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FOURTH VOLUME.

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WE cannot diſmiſs the reigns of theſe two kings, without introducing the reader to ſome ſlight acquaintance with the law and practice of our eccleſiaſtical courts. We are aware, that ſuch an undertaking muſt be attended with ſome difficulty and hazard; and that, in attempting it, we ſhall deviate from the line that has been invariably purſued by writers on the law of England. All writers upon our law, from Bracton down to Blackſtone, have calculated their performances for the practicers in the courts of common law, and have accordingly taken no other notice of the clerical courts, than as their juriſdiction had, at various times, interfered with that of the

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temporal courts. Without diſputing the propriety of ſuch writers circumſcribing their enquiries, the juridical hiſtorian may be allowed to carry his views a little further. Conſidering the eccleſiaſtical courts as employed in the adminiſtration of juſtice equally with the temporal, he will eſteem the law of each to conſtitute only different parts of the *Engliſh Law*, and to demand a proportioned ſhare of his attention. The progreſs of our hiſtorical enquiry makes it now neceſſary to turn our thoughts with more earneſtneſs to this part of our ſubject. We are approaching the reign of Henry VIII. in which many parliamentary regulations were made for reforming our eccleſiaſtical polity, and queſtions of a ſerious nature with regard to the proceedings of the clerical courts were brought forward and diſcuſſed with great heat during that reign, and thoſe which immediately ſucceeded it. It would therefore be proper, conformably with the method which has hitherto been purſued, not to carry on the reader to ſo important a criſis in the hiſtory of our eccleſiaſtical courts, without previouſly poſſeſſing him of ſuch leading circumſtances in the form and conduct of that judicature, as will enable him eaſily to apprehend the effect of ſuch alterations, and the ſcope of ſuch controverſies.

THE preſent ſeems more particularly marked as the period for enlarging on this branch of our enquiry, by the appearance of our famous canoniſt Lyndwode. Whatever doubts might hitherto have exiſted concerning the nature of the juriſprudence which prevailed in the clerical courts, they ſeem all removed by the works of this author. In the *Provinciale*, and the Gloſs upon it, we not only have a view of ſuch conſtitutions as were made in this kingdom, with the interpretation put on them by that experienced practicer and judge; but we collect from him, that the oracle to which recourſe was had in all caſes where our conſtitutions were defective or doubtful, was the body of pontifical canon law. Thus are we enabled to ſay, upon

Miſcel-

upon inconteſtable authority, *what* the eccleſiaſtical law of England was in the reigns of Henry VI. and Edward IV. and for many years after. Inſtead therefore of dwelling on the boundaries between the temporal and eccleſiaſtical juriſdictions, the *debatable ground* which we have fought over ſo often in the former parts of this Hiſtory, we ſhall now paſs the borders, and explore this obſcure region of eccleſiaſtical juriſprudence. CHAP. XXIV. HENRY VI. EDW. IV.

BUT before we proceed to examine the nature and extent of our national eccleſiaſtical law, it will be proper to take a ſhort view of the canon law, which was the original our doctors copied in every improvement they made in the law and practice of their courts. The underſtanding of that ſyſtem appears to be the beſt introduction to a knowledge of our own.

THE canoniſts, in imitation of the Roman lawyers, and as the ſubject naturally dictates, divided the canon law into ſuch as regarded the rights of perſons and of things, the proceeding in civil ſuits, and the proſecution of crimes. The rights of perſons, as they preſented themſelves to the mind of a canoniſt, were confined to their clerical character and function. The duty, rank, and privileges of all perſons, from the pope and biſhops down to thoſe in the moſt inferior ſituations in the church, conſtituted this part of the canonical juriſprudence. Without entering minutely into this enquiry, we may content ourſelves with a ſhort ſtatement of the gradation of perſons who filled the clerical ſtate, and who having been mentioned frequently in the courſe of this work, ought to be better diſcriminated than they have yet been. The whole people of the country being divided into lay and eccleſiaſtical perſons, or clerks, they ſubdivided clerks as follows: into thoſe who were *in ſacerdotio*, thoſe who were *in ſacris*, and thoſe who were *nec in ſacerdotio nec in ſacris*. Thoſe *in ſacerdotio* were divided into ſuch as were *in altiori gradu, ſeu ordine*; and thoſe *in inferiori*: in the former Of the canon law.

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were biſhops, archdeacons, and archpreſbyters; in the latter were preſbyters or prieſts.

Of biſhops.

A BISHOP, ſimply ſo called, preſided over a ſingle city with a dioceſe: a *metropolitan* (ſometimes called an archbiſhop) preſided over a province containing ſeveral cities. An archbiſhop, or primate, was a biſhop to whom the metropolitan and the other biſhops of the province were ſubject: theſe latter were in ſome places called patriarchs. The pope was reckoned among the order of biſhops, with a ſupreme authority over them all. The *cardinals*, from whom the pope was elected, were conſidered as his ſenators, and conſtituting, as it were, the *ſenatus eccleſiæ*: ſome were cardinal deacons, others cardinal prieſts, others cardinal biſhops; but each cardinal had nearly an epiſcopal juriſdiction [a].

ALL biſhops had an ordinary juriſdiction, which was of three ſorts. One was *jure ordinis*; as the conſecration of churches and altars, and the ablution and purgation of them after pollution; the making of the chriſm, and the ordination of clerks. The ſecond was *lege juriſdictionis*; as the power of correcting, collating, excommunicating, inſtituting; taking cogniſance of and hearing cauſes eccleſiaſtical. The third was *lege diœceſanâ*; as the right of exacting procuration; the *jus cathedraticum ſive ſynodaticum*; and the right of exacting and receiving penſions and tythes. All theſe powers could be exerciſed only in the biſhop's own dioceſe, over thoſe immediately ſubject to him; and that in perſon, or by proxy. Thus, too, an archbiſhop's authority went no further than his ſuffragans, and not to the ſubjects of his ſuffragans, except in a few caſes; nor could a patriarch interfere in the cauſes of thoſe who were ſubject to a biſhop or archbiſhop, unleſs by ſome cuſtom, or upon appeal. But the Roman pontiff alone could ex-

[a] Corv. Jur. Can. 5, 6, 7. Launoy. Inſt. Jur. Can. lib. 1. tit. 4.

erciſe

exciſe epiſcopal juriſdiction over all churches and all chriſtian men, either at Rome or elſewhere.

To eaſe the biſhop in the diſcharge of his paſtoral care, certain perſons uſed to be appointed; ſome of them in the church, as *an archdeacon* and *archpreſbyter*; ſome of them *extra ordinem*, upon particular emergencies, as a *coadjutor* or *vicar*. An archdeacon was, by his office, next to the biſhop, and took upon him the whole care and duty of the biſhop *tam in clericis quàm in eccleſiis*, having the whole epiſcopal cogniſance and ordinary juriſdiction[b]. An archpreſbyter, or chief-prieſt, was more exalted than other prieſts, and was vicegerent to the biſhop *in ſpiritualibus*. He was either *urbanus*, diſcharging his duty at home in the cathedral church; or *rural*, doing the like duty at a diſtance: the latter was ſometimes called a *decanus*, or *dean*, becauſe he preſided over *ten* clerks living in the country. He had the charge of all lay perſons and prieſts who had churches within his deanery, and gave notice to the biſhop of heavy offences. Archpreſbyters had only a voluntary and not a contentious juriſdiction[c]. A *coadjutor* was occaſionally appointed to be vicegerent to a biſhop or an archdeacon, in caſe of ſickneſs or any other impediment: the biſhop choſe ſuch a perſon by the advice of his chapter. Biſhops alſo, and other clerks, might chuſe a vicegerent under the denomination of *vicar*, to act for them in any emergency; and might aſſign him a portion of their church or benefice, as a reward for his trouble. Such perſons were appointed either to do divine ſervice, and then they retained the name of vicar; or they were appointed *ad juriſdictionem exercendam*, and then they were called *officials*, and *miſſi dominici*. The former kind were the vicars which have been before mentioned in the reign of Henry IV *.

Officials.

The latter had the power of adminiſtering ſpirituals as well as temporals: thus they might excommunicate, ſuſ-

[b] Corv. Jus Can. 26, 27, 28.
[c] Ibid. 29, 30.
* Vid. ant. vol. III. 122.

pend,

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pend, interdict, collate, inſtitute, confirm, elect, preſent, viſit, correct, puniſh, diſpenſe, and the like. Their juriſdiction was not deemed a delegated one, but ordinary, and the ſame as that of the biſhop; ſo that an appeal did not lie from the ſentence of the vicar to the biſhop, but to the archbiſhop; tho' from the archdeacon, and other inferior prelates, the appeal was to the biſhop. This, however, was to be underſtood of *officials principal*, who were conſtituted by the biſhop in his court by a general commiſſion of his office; not ſuch as were appointed for ſome part of a dioceſe, who were called *foranei*. Theſe latter had a different juriſdiction from that of the biſhop, and an appeal lay from them to the biſhop's conſiſtory. It was a rule, that a vicar could not ſubſtitute another vicar in his place[d].

HAVING ſaid thus much on the vicars appointed by biſhops, we ſhould add a word reſpecting thoſe who received a vicarial authority from the pope: theſe were called legates, and were either *legati à latere*, *legati miſſi*, or *legati nati*. The former were cardinals taken, as it were, from the ſide of the pope and his ſenate, who were ſent in his name into diſtant provinces; the ſecond were perſons ſent with like authority, not being cardinals; the laſt were ſuch as had this power by reaſon of a certain privilege or benefice. Theſe vicars carried with them all the pope's authority to hear all cauſes as *judices ordinarii*; but a certain eminence was always attributed to the legate *à latere*[e].

BISHOPS were *ſacerdotes* in the higher order: we now come to thoſe in the inferior, which were *preſbyteri*, or prieſts. Next to theſe come clerks that were not *in ſacerdotio*, but yet were *in ſacris*; as *deacons* and *ſubdeacons*, who were ſometimes, tho' improperly, called prieſts; for prieſts, ſtrictly ſpeaking, were thoſe only, who, in the

[d] *Vicarius non habet vicarium.* [e] Ibid. 34, 35. Conv. Jur. Can. 31, 32.

language

language of the canons, could perform the ſacrifice of the body and blood of our Lord. The deacons, conſiſtently with the original term [f], were to attend upon and aſſiſt the biſhop and prieſt in performing the divine ſervice; and the ſubdeacon was a ſubordinate aſſiſtant [g]. After theſe followed what the canoniſts called the *leſſer orders*, containing thoſe perſons who were *nec in ſacerdotio, nec in ſacris*. Theſe were ordained without the ſacramental unction, ſolely by the biſhop's benediction, with a certain diſtribution either of veſſels or veſtments, and they underwent the *prima tonſura*. They were called either *pſalmiſtæ, oſtiarii, lectores, exorciſtæ*, or *acolythi*. The duty of the firſt was to ſing; of the next, to keep the keys of the church; the next, as the name imports, were to read the ſcriptures in church; the next, according to the ſuperſtition of the times, were ſuppoſed to drive away evil ſpirits by certain deprecations and ſolemn prayers; and the laſt prepared the wax-lights, and the like.

It was the privilege of all theſe orders, that no one ſhould lay violent hands upon ſuch as had received them, without incurring the penalty of excommunication, which could not be removed but by the pope, except in the article of death. Thoſe in the lower orders were allowed to contract matrimony, which thoſe in the ſuperior orders were not, under pain of being deprived of their benefices. The gradation in which theſe ſeveral orders were ranked by the canoniſts, was this: a biſhop, a prieſt, deacon, ſubdeacon, pſalmiſt, acolyth, exorciſt, reader, oſtiarius; after theſe the canoniſts placed an abbot, and a monaſtic; for, ſay they, all monaſtics, if not clerks, are inferior to clerks [h]. The regulars, as they were exempted from epiſcopal juriſdiction, were not favoured by the clerical courts, and the diſpenſers of juſtice there; and they are ſtudiouſly marked by the canoniſts as a diſtinct ſet of perſons, not intitled to the privileges of clerks.

[f] Διακονοι. [g] Corv. Jur. Can. 37. [h] Ibid. 38, 39.

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NEXT to the rights of eccleſiaſtical perſons, the canoniſts proceed to conſider the rights of eccleſiaſtical things. Theſe they divided into *ſpiritual* and *temporal*. The former were ſo called, becauſe inſtituted *animæ cauſâ*, for the good of men's ſouls; ſome of them were corporeal, as the ſacraments; others, *res ſacræ et ſanctæ*; and others, *res religioſæ*.

THE ſacraments in the Romiſh church were ſeven: baptiſm, confirmation, the euchariſt, penance, ſacred orders, matrimony, and extreme unction. *Res ſacræ et ſanctæ* were churches, altars, the reliques of ſaints, veſſels, and veſtments. *Res religioſæ* were religious houſes; hoſpitals for the reception of ſtrangers, orphans, ſick and aged; churchyards, and ſepulchres. Such were ſpiritual things of a corporeal nature. Thoſe of an incorporeal kind were ſuch as conſiſted *in jure*; as a prebend, a right of patronage, annual penſions called *cenſus*, and what was nearly allied to them, exaction, procuration, and the canonical portion: theſe conſtituted the whole of what the canoniſts conſidered as ſpiritual things, whether corporeal, or incorporeal. Next to theſe followed three ſubjects of a mixed nature between ſpiritual and temporal; as tithes, firſt-fruits, and oblations; which were conſidered as mixed, becauſe, according to the canoniſts, the right to them was *jure divino*, while the fruit of ſuch right was temporal. Under the title of *res eccleſiæ temporales*, the canoniſts reckoned the alienation of church property, and the modes in which it could be made. Next to church property, the canoniſts conſidered the *peculium clericorum*, and how they might diſpoſe of it by will[1].

THE next object that came under the contemplation of the canoniſts, was the mode of proceeding in court, which they intitled *de judiciis*. Concerning this we ſhall have oc-

[1] Corv. Jus Can. 57 to 164. Launc. Inſt. Jur. Can. lib. 2. *per totum.*

caſion

caſion to ſpeak ſo particularly hereafter, that nothing need be ſaid on it at preſent; but we ſhall proceed to the fourth object of enquiry in the canon law, which is the nature of crimes. The canoniſts divided crimes into ſuch as were comprehended in the firſt and in the ſecond table of the Moſaical law. Without any obſervation upon this arrangement, we ſhall take a curſory view of crimes, as diſcourſed on in this clerical ſyſtem of penal juriſprudence.

Of offences.

THEY began with ſimony, which, by a very large definition, was when any thing was either given or promiſed for ſpiritual things, or for temporal things annexed to ſpiritual ones, as a prebend. Next to this were the crimes of Judaiſm, Saraceniſm, hereſy, ſchiſm, apoſtacy; then homicide, which they divided into parricide and ſimple homicide; under which they conſidered thoſe exerciſes or competitions that had a tendency to produce homicide, as tournaments, duels, and the art of ſhooting, all which were forbid under eccleſiaſtical penalties; the crime of adultery, *ſtuprum*, inceſt, rape, ſimple fornication, and ſodomy; theft, *rapina*, or robbery, burning, ſacrilege. Next to robbery and theft, the canoniſts choſe to rank uſury, as an offence, ſay they, of a ſimilar nature; then the *crimen falſi*; then *ſortilegium*, *calumnia*, colluſion. After theſe they placed ſuch as were offences only in clerks. If a clerk indulged himſelf in the noiſy amuſement of hunting; if he ſtruck any one; if he ſpoke ill of any one; if he adminiſtered to a perſon excommunicated, depoſed, or interdicted; if a perſon officiated as clerk not being ordained; if a clerk did not obſerve the regular gradation of orders, as if he was made a deacon before he had been a ſubdeacon, or a prieſt before a deacon; if he took more orders than one at a time, or took orders by ſtealth, without undergoing an examination of his qualifications; all theſe were offences puniſhable by the canon law. To theſe may be added all diſorders and irregularities whatſoever

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ſoever committed by clerks in the diſcharge of their duty. The manner in which all canonical crimes were to be proſecuted, was the next point conſidered by the writers on the canon law.

We have given this ſketch of the canon law in a curſory way for two reaſons: firſt, becauſe many objects of judicature which the canoniſts claimed, made no part of the eccleſiaſtical law in this country: ſecondly, becauſe others, which were admitted to belong to our courts, received, notwithſtanding, ſome alteration from our national conſtitutions or cuſtoms. What ſuch alterations were, and what conſtituted objects of juriſdiction in our ſpiritual courts, will be conſidered in the next chapter. For the preſent we ſhall be employed on a part of the canon law, which being adopted in our courts with leſs reſerve, demands a more minute conſideration than any other. This is the courſe of judicial proceedings, whether civil or criminal.

Of proceedings in civil ſuits.

The cogniſance of cauſes, or, as the canoniſts called it, *judicium*, was divided into *ordinary* and *extraordinary*, or *ſummary*. The former was, when all the ſolemn forms of proceeding were obſerved by a libel, conteſtation of ſuit, and the other ſteps which will be mentioned preſently. The extraordinary, or ſummary, was, when the ſolemn forms were diſpenſed with, and they proceeded *ex officio judicis*, either by inquiſition, denunciation, or ſome other courſe *de plano*, as they termed it, upon general principles of equity. Another diviſion correſponded with that of the temporal juriſdiction, into *civil* and *criminal*.

Judges, in like manner, were conſidered by the canoniſts in two lights, ordinary and extraordinary. Of the former deſcription were archbiſhops, biſhops, legates, and others having authority from the pope. A biſhop might exerciſe his juriſdiction in any part of his dioceſe that was

[a] Corv. Jus Can. 287 to 344. Launc. Inſt. Jur. Can. lib. 4. tit. 3. uſq; ad tit. 10.

not

not exempt, either in perſon or by another, by hearing all eccleſiaſtical cauſes, and correcting all eccleſiaſtical perſons who offended. An archbiſhop had juriſdiction over his ſuffragans, but not over the perſons within the dioceſes of his ſuffragans, unleſs in ſome ſpecial caſes that were exempted. An extraordinary judge was an *arbiter* choſen by the parties; or a *delegate* who received commiſſion from ſome ſuperior to hear a particular cauſe. A judge might be delegated by an ordinary, or by a delegate of the pope; but the delegate of an ordinary could not delegate another, unleſs the original delegation had included all cauſes in general. It was not only the cogniſance of a cauſe generally, but any part of the proceeding that might be delegated: thus the beginning, as the citation, and *litis conteſtatio*, might be delegated to one; the middle, containing the remainder down to the definitive ſentence, to another; the definitive ſentence and execution to another [1].

In conſidering the nature of proceedings in the eccleſiaſtical court, we ſhall begin with civil cauſes, and with the ordinary juriſdiction. The commencement of a civil ſuit in the ordinary juriſdiction, conſiſted in the citation of the defendant, or *reus*. Citations were of different kinds; they were verbal or real. A verbal citation was either public or private. A public citation was by fixing up publicly the letters of citation, (which too was called *edictalis citatio*) or proclaiming them by the mouth of a crier, or by a bell or trumpet. A private citation was, when a perſon was cited by a meſſenger, the party, or a notary at his own houſe. It was called a real citation, if the perſon of the party was apprehended. The *citatio edictalis* was to be made uſe of only where a perſon could not be otherwiſe cited: as if it was unſafe to attempt to come to him, this citation was to be affixed in ſome place near the domicil of the party, ſo that he might be reaſonably ſuppoſed to have knowledge of it.

[1] Cory. Jur. Can. 165 to 172.

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To conſtitute a legal citation, it was neceſſary that it ſhould be made at the command of the judge, by an apparitor, at the inſtance and requeſt of the ſuitor; without which no judge could cite a perſon in a private ſuit, tho' he might in a public one. All parties intereſted were to be cited, unleſs, indeed, they were perſons of dignity and rank; for ſuch were not to be cited, *niſi veniâ priùs impetratâ*, under a heavy penalty. A citation iſſued not only at the opening of the ſuit, but in the various ſtages of the cauſe, wherever any *cognitio* was to be made to expedite it. Every citation was to contain certain formalities: it was to have the name of the judge, the *nomen* and *cognomen* of the party cited, and of him at whoſe ſuit it iſſued; the cauſe of citing, the place of judgment, the day and *terminus* for appearing. The place need only be mentioned in caſes where the judge was a delegate, becauſe the ordinary's court was certain and known. A citation was to be made either by three *edicta*, at the interval of ten days each, or by one peremptory edict, containing the ſame ſpace of time as the three *edicta*; and ſuch peremptory time was not to be ſhortened by the judge but for ſome ſpecial cauſe expreſſed in the citation.

If the party was regularly and lawfully cited, he ought to appear, otherwiſe he fleed not; but an irregular and unlawful citation would be cured by a voluntary appearance. Indeed the party's non-appearance would be juſtified in many caſes: as if he had been ſpoiled of the thing in queſtion, and was not firſt reſtored to it; if he was hindered by his adverſary; was cited to a higher tribunal; was detained by ſickneſs, or other like cauſe: but as ſoon as ſuch cauſe was removed, he was to preſent himſelf before the judge. As ſoon as a citation had iſſued and was ſerved, or the ſervice was prevented by the party himſelf who was cited, then the ſuit was conſidered in law as *in pendente*[m].

[m] Conv. Jur. Can. 172, &c.

It

IT often happened that a cauſe once commenced, would go off upon an agreement between the parties: this was either by a *pactum* or a *tranſactio*, or by ſubmiſſion to an arbitrator. The two former, which may properly be conſidered as judicial agreements, were thus defined by the canoniſts: *Pactum*, ſay they, is *inter partes ex pace conveniens ſcripturâ, vel, ſine eâ, legibus ac moribus comprobata ſententia. Tranſactio* is defined, *rei dubiæ et litis incertæ, neq; finitæ, aliquo dato vel remiſſo, conventa deciſio*[n]. From the terms *ſententia* and *deciſio*, as well as from the occaſion on which the canoniſts mention theſe two agreements, they muſt be conſidered as having a ſort of judicial ſanction; and they naturally bring to the reader's mind the account we have given of a fine, in the early parts of our Hiſtory[o]. A ſubmiſſion to arbitrators was another way of compromiſing the ſubject of a ſuit: while an arbitration was depending, the jurisdiction of the judge was held to be ſuſpended[p].

IF the parties could not agree to compromiſe the matter in one of theſe three ways, they muſt reſort to the judgment of the court; in order to which it was uſual, firſt to appoint a *procurator*, or *proctor*, who was to act as attorney through the ſuit. Whether the appearance was by proctor or in perſon, the next ſtep was for the complainant to ſtate his cauſe of action. In ſummary cauſes, and ſome others, this might be done *vivâ voce*, without any writing, either by the advocate or in perſon; but in other cauſes it was to be done in writing, which was called *libellus*. A libel in civil cauſes was either *conventionalis*, or *poſtulatorius*; in criminal caſes, *accuſatorius*, or *querimonialis*. In the latter caſes, a libel was to contain the day and year, the *nomen* and *cognomen* of the accuſer and accuſed and of the judge, the crime, the time when it was committed, together with the *inſcription*, which will be explained here- The libel.

[n] Corv. Jus Can. 181. 183. Eſſay on Fines.

[o] Vid. ant. vol. I. 148. This coincidence in the civil law (from miſſion to arbitrators is called by which the canoniſts took it), has been noticed by Mr. Cruiſe, in his word compromiſe.

[p] Corv. Jus Can. 187. A ſubthe canoniſts *compromiſſum*: hence our

after.

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after. A conventional libel, in like manner, was to contain the names of the parties, of the judge, and of the thing in queſtion, with the quality of the action; though it was not indiſpenſably neceſſary that the name of the action ſhould be mentioned. The libel ſhould be tendered by the *actor* both to the judge and the *reus*[q]. If the *reus* made any anſwer, or denied a part, or the whole, this conſtituted a *litis conteſtatio*.

PERHAPS the *reus* would rather chuſe to meet the *actor* in ſome other way; for if he had any demand upon him, he might *reconvenire*, as they called it, that is, make a croſs demand upon him[r]. A *reconventio* was proper or improper: the former was ſuch as was inſtituted at the beginning of the original cauſe, and went on *pari paſſu* with it; the latter was ſuch as was made at any time before the concluſion of the cauſe. A *reconventio* was always to be before the ſame judge as the *conventio*, whether he was an ordinary or delegate; but not before an arbitrator, nor a judge of appeal: it might be had in all cauſes, except criminal, thoſe of ſpoliation, and ſome few others. The matter of the *reconventio* was to be put into a libel before the *litis conteſtatio*, or immediately after, and then would go on with the original ſuit: indeed they were conſidered as one ſuit only; for they had the ſame parties and judge: there was to be one ſentence; and if an appeal was prohibited in the firſt, it was prohibited in the ſecond alſo[s].

Litis conteſtatio.

WHEN the preparatory parts of the action were gone through, then followed the *litis conteſtatio*, which the canoniſts called *ipſius judicii principium et fundamentum*. It was truly the foundation of the judgment; for till that happened, there could be no examination of witneſſes, nor definitive ſentence; and the whole proceſs, of courſe, was

[q] Corv. Jus Can. 187, &c.

[r] *Reconventio* is defined by the canoniſts to be *mutua petitio contra convenientem vel agentem, in eodem judicio conſtituta.*

[s] Corv. Jus Can. 193, 194.

at

at a ſtand. The *litis conteſtatio* aroſe from the conflict between the intention of the *actor*, exhibited in his libel, and the anſwer of the *reus*, which ought always to be calculated to conteſt the matter there ſuggeſted. If the *reus* in his anſwer made a plain narration of a fact, not accompanied with a denial, there was no *litis conteſtatio*. A *litis conteſtatio* was regularly neceſſary in every cauſe that was conducted in the ordinary proceſs, and not *de plano*, without the figure and ſolemnity of judgment. The effect of the *litis conteſtatio* was various: it perpetuated the juriſdiction of the judge, and the action, if temporary; no innovation could be made to the prejudice of either litigant; it prevented a preſcription running; it made the matter in queſtion litigious; and the *actor* could not alter his libel[1].

NOTWITHSTANDING what has juſt been ſaid, there were ſome caſes in which witneſſes might be examined even before the *litis conteſtatio*. Thus, if there was any apprehenſion that a witneſs might die, or be long abſent, the judge, whether ordinary or delegate, might admit him to be examined; and this was done both in civil and criminal cauſes: in the latter, it was not allowed in the abſence of the other party; in the former, it was, if there was any danger in the delay; if not, the adverſe party ſhould be cited to ſee the witneſſes ſworn, and to tender interrogatories. Witneſſes might be examined thus prematurely in the following caſes: if it was a queſtion merely ſpiritual, and involving no benefit to any private perſon, as the crime of hereſy; if the public ſafety was endangered; if the ſtate of the church was concerned; in a cauſe of denunciation or of appeal; if the appellee was contumacious; in a matrimonial cauſe, if the other party was maliciouſly abſent; in a caſe of dilapidation or purgation; wherever any thing was to be done *ex officio judicis* in relation to an

[1] Corv. Jur. Can. 195, 196, 197.

action,

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action, as concerning coſts of ſuit; and in all caſes where the proceeding was ſimple, and *de plano*.

WITNESSES might be produced in this manner both by the *actor* and *reus*, though under different conſiderations. The *actor* might examine if they were old or infirm, and he was not at liberty to bring his action juſt at that time, as where a debt was due on a condition not yet broken. The judge was to decide as to the age, infirmity, or abſence of the witneſſes. When the witneſſes were ſo received, the *actor* was to bring his action within a year from the time at which he was intitled to an action, or at leaſt denounce to the *reus* the receipt of the witneſſes. A *reus*, without any ſuggeſtion of age, infirmity, or abſence, might indifferently produce any witneſſes, provided he had a ground of exception, which, though not ſufficient to found an action, might be enough to bar the action he apprehended. Witneſſes examined in this way were to be produced before the judge who was competent to the principal cauſe; the other party, as was before ſaid, ſhould be cited, unleſs the ſpeedy death of the witneſs was apprehended; and then it might be, not only in the abſence of the other party, but before a judge who was not competent to hear the principal cauſe [a].

AFTER the conteſtation of ſuit, there were ſeveral ſteps to be taken before the definitive ſentence could paſs. Theſe may be conſidered as of three kinds: firſt, the *juramentum calumniæ*; ſecondly, the *dilationes*; thirdly, the proceſs againſt the *reus*. The *juramentum calumniæ*, or oath of calumny, was taken by both the parties litigant, who reſpectively ſwore, that the cauſe was commenced, and ſhould be carried on and defended, *bonâ fide*, for the ſake of juſtice, and with no malicious deſign. The judge could not impoſe this oath but at the deſire of the other party; and ſhould either refuſe, the conſequence was

[a] Corv. Jus Can. 197, 198, 199.

fatal;

ſatal; for the *actor* would loſe his action, the *reus* the thing in queſtion, as if he had confeſſed the demand. All litigants were liable to take this oath, and they might take it themſelves, or by their proctors; but a proctor to take this oath ſhould have a ſpecial warrant, and then he might ſwear, as the canoniſts expreſſed it, *tam in animam domini quàm ſuam.* It was to be taken in all cauſes where any proof was to be made, whether in a criminal or civil ſuit. Beſides ſwearing to the juſtice of their cauſe, they were alſo to ſwear that they had not given, nor would give, any thing to the judges or others, except the honorary rewards to the advocates, and the like lawful preſents; and alſo that they would not require any proof which they did not think abſolutely neceſſary [x].

Dilationes.

THE *dilationes*, or allowances of time for the performance of any judicial act, were termed either *legales* or *arbitrariæ*; the former being ſuch as were aſcertained by law; the latter being dependent on the pleaſure of the judge, who made them longer or ſhorter according to the nature of the caſe, and the circumſtances of the parties. Theſe latter dilations were to be given by the judge ſitting on the bench, in the preſence of both parties; to the former the parties were intitled of courſe, tho' they might be qualified by the diſcretion of the judge. The uſual occaſions on which one or other of them were allowed, was for producing witneſſes, for proving inſtruments, for purgation, for conteſtation of ſuit, and the like [y].

SOME other circumſtances were conſidered as ſpecies of dilations. Among theſe were *feriæ*, or ſuch days as were always exempt from judicial proceedings of every kind; and the *ordo judiciorum*, by which the due courſe of hearing each cauſe was preſcribed. Thus a principal cauſe was to be heard before one that was only incidental to it; a criminal cauſe was to be heard before a civil one [z]. A

[x] Corv. Jus Can. 199, 200. [y] Ibid. 201. [z] Ibid. 205.

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plus petitio, as they called it, might be reckoned among the *dilationes*: this was when the *actor* demanded more than he was by law intitled to; in which caſe he loſt his action, and paid ſingle, double, or treble coſts, according to the nature of the exceſs in the demand [a].

ONE inſtance of the *ordo judiciorum* was, when a *petitory* (or, as we ſhould ſay in Engliſh, an action upon the right) and a poſſeſſory cauſe concurred. Thus the *actor* going on in a *petitory* way, and the *reus* complaining, perhaps, of a ſpoliation, made a croſs demand of a poſſeſſory nature, whether of the ſame thing, or of ſome other. If it was of the ſame thing, the poſſeſſory queſtion was firſt to be determined; and that upon the right, though firſt brought, was to be ſuſpended. If it was for a different thing, there was a diſtinction; for the poſſeſſory demand might be made either by way of reconvention, by way of action, or by way of exception: if in the firſt, then the two queſtions went on together, and there was only one ſentence, as was obſerved before: if in the ſecond way, then the poſſeſſory queſtion was firſt to be determined, whether the perſon ſpoiled was ſued civilly or criminally by the *actor*; for it was a rule, *ſpoliatus ante omnia eſt reſtituendus*: if in the latter way, the exception of ſpoliation was to be firſt decided, and then that upon the right. The perſon who ſued for the right was at liberty, before the concluſion of the cauſe, to ſue for the poſſeſſion; though not after, unleſs for ſome ſpecial cauſe. If a perſon ſued at once both for the right and poſſeſſion, they were both determined by one ſentence; and the perſon who loſt upon the poſſeſſion, might afterwards go upon the right [b].

A SPOLIATION was defined to be *violenta poſſeſſionis privatio*. It might happen both with reſpect to moveable and immoveable things; to rights, and to benefices. If a judge unlawfully deprived any one of his right by judg-

[a] Corv. Jur. Can. 206. [b] Ibid. 207.

ment,

ment, it was conſtrued a ſpoliation. A perſon who commanded a ſpoliation to be made, or who acknowledged it to be made in his name, or who received the thing from the ſpoiler, was held the ſame as the ſpoiler. A perſon ſpoiled might complain either by action, reconvention, or exception: in the firſt caſe, he was to be firſt reſtored; in the ſecond, both queſtions were to be heard *pari paſſu*; in the third, he need not anſwer till he was reſtored. A reſtitution, if made, was to be with the fruits, and the loſs ſuſtained [c].

THE next conſideration is the proceſs which iſſued againſt thoſe who were contumacious. A perſon who was lawfully cited, and, being under no lawful impediment, did not appear in perſon, or by a proctor; or if he appeared, but did not conform himſelf, or departed without the judge's leave, in all theſe caſes ſuch perſon was held contumacious. A lawful citation (as has been ſhewn) was by three *edicta*, or one peremptory, containing the ſame ſpace of time as the three edicts. The contumacy, whether of the *reus* or *actor*, (for he alſo might be contumacious) was puniſhed differently, and according as there was a *litis conteſtatio* or not; and the judge need not inflict all the penalties at once, but one after another, as the party appeared leſs likely to ſubmit himſelf.

IF the *actor* did not appear at the time to which he had cited the *reus*, he was to pay coſts to him, and could not have a new citation, without giving ſecurity for his own appearance at the new-appointed time. The *reus* alſo, if there had yet been no *litis conteſtatio*, might require that the *actor* ſhould be cited; and if he did not then appear, that he himſelf might be admitted to make proof, and ſentence be paſſed. If the *actor* was contumaciouſly abſent after the *litis conteſtatio*, and all but ſix months of the *tempus inſtantiæ* (which was uſually three years) was elapſed,

[c] Corv. Jus Can. 208. Launc. Inſt. Jur. Canon. lib. 3. tit. 10.

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the judge, if the cause was a plain one, might proceed to a definitive sentence, even in favor of the *actor*, provided the right was on his side; otherwise in favor of the *reus*, by absolving him, and condemning the *actor* in costs.

If the *reus* was contumacious, either a mulct was inflicted on him by the judge, or he was condemned to pay the *actor* his costs and other damages; or he was excommunicated, or suffered a *missio in bona*. A *reus*, if contumacious, was sometimes said to be *verus*, and sometimes *fictus*: the first was one who being personally cited, or by three edicts, did not appear; or appearing, would not answer: the latter was one who had been only cited at his house; unless, indeed, the citation had been communicated to him by his friends or domestics[d]: and there was this difference between the two, that the latter might appeal, but the former could not.

Missio in bona.

The *missio in bona* was different where there had been a *litis contestatio*, and where not. After the contestation, if the judge was not clear in the justice of the cause, he put the party into possession of the goods of the *reus*, so as to make him only the real and true *possessor* thereof, leaving to the absent *reus* to maintain a question upon the *right*. If the cause was a plain one, then he passed a definitive sentence. If there had been no contestation, as he could not properly come to the merits of the cause, there was only a simple *missio in bona*, which was done by means of a *decretum*. There was a first and a second *decretum*: by the first there was a *missio in possessionem bonorum*, merely for custody. This process might be had by all persons to whom there was an absolute debt due, not by those who had a debt only *sub conditione*; unless, indeed, where the party was a legatee. The *missio* was first into possession of moveables, then of immoveables, and lastly of incorporeal things. There was, however, a difference between a real and personal action. In a real action the *missio* was *in bona petita*, of which the party became the true *possessor*,

[d] Corv. Jus Can. 209, 210, 211.

ſeſſor, and after a year, and not before, he might take the fruits: within the year, the *reus*, if he purged himſelf, might come, and on giving ſecurity to ſtand to the ſuit, and paying the coſts, he would have reſtitution of the goods taken. In a perſonal action, the *miſſio* was in proportion to the debt, and the *actor* did not obtain poſſeſſion, but only held it, together with the owner, in a ſort of cuſtody. The *reus*, whenever he appeared, ſo as it was before the ſecond *decretum*, was to have reſtitution, upon giving ſecurity to ſtand to the ſuit, and refunding the coſts.

THE ſecond *decretum* was not neceſſary for acquiring poſſeſſion in a real action, for that we have ſeen was done by the firſt, but it was neceſſary in a perſonal one; for by means of this, after the *reus* perſiſted in his contumacy, the *actor* was put into poſſeſſion, ſo as to continue the true and unchangeable owner of the thing ſo taken. This did not iſſue till a year after the firſt *decretum*, and was at the prayer of the party. As in the former caſe, ſo here, reſtitution would be made if the party appeared, or gave ſecurity for ſtanding to the ſuit, and paid the coſts; or indeed if any juſt impediment could be ſhewn to have prevented his coming. It ſeems to have been left to the diſcretion of the judge, in what manner he would order the things taken under a *decretum*. Thus, he might either order them to be ſold, or to be delivered in payment of the demand; if a debt, he might either make the *actor* real proprietor of them, or give him only poſſeſſion. The proceſs of *miſſio in poſſeſſionem* was allowed only in profane matters, not in caſes where any dignity or benefice, or other eccleſiaſtical matter was in litigation; for then, inſtead of this proceſs, they either proceeded to a definitive ſentence, or the contumacious party was purſued by eccleſiaſtical cenſures[c]. It is for the reader to judge whether the framers of our real proceſs by caption, as related in the early parts of this Hiſtory, had any eye to this canonical proceeding *.

[c] Corv. Jus Can. 211, 212, &c. Lanne. Inſt. Jur. Can. lib. 3. tit. 6.

* Vid. ant. vol. I. 417, 418, &c.

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ANOTHER way of proceeding in cases of contumacy was by *sequestration*. This was depositing the thing in question, or the fruits of it, by consent of the parties, or by the authority of the judge, in the hands of a sequestrator, for safe custody, to be restored to the successful party in the suit; so that it was either *conventional* or *judicial*. That a person might not be deprived of the possession rashly, which was like beginning with an execution, this was confined to particular cases. If the judge apprehended that the parties might come to open violence; if the person who was *missus in possessionem* by a *decretum* was wasting the fruits and produce, and the like, such was a proper occasion for a sequestration. Things, whether moveable or immoveable, were subject to sequestration; though it would not be allowed of a benefice, if any question arose against a person who had been full three years in possession.

A CONVENTIONAL sequestration passed into what they called a *sequestral possession*, unless there was an agreement that it should only be for safe custody: and if it did, the sequestrator had all the advantages of possession; that of taking the fruits and produce, of presenting to benefices, and the like. A judicial sequestration did not convey the *possession*, but that awaited the definitive sentence. Any person who hindered the sequestration of an ecclesiastical benefice, or the receiving the fruits of it, incurred excommunication, from which he could be absolved only by restitution; and if he was one of the parties, he would lose the benefice, and whatever right he had therein [f]. It should be observed, that the whole process for a *missio in possessionem*, and for sequestration, were exceptions to the rule, that *lite pendente nihil effet innovandum*, which was most rigidly adhered to in all other respects [g].

THUS far of the *reus*, when contumacious: the next considerations are when he came in and confessed, or denied

[f] Corv. Jus Can. 216, &c. [g] Ibid. 215.

the

the charge againſt him. A confeſſion conſiſted not only in a plain admiſſion of the charge, but might be collected from circumſtances, the ſtrongeſt of which was ſilence. If, on interrogation, he ſhould contumaciouſly refuſe to anſwer, or ſhould not deny the allegations of his adverſary, this amounted to a confeſſion. A confeſſion had the force of a ſentence; ſo as that the judge, if proceeding *de plano* without the form and ſolemnity of a judgment, need not paſs ſentence upon the perſon confeſſing; but if he was proceeding in the ordinary courſe, he muſt give ſentence: the ſame alſo in criminal matters [h].

Of proof.

If the *reus* denied the libel, then the *actor* was required to prove it. Proof was divided into artificial and inartificial: the former was ſuch as could be deduced by argument from the thing itſelf: the latter conſiſted in ſuch things as were out of the cauſe; as witneſſes, inſtruments, confeſſion, an oath, and the like. Proof was again conſidered in two lights; either as *plena*, or *ſemiplena*. The firſt was ſuch as wrought on the mind of the judge *plenam fidem:* ſuch was a proof by two witneſſes, by a public inſtrument, by preſumption, the judicial confeſſions of a party, the evidence of the thing. The latter was ſuch as had only an imperfect effect on the judge's mind, not producing ſuch a faith as he ought to acquieſce in; as by one unexceptionable witneſs, a private inſtrument, compariſon of hands, an extrajudicial confeſſion, argumentation, report, and the like. However, ſeveral half proofs might be ſo put together as to make one full proof; as where they tended to one end, and not to ſeveral; and this, whether they were of the ſame kind, as two witneſſes; or of different kinds, as one witneſs, and a report. But if theſe proofs went to different objects, as one witneſs to prove a report, another to prove a flight, it would not ſuffice; be-

[h] Corv. Jus Can. 2, 8, &c.

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cauſe, to make a full proof, each ought to be proved by two witneſſes.

In ſome caſes, the canon law was content with ſomething leſs than proof, where a probable preſumption could be raiſed; as in a caſe of ſimony, which was always committed in ſecret. Proof conſiſted either in witneſſes, confeſſion, inſtruments executed with due ſolemnity, the evidence of the fact, report, antient books, and writing on ſtones or columns, letters under the ſeal of a biſhop, cardinal, abbot, or chapter, common opinion, *indicia indubitata*, violent preſumption. If the *actor* brought a full proof, he need not take an oath himſelf[1]. Two ſorts of proofs, that which conſiſted of witneſſes, and that which depended upon inſtruments, deſerve more particular conſideration: and firſt of witneſſes.

Of witneſſes.

The competency of witneſſes was meaſured by the canoniſts by much nicer conſiderations than any that operated in our law of evidence. The objections to a witneſs were ſuch as were abſolute, or ſuch as applied only between particular perſons. Of the former kinds were the following: that he was not arrived at puberty (unleſs indeed in caſes of læſe majeſty, where this was not an objection); that he was mad, or of non-ſane memory; an infamous perſon, as an uſurer, or one condemned by a public judgment; one who had been convicted of receiving money, either for giving or with-holding his evidence; one condemned either for peculation, for a libel, calumny, or adultery; a heretic (but this was no objection where he was to give evidence againſt a heretic); a perjured perſon; a woman who was or had been a common proſtitute; and all perſons who were ſtigmatized by the ſecular laws.

Between particular perſons, it was held that a domeſtic, a familiar friend, a relation by blood or marriage, one who could be influenced to be a partial witneſs, all

[1] Corv. Jus Can. 220, 221, &c.

theſe

theſe were prohibited from becoming witneſſes for any perſon towards whom they ſtood ſo circumſtanced, but not from giving evidence againſt him: nor were they prohibited from giving evidence in a cauſe for proving conſanguinity, or any matrimonial matter. On the other hand, a perſon who had confeſſed himſelf guilty of a crime, could not be witneſs againſt an accomplice, except in certain heinous and more ſecret offences; as læſe majeſty, hereſy, or ſimony: an enemy could not be permitted to be a witneſs againſt an enemy; a freedman againſt his patron; a ſon againſt a father, or a father againſt a ſon, unleſs in a matrimonial cauſe; nor a heretic or Jew againſt a chriſtian; nor a layman againſt a clerk in criminal cauſes. A woman could not be witneſs to a teſtament; nor in a criminal cauſe, if inſtituted criminally, tho' ſhe might if it was proſecuted civilly. No one could be witneſs in his own cauſe, nor could the advocate or proctor [k].

THE number of witneſſes ought at leaſt to be two, whether in a civil or criminal ſuit; nor, ſay the canoniſts, would leſs be received even from a perſon of dignity and rank. The latter were great conſiderations in the article of teſtimony: thus to convict a cardinal biſhop, ſeventy-two witneſſes were required; a cardinal preſbyter, forty-four; a cardinal deacon, twenty-four; a ſubdeacon, acolyth, exorciſt, reader, oſtiarius, ſeven; and yet, if the witneſſes were of known good life and converſation, two or three, it was thought, might ſuffice even in theſe caſes of ſuch prodigious caution. Yet in the purgation of a biſhop they invariably required twelve; of a preſbyter, ſeven; of a deacon, three: three witneſſes alſo were required to prove a will.

ALTHOUGH it was a general rule, that one witneſs, whatever was his dignity, could prove nothing; there were exceptions of caſes where he was allowed, if no prejudice could happen to any one: as when it was doubted, whe-

[k] Corv. Jus Can. 224, 225, 226.

ther

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ther a perſon was baptiſed, whether a church was conſecrated, and the like; when the will of a dumb or expiring perſon was to be proved; when a marriage was to be deſtroyed by pretext of conſanguinity; and, as was before mentioned, in caſes of læſe majeſty [l].

It was held, that a witneſs ſhould not offer himſelf voluntarily, but ſhould be called, and, as it were, brought in againſt his will; and a perſon who came voluntarily, was conſidered as a ſuborned and ſuſpected perſon. He was to be produced and received after the conteſtation of ſuit, and not before, unleſs there was an apprehenſion of his death or abſence; or unleſs it was in a cauſe of matrimony or election, or in a proſecution by inquiſition or denunciation. The production ſhould be before the judge who took cogniſance of the cauſe, unleſs the witneſſes were infirm, old, debilitated, or very poor, ſo as not to be able to come to the place where the judge was, for then they might be examined by proper perſons who were to be appointed for that purpoſe [m].

Before the judge proceeded to the examination, he was to admoniſh the witneſſes of the heinouſneſs of perjury, and then require from them an oath. An oath was taken differently by different deſcriptions of perſons: thus, by the canon law, all ſeculars ſwore, *tactis ſacroſanctis ſcripturis*; all regulars ſwore, *propoſitis evangeliis, et manu ad pectus admotâ*. After the oath was taken, the judge was to examine the witneſs apart, without the preſence of the parties, or any one, except the notary who was to take down the examination. The queſtions were to be formed upon the articles exhibited by the adverſe party, and upon interrogatories or enquiries concerning the perſons of the witneſſes themſelves: they were to be aſked as to the occaſion of their knowledge, the time, place, and the like; to all which they were bound to anſwer [n].

[l] Cory. Jus Can. 227. [m] Ibid. 228. [n] Ibid. 229.

A wit-

A witneſs was not to depoſe upon his belief or hearſay, unleſs it was ſupported by ſomething that corroborated, or where it was in caſe of ſome antient right, and he ſpoke from the reports of old people.

AFTER the depoſition was made, the judge was to read the whole, whether upon the articles or interrogatories, to the witneſs, that he might correct what he had ſaid, and then he was to diſmiſs him with ſtrict injunctions of ſilence. The judge was likewiſe to endeavour to prevail with the parties to renounce any further production of witneſſes; otherwiſe they might, within the time allowed by the judge for production, go on to a third production of witneſſes upon the ſame articles[o]: but they could not make a fourth, unleſs the party took an oath of calumny, ſwearing that he did not do it for vexation, and that he had not had a copy of the depoſitions; for when the depoſitions had been once publiſhed or known, there could be no further examination on thoſe articles, tho' there might on new ones.

WHEN the depoſitions were publiſhed, a copy was to be given by the judge to the parties litigant, to make their exceptions if they choſe; which, however, was not to be done, unleſs they had proteſted, and made mention of ſuch an intention, either before or at the time of the publication. Such an exception was to be proved by witneſſes, who were called *teſtes reprobatorii*, or by inſtruments which might be reprobated, as they called it, by others; and beyond this there was no further vying and revying[p]. When the exception was proved, the judge was then to give ſentence according to the credibility of the evidence on both ſides. If they ſeemed to be on a balance, judgment was to be given for the *reus*, unleſs the ſide of the *actor* was ſuch as the law treated with peculiar favour; as a caſe of dower, of a teſtament, a pupil, widow, orphan,

[o] Corv. Jus Can. 230. a [p] Ibid. 231.

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the church, the *fiscus*, legitimation, and some others[r]. If a witness would not readily attend, he might be compelled by the judge, unless he was privileged by some lawful excuse: thus a person was not to be compelled to give testimony against a father-in-law or son-in-law, a step-father or step-son, a cousin-germain or cousin-germain's son, nor against any person standing in the first degree of blood; not a freedman against his master; not a man aged and infirm; a soldier, one absent upon any service, a bishop, a clerk, or other ecclesiastical person. Yet if the truth could not be made out in any other way, the above persons might be compelled to give testimony: but no witness was obliged to attend, unless his expences were tendered him[s].

Of instruments.

THUS far of witnesses: the next consideration is the nature of *instruments*. Instruments were divided into public and private. Of the former kind were those made by public persons, as notaries; or under some public seal, as the seal of a bishop, a chapter, a prince, or published by authority of a magistrate; such as were subscribed by the person making it, and by two witnesses, so long as the witnesses were alive; such as were taken out of public archives. Private instruments were those made by private persons without witnesses, as accounts, private remarks, letters, cautions, and the like[t]. These of themselves were not proofs, except against the person penning them, and not denying them, or the person accepting them; unless, indeed, they were confirmed by the subscription of witnesses, or the contracting parties, or by length of time, or some judicial recognition. Respecting public instruments, there was this difference: such as were made before a judge amounted to full proof, and no proof to the contrary would be admitted; such as were made by a notary also, if attended with all the due solem-

[r] Corv. Jus Can. 232. Laune. Inst. Jur. Can. lib. 3 tit. 14.

[s] Corv. Jur Can. 232, 233.

[t] Ibid. 234.

nities,

nities, amounted to full proof; nevertheleſs, a proof to the contrary would in this caſe be admitted. The due ſolemnities were not the ſubſcription and ſubſigning of the contracting parties, and of witneſſes, but the name and ſeal of the notary, with the year, place, and ſo on[t]. Inſtruments, like witneſſes, were to be produced after the conteſtation of ſuit, and before the judge in the cauſe. If the *actor* was deficient in his proofs, it was ſometimes the practice to allow him to ſupply that deficiency by his oath.

WHEN the *intentio* of the *actor* was proved in one or other of theſe ways, the *reus* would be condemned, unleſs he could defend himſelf by ſome exception. Exceptions were divided into dilatory and peremptory: the former were either ſuch as were *declinatoriæ judicii*, or *dilatoriæ ſolutionis*. Declinatory pleas either went to the perſon of one of the parties, or the proctor, or the form of the action. Thoſe that were *dilatoriæ ſolutionis* were only to defer the claim, which was admitted to be due, but not demandable till a future day. Peremptory exceptions intirely did away the action; and they were divided into thoſe that were *peremptoriæ litis finitæ*, and thoſe *ſimpliciter peremptoriæ*: the former of theſe impeded the very commencement of the ſuit, and might be pleaded *ipſo judicii limine*: the latter did not impede the commencement of the ſuit, but might be pleaded after the conteſtation of ſuit in any ſtage before ſentence. Dilatory exceptions that were *declinatoriæ judicii*, were to be pleaded at the commencement of the ſuit; and, if omitted, could not be pleaded after: thoſe that were *dilatoriæ ſolutionis*, might be pleaded after the libel, before conteſtation, within the term aſſigned by the judge; and yet a dilatory plea might come after the conteſtation, in ſome particular caſes; as where the matter was new; or where, though it aroſe be-

Of exceptions.

[t] Corv. Jur. Can. 235.

fore,

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fore, it did not come to the knowledge of the perſon pleading it till after the conteſtation; if the judge had reſerved to the party ſuch a ground of exception; if it was excommunication. The judge had a diſcretion in appointing the time for propounding an exception. A perſon might have many exceptions, and thoſe contrary ones; and if the judge refuſed to admit them, the party might appeal.

NEXT to the exception came the replication; and there the parties ſtopped, at leaſt with reſpect to producing witneſſes; for to avoid the protracting of ſuits, it was a rule, *illos tertiò refutare non licet*. A replication might be put in at any ſtage of the ſuit. As the *reus* was not called upon to prove his exception till the *actor* had proved his *intentio*, ſo he need not prove his replication till the other had proved his exception. The time for replying was in the diſcretion of the judge [u].

AFTER the pleading and proofs, the judge was to pronounce ſentence *ſecundùm allegata et probata*. In order to this, the parties litigant were to be cited either by three common edicts, or one peremptory, containing the ſpace of three edicts. A ſentence, if paſſed legally, and no appeal made from it in ten days, was conſidered as *res judicata* [x]. Upon this execution followed. There was ſome difference in the ſuing of execution in a real and a perſonal action. In the former, it was to be made immediately upon the expiration of the ten days allowed for an appeal; in a perſonal one, not till the end of four months. The only execution allowed by this law, was by the ſpiritual arms which the church had aſſumed; by ſuſpenſion, depoſition, excommunication, or degradation. If ſuch eccleſiaſtical cenſures had not their effect, the ſecular arm was implored; and if the ſecular judge refuſed his aid, the church purſued him with excommunication [y].

[u] Corv. Jus Can. 249 to 256. Launc. Inſt. Jur. Canon. lib 3. tit. 8.

[x] Corv. Jus Can. 263, 264.

[y] Ibid. 265, 266.

HAVING

HAVING led the reader through the whole courſe of proceeding in ordinary caſes, it follows that we ſhould conſider the nature of an appeal from a ſentence, and the execution thereof. An appeal might be either before or after definitive ſentence, and was always from an inferior to a ſuperior judge. An appeal before a definitive ſentence was from an interlocutory one, or any injury felt by the party; as if he was cited to an unſafe place, or at a ſhorter day than was cuſtomary [a]. For it was a rule in the canon law, that an appeal might be made from every *gravamen* by which a litigant felt himſelf injured; ſo that an appeal was conſidered as a ſpecies of defence for the protection of innocence in all caſes. An appeal after definitive ſentence might be either from the ſentence, or the execution of it, if it was unlawfully grievous. An appeal, however, did not lie for a perſon who was ſentenced for a real contumacy, or for a manifeſt crime; or for one who had confeſſed and was convicted upon ſuch confeſſion; nor for one who had bound himſelf by oath (as was not uncommon) to bring no appeal [a].

Appeals.

AN appeal was to be made *gradatim*, from an inferior to a ſuperior judge: thus from the ordinary of the biſhop to the biſhop himſelf; from the official-general of the biſhop, and from the biſhop, to the archbiſhop. But an appeal might be made to the pope, or his legate, *uno ſaltu*, without going through the intermediate gradations. Yet an appeal to the pope did not remove the cauſe to the court of Rome, but it was to be determined by delegation in the place where it aroſe; unleſs in ſome particular caſes, where the pope was ſatisfied that a delegation could not be made without a failure of juſtice. From the pope there was no appeal [b]. An appeal lay both in a civil and criminal cauſe, unleſs in ſome particular caſes where it was prohibited. Thus no appeal could be had ſo as to prevent the

[a] Corv. Jus Can. 267.
[a] Ibid. 268.
[b] Corv. Jus Can. 269. Launc. Inſt. Jur. Can. lib. 3. tit. 17.

opening

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opening of a teſtament, and to reſtrain the heir from coming to his right; nor from an execution, unleſs, as was before ſaid, it was unlawful and grievous [c]; nor from the correction of regular diſcipline, unleſs that was made alſo unlawful and grievous; nor from a ſentence of interdict, and ſome others.

An appeal might be made *inſtanter*, *viva voce*, by the word *appello*, before the judge left the bench, or within ten days after. If it was from an interlocutory ſentence, or any other *gravamen*, ſome reaſonable cauſe of appeal was to be alledged [d], and alſo that his exception was not admitted; if from a definitive ſentence, neither of them was neceſſary; but the party appealing might alledge before the appellate juriſdiction ſuch *gravamina* as he pleaſed, founded on matter not entered upon before the judge below; and he might produce freſh witneſſes, freſh inſtruments, and make proof of ſuch things as were not before proved: whereas the appellant, in the former caſe, was confined to the cauſe of appeal expreſſed, which was to be determined intirely on a view of the proceedings in the court below.

The cauſe was diſmiſſed from the inferior to the appellate juriſdiction by *literæ dimiſſoriæ*, called likewiſe by the canoniſts *apoſtoli*. Theſe were to be ſued for by the appellant, at leaſt within thirty days from the paſſing of the ſentence [e]; and they were to be made by the judge below, and addreſſed to the judge before whom the appeal was depending. If they were not obtained within that time, or within a ſhorter, if ſo appointed by the judge, the appeal was conſidered as deſerted. If the judge refuſed the *apoſtoli*, an appeal would lie from ſuch refuſal; and if he did not appeal from the refuſal, ſuch acquieſcence would be conſtrued as a deſertion of the original appeal, and the ſentence would ſtand in force.

When the *apoſtoli* were granted, the appeal was to be notified to the adverſe party, in order that he might appear

[c] Corv. Jus Can. 270. [d] Ibid. 271. [e] Ibid. 272.

before

before the new tribunal, and was to be preſented within a certain term, to the judge *ad quem*, otherwiſe the ſentence would ſtand in force. The term for preſenting was in ſome caſes fixed by law, and in ſome was preſcribed by the judge, according to the circumſtances of the cauſe and the parties; the judge could not prolong a legal term, tho' he might ſhorten it [f]. After the preſentation was made, if the judge *ad quem* received the appeal, the appellant was to refer to the judge *a quo* the preſentation, together with *compulſoriales* and inhibitions, if he required them. The compulſorials were letters ſent by the judge *ad quem* to the judge *a quo*, requiring him to tranſmit to him, within a certain time, the proceedings in the cauſe, that the truth might be inquired into; which if he neglected, he might be compelled to do by penal mandates iſſued from the judge *ad quem*. An inhibition was a letter iſſued from the judge *ad quem* to the judge *a quo*, commanding him not to do any thing in the cauſe while the appeal depended; and whatever was done, either by the judge or party, pending the appeal, would be reſcinded as null and void, the office and power of the judge being ſuſpended, as far as concerned that cauſe; notwithſtanding which, he might yet interfere in ſome particular caſes. Thus, if the thing in queſtion was in danger of being waſted by the appellant, the judge might cauſe it to be ſequeſtered [g]; and other things might be done by the judge, if they did not prejudice the appeal. If the appellant deſerted his appeal, or was adjudged to have appealed without good cauſe, he was condemned in the expences [h].

ANOTHER way in which a cauſe might be ſubmitted to a ſuperior judge, was by *relation*. This was when ſome difficulty aroſe, and the judge choſe to refer it to the judgment of the pope, or ſome other ſuperior authority: this was to be before definitive ſentence. The grounds of the

[f] Corv. Jus Can. 273. [g] Ibid. 275. [h] Ibid. 276, 277.

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difficulty were to be ſet down in articles, and copies given to the parties, that any omiſſion might be ſupplied by them, and ſubmitted to the pope, or other perſon to whom the relation was made[i]. A *ſupplication* was a ſubſtitute for an appeal in caſes where the cauſe was determined before a judge from whom there lay no appeal, and the party had no reſource but to addreſs him by prayer and ſupplication[k]. A *recuſatio* might be conſidered in the light of an appeal: this was, when one of the parties declined the juriſdiction of the court, on ſuggeſting ſome cauſe of ſuſpicion againſt the judge. This ſhould be made before the *litis conteſtatio*, unleſs it aroſe afterwards, and then it might be made at any time, on the party ſwearing that it had not come to his knowledge before. Any partiality in the judge was a good cauſe of recuſation: this, however, was to be made out within a term appointed by the judge; and if it was not done within a year, the judge might proceed in the ſuit[l].

THUS far of ordinary proceedings, as directed by the canon law. The extraordinary, or ſummary juriſdiction, according to the ſame law, was, as they expreſſed it, *non in figurâ judicii, ſed ex officio judicis*, by inquiſition, or denunciation, or ſome other courſe *de plano*, and upon general grounds of equity. In ſuch caſe there was no tender of a ſolemn libel, nor was any conteſtation of ſuit neceſſary; the judge might proceed in times of vacation and holiday; he might refuſe to admit any delay, exception, dilatory and vain appeal; he might reſtrain the ſuperfluous number of witneſſes; give any term he choſe for the ſeveral ſtages of the proceeding; and might pronounce ſentence even before a concluſion was duly made. Such was the proceeding that was followed in cauſes of election, poſtulation, proviſion, dignities, offices, prebends, tythes, matrimony, uſury, and others[m].

[i] Corv. Jus Can. 279. [k] Ibid. 280. [l] Ibid. 277, 278, 279. [m] Ibid. 286.

CRIMINAL

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Of proceedings in criminal ſuits.

CRIMINAL proceedings differed widely from the proceeding in civil ſuits. The proſecution of offenders in the canon law might be in three ways: by *accuſation*, by *inquiſition*, or by *denunciation*. We ſhall firſt conſider the nature of an accuſation.

Accuſation.

AN accuſation might be brought by all perſons that were not under the following diſabilities: an enemy could not accuſe an enemy, nor could a perſon guilty of any crime. It was laid down by the canon law, that a layman could not proſecute a clerk by accuſation, unleſs for an injury done to himſelf, or any one belonging to him; nor a clerk a layman, without an expreſs proteſtation that it was not for thirſt of blood, or puniſhment. Perſons of low condition could not accuſe clerks, unleſs they had before been in intimacy with them [n]. Women and infants were equally debarred, unleſs they proſecuted for any injury done to themſelves [o]. In general ſuch perſons were excluded from bringing an accuſation as were excluded by the civil law. However, theſe diſqualifications were diſpenſed with in the more atrocious crimes; for in læſe majeſty, in hereſy, and ſimony, all the foregoing perſons would be admitted to accuſe [p]. The civil law was likewiſe followed in preſcribing the perſons who were not to be liable to an accuſation; in addition to which the canoniſts held, that a prince might be accuſed of hereſy, perjury, and ſacrilege; with which crimes the canon law did not ſcruple to de- the pope himſelf might be charged.

AN accuſation ought regularly to be brought in the pla- where the crime was committed, unleſs the pope ſhould permit it to be brought elſewhere, or the crime could be examined better in another place, or it was an accuſation againſt a biſhop, or the *reus* was apprehended in ſome other place. No one was admitted to bring an accu-

[n] Corv. Jus Can. 346. [o] Launc. Inſt. Jur. lib. 4. tit. 1. [p] Corv. Jus Can. 346.

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ſation, till he had made what they called an *inſcription*, or engagement, to undergo the *lex talionis*, by ſuffering the puniſhment annexed to the offence, if he failed in making out his charge. A perſon who made a denunciation by reaſon of a public office which he filled, was not bound to make this *inſcription*; nor was one who accuſed for any inferior crime, or for apoſtacy [q].

WHEN the accuſation was inſtituted, the cauſe proceeded by conteſtation of ſuit, exceptions, and ſo on, as in civil ſuits; unleſs in inferior offences, and thoſe of læſe majeſty and hereſy, which were judged of *de plano*, and notorious crimes, where no other proof was wanted, and there was no need of any judicial formality to be obſerved. Notorious offences were ſuch as were committed before the people, or any great aſſembly of perſons [r]. The accuſor and accuſed ought to be preſent at hearing the accuſation, unleſs in ſome particular caſes; as where the offence was only *de injuriâ*, and either of the parties was of ſome illuſtrious rank, and the proceeding, tho' in form a criminal one, was for a civil redreſs.

Inquiſition.

THE mode of proſecution by *inquiſition* was when a judge, without any accuſor ſtanding forward, inquired *ex officio*, whether any and what perſon had committed an offence: it was accordingly either general or ſpecial. The former was an inquiry made by a biſhop, or other ſuperintending magiſtrate, whether any offenders were within his dioceſe or diſtrict: the latter was an inquiry by them, whether a certain crime was committed by a certain perſon [s]. *Inquiſition* might be made by the pope through his legates or delegates; by biſhops in their dioceſes; metropolitans in their provinces; in ſhort, by all perſons having criminal juriſdiction.

[q] Corv. Jus Can. 348.

[r] Lyndwode gives us two verſes from a canoniſt, in which the qualities of notoriety are thus expreſſed:

Quæ vel nemo negat, populo vel teſte probantur,
Vel ſe ſubjiciunt oculis, notitia dicas. Lynd. 323. n.

[s] Corv. Jus Can. 350.

INQUISITION

INQUISITION was to be made only of the more enormous crimes, as ſimony, adultery, fornication, perjury, inceſt; nor was it to be made of crimes that were concealed and not known, but only of ſuch concerning which there had been an *infamia*, *diffamatio*, or evil report, founded upon public perſuaſion of the offence having been committed, and not upon the malevolent ſuggeſtions of thoſe who took malignant pains to ſpread the rumour. In the caſe of a prelate, beſides the *diffamatio* or *infamia*, there ought to be ſome ſcandal or danger, otherwiſe no inquiſition was to be made. If a *reus* was ſilent, (which ſilence was conſtrued into a confeſſion) he might be convicted without any preceding *infamia*, or at leaſt any inquiry into ſuch exiſting *infamia*[t]. All this relates to an inquiſition againſt a particular perſon; for a judge might make a general inquiry without any *infamia* preceding, and thence might come to a ſpecial inquiſition againſt a particular perſon. In a ſpecial inquiſition, the articles of inquiry were to be exhibited to the *reus*, and alſo the names and declarations of the witneſſes. Inquiſitions were to be made by means of proper perſons, and of good credit, and not thro' the enemies of the party, and perſons guilty of perjury. To what the inquiſition was to be directed, depended on the pleaſure of the judge. If the party was convicted of the crime by inquiſition, he did not undergo the ordinary puniſhment, but ſuch a one as the judge thought proper: if the crime was not proved, then he was to ſubmit to the canonical purgation, of which more will be ſaid hereafter.

THE third mode of proſecution, called *denunciation*, was when information was given of a concealed crime to the judge, without any of the formality of an accuſation. The canoniſts divided denunciation into *evangelical*, *cano-* Denunciation.

[t] Corv. Jus Can. 351.

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nical, and *judicial*[v]. The firſt was with no other view than that of amendment of the offender; as when a wife gave information to a prieſt of the adultery of her huſband. The ſecond was to prevent any thing unlawful from taking place; as giving information that certain perſons who were going to contract matrimony, were within the prohibited degrees. Judicial denunciation was either public or private: the former was done by a public officer, and always was preceded by an inquiſition made by the biſhop or other judge; the latter was by a private perſon who was concerned in intereſt to make it. By the canon law, all perſons who had ſome intereſt in the ſubject might make *denunciation*, and indeed other perſons who were actuated by a zeal for the public good[x]; not thoſe who were infamous, conſpirators, or enemies. A denunciation uſed to be made without inſcription; but tho' the informer was not bound in that manner to prove the crime, yet he was always required to take an oath of calumny, and name the witneſſes who were acquainted with the offence.

It was required[y], before a denunciation againſt a clerk, that there ſhould be a charitable admonition; but not in the caſe of laymen. The great object of denunciation was, that an offence being thus known to the judge, he ſhould have the power of making further inquiry concerning the truth of it[z].

If a *reus*, who was ſuſpected of a crime, could not be convicted on proof, he was not therefore to be abſolved, but was required to make out his innocence by canonical purgation. This was ſo called, becauſe impoſed by the canons, and to diſtinguiſh it from the vulgar purgation, which conſiſted in the ordeal, and had been reprobated, long ſince, by the clerical law. Canonical purgation was,

Purgation.

[v] Corv. Jus Can. 352.

[x] By a provincial conſtitution in Lyndwode, certain perſons were appointed in every dioceſe to be denunciators.

[y] Corv. Jus Can. 353.

[z] Ibid. 354.

when

when a perſon made out his innocence by his own oath, ſwearing that he was not guilty, and the oaths of compurgators ſwearing that they believed him to ſpeak truth. This was to be directed by the judge who heard the cauſe in which he was defamed, and by no other. The judge directed purgation, either at the inſtance of the party who was to be purged, or to ſatisfy himſelf reſpecting the ſuſpicions under which the *reus* laboured. The judge might, if he pleaſed, though he was not bound to, enjoin purgation, even where the *infamia* did not ariſe from very probable conjectures.

PURGATION was not to be enjoined but where the *reus* was a credible perſon, who, tho' under ſuſpicions, would not be thought very ready to perjure himſelf; and it was only to be where the party was not convicted, either by legal proof, or his own confeſſion; where the crime was not notorious, but yet he was diffamed among good men upon probable ſuſpicions. The judge was to chuſe the compurgators from perſons of honeſt character, neighbours of the *reus*, and well acquainted with his life and converſation. They were to be ſometimes twelve, ſometimes ſeven, ſometimes more and ſometimes leſs, according to his diſcretion, conſidering the circumſtances, the nature of the offence, and the quality of the *reus* and compurgators. The purgation was to be made where the diffamation was: thus if he was diffamed by the people, it was to be before the people; if among clerks, before clerks; and the like. If he ſucceeded in his purgation, he was liberated from the charge; if he failed, he was puniſhed the ſame as if he was convicted, or had confeſſed[a].

IT appears unneceſſary in this place to bring back to the reader's recollection the conduct of criminal proſecu-

[a] Corv. Jus Can. 378, 379, 380.

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tions in our own law, as mentioned in the earlier parts of this Hiſtory. The ſimilarity between thoſe and theſe we have juſt been relating, is too ſtrong to need being pointed out. We now ſee, that not only purgation is a piece of law intirely canonical, but that the proceeding *per famam patriæ*, from whence was derived the preſentment of jurors, may be found elſewhere than in our municipal cuſtoms; and that, according to the accounts of our earlieſt writers, it was firſt practiſed among us upon ideas and principles purely canonical [b].

THE puniſhments which the eccleſiaſtical court could inflict, were all of a ſpiritual kind; they conſiſted either in penance, excommunication, interdict, ſuſpenſion, removal, or degradation. Some of theſe cenſures require a little further conſideration.

Excommunication.

EXCOMMUNICATION was divided into what they called the *greater* and the *leſs*. The latter only removed the perſon from a participation of the ſacraments, and is what was more commonly meant by excommunication: the other was called *anathema*, and not only removed the party from the ſacraments, but from the church, and all communion with the faithful. Excommunication ſometimes followed *ipſo facto*, upon the commiſſion of an offence: this was called *canonical*, to diſtinguiſh it from that which did not depend upon any eſtabliſhed canon, but upon the paſſing of ſentence by a judge [c].

THE following offenders were *ipſo facto* puniſhed with the greater excommunication: all diviners and *ſortilegi*; heretics, their receivers and comforters; ſimoniacs; violators and plunderers of churches; thoſe who ſpoiled clerks going to Rome; the plunderers of the property of a bi-

[b] It may be here remarked, that ſuppoſing this proceeding to have been formed with an eye to the canon law, our conjectures about the offender's innocence being determined by the ſame perſons who ſuggeſted the *infamia*, or at moſt by purgation, without reſorting to another jury, is juſtified by the account given above of *inquiſitions*.

[c] Corv. Jus Can. 359.

ſhop

ſhop which ought to go to his ſucceſſor; thoſe who gave aid, favour, or counſel to excommunicated perſons; thoſe who laid violent hands on clerks or religious perſons, or commanded any ſo to do [d]. The following offenders were *ipſo facto* puniſhed with the leſs excommunication: all perſons committing any mortal ſin, as ſacrilegious perſons; thoſe who received a church from lay hands; notorious offenders; thoſe who talked with, ſaluted, or ſat at the ſame table with, or gave any thing in charity to perſons excommunicated by the greater excommunication, unleſs they were familiars or domeſtics [e].

THE greater excommunication could be inflicted only by one having criminal juriſdiction; the leſs might be impoſed by any clerk having the cure of ſouls. Excommunication was a cenſure that could paſs only againſt the living, except in the caſe of hereſy, which might be proſecuted after the death of the party. It could not from the nature of it be paſſed againſt pagans, who conſtituted no part of the church [f].

A SENTENCE of excommunication was to be preceded by three monitions at the due intervals, or one peremptory, containing the legal ſpace of time, with a proper regard to the quality of the perſon, and the nature of the buſineſs. The judicial courſe alſo ought to be obſerved, though the excommunication would hold without it, but not without the monition; and the judge who paſſed ſentence of excommunication without it, would be prohibited for a month *ab ingreſſu eccleſiæ*; and if proper, be ſubject to other penalties [g]. A ſentence of excommunication might paſs abſolutely or conditionally; as, "Unleſs you ſatiſ-"fy Sempronius within twenty days, I excommunicate you." The ſentence was to be put into writing, containing the cauſe thereof, and the name of the party [h]. An excom-

[d] Corv. Jus. Can. 360.
[e] Ibid. 361.
[f] Ibid. 363.
[g] Corv. Jus. Can. 364.
[h] Ibid.

munication

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munication might be taken off in ſeveral ways. It might be revoked by the judge who paſſed the ſentence. Upon appeal, the judge *ad quem* might abſolve the party, or ſend him to the judge *a quo* to abſolve him. Abſolution belonged to the ſame perſon who paſſed the ſentence, unleſs in ſome particular caſes that were referred to the pope or a biſhop[i]. Abſolution in ſome caſes uſed not to be given, till ſecurity was entered into by the party for making ſatisfaction[k].

Interdict.

AN *interdict* was an eccleſiaſtical cenſure, by which a certain place or certain perſons were interdicted from the participation of divine rites, ſepulture, and the ſacraments, till the commands of the church were obeyed. This, like excommunication, was either *ipſo facto* by the preciſe direction of the law, or by ſentence of the judge. Of the former kind was ſuch as was denounced againſt a community or city which did not expel uſurers, or which permitted repriſals againſt eccleſiaſtical perſons, or did not make them good within a month; a lord who would not admit a legate or apoſtolic meſſenger within his territory; a church polluted[l] with human blood, or conſecrated ſimoniacally.

A SENTENCE of interdict might be paſſed by all who could paſs ſentence of excommunication; an ordinary, delegate, biſhop, provincial ſynod. An interdict, if for contumacy, ſhould be preceded by monition; but this was not neceſſary, if for an offence[m]. An interdict, if iſſued againſt a people by the term *populus*, was conſtrued not to include the clergy. During an interdict, in early times, none of the eccleſiaſtical offices could be celebrated, nor any of the ſacraments, except the baptiſm of infants, and the penitence of dying perſons[n]. This was in ſubſequent times relaxed; and baptiſm and confirmation were allowed to all; penitence and the euchariſt to the dying;

[i] Corv. Jus Can. 367, 368.
[k] Ibid. 369.
[l] Ibid. 371.
[m] Corv. Jus Can. 372.
[n] Ibid. 373.

but

but not extreme unction to the laity, though it was to the clergy: at length they allowed maſs and other divine ceremonies to be performed once a-week, in ſome few churches and monaſteries, with a low voice, and the doors ſhut, without ringing of bells; and afterwards they allowed it in all churches, every day, though with the obſervance of the other reſtrictions; which, however, need not be adhered to on certain great feſtivals of the year. Perſons who did not obey ſuch interdict would be depoſed, and rendered incapable of taking a benefice [o]. An interdict might be confined to certain perſons, or to a certain place; it might be removed by abſolution, as excommunication was.

Suspension. SUSPENSION was an eccleſiaſtical cenſure, by which a ſpiritual perſon was interdicted from the exerciſe of his office, or order, or both; intirely, or in part, for a time, or *in perpetuum*. This, like the two former, was either *ipſo facto*, and canonical, or impoſed by the ſentence of a judge [p]. *Remotion*, or *depoſition* (which is the laſt eccleſiaſtical cenſure we have to mention), like the former, only related to eccleſiaſtical perſons, who might thus be depoſed, either from their dignity, order, or degree: depoſition was only by ſentence, and the ſentence of a biſhop [q]. *Degradation*, ſometimes called *ſolemn depoſition*, was the ſolemn detraction of the higher orders. The ſolemnity was this: If an abbot was to be degraded, it was to be in the preſence of abbots; if a preſbyter, of ſix biſhops; and alſo in the preſence of the ſecular judge, to whom he was to be delivered when degraded. In the preſence of theſe parties, the biſhop was to ſhave the head of the *reus*; then he was to ſcrape with glaſs or iron thoſe parts of the head and hands which were anointed at the time of his ordination; after this, he was to take off, in an order intirely reverſed from that in which it was put on, his clerical habit.

[o] Corv. Jus Can. 374. [p] Ibid. 375. [q] Ibid. 376.

When

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When this was performed, the party became, to all purpoſes, a layman; and being thus deprived of all his clerical privilege, was delivered over to the ſecular court, to be puniſhed by the ſecular laws. This puniſhment of degradation was inflicted only in three caſes; in caſe of a heretic, of a falſifier of the pope's letters, and of one who had practiſed againſt, or any ways calumniated, his biſhop[1].

[1] Corv. Jus Can. 377, 378.

CHAP.

CHAP. XXV.

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Of Eccleſiaſtical Juriſdiction—Of Matrimony—Eſpouſals—Nuptiæ—Of Cognation—Conſanguinity—Affinity—Of Divorce—Jactitation of Marriage—Of Wills and Teſtaments—Executors—Of the Forms of Wills, &c.—Of Probate—Of Inteſtacy—Of Pious Uſes—The Rationabilis Pars—Tithes—Sylva Cædua—Compoſition for Tithes—Spoliation Suits de Læſione Fidei—Defamation—Prohibitions—Provincial Conſtitutions—King and Government—The Statutes—Forteſcue—Littleton—Lyndwode—Printing of Law-Books—Miſcellaneous Facts.

SUCH was the juridical ſyſtem which the Roman canoniſts had been labouring ſo many years, with ſuch perſeverance and energy, to eſtabliſh in our eccleſiaſtical courts: and notwithſtanding they were, as we have ſeen, in ſome inſtances, diſappointed of their object, they ſucceeded in gaining preſcription for more than ſeven parts in ten of the pontifical law, which, under controul of the temporal judges, became the prevailing rule of deciſion in the eccleſiaſtical courts. It is now our buſineſs to enquire more particularly what was the extent of this juriſdiction, what objects it embraced, and in what manner it treated them. This has been ſlightly touched in the reign of Henry III[a]; but ſo much time had elapſed, and ſuch

[a] Vid. ant. vol. I. 454, 455, &c.; and vol. II. 79.

controverſy

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controverſy had ſince happened upon queſtions of judicature between the clerical and temporal courts, that the ſubject is ſtill open to further illuſtration; and it will be curious to ſee how the law of antient times is either corroborated, new modelled, or altered by later opinions.

Of eccleſiaſtical juriſdiction.

Of the objects which the canoniſts claimed as belonging to their juriſdiction, our temporal courts had long appropriated to themſelves to decide excluſively upon rights of patronage, and upon all crimes affecting life and limb. *Freehold* and *chattels* were two other deſcriptions that marked many articles of judicature as ſubject ſolely to the deciſion of the common-law courts. On the other hand, the judges ſeem to have given themſelves no concern as to the mode in which the eccleſiaſtical court proceeded with cauſes that were left to their determination. The ſpiritual tribunal was permitted, undiſturbed, to enjoy the privilege aſſumed by all courts, of forming its own courſe of proceeding; and it accordingly adopted, without any material variation, the practice of the canon law mentioned in the foregoing chapter. Without, therefore, entering any further into the nature of judicial proceedings, we ſhall briefly recapitulate the ſeveral objects upon which they might be employed; moſt of which have been frequently mentioned in the former parts of our Hiſtory, either from Bracton, or the famous conſtitution of Boniface, in the reign of Henry III; the ſtatutes of *circumſpecte agatis*, or *articuli cleri*; or on ſome other of the many occaſions when the juriſdictions of the temporal and clerical court came into competition [b].

The two grand deſcriptions of cauſes which ſeemed more indiſputably than any others within the cogniſance of this tribunal, were *matrimonial* and *teſtamentary*, and their incidents. Under teſtamentary were included laſt wills, codicils, legacies, adminiſtration and ſequeſtration,

[b] Vid. ant. vol. I. 454; and vol. II. 79. 225. 291.

commonly

commonly called letters *ad colligendum*. Under matrimonial were included, divorce; jactitation of marriage; queſtions of legitimation and baſtardy; ſuits for reſtitution of a man's wife taken away; ſuits to compel a man to receive his wife again; and ſuits for goods promiſed with a woman in marriage. Theſe were the principal and more important objects of juriſdiction; the remainder, which may with our canoniſts be conſidered as *reliqua jura eccleſiaſtica*, were claſſed in the following way:

FIRST, ſome duty ariſing upon the exerciſe of voluntary juriſdiction, and by denial made litigious; ſuch as *real compoſitions*, when attempted by ſome perſons to be annulled; procurations, penſions, indemnities, fees for probates, and the like: or ſecondly, ſuch demands as became due only upon exerciſe of litigious juriſdiction; as fees of court, fees to advocates, proctors, apparitors, and the like: or thirdly, ſuch as were due to a miniſter in the church who had no title; as a ſalary to a curate or a clerk: or fourthly, to a miniſter who had a title; and then it was either ſomething incident to him, as to name a pariſh-clerk, or concerning the whole title and intereſt of his benefice; for though the right of patronage was cogniſable only in the temporal court, yet the avoidance or ſpoliation belonged to the court chriſtian. Next follow the dues that concern a miniſter's maintenance; as tithes, oblations, obventions, penſions, mortuaries, church-yards, or places of burial: and laſtly, ſuch things as are due to a whole pariſh; as to have a chaplain found, or divine ſervice performed, or ſacraments adminiſtered amongſt them, or any thing due to their church; or for a pariſhioner to be contributory with the reſt to reparation of the church, for ſeats, bells, books, utenſils, and other ornaments or neceſſaries for the church. Thus far of thoſe things that were objects of juriſdiction in conſideration of their being *jura eccleſiaſtica*.

THE

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THE crimes and offences puniſhable by the court chriſtian, were divided into ſuch as were contrary either to piety, juſtice, or ſobriety. Of the firſt claſs were blaſphemy, ſwearing, idolatry, hereſy, error in faith, ſchiſm, apoſtacy, not frequenting public prayer, neglect of the ſacraments, perjury in an eccleſiaſtical court or matter, diſturbance of divine ſervice, violating and profaning the ſabbath. Of the ſecond were ſimony, uſury, diffamation, ſubornation of perjury in a court eccleſiaſtical, violence to a miniſter, ſacrilege, dilapidations, not building of a church as enjoined by a teſtator, not fencing a church-yard, not repairing a church or chancel, or not keeping it in good repair; a church-warden refuſing to give an account of the church ſtock and goods; the violating of a ſequeſtration made for tithes not paid; hindering to gather or carry tithes; money promiſed for redeeming corporal penance; contempt of the eccleſiaſtical juriſdiction; the violation of churches and church-yards. Of the laſt claſs were all incontinence not made capital by the common law, whether it was inceſt, adultery, *ſtuprum* or ſimple fornication, polygamy, the ſolicitation of a woman's chaſtity, drunkenneſs, filthy ſpeech, or the like irregularities [c].

THE objects of clerical juriſdiction, when thus enumerated and placed in array, make a very formidable appearance: and when we reflect, that many ſpiritual offences were the conſequences of habit and conſtitution; that the cenſures inflicted on ſuch offenders might be commuted for money, payable to the judge himſelf; and that there was ſuch a judge in every diocele to enforce the execution of the law; it muſt be confeſſed, that the eccleſiaſtical maintained againſt the temporal power a divided empire,

[c] Vid. An Apologie of certaine Proceedings in Courts Eccleſiaſticall, printed in the reign of Queen Elizabeth, Part I. page 18.

which

which if not ſo extenſive, was more vigilant, more oppreſſive, and more odious to perſons of both ſexes, and of every rank and age in the kingdom; and was capable of producing great good or great evil[d].

In

[d] Our old Engliſh Bard has given us a very ſpirited comment upon the practice of the ſpiritual court, which, if it is not overcharged, deſerves all the credit of a cotemporary expoſition of the conduct and manners of its retainers. In the Canterbury Tales, Chaucer introduces a Friar, and a Sumpnour, or Apparitor, who uſed to ſerve the *ſummons* and citations of the biſhop's court. The latter had ſhewn a violent diſpoſition to quarrel with the former, which the Friar attributes to his fraternity being exempt from the juriſdiction of the biſhop, and ſo not liable to be pilloged by the Sumpnour's extortion. This perhaps might be the true cauſe, and it accordingly drew more ill language upon the poor Friar; who, when it came to his turn, revenged himſelf by telling a malicious ſtory of a Sumpnour. He begins with an account which ſeems to deſcribe the juriſdiction of the ſpiritual court very fully.

Whilom ther was dwelling in my contree
An archedeken, a man of high degree,
That boldely did execution
In puniſhing of fornication,
Of witchecraft, and eke of bauderie,
Of defamation, and avouterie;
Of chirche-reves, and of teſtaments,
Of contracts, and of lack of ſacraments;
Of uſure, and of ſimonie alſo;
But certes lechours did he greteſt wo;
They ſhulden ſingen, if that they were hent,
And ſmale titheres weren foule yſhent:
If any perſone wold upon hem plaine,
Ther might aſtert hem no pecuniel peine.
For ſmale tithes, and ſmale offering,
He made the peple pitouſly to ſing;
For er the biſhop hent hem with his crook,
They weren in the archedeken's book;
Then had he, thurgh his juriſdiction,
Power to don on hem correction.

Of all theſe points of judicature, none was ſo fruitful to the court as that of incontinence; this was a weed to be found in moſt ſoils, and the Sumpnour was always hunting for it. The Friar tells us,

A Sumpnour is a renner up and down
With mandements for fornicatioun,
And is ybete at every toune's ende.

The Friar makes the ſuppoſed Sumpnour's diligence to be moſtly engaged on this part of his employment. After the above account of the archdeacon and his court, he goes on thus:

He had a Sumpnour redy to his hond,
A ſlier boy was non in Engelond;

For

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In order to obtain a more clear idea of the clerical judicature, we ſhall now take a nearer view of the different objects

For ſubtilly he had his eſpiaille,
That taught him well wher it might ought availe;
He coude ſpare of lechours on or two,
To techen him to foure and twenty mo.

This falſe theef, this Sumpnour (quod the Frere)
Had alway baudes redy to his hond,
As any haukе to lure in Englelond,
That told him all the ſecree that they knewe,
For hir acquaintance was not come of newe;
They weren his approvers prively.
He tooke himſelf a gret profit therby,
His maiſter knew not alway what he wan.
Withouten mandement, a lewed man
He coude ſompne, up peine of Chriſte's curſe,
And they were inly glad to fill his purſe,
And maken him gret feſtes at the nale.
And right as Judas hadde purſes ſmale,
And was a theef, right ſuch a theef was he,
His maiſter hadde but half his duetee.
He was (if I ſhall yeven him his laud)
A theef, and eke a Sumpnour, and a baud.
He had eke wenches at his retenue,
That whether that Sire Robert, or Sire Hue,
Or Jakke, or Rauf, or whoſo that it were
That lay by hem, they told it in his ere.
Thus was the wench and he of on aſſent,
And he wold fecche a feined mandement,
And ſompne hem to the chapitre bothe two,
And pill the man, and let the wenche go.
Then wold he ſay, Frend, I ſhall for thy ſake,
Do ſtrike thee out of oure lettres blake;
Thee thar no more as in this cas travaille,
I am thy frend, ther I may thee availle.
Certain he knew of briboures many mo
Than poſſible is to tell in yeres two:
For in this world n' is dogge for the bowe,
That can an hurt dere from an hole yknowe,
Bet than this Sumpnour knew a ſlie lechour,
Or an avowtrer, or a paramour;
And for that was the fruit of all his rent,
Therfore on it he ſet all his intent. [*See the Frere's Tale.*]

The game which theſe ſpiritual bailiffs were in the practice of playing, by ſuch well-timed activity and connivance, is noticed by Chaucer, in the character he gives of this very Sumpnour, againſt whom all the laugh was raiſed by the Friar.

He was a gentil harlot and a kind,
A better felaw ſhulde a man not find.

He

objects of its juriſdiction, beginning with cauſes matrimonial and teſtamentary, and then proceeding to tithes, and the others before enumerated. CHAP. XXV. HENRY VI. EDW. IV.

Of

He wolde ſuffre for a qnart of wine,
A good felaw to have his concubine
A twelve month, and excuſe him at the full.
Full privily a finch eke coude he pull.
And if he found o where a good felawe,
He wolde techen him to have non awe
In ſwiche a cas of the archedeken's curſe,
But if a mannes ſoule were in his purſe;
For in his purſe he ſhulde ypuniſhed be;
Purſe is the archedeken's helle, ſaid he.
But well I wot he lied right indede:
Of curſing ought eche gilty man him drede.
For curſe wol ſle right as aſſoiling ſaveth,
And alſo ware him of a *ſignificavit*.
In danger hadde he at his owen giſe,
The yonge girles of the diociſe;
And knew hir conſeil, and was of hir rede. [*See the Prologue.*]

To go on with the Friar's Tale, verſation with a bailiff. who brings the Sumpnour into con-

Brother, quod he, here wonneth an old Rebekke,
That had almoſt as lefe to leſe hir nekke,
As for to yeve a peny of hire good.
I wol have twelve pens though that ſhe be wood,
Or I wol ſomone hire to our office;
And yet, God wot, of hire know I no vice.

He then deſcribes him as knocking at the woman's door, and entering upon the execution of his office, in the following manner:

I have, quod he, of ſomons here a bill:
Up peine of curſing, loke that thou be
To-morwe before the archedeken's knee,
To anſwere to the court of certain things.

May I not axe a libel, Sire Sumpnour,
And anſwere ther by my procuratour,
To ſwiche thing as men wold appoſen me?
Yes, quod this Sumpnour, pay anon, let ſee,
Twelf pens to me, and I wol thee acquite,
I ſhall no profit han therby but lite:
My maiſter hath the profit, and not I;
Come of, and let me riden haſtily;
Yeve me twelf pens, I may no langer tarie.

The ſequel of the Tale is not to our purpoſe, except that the woman being unable to pay the money, the Sumpnour is repreſented as pretending

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Of matrimony.

Of all articles of judicial cogniſance which the eccleſiaſtical court claimed excluſively to entertain, that of *matrimony* ſeems to have been leaſt controverted by the temporal judges. When marriage was admitted by the religion of the country to be a chriſtian ſacrament, the juriſdiction of ſpiritual judges could not well be diſputed. We accordingly find no parliamentary interpoſition on this head, but the eccleſiaſtical court was left to decide in matrimonial cauſes upon the pure principles of canonical juriſprudence.

MATRIMONY was defined by the canoniſts in this manner: *Viri et mulieris conjunctio, individuam vitæ conſuetudinem, cum divini et humani juris communicatione, continens.* This union of man and wife was preceded by *ſponſalia*, or eſpouſals, the nature of which muſt be firſt conſidered, before we come to ſpeak of matrimony. Eſpouſals were the promiſe of a marriage that was to take place, and were divided into eſpouſals *de præſenti*, and eſpouſals *de futuro*. Thoſe of the former kind were conſidered in the ſame light as matrimony; ſo that eſpouſals, properly ſo called, were the latter; which were, when a promiſe of a future marriage was made by words of a future ſignifi-

Eſpouſals.

pretending to have compounded at the office former irregularities committed by her, and that ſhe had never reimburſed him: to indemnify himſelf, therefore, for both demands at once he is made to ſeize on a piece of her furniture.

This vindictive Tale ſets the officers of the ſpiritual court in a very diſgraceful light, and reflects ſome ſcandal on the court itſelf. Making allowance for exaggerations, we may, however, collect from this and other notices, that the officers of the biſhop were perhaps as numerous, as well known, and as much regarded as thoſe of the ſheriff; that irregularities of conduct, if known, were as conſtantly corrected, as the depredations of robbers; and that the power and juriſdiction of this tribunal was, therefore, continually before the eyes of the people. Such conſiderations as theſe can alone account for the great heat with which queſtions of judicature were conteſted on both ſides. When the reformation of religion had lowered the pretenſions of the clergy, and altered the ſentiments of the people reſpecting eccleſiaſtical authority, the biſhop's court exerciſed its juriſdiction with great tenderneſs and ſcruple, till at length it ſunk into neglect, and almoſt into oblivion. The ſtate of things at preſent is very much altered. It is rarely that eccleſiaſtical judicature is now heard of any where but in the courts that are collected together in *Doctors Commons*.

cation;

cation; as, "I will take you to wife." Such eſpouſals might be *nuda et ſimplicia*, or *firmata*, as the canoniſts called them: the former was where a mere promiſe was made; the latter was where ſome earneſt or pledge preceded, as a ring given, or an oath taken. Eſpouſals muſt be contracted by conſent, whether expreſſed in words, or by ſome ſign; as that of a ring, a gift, a kiſs, or embrace; by a letter, meſſenger, or procurator. A ring, to anſwer this purpoſe, muſt always be accompanied with ſome ſigns to expreſs both that it was given and received by way of eſpouſals; and any doubt on this point was to be determined by the eccleſiaſtical judge.

ALL perſons who had completed their ſeventh year, were held competent to contract eſpouſals; and eſpouſals contracted even before that age, might be ratified by a regular conſent. It was no impediment that a perſon was deaf and dumb, provided he had his intellects, and could expreſs his mind by ſigns. Eſpouſals might alſo be contracted by third perſons for the party; as by a father for a ſon, a mother for a daughter, an uncle for a nephew, by tutors and curators for their pupils. But theſe had no legal effect, unleſs the party when of age of puberty ſignified his conſent; which in caſe of a promiſe by a father might be a tacit conſent, but in other caſes muſt be expreſs: if the party was preſent, and preſerved a ſilence, it was held to be a tacit aſſent. Eſpouſals were made either *purè*, or with appointment of a day, or *ſub conditione*. If the promiſe contained neither of the latter qualifications, it was ſaid to be made *purè*. A promiſe on condition made the performance of it depend on ſome event, and till that took place it had no effect; unleſs a *carnalis copula* intervened, or the condition was ſuch as the law pronounced to be *turpis*.

ESPOUSALS, when once contracted, ſo bound the parties, that they could not retract, but each had a *jus matrimonii*, ſo as to be able to inſtitute a ſuit for the eccleſi-

aſtical judge by cenſures to compel the other party to conſummate the marriage. Indeed, if a *carnalis copula* ſucceeded, the marriage was completed without more ceremony; for notwithſtanding the maxim, that *non concubitus ſed conſenſus facit matrimonium*, the church preſumed that by ſuch act the party meant to perform his promiſe, rather than commit the ſin of fornication. This was a preſumption which did not admit any proof to the contrary, and it could be done away only by ſhewing that the eſpouſals had before been legally diſſolved, or were in themſelves null and void. If there were more than one eſpouſals, the former were preferred, even tho' the latter had been ſanctioned by an oath; unleſs indeed a *carnalis copula* had taken place. The effect of eſpouſals was to create ſuch a relationſhip, that the *conſanguinei* of the *ſponſus*, or man eſpouſed, could not, upon his death, or the diſſolution of the eſpouſals, marry with the *ſponſa*, nor *vice verſâ*.

MANY were the cauſes which were held by the canoniſts ſufficient to diſſolve eſpouſals. They might be diſſolved by mutual conſent, even tho' ſanctioned by an oath; by abſolution of the judge; by other eſpouſals confirmed by a *carnalis copula*; by affinity ſupervening, tho' by an illicit *copula*; by entry into religion; by fornication, whether corporal or ſpiritual, as if either party fell into hereſy or idolatry; by lapſe of time, as if they had let the day mentioned in the contract paſs; or, if no day was fixed, an abſence of three years; for if a perſon was abſent ſuch a length of time without ſufficient cauſe, the other party might contract afreſh; by failure in performing a condition, if any was annexed; by report of a canonical impediment; by *capitales inimicitiæ* happening between the perſons eſpouſed; by aſperity of manners in either party; by deformity, or any contagious diſorder; in all which caſes other eſpouſals might be contracted, without the authority of the judge, if the cauſe was notorious in point

of

of fact, and likewiſe plain in point of law; if not notorious, then by the ſentence of a judge [c].

Nuptiæ.

ESPOUSALS *de præſenti*, as was before ſaid, were in effect a contract of marriage celebrated *per verba de præſenti*. The definition of *matrimonium* or *nuptiæ* was given before: upon that definition it is ſufficient to remark, that the words *divini humaniq; juris communicationem*, expreſſed that the parties ſhould be of the ſame religion. Chriſtians, by the canon law, could not contract matrimony with Pagans, Jews, or Turks, under pain of excommunication. Matrimony was conſidered in various lights: firſt, it was public or clandeſtine: the former was celebrated in the preſence of witneſſes with all the due ſolemnities; the latter was without either. Again, matrimony was divided into *legitimum et non ratum*, and *ratum et non legitimum*, and *legitimum et ratum*.

A MARRIAGE was ſaid to be *legitimum et non ratum*, if it was celebrated between Jews and Infidels, and it was called *non ratum*, becauſe it might be diſſolved by repudiation; whereas marriage among chriſtians was indiſſoluble, and was therefore called *ratum*; ſo that a marriage *ratum et non legitimum* was ſuch as was among chriſtians, without the canonical ſolemnities; that which was *ratum et legitimum* was a marriage among chriſtians, attended with all the due canonical ſolemnities. This is the marriage which it is our buſineſs to conſider.

FOR a marriage to be contracted in a legitimate way, it was neceſſary to have the conſent not only of the parties, but of the parents, if they had any; and if there was any force, or fear, or error, theſe were circumſtances that vitiated a marriage, and rendered it void. The *metus* was ſuch as *in conſtantem virum vel fœminam poteſt cădere*; and the *error* was to be concerning ſomething neceſſary to the marriage, as the identity of the perſon, and not his qua-

[c] Corv. Jus Can. 79 to 84. Launc. Inſt. Jur. Can. lib. 2. tit. 9, 10.

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lity or fortune. There were other impediments to matrimony than theſe three, and theſe impediments were divided into ſuch as impeded the contract of marriage, and, if completed, diſſolved it; and thoſe which impeded, but did not diſſolve, the contract. Of the former kind were force, fear, and error, which have juſt been mentioned; to which the canoniſts added *cognatio*, *juſtitia publicæ honeſtatis*, *votum ſolemne*, *ordo*, *crimen*, *coeundi impotentia*, *cultûs diſparitas*.

cognation.

THE impediment of *cognation* was that upon which the canoniſts had employed great attention; and by various ſubtleties they had extended it to ſuch unexpected conſequences, that the compaſs within which marriage might be contracted, was by theſe means greatly narrowed.

THEY divided *cognation* into *ſpiritual*, *carnal*, and *legal*. Spiritual was ſuch as aroſe from baptiſm or confirmation. Thus there was a *compaternitas* between the ſpiritual father who baptiſed, the ſponſor for the child[r], and the father of it; and a *paternitas* between the perſon baptiſing and the child baptiſed, the ſponſor and the child. There was in like manner a *fraternitas* between the children of the perſon baptiſing, or of the ſponſor, and the child baptiſed; and ſuch cognation in either of theſe inſtances was an impediment which would both obſtruct marriage, and diſſolve it, if contracted. The canoniſts, however, had guarded againſt one probable conſequence of this cognation; for if the father or mother of the child ſhould happen to be ſponſors, this was not held to be a cauſe of ſeparation, tho' it was an irregularity that conſtituted a ſpiritual offence[s].

[r] *Qui puerum ſuſcipit de fonte*; this was done by the *ſponſor*, or godfather.

[s] The Council of Trent made an alteration in this point of ſpiritual cognation; for it was there decreed, that the prohibition of marriage was only to be between the child and its father and mother and the ſponſor; and between the perſon confirming and the confirmed, and its father and mother; and the perſon *holding it* at the time of confirmation; without extending to the deſcendants in either caſe. Corv. Jus Can. 90, 91.

THE

Consanguinity.

THE *cognatio carnalis* arose either from consanguinity or affinity. Consanguinity, which was sometimes signified by the general appellation of *cognation*, is defined by the canonists to be, *vinculum personarum ab eodem stipite descendentium, vel ascendentium, carnali propagatione in matrimonio, vel extra illud, contractum.* There are three considerations relating to this point, which are the *stipes*, *linea*, and *gradus*. The *stipes* was the stock from which the persons, whose relationship was in question, descended; and this was never computed as a degree. *Linea* was defined to be *collectio personarum ab eodem stipite descendentium, diversos continens gradus, et numeros distinguens.* It was either the *right* line *superior*, containing the ascendants; or *inferior*, containing the descendants; or *transverse*, which was between the brothers and other *cognati*.

THE transverse line was either *equal*, which was when the *cognati* were equally distant from the *stipes*; or *unequal*, which was when they were not. Thus brothers were in an equal line, because both were distant in the same degree from the father: the brother and brother's son were in an unequal line, because the brother was distant from the father in the first degree, but the brother's son in the second. A *gradus*, or degree, is defined, *habitudo distantium personarum quâ propinquitatis distantia inter personas duas vel diversas discernitur.* The canon law, as it considered the degrees with a view to marriage, which subsisted by the consent of two parties, for that reason always joined two persons in reckoning them. This was done differently in the right line, and in the transverse line; for in the right line, whether superior or inferior, it was a rule, *quot generationes numerantur, tot numerantur gradus, dempto stipite:* thus every person, whether ascending or descending, added a degree. In the transverse line, if equal, the rule was, *quoto gradu unusquisq; eorum distat à stipite, eodem distant inter se.* Thus, *patrueles* and *consobrini* are

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are diſtant in the ſecond degree from the common ſtock, and therefore, by the canon law, were deemed in the ſame degree from each other; ſo that two degrees, as reckoned in the civil law, conſtitute only one in the canon law. In the *tranſverſe unequal line* the rule was, *quoto gradu remotior diſtat à ſtipite, eodem diſtant inter ſe:* thus the brother's ſon was diſtant in the ſecond degree from the uncle, becauſe he was diſtant from the grand-father, the common ſtock, in the ſecond degree.

THUS ſtood the law of conſanguinity, according to the computation of the canoniſts; and the manner in which they applied it to the ſubject of marriage was this. In the right line, whether aſcending or deſcending, all marriage was prohibited *in infinitum*, and ſuch as were contracted would be diſſolved. In the tranſverſe line, marriage was formerly prohibited as far as the ſeventh degree, and lately to the fourth degree only inclusive *: however, they held that ſuch prohibited marriages contracted between infidels, who were afterwards converted, ſhould not be diſſolved.

Affinity.

THUS much of conſanguinity: affinity, the other branch of cognation, was defined to be, *perſonarum neceſſitudo, ex coitu proveniens*, whether lawful or unlawful. Affinity, however, did not extend to the *affines* of the married perſon, nor to the *cognati* of the man and woman between themſelves. The degrees of affinity were calculated by the ſame rule as thoſe of conſanguinity; for as man and wife were one fleſh, ſo in whatſoever degree of conſanguinity *Titius* or *Titia* ſtand to me, in the ſame degree of affinity would ſtand the huſband of the one or the wife of the other. Affinity was of three kinds. The firſt kind of affinity was contracted by one perſon, the ſecond by two, and the third by three. For example, my brother is

* There ſeems to have been ſome ambiguity as to the degrees prohibited in England. By a conſtitution of Archbiſhop Lanfranc, no marriage was to be allowed within the ſeventh degree; and yet we find that ſtat. 32 Hen. VIII. c. 38. ſpeaks of the prohibition as confined to the fourth, or fifth degree.

my

my *conſanguineus*, his wife Mævia is related to me in the firſt kind of affinity; if my brother died, and Mævia married Titius, he would be related to me in the ſecond kind; and if Mævia died, and Titius married another wife, ſhe would be related in the third kind of affinity. The wives or huſbands of two who were related by conſanguinity, were related to each other by an affinity of the ſecond kind. In ſhort, the huſband or wife of one related to me by conſanguinity, is related to me by an affinity of the firſt kind; the huſband or wife of ſuch relation in the firſt kind of affinity, is related to me in the ſecond; and the huſband or wife of a perſon related to me in the ſecond kind, is related to me in the third kind of affinity.

THE manner in which this law of affinity was applied to marriage, was this: in like manner as marriage between *conſanguinei*, in the aſcending or deſcending line, was prohibited *in infinitum*; it was equally ſo among thoſe related by affinity, becauſe they were conſidered *in loco parentum et liberorum*; ſo that no marriage could take place between me and the *conſanguinei* of my wife in the right line. The ſame prohibition extended to thoſe in the tranſverſe line, as far as the ſeventh degree in the firſt kind of affinity; to the fourth degree, in the ſecond kind; and to the ſecond degree, in the third kind. It muſt be remarked, that the affinity to impede marriage, muſt be ſuch as ſubſiſted before the marriage, and not ſuch as might afterwards ſupervene. Such ſubſequent affinity would neither diſſolve a marriage, nor eſpouſals *de præſenti*, tho' it would eſpouſals *de futuro*.

ALL theſe impediments, whether from conſanguinity or affinity, might be diſpenſed with by the pope, upon ſhewing ſome true and lawful cauſe for ſuch diſpenſation. But even on this prerogative of the ſovereign pontiff the canoniſts had impoſed ſome reſtrictions; for it was held, that he could grant no diſpenſation to make a marriage lawful, if the impediment was in the right line; but only in the

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the collateral, and in that too not nearer than the ſecond degree. For, ſay the canoniſts, the pope in the plenitude of his power could diſpenſe with the law only where he violated neither the articles of faith, nor the general ſtate of the church.

THE laſt ſort of cognation, called *cognatio legalis*, is defined to be, *perſonarum proximitas ex adoptione vel arrogatione ſolenni ritu factâ proveniens*. This both impeded and diſſolved matrimony between aſcendents or deſcendents, not only during the adoption, but even if it was at end; in the tranſverſe line, only while the adoption ſubſiſted. But the law of adoption never having prevailed in this country, no impediment could ariſe to marriage on this conſideration. Thus far of cognation in all its parts.

THE next impediment was what the canoniſts termed *juſtitia publicæ honeſtatis*; and this they defined, *propinquitas ex ſponſalibus proveniens, robur ex inſtitutione eccleſiæ trahens propter ejuſdem eccleſiæ honeſtatem*. This both impeded and diſſolved marriage; and it extended to the fourth degree. The *votum caſtitatis ſolemne*, and *ordo ſacer*, are impediments that need no particular obſervation. The *crimen adulterii* became an impediment in this manner: If any one, during the life of his wife, contracted matrimony or eſpouſals with another, and a *carnalis copula* enſued, and the woman knew he had another wife, ſuch marriage could not afterwards be eſtabliſhed even by the death of the firſt wife: but if ſhe was ignorant of his having another wife, and no *carnalis copula* had taken place, the marriage might be contracted after the death of the firſt wife. *Impotentia*, if natural, would both impede and diſſolve marriage; and ſo, if accidental, and before the marriage; but if the accident happened after the marriage, it had not that legal conſequence.

OTHER impediments there were, which only impeded, but did not diſſolve marriage. Theſe were *furor*, *interdictum*, *feriæ*, *catechiſmus*, *votum ſimplex*, *crimen*. A perſon

perſon who was mad, might, however, during a lucid interval, contract marriage. The *feriæ*, within which marriage could not be celebrated, were from Advent to Epiphany; from Septuageſima to the octave of Eaſter; and from the firſt Rogation-day to the octave of Pentecoſt. Catechiſm was conſidered as an impediment, on account of the ſpiritual cognation which was ſuppoſed to be thereby created.

THE crimes which impeded, but did not diſſolve, marriage were theſe: *inceſtus*, *uxoricidium*, *raptus*, *ſuſceptio proprii filii de fonte*, *preſbytericidium*, *pœnitentia ſolemnis*. The manner in which inceſt was an impediment, is thus explained by the canoniſts: If a perſon committed inceſt with a perſon in conſanguinity with his wife, and of courſe in affinity with him, this fact made him aſſume an affinity with his wife, ſo as to diſable him from claiming the conjugal rites during her life, and, when ſhe died, from contracting matrimony. The impediment from receiving his own child from the font, was, in like manner, that he could not demand of his wife the conjugal rites. A perſon who killed his wife (and ſo alſo a wife who killed her huſband), or one who killed a preſbyter, or who had incurred the puniſhment of any ſolemn penance, could not contract matrimony. It was required by the canons, that a marriage ſhould be celebrated publicly in the face of the church, or in ſome aſſembly of the faithful, repreſenting the church; and the pariſh-prieſt, or ſome one by his permiſſion, was to pronounce his benediction [b].

WE ſhall now add a few words on *clandeſtine* marriages. Theſe were ſo called if contracted without witneſſes, and as it were by ſtealth, without any of the ſolemnities requiſite to the celebration of all lawful marriages. The requiſite ſolemnities were, that the marriage ſhould be propounded by the prieſt, who was to fix a time, within which

[b] Corv. Jur. Can. 85 to 102. Launc. Inſt. Jur. Can. lib. 2. tit. 11, 12, 13.

thoſe

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thoſe who knew any impediment ſhould declare it. The prieſt, in the mean time, was likewiſe to examine if there was any impediment, under pain of ſuſpenſion for three years if he neglected ſo to do. The conſequence of ſuch clandeſtine marriage was, that the children were all illegitimate: however, the marriage might be made good, and the children legitimated, if it was afterwards approved by the church, or publiſhed by the parties [i]. The abuſe of clandeſtine marriages was very early noticed by our provincial ſynods. It was required by one of our conſtitutions, that banns of marriage ſhould be previouſly publiſhed, and that no marriage ſhould be celebrated but in a pariſh-church, or chapel having parochial rights, unleſs with ſpecial licence of the biſhop; and any prieſt aſſiſting at a marriage not ſo celebrated, was ſubjected to the penalty of ſuſpenſion [k].

THE canoniſts reckon, among others, the effects and conſequences of matrimony to be theſe: that the children born afterwards either are legitimate, or become ſo. Of the former ſort are thoſe born during the marriage; of the latter *, are thoſe born before the marriage, if the parents, at the time, were capable of contracting matrimony: ſecondly, that they were to cohabit: thirdly, that no ſimple *donatio inter virum et uxorem* could regularly hold [l].

Of divorce.

THE next point to be conſidered is *divorce*. This was defined to be, *legitima mariti et uxoris ſeparatio, apud competentem judicem, cum cauſæ cognitione, et ſufficiente ejus probatione factâ*. It was either *tori*, or *vinculi matrimonialis*. In the firſt inſtance, there was an interdiction from any cohabitation, or mutual converſation, either for a time, or generally without any mention of time: in the latter, the marriage was intirely diſſolved for ever. The cauſes of divorce of the former kind were, *propter adulterium, propter furorem, propter hæreſin, propter ſævitiam.*

[i] Corv. Jus Can. 102, 103. Lamc. Inſt. Jur. Can. lib. 2. tit. 14.
[k] Lynd. 273, 274. 277.
* Vid. ant. vol. I. 265.
[l] Corv. Jus Can. 104. 106.

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With reſpect to adultery it was held, that if both parties were equally guilty, or the huſband proſtituted the wife, or the huſband was reconciled to his wife after her guilt, it was no cauſe of divorce. The only cauſe of divorce *vinculi matrimonialis*, as laid down by the pious canoniſts, was *propter infidelitatem*, which was when one of the parties became catholic, and would not live with the other, who continued ſtill an unbeliever. But this, tho' the only cauſe of divorce *à vinculo*, was not the only ground upon which a marriage might be diſſolved, for we have juſt been enumerating many impediments which intirely diſſolved the marriage. In caſe of a divorce *quoad vinculum*, the parties were at liberty to marry; but a divorce *à toro* had no ſuch effect, the parties ſtill continuing man and wife. If either party, without a cauſe of divorce, or the judge's authority, declined the conjugal ſtate, he or ſhe might be compelled by an action *ad matrimonium colendum*. If a woman, upon a juſt cauſe of complaint of the huſband's ſeverity, but without a regular divorce, departed from him, ſhe would be reſtored to her huſband, if he demanded her, provided he gave ſecurity for treating her well; but no reſtitution would be made, if the ſeverity was ſuch as could not eaſily be guarded againſt by any ſecurity; and, in ſuch caſe, ſhe would be committed to the cuſtody of ſome diſcreet woman till the deciſion of the cauſe.

THE canon law put a mark of diſapprobation upon *nuptiæ ſecundæ*; for ſo they termed every marriage after the firſt: no benediction could be pronounced, nor could any prieſt be preſent at the celebration of them[m]. Bigamy was ſuch a ſtigma upon a man, as to diſqualify him for receiving orders, even tho' his wife was dead; nor could it be removed by any diſpenſation. But the canoniſts carried the conſtruction of bigamy beyond the contracting of a ſecond marriage. If a man carnally knew a woman who committed

[m] Corv. Jus Can. 108, 109, 110. Launc. Inſt. Jur. Can. lib. 2. tit. 16.

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mitted adultery, if he married a woman repudiated, or a widow, he was conſidered as a bigamiſt, and diſqualified for orders. It was held, that a perſon marrying a woman, who was married to another, but not carnally known by ſuch ſtranger, was not a bigamiſt; nor one who had had many concubines, if he had undergone penance, and had been diſpenſed with. The latter therefore was not conſidered ſuch an *irregularity* (for ſo bigamy was termed) as to render a perſon unfit for the duties of the church [n]. The credit that was given by our courts of common law to the biſhop's certificate in caſes of baſtardy and bigamy, has been too often mentioned to need being enlarged upon in this place [*].

Such was the law of marriage, as delivered by the canoniſts, and adopted by our eccleſiaſtical courts for their rule, in deciding upon matrimonial cauſes. To theſe it will be neceſſary to add ſome points of a juridical nature relating to marriage, which were peculiar to our own law, and occaſionally had been agitated both in our lay and ſpiritual courts.

Jactitation of marriage.

In our ſpiritual courts we find a ſuit ſpoken of by writers of the next period, called *jactitation of marriage*, and which probably exiſted at the time of which we are now writing. This was a proceeding to clear a perſon of a matrimonial contract, which was pretended to exiſt by the other party. A ſuit, as was before ſeen, might be brought in the eccleſiaſtical court by a man for recovery of his wife, if ſhe was taken from him, provided the action was merely to have poſſeſſion of her; and yet he might alſo have an action of treſpaſs to recover her; and alſo, if the caſe was of that ſort, an action *de uxore abductâ cum bonis viri* [o]. If a man lived ſeparated from his wife, an action might be had in this court to compel him to receive her and cohabit with her; and this proviſion of the canon law, as has juſt been ſhewn, was ſuppoſed to be alſo ſanctioned by an expreſſion in ſtat. 13 Ed. I. c. 34 [p].

[n] Corv. Jus Can. 44.

[*] Vid. ant. vol. I. 466.

[o] Goodall, of the Liberties of the Clergie by the Lawes of the realme, printed by Rob. Wier, tempore Hen. VIII.

[p] Vid. ant. vol. II. 111.

It appears alſo, that goods promiſed with a woman in marriage were demandable in this court, after the marriage celebrated: but upon this had ariſen ſome difference of opinion. We have before ſeen a diſtinction between a contract to give money, if a perſon will take to wife a woman, and a promiſe of money with a woman in marriage; the former being held a temporal matter, the latter ſuch as was proper for this court[q]. It may be doubted, whether the judges were now ſo nice as to make any diſtinction upon the wording or form of ſuch agreements, unleſs they were by deed, and then there was no diſpute but they were purely lay contracts[r]. For in 14 Ed. IV. where the declaration merely ſtated that he had married the daughter of the defendant, and that he ſhould have twenty pounds in reſpect thereof, all the judges of the common-pleas held, that upon the face of it, this was only determinable in the court chriſtian, *being of the ſame nature as the marriage*[s]; and it is collected from the Regiſter, that for marriage money, and penſions, ſuit was invariably to be in the ſpiritual court[t]. Mention is there made of ſuch a ſuit brought againſt the executors of the perſon promiſing, and it being held good, a conſultation was granted[u]. Indeed, this ſeemed to be the ſettled opinion, which prevailed in the two following reigns, and long after. On comparing theſe caſes, we find the law as delivered by Bracton at length re-eſtabliſhed and confirmed[x]. It was alſo ſaid, that where a man gave goods with his daughter in marriage, and ſhe was afterwards divorced, he might have a ſuit in this court to recover the goods[y]; but this muſt be underſtood of a divorce for ſome impediment, and not upon the woman's adultery[z].

[q] Vid. ant. vol. III. 65.
[r] 43 Ed. III. 24.
[s] 14 Ed. IV. 6. and 17 Ed. IV. 4.
[t] Reg. 46. 48. Bro. Proh.
[u] Reg. 46. b.
[x] Vid. ant. vol. I. 454.
[y] Vide Goodall.
[z] An Apologie, &c. 25 to 27.

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Of wills and teſtaments.

NOTWITHSTANDING wills, and the adminiſtration of inteſtates' effects, were objects of eccleſiaſtical judicature, theſe were matters of ſuch jealous concern, that the parliament had more than once interpoſed to lay down rules for the government of biſhops in the article of adminiſtration in caſes of inteſtacy. It had been ordained, firſt, that the ordinary ſhould pay the debts of the inteſtate, the ſame as an executor [a]; and, ſecondly, that the ordinary ſhould, in ſuch caſe, always grant adminiſtration to the next and moſt lawful friends of the inteſtate [b]. When theſe grand points were adjuſted, the mode of accompliſhing either was left to be ſettled by the eccleſiaſtical juriſdiction. Upon this head ſeveral conſtitutions had been made, one of them ſo far back as the reign of Henry III.

IT was ordained by a legatine conſtitution of cardinal Ottoboni, that no executor ſhould be admitted to the execution of any teſtament, nor ſhould any teſtament be proved by him before the ordinary, according to the eſtabliſhed cuſtom, till he had, if a layman, expreſsly renounced the privilege of his own temporal court. Such was the conteſt in thoſe days concerning the juriſdiction over teſtamentary queſtions, that it was thought neceſſary to bind an executor not to avail himſelf of this difference of opinion. The conſtitution further ordains, that executors, before they received adminiſtration of the effects, ſhould make an inventory in the preſence of credible perſons, who were acquainted with the effects of the deceaſed, and exhibit it to their ſuperior prelate. If any one preſumed to adminiſter before he had made an inventory, he was to be puniſhed at the diſcretion of the biſhop [c]. There are two conſtitutions of *Stephen Langton* on the ſubject of teſtaments made by eccleſiaſtics. By one it was ordained, that no beneficed clerk ſhould leave any thing by teſtament to his concubine; and if he did, that the whole bequeſt ſhould,

[a] Vid. ant. vol. II. 167. [b] Ibid. 387. [c] Conſt. Ottobon. tit. 14.

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by the biſhop of the dioceſe, be converted to the uſe of the church which the deceaſed perſon held. By the ſecond it was ordained, that religious perſons, as from the deſign of their rule and order they were to have no property, ſo they ſhould not make any teſtament; which was conformable with the rule of the pontifical law [d].

If religious perſons had no property of their own, they were deemed unfit to be truſted with the property of others. It had accordingly been ordained, in a conſtitution of archbiſhop Boniface, in the time of Henry III. that no religious perſons of whatever order ſhould be executors of teſtaments, unleſs by the licence and pleaſure of their ordinary. This was ſoftened by a conſtitution of archbiſhop Peckham in the reign of Edward I. which required that no religious perſon ſhould be executor, unleſs his ſuperior was ſecurity for a due performance of his duty, and for his rendering a faithful and true account of the overplus to the ordinary of the place: and becauſe ſome perſons wearing a religious habit got themſelves to be appointed *diſtributors* of the effects of deceaſed perſons, as if that was not within the proviſions concerning executors, it was now ordained, that the above regulation ſhould apply in both caſes; and any one who, without ſuch ſecurity, intermeddled in the execution or diſtribution of ſuch effects, was made liable to the pain of an anathema; ſo that thoſe who could not give ſecurity, could neither be executors nor diſtributors [e].

The next legiſlative proviſion on the ſubject of teſtaments, is a conſtitution of archbiſhop *Mepham*, in the beginning of the reign of Edward III. This was to repreſs a grievance which was a ſubject of great complaint during the whole of that king's reign. It ſeems that ordinaries uſed to exact of executors great ſecurities for the inſinuation or proving of teſtaments, and the commiſſion of adminiſtration, in order to extort heavy fees and douceurs.

[d] Lynd. 166, 167. [e] Ibid. 167, 168, 169.

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To prevent this in ſome degree, it was ordained, that for the inſinuation of a will of a poor man, the inventory of whoſe goods did not exceed one hundred ſhillings ſterling, nothing at all ſhould be demanded[f].

ANOTHER conſtitution made by archbiſhop Boniface in the reign of Henry III. was revived, and re-enacted by archbiſhop Stratford in the reign of Edward III. Complaint had then been made, and the ſame cauſe continued in the latter reign, that where perſons, whether clergy or lay, died inteſtate, the lords of fees did not permit the debts of the deceaſed to be paid out of their moveables, nor diſtribution to be made by the ordinary to the uſe of the wife, children, relations, or others, in ſuch proportion as was due to each, according to the cuſtom of the country. Others, again, prevented perſons who were *adſcriptitii*, and of ſervile condition, and women, whether married or ſingle, from making their wills; all which was ſtated to be in violation of the uſage of thechurch hitherto approved, as well as an offence to the Divine Majeſty, and the eccleſiaſtical law. Such are ſtated to be the abuſes which now prevailed on this ſubject. For the correction of them it was now ordained, that all perſons in ſuch caſe offending ſhould be involved in a ſentence of the greater excommunication. It was further provided, that when a teſtament had once been proved and approved before the ordinary of the place, it ſhould not be required to be proved and approved before any layman, unleſs by reaſon of any lay fee which might be bequeathed in ſuch teſtament. It was enjoined, that none ſhould preſume to prevent the effect of any teſtament or laſt will, where a bequeſt was warranted either by particular cuſtom, or the general law. All offenders in the above caſes were declared to be involved in a ſentence of the greater excommunication.

[f] Lynd. 170.

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THE article of inventories was again provided for in this conſtitution. It was ordained, that adminiſtration ſhould not be granted to an executor, till a faithful inventory had been made of all the goods, with an exception only of the funeral expences, and thoſe of making ſuch inventory. The time of delivering this inventory was left to the diſcretion of the ordinary. Farther, it was provided, as had been before done in the caſe of religious perſons, that after the will was proved, the adminiſtration ſhould not be committed but to ſuch perſons as were able to give a good account of their adminiſtration; and, if neceſſary, give good ſecurity, and make faithful promiſe ſo to do, whenever they ſhould be required by the ordinary. As to religious perſons, they were not to be executors without the permiſſion of their ordinaries. It was alſo enacted, that out of the portion that belonged to the dead man, the church ſhould receive its accuſtomed due; meaning the *mortuary* that was due by the cuſtom of ſome places.

Executors.

TO prevent all pretences that might be made uſe of to embezzle the effects of the deceaſed, it was ordained, that no executor ſhould appropriate any goods of the deceaſed under title of a ſale, or by any other pretence, unleſs a gift of them had been made by the teſtator *inter vivos*, or by will; or they were given to him by the direction of the ordinary for his trouble; or any debt was owing to him from the deceaſed; or they were taken as a moderate compenſation for the expences of the adminiſtration. If he had none of theſe excuſes, a perſon appropriating any goods of the deceaſed, would be ſuſpended *ab ingreſſu eccleſiæ*; nor ſhould be abſolved till he had reſtored the things ſo unjuſtly appropriated, and double the value out of his own goods to the fabric of the church to which the deceaſed belonged[s].

[s] Lynd. 171 to 179.

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THE liberty taken with the goods of deceaſed perſons was a matter of great ſcandal to the church, and great oppreſſion to the people, and was much complained of during the reign of Edward III. In the 16th year of that king, the extent of this evil is thus ſtated in the preamble of a conſtitution by archbiſhop Stratford. It recites, that ſome eccleſiaſtical judges would not permit the executors of deceaſed perſons to diſpoſe of their goods according to the direction of their teſtators, and the ſanctions both of the law and the canons; that they took to themſelves the moveables of teſtators, and of inteſtates (which after the payment of debts ſhould be applied to pious uſes); and ſo ſometimes diſtributed them at their pleaſure, both excluding the deceaſed and their creditors: in conſideration whereof many perſons, when ſick, uſed to alien their moveables, ſo that churches were defrauded; and creditors, children, and wives, who by law and cuſtom ought to have their ſhares, were deprived of their due [b]. Such were the abuſes; and the remedy provided for them was as follows. It was ordained, that biſhops and other eccleſiaſtical judges ſhould not intermeddle in effects of teſtators, except ſo far as the law permitted, under any pretence whatſoever, but ſhould freely permit the executors to diſpoſe of them; and it directs that they ſhould diſtribute the goods of inteſtates in this manner: ſuch as remained after payment of debts, were to go *ad pias cauſas, et perſonis decedentium conſanguineis, ſervitoribus, et propinquis, ſeu aliis, pro defunctorum animarum ſalute*; and the ordinary was to retain nothing to himſelf, except, perhaps, ſomething reaſonable for his trouble, under pain of ſuſpenſion *ab ingreſſu eccleſiæ* [i]. The proviſions of this conſtitution did not yet remedy the evil: inſtead therefore of calling again upon the ordinaries to fulfil the duty hereby enjoined, it was judged a better regulation to remove the adminiſtration intirely

[b] Johnſ. Canons, *ad annum.* [i] Lynd. 179, 180.

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out of their hands; which was done, as we have ſeen, by ſtat. 31 Ed. III. which commands the ordinary, in caſe of inteſtacy, to depute *the next and moſt lawful friends* of the inteſtate to adminiſter his goods [k].

By another conſtitution of the ſame archbiſhop, the fees to be paid in caſes of wills were fixed. It was ordained, that for the proving, approving, or the inſinuation of a will, nothing ſhould be taken by biſhops or ordinaries; but to the clerks, a certain reward for their trouble was to be paid. The particular ſums to be paid for inſinuation, inventory, acquittances, for hearing the account, are preſcribed by this conſtitution in proportion to the value of the effects; if any one took more, he was, within a month, to pay double the value to the fabric of the church of the place; if he neglected ſo to do, the offender, being a biſhop, was to be ſuſpended *ab ingreſſu eccleſiæ*, if an inferior, *ab officio et beneficio*, till he complied. It was alſo ordained, that no acquittance ſhould be made to an executor, till he had given a true account of his adminiſtration, under pain of ſuſpenſion *ab ingreſſu eccleſiæ* for ſix months [l].

Such were the proviſions made, at different times, by the eccleſiaſtical legiſlature, upon the ſubject of wills and inteſtacy. Both theſe articles are very fully conſidered

[k] Vid. ant. vol. II. 387.

[l] Ibid. 181, 182, 183. There is a proviſion among the legatine conſtitutions of cardinal Ottoboni, which commends the practice of diſtributing the goods of inteſtates *in pios uſus*, and directs that biſhops ſhould make diſtribution according to a ſtatute made by the prelates, with the approbation of the king and barons; meaning, as it ſhould ſeem, that ſome ſtatute had been made to warrant ſuch diſtribution *in pios uſus*. This conſtitution was made in 52 Hen. III. *John de Athona* in his gloſs on this paſſage ſays, that the ſtat. Weſtm. 2. 13 Ed. I. c. 19. which requires the ordinary to pay the debts of the inteſtate, as an executor ſhould, was the ſtatute here meant; which anachroniſm is very ſingular in a writer who lived ſo near the period. Biſhop Gibſon confeſſes he cannot diſcover what ſtatute is here alluded to. It is not eaſy to ſuppoſe, that the proviſion of *Magna Charta* is here meant. Vid. ant. vol. I. 244. and the references there made. Leg. Conſt. Ottoboni, tit. 14. John de Athona, *ad locum*.

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by our two canoniſts, *Lyndwood* and *John de Athona*, from whoſe gloſſes we are to collect what were the opinions prevailing in the clerical courts reſpecting theſe two objects of eccleſiaſtical cogniſance. With the aſſiſtance of theſe writers, we ſhall be able to acquaint the reader with the law upon this head. We ſhall begin with *wills*.

Of the forms of wills, &c.

It ſhould firſt be obſerved, that *wills* were of two kinds; that is, *teſtamentum*, and *ultima voluntas*; and all the foregoing conſtitutions make uſe of both theſe terms, ſo that their regulations are applicable to both. The doctors, however, made a difference between them. The former was a more ſolemn act, attended with all the forms preſcribed in ſuch caſes by the law books: if any of theſe forms were wanting, it was not a teſtament, but a mere declaration of the *ultima voluntas*. A *codicil* alſo might go under this title: thus, in our eccleſiaſtical law, a *teſtament* and a *laſt will* ſeemed to be nearly the ſame thing in effect [m]; and we ſhall accordingly uſe the word *will*, without any reference to a diſtinction between that and a teſtament.

We have ſeen, that the right of wives and of perſons *adſcriptitii*, and others *ſervilis conditionis*, (meaning, probably, ſuch as held by villain tenure, though not villains themſelves) to make wills, was vindicated by a conſtitution of archbiſhop Stratford. This conſtitution is ſupported by Lyndwood, who lays it down, that all perſons may make wills, except thoſe who come under any of the following deſcriptions: firſt, thoſe who had no ſufficient authority, as ſons, actual villains, monks, hoſtages; ſecondly, thoſe not having ſufficient underſtanding, as an infant, madman, *mente captus*, and prodigal; thirdly, thoſe who had not ſufficient ſenſes, as the blind, deaf, and dumb; fourthly, thoſe condemned to death or to baniſhment; and, fifthly, thoſe whoſe true ſtate and condition

[m] Lynd. 173. b.

was

was not known. Such perſons are allowed by Lyndwood to be properly excepted by all the doctors from the privilege of making a will; but as a married woman is not mentioned among theſe exceptions, he expreſſes great aſtoniſhment, that in his time huſbands endeavoured to prevent them from making wills; and he combats this poſition with great earneſtneſs.

As to the objection that wives have *nulla bona*, no goods of which to make a will, but that they all belonged to the huſband, ſo that ſhe could not make a will without his permiſſion; he ſaid, that this might, indeed, hold as far as concerned the huſband's own goods, (though there were ſome doctors who thought the married ſtate gave the wife dominion over her huſband's goods), and he admitted that his permiſſion was neceſſary to her making a will of any part of *them*. But he contends, that there was a diſtinction, which made certain goods the property of the huſband, and others the property of the wife; for, ſays he, the prohibition which prevented any gifts between man and wife * during the marriage, could have no application, unleſs they had diſtinct goods: the ſame may be ſaid of the rule of the canon law, that goods produced from the goods of the huſband and wife ſhould be divided equally when the marriage ceaſed, and that rule which gave the wife's portion back to her upon the diſſolution of the marriage. He admits, however, that the huſband had power over the wife's portion, and that what was gained by the wife during the marriage, was preſumed to be gained out of her huſband's goods, and ſhe clearly could not bequeath them. Theſe reſtraints, therefore, upon the wife were, where it did not appear whence ſhe had made her acquiſitions; and he ſeems to think, that where a rich woman married a poor man, and the acquiſitions of the wife could not be ſuppoſed to be made out of his pro-

* Vid. ant.

perty,

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perty, ſhe would not be reſtrained from making a will without her huſband's conſent. He ſeems to think, that the poſition which made a huſband maſter of his wife's property was true *in dotalibus*; but this held only *quamdiu bene adminiſtrat*; and ſo long as he was not ſuſpected, nor declining in his circumſtances, he was maſter ſo as to adminiſter them. But though he was *dominus in dotalibus*, he lays it down peremptorily that he was not ſo *in rebus paraphernalibus*; for theſe belonged to the wife even during the marriage, and ſhe might freely make a will of them without her huſband's conſent. The *bona paraphernalia* are defined by Lyndwood to be, *quæ uxor habet extra dotem* [p]. If we refer to the judgment of the common law, we find it laid down, that a wife might, with the licence of her huſband, make executors; but his agreement was conſidered as neceſſary to make the will good: ſhe might alſo make her huſband executor to her will [q].

NEXT to the *teſtator*, we ſhould conſider the ſituation of the *executor*, whom he deputes to execute the will he has made. Many points of law concerning the duty and character of executors are agitated by *John de Athona*, in his famous gloſs on a conſtitution of cardinal Ottoboni [r]. We learn from him, that a minor of ſeventeen years old might be an executor by a particular cuſtom, though not by the canonical law. It was by cuſtom alſo, that a woman might be made an executor. It was a point much debated among the canoniſts, whether an executor was compellable to take upon him the truſt; and ſome had held that he was, becauſe it was a public duty, and a public duty every one was bound to diſcharge. But this opinion is thought by our gloſſiſt to apply to what he calls *executor legitimus*, and not to a teſtamentary executor, who certainly was at liberty to decline; becauſe no man could impoſe a duty on another beyond the benefit he received: though when

[p] Lynd. 173. b. [q] 4 Hen. VI. 31. 39 Hen. VI. 27. [r] Tit. 14.

once

once he had undertaken such duty, he might be compelled by ecclesiastical censures to fulfil it. Another question among the canonists was, whether, when there were more than one executor, they were all to concur in being *actor* or *reus* in an action, or in making an agreement. If they were considered in the light of procurators, as some held, they could not act alone; but others held, they were rather in the nature of tutors and curators to minors in the civil law, and then each might act singly for the rest. This latter was the opinion of John de Athona, who says, the custom of the realm was such in the temporal courts in his days; though he admits, that in judicial matters it was necessary for them all to join.

Another question was, whether such action as an executor had against his testator, was extinct by the executorship. Some thought that it was; others, that it was not, considering there was an heir against whom an action might be brought: though if there was no heir, it was the opinion of our glossist, that the executor might, without any breach of trust, openly take what was owing to him; and he adds, that any legacy left to him, ought not to deprive him of his *actio funeraria*. After this, there could be no doubt, as it was with some of the foreign canonists, whether any and what action could be brought by an executor; distinguishing between a *nudus executor*, and one who had an interest. It was held, that every executor might bring all actions that related to the administration of the last will; and if he omitted to bring such as were necessary, the diocesan might. Similar to the last was the question, whether an executor might come to a compromise or make any agreement with the heir or any debtor of the testator. Some thought he could not remit a debt any more than a *procurator ad agendum*, unless, perhaps, with the consent of the legatees and creditors, who were materially interested; or he had a special authority from the testator so to do. Others thought, that as it might be paid to him,

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him, and he might bring an action for it, especially if he was deficient in proofs, and a suit would be hazardous, he might compromise a debt.

In the time of John de Athona it was a question, whether an executor should give security for a due administration; and then a distinction was made between a testamentary executor, and one appointed by the ordinary, who was called *legitimus*; and it was held, that the former need give no security[t]: but we have seen, that by later constitutions, executors of every kind were required to give security[s]. He also examines, whether, in giving an account of their administration, it was sufficient to verify what they did upon their oaths; which points we shall consider presently. When an action was brought, either by creditors or by legatees, against an executor, they were not bound to shew the sufficiency of the property to satisfy their demands, but that was to be presumed till the contrary was shewn by the executor. Another question in the time of John de Athona was, whether an executor might buy any goods belonging to the testator; but this was afterwards settled in the negative by constitutions before mentioned[t]. As to the point, whether the heir or the executor should be proceeded against by a creditor or legatee, it was held by some, that the heir should; by others, that it should be the executor, in all cases of demands on the moveables; but our glossist says, that this must, after all, lie in the option of the claimant[u].

Of probate.

When the will was made, and the executor appointed, then was the authority of the bishop necessary to carry it into execution. The bishop's authority applied to these points: the proof and insinuation of the will, the making an inventory, the committing of administration to the executors, and, lastly, the demanding of the executor an

[s] Vid. ant. 69.
[t] Vid. ant. 69.
[u] John de Athon. in Const. Ottoboni, tit. 14. *per totum*.

account

account of his adminiſtration[x]. The regular courſe was, that the proof of a will ſhould be before the ordinary of the place where the teſtator died; and formerly, when a perſon had effects in more dioceſes than one, they contented themſelves with one probate; but the ordinary of each dioceſe was to give adminiſtration of the goods within his dioceſe, and was to call the executor to account. Thus ſtood the practice in the time of Edward I. as appears by the conſtitution of cardinal Ottoboni, and the gloſs of John de Athona thereon, ſo often referred to. But at the time of which we are now writing, a different practice had obtained; for we are informed by Lyndwood, that the archbiſhop of Canterbury, in his province, took to himſelf, as well the proof and inſinuation of all wills, as to commit the adminiſtration of the goods, and to call the executors to account, in all caſes, where the teſtator had *bona notabilia* in different dioceſes within his province. This prerogative of the archbiſhop had given riſe to much argument on the meaning of *bona notabilia*; and Lyndwood, upon the authority of conſtitutions, of doctors, and of reaſon, takes upon him to pronounce *bona notabilia* to be ſuch, whoſe poſſeſſion would exempt the owner from the deſcription of *pauper*: but, proceeds he, one who has leſs than one hundred ſhillings ſterling is *a pauper*; from whence he concludes, that one having leſs than one hundred ſhillings had not *bona notabilia*[y].

The probate of the will is ſpoken of under different terms by our great canoniſts; the *probatio* or *publicatio*, and the *approbatio* or *inſinuatio*; the two former denoting the act of the executor; the two latter, that of the biſhop. The will of the deceaſed perſon was required to be *proved* by two witneſſes who were *omni exceptione majores*. When that was done, the eccleſiaſtical judge was to give his *approbation* to the proof[z]. It was only in

[x] Lynd. 179. t. [y] Ibid. 174. [z] Ibid. 174. f. g. h.

reſpect

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reſpect of the *bona*, or moveables and perſonalty, that a will became the object of cogniſance to the eccleſiaſtical judge; he pretending no claim over a deviſe of a lay fee; but if a will contained both, it was neceſſary that it ſhould be approved by the ſpiritual judge.

THE making of an inventory, which was the next ſtep, and was ſo earneſtly preſſed by the abovementioned conſtitutions, was as requiſite for the ſecurity of the executor as of the effects; for it had become a rule of the canoniſts, that where a perſon intermeddled in the adminiſtration without having made ſuch an inventory (except for the expences of the funeral, the probate and inventory, and the neceſſary preſervation of the property), a preſumption was raiſed of ſufficient aſſets, and he was bound to anſwer to every one of the creditors [b]. If no inventory was made, the acts of the executor were ſtill valid; but he might be removed, as a ſuſpected perſon, by the ordinary [c]. It is ſaid by Lyndwood, that debts which were not ſecured by ſome inſtrument or obligation, need not be inſerted in an inventory till they were received [d].

THE *ſufficiens cautio*, which was required by the above conſtitutions, created ſome doubts among the canoniſts; for a *ſufficiens cautio* might be of three kinds: it might be either *pignoratitia*, *fidejuſſoria*, or *juratoria*; and it ſeems to have been left to the diſcretion of the ordinary which of theſe he would take. If a perſon was ſuſpected, he would be required to give one of the two former; if he was a credible perſon, the latter was ſufficient [e]. Another conſideration which weighed in this point, was the ſituation of the executor: if he derived any benefit under the will, he was to give one of the former ſecurities; but if he was a mere *nudus executor*, he was not required to give either of the higher ſecurities. Another conſidera-

[b] Lynd. 176. p.
[c] Ibid.
[d] Lynd. 168. h.
[e] Ibid 169. a.

tion

tion ſeems to have been, whether he was a teſtamentary executor or appointed by the ordinary, and ſo called *legitimus*; for the former, being a perſon entruſted by the teſtator, ought not to be ſuſpected by the ordinary; and therefore the latter ſecurity of an oath was thought ſufficient in ſuch caſe; nor was that to be required till the adminiſtration was completely finiſhed [h].

After the ordinary had committed adminiſtration, he might remove the executor, if there was any ſuggeſtion of fraud and miſmanagement of the effects [i], or if he could not give a good account of his adminiſtration. In taking an account, the biſhop ſeems to have had the ſame diſcretion as in taking caution for a due adminiſtration. According to the character and circumſtances of the parties, he might require a *plena probatio*, or content himſelf with the oath of the executor; and as to the account, he might require it to be more or leſs particular [k].

In giving a true account of his adminiſtration, it muſt ariſe very often that the executor would have a reſiduum, either by reaſon of legatees dying before the teſtator, or by reaſon of the effects exceeding the diſpoſitions made in the will. In ſuch caſe, the law is thus laid down by Lyndwood: if the executor was a *nudus miniſter*, who was to have no benefit, he could not apply this reſidue to his own uſe; but where the executors, ſays he, are *executores univerſorum bonorum*, ſuch perſons being *in loco hæredum*, were to take every thing that was undiſpoſed of by the teſtator; and yet, ſays he, ſuch an executor would do well, if he diſpoſed of the overplus by the advice of the ordinary [l]. In the other caſe, the teſtator would be conſidered as dying inteſtate with regard to ſuch undiſpoſed property.

The conſequences of inteſtacy were not much better aſcertained than they were before the ſtat. 31 Ed. III. Of inteſtacy.

[h] Lynd. 170. h. [i] Ibid. 177. g. [k] Ibid. 168. l. [l] Ibid. 179. a.

The

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The difference merely was, that inſtead of truſting to the diſcretion of a biſhop for diſtributing the effects *in pios uſus*, the adminiſtration was to be committed to the next and moſt lawful friends of the inteſtate, who were to adminiſter, and diſpend them for the ſoul of the deceaſed [m]. The text, therefore, of the canon law was ſtill the rule by which the adminiſtration was to be governed; and we muſt recur to our provincial conſtitutions to learn what was ſuch an application of the property as might be ſaid, according to the notions of theſe times, to be for the benefit of the deceaſed perſon's ſoul. The conſtitution of archbiſhop Stratford abovementioned directs that the goods of an inteſtate which remained after the payment of debts, ſhould be diſtributed *ad pias cauſas, et perſonis decedentium conſanguineis, ſervitoribus, et propinquis, ſeu aliis, pro defunctorum animarum ſalute.*

Of pious uſes.

THE interpretation put upon *piæ cauſæ* by the canoniſts was extenſive. We are informed by Lyndwood, that any perſon who was an object of compaſſion; an orphan, widow, or pauper deſtitute of ſupport from himſelf; thoſe rendered infirm by diſeaſe or age, being alſo poor; all ſuch were objects that came under the deſcription of *piæ cauſæ*. They alſo reckoned under the ſame head, the watching of a city, the repairing of bridges, roads, walls and ditches of a city or caſtle, and the like, particularly in caſes of neceſſity. To theſe they added, as might be expected where churchmen were the interpreters of the law, the ornaments and fabric of churches, lights, anniverſaries, and incidents relating to divine worſhip: gifts *pro emendandis forefactis*, and *pro malè ablatis*, were deemed of the ſame kind. In general, any thing given *pro animâ*, was judged to be of this deſcription; and yet a gift to a father or mother *pro animâ*, was not ſo eſteemed unleſs they were poor [n].

[m] Vid. ant. vol. II. 387. [n] Lynd. 18c. d.

THE

THE *piæ cauſæ* being ranked as the firſt objects of conſideration in this conſtitution, it ſhould ſeem as if nothing was to go to the *conſanguinei*, and the others there mentioned, till ſome portion had been firſt beſtowed on ſome of theſe righteous purpoſes. After theſe follow the *conſanguinei*, the *ſervitores*, the *propinqui*, and *others*. The church had laid down to itſelf a different rule for the diſtribution of the effects of a layman and a clerk, and of a beneficed and non-beneficed clerk. If a beneficed clerk died inteſtate, the goods which accrued to him by means of his benefice were, by the canon law, to go to the ſucceſſor; thoſe that had become his property on other perſonal conſiderations, were to go to the *conſanguinei*, and, upon failure of them, to the church. The ſame of a clerk not beneficed; only proviſion had been made in the early times of Chriſtianity, that the widow ſhould come in after the *conſanguinei*, and before the church. In caſe of laymen inteſtate, upon failure of the *conſanguinei* and the widow, the *fiſcus* was to ſucceed. The manner in which the *conſanguinei* were to be reckoned, is thus laid down by Lyndwood. The firſt conſideration, ſays he, in the ſucceſſion *ab inteſtato*, is that of the children; the ſecond, of the aſcendants, with ſome collaterals, if any are extant; the third, of the tranſverſe line; the firſt two being extended *in infinitum*; the third only as far as the tenth degree, whether *agnati* or *cognati*. Upon failure of theſe, and not till then, if there was any widow of the deceaſed, ſhe was to ſucceed; and after her the *fiſcus* [o]. The portion to the *ſervitores*, was to be according to their ſeveral merits. *Propinquus* might be underſtood either of blood or neighbourhood, and the *others*, according to Lyndwood, muſt be poor perſons; who having before been reckoned among the *piæ cauſæ*, were thus doubly provided for [p]. The whole of the effects was to be diſtributed in the above way; formerly by the ordinary

[o] Lynd. 180. f. [p] Ibid. 180. h. i. k.