philip and Mary[u]. In 1553, there came out an abridgement of the book of aſſiſes[x].

THOMAS BERTHELET, who had a patent of the office of king's printer for life, died in 1555. After this, in 7 Ed. VI. there is found a ſpecial licence to Richard Tathile (or Tottel, whoſe name like many others of this time was variouſly ſpelt), for him and his aſſigns to print for ſeven years all manner of books of the temporal law, called the common law, ſo as the copies were allowed and judged proper to be printed by one of the juſtices, or two ſerjeants, or three apprentices of the law, one of whom was to be a reader in court; and no one was to print what *he* had firſt printed, under pain of forfeiture of ſuch books. A licence for the ſame term was alſo granted him in 2 and 3 of Ph. and Ma.; and in 1 Eliz. he had a ſimilar licence for his life[y]. By Tottel, and by other printers, in theſe two reigns, moſt of the books printed in the reign of Henry VIII. were reprinted; but ſuch different editions would be too tedious to enumerate.

[t] Plowd. 357. 358.

[t] Such is the manner in which *Saunders* and *Catline* deliver themſelves, in the argument of *Stowel verſus lord Zouch*, in the 11th of Elizabeth. Such a judgment upon theſe antient writers might be very diſcreet and juſt at the time; but I was aſtoniſhed to find Fitzherbert inform us, that it was agreed by the whole court in 35 Hen. VI. that Bracton was *never* taken for an author in our law. It was a pleaſure to diſcover that the Year-book had given him no warrant for this monſtrous opinion. The readers of Abridgements have been long aſperſing the reputation of Bracton with more ſucceſs than authority.

[u] Typ. Antiq. 474.

[x] Ibid. 810.

[y] Orig. Juriſ. 59, 60. Typ. Antiq. 896.

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The editions, however, of ſuch books as had never before reached the preſs, are worthy of notice. Among ſuch are the following: In 1555, was printed by Tottel, a book intitled, *Anni Regis Henrici ſeptimi*; containing ſome year-books of that king; reſpecting which he informs us, that the firſt and ſecond were from a new collation; and that the 10th, 11th, 13th, 16th, and 20th, had never before been publiſhed [z]. Some time about 1553, was printed a tract of ſir John Forteſcue with the following title, *De politicâ Adminiſtratione et Legibus civilibus florentiſſimi Regni Angliæ Commentarius* [a].

Miſcellaneous facts.

In this age of reformation, an act was paſſed through the houſe of commons in 1549, for making ſome conſiderable alterations in the proceſs of the common law; but it was thrown out in the houſe of lords. A long diſcourſe on this topic of reforming the common law was written about this time, which *biſhop Burnet* ſays he had ſeen. It is there complained, that the law of England was a barbarous kind of ſtudy, *and did not lead men into a finer ſort of learning*; which made common-lawyers ſo unfit for negotiating foreign affairs. It was therefore propoſed by this author, that the common and ſtatute law ſhould be digeſted into a body under titles and heads, and put into good Latin, in imitation of the Roman laws [b]; a propoſal which, it ſhould ſeem, was leſs neceſſary now than it ever had been, as *Fitzherbert*'s and *Raſtell*'s works were new, and had at leaſt made a great ſtep towards a complete digeſt. The whim of imitating the Roman law ſo cloſely as to adopt its language, was taken up and executed by a writer in after-times [c]; the ſucceſs of which performance is a more deciſive anſwer to the above project, than many arguments of expedience and propriety.

[z] Typ. Antiq. 509.
[a] Ibid. 549.
[b] Burn. Ref. vol. II. 91, 92.
[c] Dr. Cowel's *Inſtitutiones Juris Anglicani*, publiſhed in the reign of James I.

AN

AN order was made in the ſociety of the Inner Temple, in 3 and 4 Ph. and Ma. that thenceforth no attorney, or common ſolicitor, ſhould be admitted into that houſe without the aſſent and agreement of their parliament[d].

THE grievance of long beards was not yet removed. We find an order was made in the Inner Temple, that no fellow of that houſe ſhould wear his beard above three weeks growth, upon pain of forfeiting twenty ſhillings[e]. In the Middle Temple, an order was made in 4 and 5 Ph. and Ma. that none of that ſociety ſhould wear great breeches in their hoſe, made after the Dutch, Spaniſh, or Almain faſhion, or lawn upon their caps, or cut doublets, on pain of forfeiting 3s. 4d.: for the ſecond offence, the offender was to be expelled.

IN 3 and 4 Ph. and Ma. an order was made by the ſociety of Lincoln's Inn, that thenceforth none ſhould be admitted into that houſe, who had not been of an inn of chancery before, for the ſpace of one year, unleſs he paid forty ſhillings at admittance[f]. In 1 and 2 Ph. and Ma. a gentleman of Lincoln's Inn was fined five groats by a ſpecial order, for going in his ſtudy-gown in Cheapſide on a Sunday about ten o'clock in the forenoon, and in Weſtminſter-hall, in the term-time, in the forenoon[g].

IN 3 and 4 Ph. and Ma. the following orders were agreed upon to be obſerved in all the four inns of court. That none of the companions, except knights or benchers, ſhould wear in their doublets, or hoſe, any light colours, except ſcarlet and crimſon; nor wear any upper velvet cap, or any ſcarf, or wings in their gowns, white jerkins, buſkins, or velvet ſhoes, double cuffs on their ſhirts, feathers or ribbons on their caps, on pain of forfeiting 3s. 4d. and for the ſecond offence, of expulſion. No attorney was to be admitted into any of the houſes: and in all admiſſions thenceforward this condition

[d] Dugd. Orig. 147. [e] Ibid. 148. [f] Ibid. 242. [g] Ibid. 243.

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was to be implied: that if he who was admitted practiſed *attorneyſhip* he ſhould be *ipſo facto* diſmiſſed, and have liberty to repair to the inn of chancery from whence he came, or to any one of them, if he were of none before. It was required, that none of the companies of ſuch houſes ſhould wear their ſtudy-gowns into the city any further than *Fleet-bridge*, or *Holborn-bridge*; nor might they wear them as far as the *Savoy*, upon like pains as thoſe beforementioned. None of the ſaid companions, when in commons, might wear Spaniſh cloaks, ſword and buckler, or rapier, or gowns and hats, or gowns girded with a dagger on the back, upon the like pain.

THE moot-caſes in any of the houſes of court were not to contain more than two points for argument: they were to be brought in pleading, and the puiſne of the bench was to recite the whole pleading. None of the bench were to argue above two points; if any did, the Reader was to remonſtrate with him, and correct it in future. Every reader of a court of chancery was to give the ſame orders about apparel, weapons, and ſtudy-gowns, to his houſe of chancery. Among the ſame regulations it was ordained, that none of the ſaid companions, under the degree of a knight, being in commons, ſhould wear any beard above three weeks growth, on pain of forfeiting forty ſhillings, and double the ſum every week after monition [k].

[k] Dugd. Orig. 300.

FINIS.

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The NUMERALS denote the VOLUMES; the FIGURES the PAGES.

Writ

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