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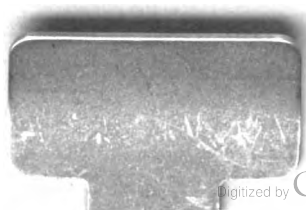
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THE  
HISTORY  
OF THE  
**Common Law**  
OF  
ENGLAND.

---

Divided into Twelve Chapters.

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By Sir MATTHEW HALE, Knt.  
late Lord Chief Justice of the Court  
of KING's BENCH.

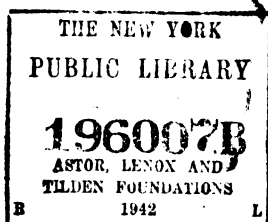
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THE



I

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THE  
HISTORY  
OF THE  
Common Law  
OF  
ENGLAND.

---

CHAP. I.

*Concerning the Distribution of the Laws of  
England into Common Law, and Statute  
Law. And First, concerning the Statute  
Law, or Acts of Parliament.*

**T**HE Laws of England may aptly enough be divided into two Kinds, viz. *Lex Scripta*, the written Law; and *Lex non Scripta*, the unwritten Law: For although (as shall be shewn hereafter) all the Laws of this Kingdom have some Monuments or Memorials there-  
B there-

CHAP. I.  
The Kinds  
of Law.

CHAP. I. thereof in Writing, yet all of them have not their Original in Writing; for some of those Laws have obtain'd their Force by immemorial Usage or Custom, and such Laws are properly call'd *Leges non Scriptæ*, or unwritten Laws or Customs.

1. *Leges non Scriptæ.*

2. *Leges Scriptæ.*

Those Laws therefore, that I call *Leges Scriptæ*, or written Laws, are such as are usually called *Statute Laws*, or Acts of Parliament, which are originally reduced into Writing before they are enacted, or receive any binding Power, every such Law being in the first Instance formally drawn up in Writing, and made, as it were, a *Tripartite Indenture*, between the King, the Lords and the Commons; for without the concurrent Consent of all those Three Parts of the Legislature, no such Law is, or can be made: But the Kings of this Realm, with the Advice and Consent of both Houses of Parliament, have Power to make New Laws, or to alter, repeal, or enforce the Old. And this has been done in all Succession of Ages.

Statute  
Laws of  
Two  
Kinds.

Time of  
Memory.

Now, *Statute Laws*, or Acts of Parliament, are of Two Kinds, viz. First, Those Statutes which were made *before Time of Memory*; and, Secondly; Those Statutes which were made *within or since Time of Memory*; wherein observe, That according to a juridical Account and legal Signification, *Time within Memory* is the Time of Limitation in a Writ of Right; which by the Statute of *Westminster 1. cap. 38.* was settled, and reduced to the Beginning of the Reign of King *Richard 1. or Ex prima Coronatione Regis Richardi Primi,*

*Primi*, who began his Reign the 6th of CHAP. I.  
*July* 1189, and was crown'd the 3d of *September* following: So that whatsoever was  
 before that Time, is *before* Time of Memory; and what is since that Time, is, in a  
 legal Sense, said to be *within* or since the  
 Time of Memory.

And therefore it is, that those Statutes or  
 Acts of Parliament that were made before  
 the Beginning of the Reign of King *Richard* 1. and have not since been repealed  
 or altered, either by contrary Usage, or by  
 subsequent Acts of Parliament, are now ac-  
 counted Part of the *Lex non Scripta*, being  
 as it were incorporated therewith, and be-  
 come a Part of the Common Law; and in  
 Truth, such Statutes are not now pleadable  
 as Acts of Parliament, (because what is *be-*  
*fore* Time of Memory is supposed without  
 a Beginning, or at least such a Beginning  
 as the Law takes Notice of) but they ob-  
 tain their Strength by meer immemorial  
 Usage or Custom.

And doubtless, many of those Things Ancient Statutes.  
 that now obtain as Common Law, had their  
 Original by Parliamentary Acts or Consti-  
 tutions, made in Writing by the King,  
 Lords and Commons; though those Acts  
 are now either not extant, or if extant,  
 were made before Time of Memory; and  
 the Evidence of the Truth hereof will easi-  
 ly appear, for that in many of those old  
 Acts of Parliament that were made before  
 Time of Memory, and are yet extant, we  
 may find many of those Laws enacted which

## CHAP. I.



now obtain meerly as Common Law, or the General Custom of the Realm: And were the rest of those Laws extant, probably the Footsteps of the Original Institution of many more Laws that now obtain meerly as Common Law, or Customary Laws, by immemorial Usage, would appear to have been at first Statute Laws, or Acts of Parliament.

## Of Two Periods.

Those ancient Acts of Parliament which are ranged under the Head of *Leges non Scriptæ*, or Customary Laws, as being made before Time of Memory, are to be considered under Two Periods: *Viz.* First, Such as were made before the coming in of King *William I.* commonly called, *The Conqueror*; or, Secondly, Such as intervened between his coming in, and the Beginning of the Reign of *Richard I.* which is the legal Limitation of Time of Memory.

1. Before  
K. W. I.

The former Sort of these Laws are mentioned by our ancient Historians; especially by *Brompton*, and are now collected into one Volume by *William Lambard*, Esq; in his *Tractatus de priscis Anglorum Legibus*, being a Collection of the Laws of the Kings, *Ina, Alfred, Edward, Athelstane, Edmond, Edgar, Ethelred, Canutus*, and of *Edward the Confessor*; which last Body of Laws, compiled by *Edward the Confessor*, as they were more full and perfect than the rest, and better accommodated to the then State of Things, so they were such whereof the *English* were always very zealous, as being the great Rule and Standard of their Rights

## Common Law of England.

5

Rights and Liberties: Whereof more here-  
after. CHAP. 1.

The second Sort are those Edicts, Acts of Parliament, or Laws, that were made after the coming in of King *William*, commonly named, *The Conqueror*, and before the beginning of the Reign of King *Richard I.* and more especially are those which follow; whereof I shall make but a brief Remembrance here, because it will be necessary in the Sequel of this Discourse (it may be more than once) to resume the Mention of them; and besides, Mr. *Selden*, in his Book called, *Janus Anglorum*, has given a full Account of those Laws; so that at present it will be sufficient for me, briefly to collect the Heads or Divisions of them, under the Reigns of those several Kings wherein they were made, viz.

*First*, The Laws of King *William I.* These consisted in a great Measure of the Repetition of the Laws of King *Edward the Confessor*, and of the enforcing them by his own Authority, and the Assent of Parliament, at the Request of the *English*; and some new Laws were added by himself with the like Assent of Parliament, relating to Military Tenures, and the Preservation of the publick Peace of the Kingdom; all which are mention'd by Mr. *Lambart*, in the Tractate before-mentioned, but more fully by Mr. *Selden*, in his Collections and Observations upon *Eadmerus*. K. W. 1.

*Secondly*, We find little of new Laws after this, till the Time of King *Henry I.* who K. H. 1.



## CHAP. I.

besides the Confirmation of the Laws of the Confessor, and of King *William I.* brought in a new Volume of Laws, which to this Day are extant, and called the *Laws of King Henry 1.* The entire Collection of these is entered in the Red Book of the *Exchequer*, and from thence are transcribed and published by the Care of Sir *Roger Twisden*, in the latter End of Mr. *Lambart's* Book before-mention'd; what the Success of those Laws were in the Time of King *Steven*, and King *Henry 2.* we shall see hereafter: But they did not much obtain in *England*, and are now for the most Part become wholly obsolete, and in Effect quite antiquated.

## K. H. 2.

*Thirdly*, The next considerable Body of Acts of Parliament, were those made under the Reign of King *Henry 2.* commonly called, *The Constitutions of Clarendon*; what they were, appears best in *Hoveden* and *Mat. Paris*, under the Years of that King. We have little Memory else of any considerable Laws enacted in this King's Time, except his Assizes, and such Laws as related to the Forests; which were afterwards improv'd under the Reign of King *Richard 1.* But of this hereafter, more at large.

And this shall serve for a short Instance of those Statutes, or Acts of Parliament, that were made *before Time of Memory*; whereof, as we have no Authentical Records, but only Transcripts, either in our ancient Historians, or other Books and Manuscripts; so they being Things done before Time of Memory, obtain at this Day no further than as by Usage and Custom they are,

## Common Law of England.

7

are, as it were, engrafted into the Body of the Common Law, and made a Part thereof. CHAP. I.

And now I come to those *Leges Scriptæ*, Leges  
or Acts of Parliament, which were made Scriptæ,  
since or within the Time of Memory, Two  
*viz.* Since the Beginning of the Reign of Kings.  
*Richard 1.* and those I shall divide into Two  
General Heads, *viz.* Those we usually call  
the *Old Statutes*, and those we usually call  
the *New* or later Statutes: And because I  
would prefix some certain Time or Boun-  
dary between them, I shall call those the  
*Old Statutes* which end with the Reign of Old Sta-  
King *Edward 2.* and those I shall call the tutes.  
*New* or later Statutes which begin with the  
Reign of King *Edward 3.* and so are de-  
rived through a Succession of Kings and  
Queens down to this Day, by a continued  
and orderly Series.

Touching these later Sort I shall, say no- Later Sta-  
thing, for they all keep an orderly and tutes.  
regular Series of Time, and are extant upon  
Record, either in the Parliament Rolls, or  
in the Statute Rolls of King *Edward 3.*  
and those Kings that follow: For except-  
ing some few Years in the Beginning of  
K. *Edward 3.* *i. e.* 2, 3, 7, 8 & 9 *Edw. 3.* all  
the Parliament Rolls that ever were since  
that Time have been preserved, and are ex-  
tant; and, for the most Part, the Petitions  
upon which the Acts were drawn up, or  
the very Acts themselves.

Now therefore touching the elder Acts Old Sta-  
of Parliament, *viz.* Those that were made tutes in  
between the First Year of the Reign of the Time  
K. *Richard 1.* and the last Year of K. *Edward 2.* of K. R

B 4

we

CHAP. I. we have little extant in any authentical History; and nothing in any authentical Record touching Acts made in the Time of K. *Rich. I.* unless we take in those Constitutions and Assizes mentioned by *Hoveden* as aforesaid.

K. *John.* Neither is there any great Evidence, what Acts of Parliament pass'd in the Time of King *John*; tho' doubtless many there were both in his Time, and in the Time of K. *Rich. I.* But there is no Record extant of them, and the *English* Histories of those Times give us but little Account of those Laws; only *Matthew Paris* gives us an Historical Account of the *Magna Charta*, and *Charta de Foresta*, granted by King *John* at *Running Mead* the 15th of *June*, in the Seventeenth Year of his Reign.

His two  
Charters.

Granted in  
a Parlia-  
mentary  
Way.

And it seems, that the Concession of these Charters was in a Parliamentary Way; you may see the Transcripts of both Charters *verbatim* in *Mat. Paris*, and in the Red Book of the *Exchequer*. There were seven Pair of these Charters sent to some of the Great Monasteries under the Seal of King *John*, one Part whereof sent to the *Abby* of *Tewkesbury* I have seen under the Seal of that King; the Substance thereof differs something from the *Magna Charta*, and *Charta de Foresta*, granted by King *Henry 3.* but not very much, as may appear by comparing them.

But tho' these Charters of King *John* seem to have been passed in a kind of Parliament, yet it was in a Time of great Confusion between that King and his Nobles; and therefore

fore they obtained not a full Settlement till the Time of King *Henry 3.* when the Substance of them was enacted by a full and solemn Parliament.

I therefore come down to the Times of those succeeding Kings, *Henry 3. Edw. 1. and Edw. 2.* and the Statutes made in the Times of those Kings, I call the *Old Statutes*; partly because many of them were made but in Affirmance of the Common Law; and partly because the rest of them, that made a Change in the Common Law, are yet so ancient, that they now seem to have been as it were a Part of the Common Law, especially considering the many Expositions that have been made of them in the several Successions of Times, whereby as they became the great Subject of Judicial Resolutions and Decisions; so those Expositions and Decisions, together also with those old Statutes themselves, are as it were incorporated into the very Common Law, and become a Part of it.

Old Statutes.

In the Times of those three Kings last mentioned, as likewise in the Times of their Predecessors, there were doubtless many more Acts of Parliament made than are now extant of Record, or otherwise, which might be a Means of the Change of the Common Law in the Times of those Kings from what it was before, tho' all the Records or Memorials of those Acts of Parliament introducing such a Change, are not at this Day extant: But of those that are extant, I shall give you a brief Account,  
not

CHAP. I. not intending a large or accurate Treatise touching that Matter.

K. H. 3. The Reign of *Henry 3.* was a troublesome Time, in respect of the Differences between him and his Barons, which were not composed till his 51st Year, after the Battle of *Evesham*. In his Time there were many Parliaments, but we have only one Summons of Parliament extant of Record in his Reign, viz. 49 *Henry 3.* and we have but few of those many Acts of Parliament that passed in his Time, viz. The great Charter, and *Charta de Foresta*, in the Ninth Year of his Reign, which were doubtless pass'd in Parliament; the Statute of *Merton*, in the 20th Year of his Reign; the Statute of *Marlbridge*, in the 52d Year; and the *Dictum sive Edictum de Kenelworth*, about the same Time; and some few other old Acts.

K. E. 1. In the Time of *K. Edw. 1.* there are many more Acts of Parliament extant than in the Time of *K. Henry 3.* Yet doubtless, in this King's Time, there were many more Statutes made than are now extant: Those that are now extant, are commonly bound together in the old Book of *Magna Charta*. By those Statutes, great Alterations and Amendments were made in the Common Law; and by those that are now extant, we may reasonably guess, that there were considerable Alterations and Amendments made by those that are not extant, which possibly may be the real, tho' sudden Means of the great Advance and Alteration of the Laws of *England* in this King's Reign, over what

## Common Law of England.

II

what they were in the Time of his Predecessors. CHAP. I.

The first Summons of Parliament that I remember extant of Record in this King's Time, is 23 *Edw. 1.* tho' doubtless there were many more before this, the Records whereof are either lost or mislaid: For many Parliaments were held by this King before that Time, and many of the Acts pass'd in those Parliaments are still extant; as, the Statutes of *Westminster 1.* in the 3d of *Edw. 1.* The Statutes of *Gloucester, 6 Edw. 1.* The Statutes of *Westminster 2.* and of *Winton, 13 Edw. 1.* The Statutes of *Westminster 3.* and of *Quo Warranto, 18 Edw. 1.* And divers others in other Years, which I shall have Occasion to mention hereafter.

In the Time of *K. Edw. 2.* many Parliaments were held, and many Laws were enacted; but we have few Acts of Parliament of his Reign extant, especially of Record. K. E. 2.

And now, because I intend to give some short Account of some general Observations touching Parliaments, and of Acts of Parliament pass'd in the Times of those three Princes, viz. *Henry 3. Edw. 1.* and *Edw. 2.* because they are of greatest Antiquity, and therefore the Circumstances that attended them most liable to be worn out by Process of Time, I will here mention some Particulars relating to them to preserve their Memory, and which may also be useful to be known in relation to other Things.

We

## The History of the

## CHAP. I.

Parliamentary  
Records.

We are therefore to know, That there are these several Kinds of Records of Things done in Parliament, or especially relating thereto, *viz.* 1. The Summons to Parliament. 2. The Rolls of Parliament. 3. Bundles of Petitions in Parliament. 4. The Statutes, or Acts of Parliament themselves. And, 5. The *Brevia de Parlamento*, which for the most part were such as issued for the Wages of Knights and Burgeffes; but with these I shall not meddle,

Summons  
to Parlia-  
ment.

*First*, as to the Summons to Parliament. These Summons to Parliament are not all entred of Record in the Times of *Henry 3.* and *Edw. 1.* none being extant of Record in the Time of *Hen. 3.* but that of 49 *Hen. 3.* and none in the Time of *Edw. 1.* till the 23 *Edw. 1.* But after that Year, they are for the most part extant of Record, *viz.* In *Dorso Claus' Rotulorum*, in the Backside of the Close Rolls.

Rolls of  
Parlia-  
ment.

*Secondly*, As to the Rolls of Parliament, *viz.* The Entry of the several Petitions, Answers and Transactions in Parliament. Those are generally and successively extant of Record in the *Tower*, from 4 *Edw. 3.* downward till the End of the Reign of *Edw. 4.* Excepting only those Parliaments that intervened between the 1st and the 4th, and between the 6th and the 11th, of *Edw. 3.*

Many  
lost, &c.

But of those Rolls in the Times of *Hen. 3.* and *Edw. 1.* and *Edw. 2.* many are lost and few extant; also, of the Time of *Henry 3.*

1

I have

I have not seen any Parliament Roll; and all that I ever saw of the Time of *Edw. 1.* was one Roll of Parliament in the Receipt of the *Exchequer* of 18 *Edw. 1.* and those Proceedings and Remembrances which are in the *Liber placitor' Parliamenti* in the *Tower*, beginning, as I remember, with the 20th Year of *Edw. 1.* and ending with the Parliament of *Carlisle*, 35 *Edw. 1.* and not continued between those Years with any constant Series; but including some Remembrances of some Parliaments in the Time of *Edw. 1.* and others in the Time of *Edw. 2.*

In the Time of *Edw. 2.* besides the *Rotulus Ordinationum*, of the Lords Ordoners, about 7 *Edw. 2.* we have little more than the Parliament Rolls of 7 & 8 *Edw. 2.* and what others are interspersed in the Parliament Book of *Edw. 1.* above mentioned, and, as I remember, some short Remembrances of Things done in Parliament in the 19 *Edw. 3.*

*Thirdly*, As to the Bundles of Petitions in Parliament. They were for the most part Petitions of private Persons, and are commonly endorsed with Remissions to the several Courts where they were properly determinable. There are many of those Bundles of Petitions, some in the Times of *Edw. 1.* and *Edw. 2.* and more in the Times of *Edw. 3.* and the Kings that succeeded him.

*Fourthly*, The Statutes, or Acts of Parliament themselves. These seem, as if in the Time of *Edw. 1.* they were drawn up into the Form of a Law in the first Instance, and so

Bundles of  
Petitions.

Acts, or  
Statutes.



## CHAP. I.

Manner of  
Passing  
anciently

And of  
later  
Times.

so assented to by both Houses, and the King, as may appear by the very Observation of the Contexture and Fabrick of the Statutes of those Times. But from near the Beginning of the Reign of *Edw. 3.* till very near the End of *Hen. 6.* they were not in the first Instance drawn up in the Form of Acts of Parliament; but the Petition and the Answer were entred in the Parliament Rolls, and out of both, by Advice of the Judges, and others of the King's Council, the Act was drawn up conformable to the Petition and Answer, and the Act itself for the most part entred in a Roll, called, *The Statute Roll*, and the Tenor thereof affixed to Proclamation Writs, directed to the several Sheriffs to proclaim it as a Law in their respective Counties.

But because sometimes Difficulties and Troubles arose, by this extracting of the Statute out of the Petition and Answer; about the latter End of *Hen. 6.* and Beginning of *Edward 4.* they took a Course to reduce 'em, even in the first Instance, into the full and compleat Form of Acts of Parliament, which was prosecuted (or Entred) commonly in this Form: *Item quedam Petitio exhibita fuit in hoc Parlamento formam actus in se continens, &c.* and abating that Stile, the Method still continues much the same, namely; That the entire Act is drawn up in Form, and so comes to the King for his Assent.

The ancient Method of passing Acts of Parliament being thus declared, I shall now  
2 give

give an Account touching those Acts of Parliament that are at this Day extant of the Times of *Henry 3. Edw. 1. and Edw. 2.* and they are of two Sorts, *viz.* Some of them are extant of Record; others are extant in ancient Books and Memorials, but none of Record. And those which are extant of Record, are either Recorded in the proper and natural Roll, *viz. the Statute Roll*; or they are entred in some other Roll, especially in the *Clofe Rolls* and *Patent Rolls*, or in both. Those that are extant, but not of Record, are such as tho' they have no Record extant of them, but possibly the same is lost; yet they are preserved in ancient Books and Monuments. and in all Times have had the Reputation and Authority of Acts of Parliament.

CHAP. I.  
Statutes  
extant.  
Two Sorts.

1. Of Record.

For an Act of Parliament made within Time of Memory, loses not its being so, because not extant of Record, especially if it be a general Act of Parliament. For of general Acts of Parliament, the Courts of Common Law are to take Notice without pleading of them; and such Acts shall never be put to be tried by the Record, upon an Issue of *Nul tiel Record*, but it shall be tried by the Court, who, if there be any Difficulty or Uncertainty touching it or the right Pleading of it, are to use for their Information ancient Copies, Transcripts, Books, Pleadings and Memorials to inform themselves, but not to admit the same to be put in Issue by a Plea of *Nul tiel Record*.

2. Not of Record.

For,

## CHAP. I.

For, as shall be shewn hereafter, there are very many old Statutes which are admitted and obtain as such, tho' there be no Record at this Day extant thereof, nor yet any other written Evidence of the same, but what is in a manner only Traditional, as namely, Ancient and Modern Books of Pleadings, and the common receiv'd Opinion and Reputation, and the Approbation of the Judges Learned in the Laws: For the Judges and Courts of Justice are, *ex Officio*, (bound) to take Notice of publick Acts of Parliament, and whether they are truly pleaded or not, and therefore they are the Triers of them. But it is otherwise of private Acts of Parliament, for they may be put in Issue, and tried by the Record upon *Nul tiel Record* pleaded, unless they are produced exemplified, as was done in the *Prince's Case* in my Lord *Coke's* 8th *Rep.* and therefore the Averment of *Nul tiel Record* was refused in that Case.

The first  
Statute  
Roll.

The old Statutes or Acts of Parliament that are of Record, as is before said, are entered either upon the proper Statute Roll, or some other Roll in *Chancery*.

The first Statute Roll which we have, is in the *Tower*, and begins with *Magna Charta*, and ends with *Edw. 3.* and is called *Magnus Rotulus Statutor*. There are five other Statute Rolls in that Office, of the Times of *Richard 2.* *Henry 4.* *Hen. 5.* *Hen. 6.* and *Edw. 4.*

Ancient  
Statutes of  
Record.

I shall now give a Scheme of those ancient Statutes of the Times of *Henry 3.*  
*Edw.*

Edw. 1. and Edw. 2. that are recorded in the first of those Rolls or elsewhere, to the best of my Remembrance, and according to those Memorials I have long had by me, viz.

*Magna Charta. Magno Rot. Stat. membr. 40.*  
 & Rot. Cartar. 28 E. 1 membr. 16.

*Charta de Foresta. Mag. Rot. Stat. membr. 19.*  
 & Rot. Cartar. 28 E. 1. membr. 26.

*Stat. de Gloucestre. Mag. Rot. Stat. membr. 47.*

*Westm. 2. Rot. Mag. Stat. membr. 47.*

*Westm. 3. Rot. Clauso, 18 E. 1. membr. 6.*

*Dorso.*

*Winton. Rot. Mag. Stat. membr. 41. Rot. Clauso, 8 E. 3. membr. 6. Dorso. Pars. 2. Rot. Clauso, 5 R. 2. membr. 13. Rot. Paten. 25 E. 1. membr. 13.*

*De Mercatoribus. Mag. Rot. Stat. membr. 47.*  
*In Dorso.*

*De Religiosis. Mag. Rot. Stat. membr. 47.*

*Articuli Cleri. Mag. Rot. Stat. membr. 34.*  
*Dorso 2 Pars. Pat. E. 1. 2. membr. 34. 2. Pars. Pat. 2 E. 3. membr. 15.*

*De hiis qui ponendi sunt in Assis. Mag. Rot. Stat. membr. 41.*

*De Finibus levatis. Mag. Rot. Stat. membr. 37.*

*De defensione Juris liberi Parliam. Lib. Parl. E. 1. fo. 32.*

*Stat. Eborum. Mag. Rot. Stat. membr. 32.*

*De conjunctis insecutis. Mag. Rot. Stat. membr. 34.*

*De Escætoribus. Mag. Rot. Stat. membr. 35.*  
*Dorso, & Rot. Claus. 29 E. 1. membr. 14.*  
*Dorso.*

C

Stat.

# The History of the

*Stat. de Lincolne. Mag. Rot. Stat. membr. 32.*  
*Stat. de Priscis. Rot. Mag. Stat. membr. 33.*  
*In Scheda de libertatibus perquirendis, vel Rot.*  
*Claus. 27 E. 1. membr. 24.*

*Stat. de Aston Burnel. Rot. Mag. Stat.*  
*membr. 46. Dorso, & Rot. Claus. 11. E. 1.*  
*membr. 2.*

*Juramentum Vicecomit. Rot. Mag. Stat.*  
*membr. 34. Dorso, & Rot. Claus. 5 E. 2.*  
*membr. 23.*

*Articuli Stat. Gloucestrie. Rot. Claus. 2 E. 2.*  
*Pars. 2. membr. 8.*

*De Pistoribus & Braciatoribus. 2 Pars; Claus.*  
*vel Pat. 2 R. 2. membr. 29.*

*De asportatis Religiosor. Mag. Rot. Stat.*  
*membr. 33.*

*Westm. 4. De Vicecomitibus & Viridi cera.*  
*Rot. Mag. Stat. membr. 33. In Dorso.*

*Confirmationes Chartarum. Mag. Rot. Stat.*  
*membr. 28.*

*De Terris Templariorum. Mag. Rot. Stat.*  
*membr. 31. in Dorso, & Claus. 17 E. 2. membr. 4.*

*Litera patens super pris is bonorum Cleri. Rot.*  
*Mag. Stat. membr. 33. In Dorso.*

*De Forma mittendi extractas ad Scaccar. Rot.*  
*Mag. Stat. membr. 36. & membr. 30. In Dorso.*

*Statutum de Scaccar. Mag. Rot. Stat.*

*Statutum de Rutland. Rot. Claus. 12 E. 1.*

*Ordinatio Forestæ. Mag. Rot. Stat. membr. 30.*  
*& Rot. Claus. 17 E. 2. Pars 2. membr. 3.*

According to a strict Inquiry made about  
 30 Years since, these were all the old Sta-  
 tutes of the Times of *Hen. 3. Edw. 1. and*  
*Edw. 2.* that were then to be found of Re-  
 cord;

cord; what other Statutes have been found since, I know not. CHAP. I.

The Ordinance called *Butler's*, for the Heir to punish Waste in the Life of the Ancestor, tho' it be of Record in the Parliament Book of *Edw. 1.* yet it never was a Statute, nor never so received, but only some Constitution of the King's Council or Lords in Parliament, and which never obtain'd the Strength or Force of an Act of Parliament. *Butler's Ordinance.*

Now those Statutes that ensue, tho' most of 'em are unquestionable Acts of Parliament, yet are not of Record that I know of, but only their Memorials preserved in ancient Printed and Manuscript Books of Statutes; yet they are at this Day for the most part generally accepted and taken as Acts of Parliament, tho' some of 'em are now antiquated and of little Use, viz. Ancient Statutes not of Record.

The Statutes of *Merton*, *Marlbridge*, *Westm. 1.* *Explanatio Statuti Gloucestræ*, *De Champertio*, *De visu Frankplegii*, *De pane & Cervisia*, *Articuli Inquisitionis super Stat. de Winton*, *Circumspecte agatis*, *De districtione Scaccarii*, *De Conspirationibus*, *De vocatis ad Warrant.* *Statut. de Carliol*, *De Prerogativa Regis*, *De modo faciendi Homag.* *De Wardis & Relevis* *Dies Communes in Banco.* *Stat. de Bigamis*, *Dies Communes in Banco in casu consimili.* *Stat. Hiberniæ*, *De quo Warranto*, *De Essoin calumpniand.* *Judicium collistrigii*, *De Frangentibus Prisonar.* *De malefactoribus in Parcis*, *De Consultationibus*, *De Officio Coronatoris*, *De Protectionibus*,  
C 2

CHAP. I. *nibus, Sententia lata super Chartas, Modus levandi Fines. Statut. de Gavelet, De Militibus, De Vasto, De anno Biffextili, De appellatis, De Extenta Manerii, Compositio Mensurarum vel Computatio Mensurarum. Stat. de Quo Warranto, Ordinatio de Inquisitionibus, Ordinatio de Foresta, De admensura Terre, De dimissione Denarior. Statut. de Quo Warranto novum, Ne Rector prosternat arbores in Cœmeterio, Consuetudines & Assisa de Foresta, Compositio de Ponderibus, De Tallagio, De visu Terræ & servitio Regis, Compositio ulnarum & partiarum, De Terris amortizandis, Dictum de Kenelworth, &c.*

From whence we may collect these Two Observations, viz.

*First*, That altho' the Record itself be not extant, yet general Statutes made within Time of Memory, namely, since 1 *Richardi Primi*, do not lose their Strength, if any authenticall Memorials thereof are in Books, and seconded with a general receiv'd Tradition attesting and approving the same.

Many Acts  
of Parliam-  
ent lost.

*Secondly*, That many Records, even of Acts of Parliament, have in long Process of Time been lost, and possibly the Things themselves forgotten at this Day, which yet in or near the Times wherein they were made, might cause many of those authoritative Alterations in some Things touching the Proceedings and Decisions in Law: The Original Cause of which Change being otherwise at this Day hid and unknown to us;

us; and indeed, Histories (and Annals) give us an Account of the Suffrages of many Parliaments, whereof we at this Time have none, or few Footsteps extant in Records or Acts of Parliament, The Instance of the great Parliament at *Oxford*, about 40th of *Henry 3.* may, among many others of like Nature, be a concurrent Evidence of this: For tho' we have Mention made in our Histories of many Constitutions made in the said Parliament at *Oxford*, and which occasioned much Trouble in the Kingdom, yet we have no Monuments of Record concerning that Parliament, or what those Constitutions were.

CHAP. I.

And thus much shall serve touching those Old Statutes or *Leges Scriptæ*, or Acts of Parliament made in the Times of those three Kings, *Henry 3.* *Edw. 1.* and *Edw. 2.* Those that follow in the Times of *Edw. 3.* and the succeeding Kings, are drawn down in a continued Series of Time, and are extant of Record in the Parliament Rolls, and in the Statute Rolls, without any remarkable Omission, and therefore I shall say nothing of them.



## C H A P. II.

*Concerning the Lex non Scripta, i. e.  
The Common or Municipal Laws of this  
Kingdom.*

CHAP. 2.

The Com-  
mon Law  
consists of

General  
Customs,

And par-  
ticular.

Written in  
Books, &c.

**I**N the former Chapter, I have given you a short Account of that Part of the Laws of *England* which is called *Lex Scripta*, namely, Statutes or Acts of Parliament, which in their original Formation are reduced into Writing, and are so preserv'd in their Original Form, and in the same Stile and Words wherein they were first made: I now come to that Part of our Laws called, *Lex non Scripta*, under which I include not only General Customs, or the Common Law properly so called, but even those more particular Laws and Customs applicable to certain Courts and Persons, whereof more hereafter.

And when I call those Parts of our Laws *Leges non Scriptæ*, I do not mean as if all those Laws were only Oral, or communicated from the former Ages to the later, merely by Word. For all those Laws have their several Monuments in Writing, whereby they are transferr'd from one Age to another, and without which they would soon lose all kind of Certainty: For as the Civil and Canon Laws have their *Responsa Prudentum*,

*dentum Consilia & Decisiones, i. e.* their Canons, Decrees, and Decretal Determinations extant in Writing; so those Laws of *England* which are not comprized under the Title of Acts of Parliament, are for the most part extant in Records of Pleas, Proceedings and Judgments, in Books of Reports, and Judicial Decisions, in Tractates of Learned Men's Arguments and Opinions, preserved from ancient Times, and still extant in Writing.

But I therefore stile those Parts of the Law, *Leges non Scriptæ*, because their Authoritative and Original Institutions are not set down in Writing in that Manner, or with that Authority that Acts of Parliament are; but they are grown into Use, and have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom. The Matters indeed, and the Substance of those Laws, are in Writing, but the formal and obliging Force and Power of them grows by long Custom and Use, as will fully appear in the ensuing Discourse.

Hath its  
Force by  
Usage.

For the Municipal Laws of this Kingdom, which I thus call *Leges non Scriptæ*, are of a vast Extant, and indeed include in their Generality all those several Laws which are allowed, as the Rule and Direction of Justice and Judicial Proceedings, and which are applicable to all those various Subjects, about which Justice is conversant. I shall, for more Order, and the better to guide

CHAP. 2. my Reader, distinguish them into Two  
 Is of Two Kinds, viz.  
 Kinds.

*First*, The Common Law, as it is taken in its proper and usual Acceptation.

*Secondly*, Those particular Laws applicable to particular Subjects, Matters or Courts.

1. Common  
 Law its  
 Extent,

1. Touching the former, viz. The Common Law in its usual and proper Acceptation. This is that Law by which Proceedings and Determinations in the King's *Ordinary Courts* of Justice are directed and guided. This directs the Course of Discents of Lands, and the Kinds; the Natures, and the Extents and Qualifications of Estates; therein also the Manner, Forms, Ceremonies and Solemnities of transferring Estates from one to another: The Rules of Settling, Acquiring, and Transferring of Properties; The Forms, Solemnities and Obligation of Contracts; The Rules and Directions for the Exposition of Wills, Deeds and Acts of Parliament. The Process, Proceedings, Judgments and Executions of the King's *Ordinary Courts* of Justice; The Limits, Bounds and Extents of Courts, and their Jurisdictions. The several Kinds of *Temporal* Offences, and Punishments at Common Law; and the Manner of the Application of the several Kinds of Punishments, and infinite more Particulars which extend themselves as large as the many Exigencies in the  
 Distri-

Distribution of the King's *Ordinary* Justice requires. CHAP 2.

And besides these more common and ordinary Matters to which the Common Law extends, it likewise includes the Laws applicable to divers Matters of very great Moment; and tho' by Reason of that Application, the said Common Law assumes divers Denominations, yet they are but Branches and Parts of it; like as the same Ocean, tho' it many times receives a different Name from the Province, Shire, Island or Country to which it is contiguous, yet these are but Parts of the same Ocean. Its Denominations,

Thus the Common Law includes, *Lex Prerogativa*, as 'tis applied with certain Rules to that great Business of the King's Prerogative; so 'tis called *Lex Foresta*, as it is applied under its special and proper Rules to the Business of Forests; so it is called *Lex Mercatoria*, as it is applied under its proper Rules to the Business of Trade and Commerce; and many more Instances of like Nature may be given: Nay, the various and particular Customs of Cities, Towns and Manors, are thus far Parts of the Common Law, as they are applicable to those particular Places, which will appear from these Observations, *viz.*

*First*, The Common Law does determine what of those Customs are good and reasonable, and what are unreasonable and void. *Secondly*, The Common Law gives to those Customs, that it adjudges reasonable, the Force and Efficacy of their Obligation, Its Effects on particular Customs

## CHAP. 2.

gation. *Thirdly*, The Common Law determines what is that Continuance of Time that is sufficient to make such a Custom. *Fourthly*, The Common Law does interpose and authoritatively decide the Exposition, Limits and Extension of such Customs.

Not alter-  
able but by  
Statute.

This Common Law, though the Usage, Practice and Decisions of the King's Courts of Justice may expound and evidence it, and be of great Use to illustrate and explain it; yet it cannot be authoritatively altered or changed but by Act of Parliament. But of this Common Law, and the Reason of its Denomination, more at large hereafter.

2dly, *Particular  
Laws, viz.*

Now, *Secondly*, As to those particular Laws I before mentioned, which are applicable to particular Matters, Subjects or Courts: These make up the second Branch of the Laws of *England*, which I include under the general Term of *Leges non Scriptæ*, and by those particular Laws I mean the Laws Ecclesiastical, and the Civil Law, so far forth as they are admitted in certain Courts, and certain Matters allow'd to the Decision of those Courts, whereof hereafter.

1. Civil.  
2. Ecclesi-  
astical.

It is true, That those Civil and Ecclesiastical Laws are indeed Written Laws; the Civil Law being contain'd in their Pandects, and the Institutions of *Justinian*, &c. (their Imperial Constitutions or Codes answering to our *Leges Scriptæ*, or Statutes.) And the Canon or Ecclesiastical Laws contain'd for the most part in the Canons and Constitutions of Councils and Popes, collected in  
their

their *Decretum Gratiani*, and the Decretal Epistles of Popes, which make up the Body of their *Corpus Juris Canonici*, together with huge Volumes of Councils and Expositions, Decisions, and Tractates of learned Civilians and Canonists, relating to both Laws; so that it may seen at first View very improper to rank these under the Branch of *Leges non Scriptæ*, or Unwritten Laws.

But I have for the following Reason rang'd these Laws among the Unwritten Laws of *England*, viz. because it is most plain, That neither the Canon Law nor the Civil Law have any Obligation as Laws within this Kingdom, upon any Account that the Popes or Emperors made those Laws, Canons, Rescripts or Determinations, or because *Justinian* compiled their *Corpus Juris Civilis*, and by his Edicts confirm'd and publish'd the same as authentical, or because this or that Council or Pope made those or these Canons or Degrees, or because *Gratian*, or *Gregory*, or *Boniface*, or *Clement*, did, as much as in them lie, authenticate this or that Body of Canons or Constitutions; for the King of *England* does not recognize any Foreign Authority as superior or equal to him in this Kingdom, neither do any Laws of the Pope or Emperor, as they are such, bind here: But all the Strength that either the Papal or Imperial Laws have obtained in this Kingdom, is only because they have been receiv'd and admitted either by the Consent of Parliament, and so are Part of the Statute Laws of the Kingdom, or else by

Why accounted  
*Leges non Scriptæ*.

CHAP. 2.



Allowed  
by Usage  
only.

by immemorial Usage and Custom in some particular Cafes and Courts; and no other-wise; and therefore fo far as fuch Laws are received and allowed of here, fo far they obtain and no farther; and the Authority and Force they have here is not founded on, or derived from themfelves; for fo they bind no more with us than our Laws bind in *Rome* or *Italy*. But their Authority is founded merely on their being admitted and received by us, which alone gives 'em their Authoritative Effence, and qualifies their Obligation.

And controul'd by  
the Common Law.

And hence it is, That even in thofe Courts where the Ufe of thofe Laws is indulged according to that Reception which has been allowed 'em: If they exceed the Bounds of that Reception, by extending themfelves to other Matters than has been allowed 'em; or if thofe Courts proceed according to that Law, when it is controul'd by the Common Law of the Kingdom: The Common Law does and may prohibit and punifh them; and it will not be a fufficient Answer, for them to tell the King's Courts, that *Justinian* or Pope *Gregory* have decreed otherwife. For we are not bound by their Decrees further, or otherwife than as the Kingdom here has, as it were transfpos'd the fame into the Common and Municipal Laws of the Realm, either by Admiffion of, or by Enacting the fame, which is that alone which can make 'em of any Force in *England*. I need not give particular Inftances herein; the Truth thereof is plain

plain and evident, and we need go no further than the Statutes of 24 *H. 8. cap. 12.* 25 *H. 8. c. 19, 20, 21.* and the learned Notes of *Selden* upon *Flota*, and the Records there cited; nor shall I spend much Time touching the Use of those Laws in the several Courts of this Kingdom: But will only briefly mention some few Things concerning them.

CHAP. 2.  
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There are Three Courts of Note, wherein the Civil, and in one of them the Canon or Ecclesiastical Law, has been with certain Restrictions allow'd in this Kingdom, *viz.* 1<sup>st</sup>. The Courts Ecclesiastical, of the Bishops and their derivative Officers. 2<sup>dly</sup>. The Admiralty Court. 3<sup>dly</sup>. The *Curia Militaris*, or Court of the Constable and Marshal, or Persons commission'd to exercise that Jurisdiction. I shall touch a little upon each of these.

Three  
Courts  
using the  
Civil and  
Common  
Law.

First, The Ecclesiastical Courts, they are of two Kinds, *viz.* 1<sup>st</sup>. Such as are derived immediately by the King's Commission; such was formerly the Court of High Commission; which tho', without the help of an Act of Parliament, it could not in Matters of Ecclesiastical Cognizance use any Temporal Punishment or Censure, as Fine, Imprisonment, &c. Yet even by the Common Law, the Kings of *England*, being delivered from *Papal Usurpation*, might grant a Commission to hear and determine Ecclesiastical Causes and Offences; according to the King's Ecclesiastical Laws, as *Carwdry's Case*, *Cook's 5th Report*. 2<sup>dly</sup>. Such as are not

1. Ecclesi-  
astical  
Courts.  
Two  
Kinds.



## CHAP. 2.

Quer.

Their Jurisdiction  
derived  
from the  
Crown.

not derived by any immediate Commission from the King; but the Laws of *England* have annexed to certain Offices, Ecclesiastical Jurisdiction, as incident to such Offices: Thus every Bishop by his Election and Confirmation, even before Consecration, had Ecclesiastical Jurisdiction annex'd to his Office, as *Judex Ordinarius* within his Diocese; and diverse Abbots anciently, and most Archdeacons at this Day, by Usage, have had the like Jurisdiction within certain Limits and Precincts.

But altho' these are *Judices Ordinarii*, and have Ecclesiastical Jurisdiction annex'd to their Ecclesiastical Offices, yet this Jurisdiction Ecclesiastical in *Foro Exteriori* is derived from the Crown of *England*: For there is no External Jurisdiction, whether Ecclesiastical or Civil, within this Realm, but what is derived from the Crown: It is true, both anciently, and at this Day, the Process of Ecclesiastical Courts runs in the Name, and issues under the Seal of the Bishop; and that Practice stands so at this Day by Virtue of several Acts of Parliament, too long here to recount. But that is no Impediment of their deriving their Jurisdictions from the Crown; for till 27 *H. 8.*



*cap. 24.* the Process in Counties Palatine ran in the Name of the Counts Palatine, yet no Man ever doubted, but that the Palatine Jurisdictions were derived from the Crown.

Touching the Severance of the Bishop's Consistory from the Sheriff's Court: See the

the Charter of King *Will. 1.* and Mr. *Selden's* CHAP. 2.  
Notes on *Eadmerus*.

Now the Matters of Ecclesiastical Jurisdiction are of Two Kinds, Criminal and Civil. Ecclesiastical Jurisdictions of Two Kinds.

The Criminal Proceedings extend to such Crimes, as by the Laws of this Kingdom are of Ecclesiastical Cognizance; as Heresy, Fornication, Adultery, and some others, wherein their Proceedings are, *Pro Reformatione Morum, & pro Salute Animæ*; and the Reason why they have Cognizance of those and the like Offences, and not of others, as Murder, Theft, Burglary, &c. is not so much from the Nature of the Offence (for surely the one is as much a Sin as the other, and therefore, if their Cognizance were of Offences *quatenus peccata contra Deum*, it would extend to all Sins whatsoever, it being against God's Law). But the true Reason is, because the Law of the Land has indulged unto that Jurisdiction the Cognizance of some Crimes and not of others. 1st. Criminal.

The Civil Causes committed to their Cognizance, wherein the Proceedings are *ad Instantiam Partis*, ordinarily are Matters of Tythes, Rights of Institution and Induction to Ecclesiastical Benefices, Cases of Matrimony and Divorces, and Testamentary Causes, and the Incidents thereunto, as Insinuation or Probation of Testaments, Controversies touching the same, and of Legacies of Goods and Moneys, &c. 2d. Civil.

Altho' *de Jure Communi* the Cognizance of Wills and Testaments does not belong to

CHAP. 2.



They use  
the Canon  
Law.

to the Ecclesiastical Court, but to the Temporal or Civil Jurisdiction; yet *de Consuetudine Angliæ pertinet ad Judices Ecclesiasticos*, as *Linwood* himself agrees, *Exercit. de Testamentis, cap. 4. in Glossa*. So that it is the Custom or Law of *England* that gives the Extent and Limits of their external Jurisdiction in *Foro Contentioso*.

The Rule by which they proceed, is the Canon Law, but not in its full Latitude, and only so far as it stands uncorrected, either by contrary Acts of Parliament, or the Common Law and Custom of *England*; for there are divers Canons made in ancient Times, and Decretals of the Popes that never were admitted here in *England*; and particularly in relation to Tythes; many Things being by our Laws privileg'd from Tythes, which by the Canon Law are chargeable, (as Timber, Oar, Coals, &c.) without a Special Custom subjecting them thereunto.

And Civil.

Where the Canon Law, or the *Stylus Curie*, is silent, the Civil Law is taken in as a Director, especially in Points of Exposition and Determination, touching Wills and Legacies.

Not to  
judge of  
Tempo-  
ral Mat-  
ters.

But Things that are of Temporal Cognizance only, cannot by Charter be delivered over to Ecclesiastical Jurisdiction, nor be judged according to the Rules of the Canon or Civil Law, which is *aliud Examen*, and not competent to the Nature of Things of Common Law Cognizance: And therefore, *Mich. 8 H. 4. Rot. 72. coram Rege*, when the

I

Chan-

Chancellor of *Oxford* proceeded according to the Rule of the Civil Law in a Case of Debt, the Judgment was reversed in *B. R.* wherein the principal Error assigned was, because they proceeded *per Legem Civilem ubi quilibet ligens Domini Regis Regni sui Angliæ in quibuscunque placitis & querelis infra hoc Regnum factis & emergentibus de Jure tractari debet per Communem Legem Angliæ*; and altho' King *H. 8. 14 Anno Regni sui*, granted to the University a liberal Charter to proceed according to the Use of the University, *viz.* By a Course much conform'd to the Civil Law; yet that Charter had not been sufficient to have warranted such Proceedings without the Help of an Act of Parliament: And therefore in 13 *Eliz.* an Act passed, whereby that Charter was in Effect enacted; and 'tis thereby that at this Day they have a kind of Civil Law Procedure, even in Matters that are of themselves of Common Law Cognizance, where either of the Parties to the Suit are privileged.

Privilege  
of the U-  
niversity.

The Coertion or Execution of the Sentence in Ecclesiastical Courts, is only by Excommunication of the Person contumacious, and upon Signification thereof into *Chancery*, a Writ *de Excommunicatio capiendo* issues, whereby the Party is imprisoned till Obedience yielded to the Sentence. But besides this Coertion, the Sentences of the Ecclesiastical Courts touching some Matters do introduce a real Effect, without any other Execution; as a Divorce, a *Vinculo Matrimonii* for the Causes of Consanguinity,

Sentence  
enforced.

D

Pre-

CHAP. 2.

Precontract, or Frigidity, do induce a legal Dissolution of the Marriage; so a Sentence of Deprivation from an Ecclesiastical Benefice, does by Virtue of the very Sentence, without any other Coertion or Execution, introduce a full Determination of the Interest of the Person deprived.

And thus much concerning the Ecclesiastical Courts, and the Use of the Canon and Civil Law in them, as they are the Rule and Direction of Proceedings therein.

2dly, The  
Admiral  
Jurisdiction.

Secondly, The second special Jurisdiction wherein the Civil Law is allow'd, at least as a Director or Rule in some Cases, is the Admiral Court or Jurisdiction. This Jurisdiction is derived also from the Crown of *England*, either immediately by Commission from the King, or mediately, which is several Ways, either by Commission from the Lord High Admiral, whose Power and Constitution is by the King, or by the Charters granted to particular Corporations bordering upon the Sea, and by Commission from them, or by Prescription, which nevertheless in Presumption of Law is derived at first from the Crown by Charter not now extant.

Of Two  
Kinds.

The Admiral Jurisdiction is of Two Kinds, viz. *Jurisdidio Voluntaria*, which is no other but the Power of the Lord High Admiral, as the King's General at Sea over his Fleets; or *Jurisdidio Contentiosa*, which is that Power of Jurisdiction which the Judge of the Admiralty has in *Foro Contentioso*; and what I have to say is of this later Jurisdiction.

The

The Jurisdiction of the Admiral Court, as to the Matter of it, is confined by the Laws of this Realm to Things done upon the High Sea only; as Depredations and Piracies upon the High Sea; Offences of Masters and Mariners upon the High Sea; Maritime Contracts made and to be executed upon the High Sea; Matters of Prize and Reprizal upon the High Sea. But touching Contracts or Things made within the Bodies of *English* Counties, or upon the Land beyond the Sea, tho' the Execution thereof be in some Measure upon the High Sea, as Charter Parties, or Contracts made even upon the High Sea, touching Things that are not in their own Nature Maritime, as a Bond or Contract for the Payment of Money; so also of Damages in Navigable Rivers, within the Bodies of Counties, Things done upon the Shore at Low-Water, Wreck of the Sea, &c. These Things belong not to the Admiral's Jurisdiction: And thus the Common Law, and the Statutes of 13 *Rich. 2. cap. 15.* 15 *Rich. 2. cap. 3.* confine and limit their Jurisdiction to Matters Maritime, and such only as are done upon the High Sea.

This Court is not bottom'd or founded upon the Authority of the Civil Law, but hath both its Power and Jurisdiction by the Law and Custom of the Realm, in such Matters as are proper for its Cognizance; and this appears by their Process, *viz.* The Arrest of the Persons of the Defendants, as well as by Attachment of their Goods; and

The  
Ground  
of its Au-  
thority.

CHAP. 2. likewise by those Customs and Laws Maritime, whereby many of their Proceedings are directed, and which are not in many Things conformable to the Rules of the Civil Law; such are those ancient Laws of *Oleron*, and other Customs introduced by the Practice of the Sea, and Stile of the Court.

Also, The Civil Law is allowed to be the Rule of their Proceedings, only so far as the same is not contradicted by the Statute of this Kingdom, or by those Maritime Laws and Customs, which in some Points have obtain'd in Derogation of the Civil Law: But by the Statute 28 *Hen. 8. cap. 15.* all Treasons, Murders, Felonies, done on the High Sea, or in any Haven, River, Creek, Port or Place, where the Admirals have, or pretend to have Jurisdiction, are to be determined by the King's Commission, as if the Offences were done at Land, according to the Course of the Common Law.

And thus much shall serve touching the Court of *Admiralty*, and the Use of the Civil Law therein.

3. The  
Military  
Court.

*Thirdly*, The Third Court, wherein the Civil Law has its Use in this Kingdom, is the Military Court, held before the Constable and Marshal anciently, as the *Judicis Ordinarii* in this Case, or otherwise before the King's Commissioners of that Jurisdiction, as *Judices Delegati*.

The

The Matter of their Jurisdiction is declared and limited by the Statutes of 8 R. 2. *cap. 5.* and 13 R. 2. *cap. 2.* And not only by those Statutes, but more by the very Common Law is their Jurisdiction declared and limited as follows, *viz.*

CHAP. 2.  
Its Jurisdiction.

*First*, Negatively: They are not to meddle with any Thing determinable by the Common Law: And therefore, inasmuch as Matter of Damages, and the Quantity and Determination thereof, is of that Conuzance; the Court of Constable and Marshal cannot, even in such Suits as are proper for their Conuzance, give Damages against the Party convicted before them, and at most can only order Reparation in Point of Honour, as *Mendacium sibi ipsi imponere*: Neither can they, as to the Point of Reparation, in Honour, hold Plea of any such Words or Things, wherein the Party is relievable by the Courts of the Common Law.

Negatively.

*Secondly*, Affirmatively: Their Jurisdiction extends to Matters of Arms and Matters of War, *viz.*

Affirmatively.

*First*, As to Matters of Arms (or Heraldry), the Constable and Marshal had Conuzance thereof, *viz.* Touching the Rights of Coat-Armour, Bearings, Crests, Supporters, Pennons, &c. And also touching the Rights of Place and Precedence, in Cases where either Acts of Parliament or the King's Patent (he being the Fountain



of Honour) have not already determined it, for in such Cases they have no Power to alter it. Those Things were anciently allowed to the Conuzance of the Constable and Marshal, as having some Relation to Military Affairs; but so restrain'd, that they were only to determine the Right, and give Reparation to the Party injured in Point of Honour, but not to repair him in Damages.

But, *Secondly*, As to Matters of War. The Constable and Marshal had a double Power, *viz.*

1. A Ministerial Power, as they were Two great ordinary Officers, anciently, in the King's Army; the Constable being in Effect the King's General, and the Marshal was employed in marshalling the King's Army, and keeping the List of the Officers and Soldiers therein; and his Certificate was the Trial of those whose Attendance was requisite. *Vide Littleton*, §. 102.

Again, 2. The Constable and Marshal had also a Judicial Power, or a Court wherein several Matters were determinable: As 1<sup>st</sup>, Appeals of Death or Murder committed beyond the Sea, according to the Course of the Civil Law. 2<sup>dly</sup>, The Rights of Prisoners taken in War. 3<sup>dly</sup>, The Offences and Miscarriages of Soldiers contrary to the Laws and Rules of the Army: For always preparatory to an actual War, the Kings of this Realm, by Advice of the Constable, (and Marshal) were used to compose a Book of *Rules and Orders* for the

the due Order and Discipline of their Officers and Soldiers, together with certain Penalties on the Offenders; and this was called, *Martial Law*. We have extant in the Black Book of the Admiralty, and elsewhere, several Exemplars of such Military Laws, and especially that of the 9th of *Rich. 2.* composed by the King, with the Advice of the Duke of *Lancaster*, and others.

CHAP. 2.

Of Law  
Martial.

But touching the Business of Martial Law, these Things are to be observed, *viz.*

*First*, That in Truth and Reality it is not a Law, but something indulged rather than allowed as a Law; the Necessity of Government, Order and Discipline in an Army, is that only which can give those Laws a Countenance, *Quod enim Necessitas cogit defendi.*

*Secondly*, This indulged Law was only to extend to Members of the Army, or to those of the opposite Army, and never was so much indulged as intended to be (executed or) exercised upon others; for others who were not listed under the Army, had no Colour of Reason to be bound by Military Constitutions, applicable only to the Army, whereof they were not Parts; but they were to be order'd and govern'd according to the Laws to which they were subject, though it were a Time of War.

*Thirdly*, That the Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be

permitted in Time of Peace, when the King's Courts are open for all Persons to receive Justice, according to the Laws of the Land. This is in Substance declared by the Petition of Right, 3 *Car.* 1. whereby such Commissions and Martial Law were repealed, and declared to be contrary to Law: And accordingly was that famous Case of *Edmond Earl of Kent*; who being taken at *Pomfret*, 15 *Ed.* 2. the King and divers Lords proceeded to give Sentence of Death against him, as in a kind of Military Court by a Summary Proceeding; which Judgment was afterwards in 1 *Ed.* 3. revers'd in Parliament: And the Reason of that Reversal serving to the Purpose in Hand, I shall here insert it as entered in the Record, viz.

*Quod cum quicumq; homo ligeus Domini Regis pro Seditionibus, &c. tempore pacis captus & in quacunque Curia Domini Regis ductus fuerit de ejusmodi Seditionibus & aliis Feloniis sibi impositis per Legem & Consuetudine Regni arrestari debet & Responsonem adduci, Et inde per Communitatem Legem, antequam fuerit Morti adjudicand' (iriari) &c. Unde cum notorium sit & manifestum quod totum tempus quo impositum fuit eidem Comiti propter Mala & Facinora fecisse, ad tempus in quo captus fuit & in quo Morti adjudicatus fuit, fuit tempus Pacis maxime, Cum per totum tempus prædictum & Cancellaria & aliæ plac. Curia Domini Regis aperte fuer' in quibus cuilibet Lex fiebatur sicut fieri consuevit, Nec idem Dominus Rex unquam tempore illo cum vexillis explicatis*

*explicatis Equitabat, &c.* And accordingly the Judgment was revers'd; for Martial Law, which is rather indulg'd than allow'd, and that only in Cases of Necessity, in Time of open War, is not permitted in Time of Peace, when the ordinary Courts of Justice are open. CHAP. 2.

In this Military Court, Court of Honour, or Court Martial, the Civil Law has been used and allowed in such Things as belong to their Jurisdiction; as the Rule or Direction of their Proceedings and Decisions, so far forth as the same is not controuled by the Laws of this Kingdom, and those Customs and Usages which have obtain'd in *England*, which even in Matters of Honour are in some Points derogatory to the Civil Law. But this Court has been long disused upon great Reasons.

And thus I have given a brief Prospect of these Courts and Matters, wherein the Canon and Civil Law has been in some Measure allowed, as the Rule or Direction of Proceedings or Decisions: But although in these Courts and Matters the Laws of *England*, upon the Reasons and Account before expressed, have admitted the Use and Rule of the Canon and Civil Law; yet even herein also, the Common Law of *England* has retain'd those *Signa Superioritatis*, and the Preference and Superintendence in relation to those Courts: Namely,

Prehemi-  
nence of  
the Com-  
mon Law.

1<sup>st</sup>. As the Laws and Statutes of the Realm have prescribed to those Courts their Bounds

Bounds and Limits, so the Courts of Common Law have the Superintendency over those Courts, to keep them within the Limits and Bounds of their several Jurisdictions, and to judge and determine whether they have exceeded those Bounds, or not; and in Case they do exceed their Bounds, the Courts at Common Law issue their Prohibitions to restrain them, directed either to the Judge or Party, or both: And also, in case they exceed their Jurisdiction, the Officer that executes the Sentence, and in some Cases the Judge that gives it, are punishable in the Courts at Common Law; sometimes at the Suit of the King, sometimes at the Suit of the Party, and sometimes at the Suit of both, according to the Variety and Circumstances of the Case.

*2dly.* The Common Law, and the Judges of the Courts of Common Law, have the Exposition of such Statutes or Acts of Parliament as concern either the Extent of the Jurisdiction of those Courts (whether Ecclesiastical, Maritime or Military) or the Matters depending before them; and therefore, if those Courts either refuse to allow these Acts of Parliament, or expound them in any other Sense than is truly and properly the Exposition of them, the King's Great Courts of the Common Law (who next under the King and his Parliament have the Exposition of those Laws) may prohibit and controul them.

And thus much touching those Courts wherein the Civil and Canon Laws are allowed

lowed as Rules and Directions under the Restrictions above-mentioned : Touching which, the Sum of the Whole is this: CHAP. 2.

*First*, That the Jurisdiction exercised in those Courts is derived from the Crown of *England*, and that the last Devolution is to the King, by Way of Appeal. 1.

*Secondly*, That although the Canon or Civil Law be respectively allowed as the Direction or Rule of their Proceedings, yet that is not as if either of those Laws had any original Obligation in *England*, either as they are the Laws of Emperors, Popes, or General Councils, but only by Virtue of their Admission here, which is evident; for that those Canons or Imperial Constitutions which have not been receiv'd here do not bind; and also, for that by several contrary Customs and Stiles used here many of those Civil and Canon Laws are controuled and derogated. 2.

*Thirdly*, That although those Laws are admitted in some Cases in those Courts, yet they are but *Leges sub graviore Lege*; and the Common Laws of this Kingdom have ever obtain'd and retain'd the Superintendency over them, and those *Signa Superioritatis* before-mentioned, for the Honour of the King and the Common Laws of *England*. 3.

## C H A P. III.

*Concerning the Common Law of England,  
its Use and Excellence, and the Reason  
of its Denomination.*

CHAP. 3.

**I** Come now to that other Branch of our Laws, the Common Municipal Law of this Kingdom, which has the Superintendency of all those other particular Laws used in the before-mentioned Courts, and is the common Rule for the Administration of common Justice in this great Kingdom; of which it has been always tender, and there is great Reason for it; for it is not only a very just and excellent Law in it self, but it is singularly accommodated to the Frame of the *English* Government, and to the Disposition of the *English* Nation, and such as by a long Experience and Use is as it were incorporated into their very Temperament, and, in a Manner, become the Completion and Constitution of the *English* Commonwealth.

Infomuch, that even as in the natural Body the due Temperament and Constitution does by Degrees work out those accidental Diseases which sometimes happen, and do reduce the Body to its just State and Constitution; so when at any Time through the Errors, Distempers or Iniquities of Men or Times,

Times, the Peace of the Kingdom, and right Order of Government, have received Interruption, the Common Law has wasted and wrought out those Distempers, and reduced the Kingdom to its just State and Temperament, as our present (and former) Times can easily witness. CHAP. 3.

This Law is that which asserts, maintains, and, with all imaginable Care, provides for the Safety of the King's Royal Person, his Crown and Dignity, and all his just Rights, Revenues, Powers, Prerogatives and Government, as the great Foundation (under God) of the Peace, Happiness, Honour and Justice, of this Kingdom; and this Law is also, that which declares and asserts the Rights and Liberties, and the Properties of the Subject; and is the just, known, and common Rule of Justice and Right between Man and Man, within this Kingdom.

And from hence it is, that the Wisdom of the Kings of *England*, and their great Council, the Honourable House of Parliament, have always been jealous and vigilant for the Reformation of what has been at any Time found defective in it, and so to remove all such Obstacles as might obstruct the free Course of it, and to support, countenance and encourage the Use of it, as the best, safest and truest Rule of Justice in all Matters, as well Criminal as Civil.

I should be too Voluminous to give those several Instances that occur frequently in the Statutes, the Parliament Rolls, and

I

Par-



CHAP. 3. Parliamentary Petitions, touching this Matter; and shall therefore only instance in some few Particulars in both Kinds, viz. Criminal and Civil: And First, in Matters Civil.

1. Civil Cases.

In the Parliament 18 *Edw.* 1. In a Petition in the Lords House, touching Land between *Hugh Lowther* and *Adam Edington*: The Defendant alledges, That if the Title should in this Manner be proceeded in, he should lose the Benefit of his Warranty; and also, that the Plaintiff, if he hath any Right, hath his Remedy at Common Law by Assize of *Mortdancestor*, and therefore demands Judgment, *Si de libero Tenemento debeat hic sine brevi Respondere*; and the Judgment of the Lords in Parliament thereupon is enter'd in these Words, viz. *Et quia actio de predicto Tenemento petendo & etiam suum recuperare, si quid habere debeat vel possit eidem Ade per Assisam mortis Antecessoris competere debet nec est juri consonum vel hactenus in Curia ista usitat' quod aliquis sine Lege Communi, & Brevi de Cancellaria de libero Tenemento suo respondeat & maxime in Casu ubi Breve de Cancellaria Locum habere potest, dictum est prefato Ade quod sibi perquirat per Breve de Cancellaria, si sibi viderit Expedire.*

*Rot. Parl.* 13 *R.* 2. No. 10. *Adam Chaucer* prefer'd his Petition to the King and Lords in Parliament, against *Sir Robert Knolles*, to be relieved touching a Mortgage, which he supposed was satisfied, and to have Restitution of his Lands. The Defendant appeared, and upon the several Allegations on both Sides,

Sides, the Judgment is thus entered, viz. *Et* CHAP. 3.  
*après les Raisons & les Allegeances de l'un party*  
*& de l'autre, y sembles a Seigneurs du Parlement*  
*que le dit Petition ne estoit Petition du Parlement,*  
*deins que le mattier en icel comprize doit estre*  
*disculs per le Commune Ley. Et pur ceo agard*  
*suit que le dit Robert iroit eut sans jour & que*  
*le dit Adam ne prendroit rien per say suit icy,*  
*eins que il sueroit per le Commune Ley si il luy*  
*sembloit ceo faire.* Where we may note, the  
 Words are *Dovut estre*, and not *Poet estre* dis-  
 cusse per le, &c.

*Rot. Parl. 50 Ed. 3. No. 43.* A Judgment  
 being given against the Bishop of *Norwich*,  
 for the Archdeaconry of *Norwich*, in the  
 Common Bench, the Bishop petitioned the  
 Lords in Parliament, that the Record might  
 be brought into that House, and to be re-  
 versed for Error. *Et quoy a luy estoit finale-*  
*ment Respondu per common Assent des ils les Jus-*  
*tices que si Error y fust si ascun a fine force per*  
*le Ley de Angleterre tiel Error suit voire en*  
*Parlement immediatement per voy de Error ains*  
*en Bank le Roy, & en nul part ailhors, Mais si*  
*le Case avenoit que Error fust fait en Bank le*  
*Roy adonque ceo serra amendes en Parlement.*

And let any Man but look over the Rolls  
 of Parliament, and the Bundles of Petitions  
 in Parliament, of the Times of *Ed. 1. Ed. 2.*  
*Ed. 3. Hen. 4. H. 5. & H. 6.* he will find  
 Hundreds of Answers of Petitions in Par-  
 liament concerning Matters determinable  
 at Common Law, endorfed with Answers  
 to this, or the like Effect, viz. *Suez vous a le*  
*Com-*

*Commune Ley; sequatur ad Communem Legem; Perquirat Breve in Cancellaria si sibi viderit expedire; ne est Petition du Parlement, Mandetur ista Petitio in Cancellarium, vel Cancellario, vel Justiciariis de Banco, vel Thesaurario & Baronibus de Scaccario, and the like.*

And these were not barely upon the *Bene placita* of the Lords, but were *De jure*, as appears by those former Judgments given in the Lords House in Parliament; and the Reason is evident; *First*, Because, if such a Course of extraordinary Proceeding should be had before the Lords in the first Instance, the Party should lose the Benefit of his Appeal by Writ of Error, according as the Law allows; and that is the Reason, why even in a Writ of Error, or Petition of Error upon a Judgment in any inferior Court, it cannot go *per Saltum* into Parliament, till it has passed the Court of *King's-Bench*; for that the first Appeal is thither. *Secondly*, Because the Subject would by that Means lose his Trial *per Pares*, and consequently his Attaint, in case of a Mistake in Point of Issue or Damages: To both which he is entitled by Law.

And although some Petitions of this Nature have been determined in that Manner, yet it has been (generally) when the Exception has not been started, or at least not insisted upon: And One Judgment in Parliament, that Cases of that Nature ought to be determined according to the Course of the Common Law, is of greater Weight than many Cases to the contrary, wherein the  
Question

Question was not stirred: Yea, even tho' it should be stirred, and the contrary affirm'd upon a Debate of the Question, because greater Weight is to be laid upon the Judgment of any Court when it is exclusive of its Jurisdiction, than upon a Judgment of the same Court in Affirmance of it.

Now as to Matters Criminal, whether Capital or not, they are determinable by the Common Law, and not otherwise; and in Affirmance of that Law, where the Statutes of *Magna Charta*, cap. 29. 5 Ed. 3. cap. 9. 25 Ed. 3. cap. 4. 29 Ed. 3. cap. 3. 27 Ed. 3. cap. 17. 38 Ed. 3. cap. 9. & 40 Ed. 3. cap. 3. The Effect of which is, That no Man shall be put out of his Lands or Tenements, or be imprisoned by any Suggestion, unless it be by Indictment or Presentment of lawful Men, or by Process at Common Law.

And by the Statute of 1 Hen. 4. cap. 14. it is enacted, That no Appeals be sued in Parliament at any Time to come: This extends to all Accusations by particular Persons, and that not only of Treason or Felony, but of other Crimes and Misdemeanors. It is true, the Petition upon which that Act was drawn up, begins with Appeals of Felony and Treason, but the Close thereof, as also the King's Answer, refers as well to Misdemeanors as Matters Capital; and because this Record will give a great Light to this whole Business, I will here set down the Petition and the Answer verbatim. *Vide Rot. Parl.* 1 Hen. 4. No. 144.

E

Item,

CHAP. 3.

Petition.

1 Hen. 4.

No. 144.

Item, *Supplyont les Commens que desore en avant nul appelle de Traison ne de autre Felony quelconq; soit accept ou receive en le Parlement ains en vous autres Courts de dans vostre Realm dementiers que en vous dits Courts purra estre Terminer come ad ote fait & use ancienement en temps de vous noble Progeniteurs; Et que chescun Person qui en temps a venir serra accuse ou impeach en vostre Parlement ou en ascuns des vos dits Courts per les Seigniors & Commens di vostre Realm ou per ascun Person & defence ou Responce a son Accusement ou Empeachment & sur son Responce raisonat le Record Jugement & Tryal come de ancienement temps ad estre fait & use per les bones Leges de vostre Realm, nient obstant que les dits Empeachments ou Accusements soient faits per les Seigneurs ou Commens de vostre Relme come que de novel en temps de Ric. nadgarius Roy ad estre fait & use a contrar, a tres grand Mischief & tres grand Maleveys Exemple de vostre Realm.*

Answer.

*Le Roy voet que de cy en avant toutes les Appeles de choses faits deins le Relme soient tryez & terminez per les bones Leys faits en temps de tres noble Progeniteurs de nostre dit Seigneur le Roy, Et que tous les Appeles de choses faits hors du Realm, soient tryez & terminez devant le Constable & Marshal de Angleterre, & que nul Appelle soit fait en Parlement desore en ascun temps a venir.*

Srat. 1 H. 4.  
cap. 14.

This is the Petition and Answer. The Statute as drawn up hereupon, is general, and runs thus: Item, *Pur plusieurs grands Inconveniencies & Mischeifs que plusieurs fait ont advenus*

*advenus per colour des plusieurs Appeles faits deins le Realm avant ces heurs ordainez & establiez, Que desore en avant tous Appeles de choses faits deins le Realm soient tries & terminees per les bones Leys de le Realm faits & uses en temps de tres noble Progeniteurs de dit nostre Seigneur le Roy; Et que ils les Appeles de choses faits hors du Realm soient tries & terminees devant le Constable & Marshal pur les temps esteant; Et ouster accordez est & assentus que nulls Appeles soient desore faits ou pursues en Parlement en nul temps avenir.*

Where we may observe, That though the Petition expresses (only) Treason and Felony, yet the Act is general against all Appeals in Parliament; and many Times the Purview of an Act is larger than the Preamble, or the Petition, and so 'tis here: For the Body of the Act prohibits all Appeals in Parliament, and there was Reason for it: For the Mischief, *viz.* Appeals in Parliament in the Time of King *Richard 2.* (as in the Petition is set forth) were not only of Treason and Felony, but of Misdemeanors also, as appears by that great Proceeding, 11 R. 2. against divers, by the Lords Appellants, and consequently it was necessary to have the Remedy as large as the Mischief. And I do not remember that after this Statute there were any Appeals in Parliament, either for Matters Capital or Criminal, at the Suit of any Particular Person or Persons.

## CHAP. 3.

Impeach-  
ments, and  
Appeals.

It is true, Impeachments by the House of Commons, sent up to the House of Lords, were frequent as well after as before this Statute, and that justly, and with good Reason; for that neither the Act nor the Petition ever intended to restrain them, but only to regulate them, *viz.* That the Parties might be admitted to their Defence to them, and as neither the Words of the Act nor the Practice of After-times extended to restrain such Impeachments as were made by the House of Commons, so neither do those Impeachments and Appeals agree in their Nature or Reason; for Appeals were nothing else but Accusations, either of Capital or Criminal Misdemeanors, made in the Lords House by particular Persons; but an Impeachment is made by the Body of the House of Commons, which is equivalent to an Indictment *pro Corpore Regni*, and therefore is of another Nature than an Accusation or Appeal, only herein they agree, *viz.* Impeachments in Cases Capital against Peers of the Realm, have been ever tried and determined in the Lords House; but Impeachments against a Commoner have not been usual in the House of Lords, unless preparatory to a Bill, or to direct an Indictment in the Courts below: But Impeachments at the Prosecutions of the House of Commons, for Misdemeanors as well against a Commoner as any other, have usually received their Determinations and final Judgments in the House of Lords; whereof there have been numerous Precedents

dents in all Times, both before and since CHAP. 3.  
the said Act.

And thus much in general touching the great Regard that Parliaments and the Kingdom have had, and that most justly, to the Common Law, and the great Care they have had to preserve and maintain it, as the Common Interest and Birthright of the King and Kingdom.

I shall now add some few Words touching the Stiles and Appellations of the Common Law, and the Reasons of it: 'Tis called sometimes by Way of Eminence, *Lex Terræ*, as in the Statute of *Magna Charta*, cap. 29. where certainly the Common Law is at least principally intended by those Words, *aut per Legem Terræ*, as appears by the Exposition thereof in several subsequent Statutes, and particularly in the Statute 28 Ed. 3. cap. 3. which is but an Exposition and Declaration of that Statute: Sometimes 'tis called, *Lex Angliæ*, as in the Statute of *Merton*, cap. . . . *Nolumus Leges Angliæ mutare*, &c. Sometimes 'tis called, *Lex & Consuetudo Regni*, as in all Commissions of *Oyer and Terminer*, and in the Statutes of 18 Ed. 1. cap. . . and *De quo Warranto*, and divers others; but most commonly 'tis called, *The Common Law*, or, *The Common Law of England*, as in the Statute of *Articuli super Chartas*, cap. 15. in the Statute 25 Ed. 3. cap. 5. and infinite more Records and Statutes.

Appella-  
tion of the  
Common  
Law.

Now the Reason why 'tis call'd *The Common Law*, or what was the Occasion that



CHAP. 3. first gave that Determination to it, is variously assigned, viz.

The Reasons thereof.

*First*, Some have thought it to be so called by Way of Contradistinction to those other Laws that have obtain'd within this Kingdom; as, 1<sup>st</sup>. By Way of Contradistinction to the Statute Law, thus a Writ of Entry *ad Communem Legem*, is so call'd in Contradistinction to Writs of Entry in *Casu consimili*, and *Casu proviso*, which are given by Act of Parliament. 2<sup>dly</sup>, By Way of Contradistinction to particular Customary Laws: Thus Discents at Common Law, Dower at Common Law, are in Contradistinction to such Dowers and Discents as are directed by particular Customs. And 3<sup>dly</sup>, In Contradistinction to the Civil, Canon, Martial and Military Laws, which are in some particular Cases and Courts admitted, as the Rule of their Proceedings.

*Secondly*, Some have conceived, that the Reason of this Appellation was this, viz. In the Beginning of the Reign of *Edward 3.* before the Conquest, commonly called, *Edward the Confessor*, there were several Laws, and of several Natures, which obtain'd in several Parts of this Kingdom, viz. The *Mercian Laws*, in the Counties of *Gloucester, Worcester, Hereford, Warwick, Oxon, Chester, Salop and Stafford*. The *Danish Laws*, in the Counties of *York, Derby, Nottingham, Leicester, Lincoln, Northampton, Bedford, Bucks, Hertford, Essex, Middlesex, Norfolk, Suffolk, Cambridge and Huntingdon*. The *West-Saxon Laws*, in the Counties of *Kent, Sussex, Surrey, Berks, Southamp-*

Southampton, Wilts, Somerset, Dorset, and CHAP. 3.  
Devon.

This King, to reduce the Kingdom as well under one Law, as it then was under one Monarchical Government, extracted out of all those Provincial Laws, one Law to be observed through the whole Kingdom: Thus *Ranulphus Cestrensis*, cited by Sir Henry Spelman in his *Glossary*, under the Title *Lex*, says, *Ex tribus his Legibus Sanctus Edvardus unam Legem* — &c. And the same in *totidem verbis*, is affirmed in his History of the last Year of the same King *Edward*. (*Vide ibid. plura de hoc.*) But *Hoveden* carries up the *Common Laws*, or those stiled the *Confessor's Laws*, much further; for he in his History of *Henry 2.* tell us, *Quod istæ Leges prius inventæ & constitutæ erant Tempore Edgari, Avi sui, &c.* (*Vide Hoveden.*) And possibly the Grandfather might be the first Collector of them into a Body, and afterwards *Edward* might add to the Composition, and give it the Denomination of the Common Law; but the Original of it cannot in Truth be referred to either, but is much more ancient, and is as undiscoverable as the Head of *Nile*: Of which more at large in the following Chapter.

*Thirdly*, Others say, and that most truly, That it is called the Common Law, because it is the common Municipal Law or Rule of Justice in this Kingdom: So that *Lex Communis*, or *Jus Communis*, is all one and the same with *Lex Patriæ*, or *Jus Patrium*; for although there are divers particular Laws,

some by Custom applied to particular Places, and some to particular Causes; yet that Law which is common to the generality of all Persons, Things and Causes, and has a Superintendency over those particular Laws that are admitted in Relation to particular Places or Matters, is *Lex Communis Angliæ*, as the Municipal Laws of other Countries may be, and are sometimes called, *The Common Law of that Country*; as *Lex Communis Norrica*, *Lex Communis Burgundica*, *Lex Communis Lombardica*, &c. So that although all the former Reasons have their Share in this Appellation, yet the principal Cause thereof seems to be the latter: And hence some of the Ancients call'd it *Lex Communis*, others *Lex Patriæ*; and so they were called in their Confirmation by King *William I.* Whereof hereafter.

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## C H A P. IV.

*Touching the Original of the Common Law of England.*

**T**HE Kingdom of *England* being a very CHAP. 4.  
 ancient Kingdom, has had many Vicissitudes and Changes (especially before the coming in of King *William 1.*) under several either Conquests or Accessions of Foreign Nations. For tho' the *Britains* were, as is supposed, the most ancient Inhabitants, yet there were mingled with them, or brought in upon them, the *Romans*, the *Picts*, the *Saxons*, the *Danes*, and lastly, the *Normans*; and many of those Foreigners were as it were incorporated together, and made one Common People and Nation; and hence arises the Difficulty, and indeed Moral Impossibility, of giving any satisfactory or so much as probable Conjecture, touching the Original of the Laws, for the following The Difficulty of discovering their Original.  
 Reasons, *viz.*

*First*, From the Nature of Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniencies of the People, for or by whom they are appointed, as those Exigencies and Conveniencies do insensibly grow upon the People, so many Times there grows insensibly a Variation of Laws, especially in a long Tract of Time; and hence it is, that tho' for the Purpose in some particular Part of

of the Common Law of *England*, we may easily say, That the Common Law, as it is now taken, is otherwise than it was in that particular Part or Point in the Time of *Hen. 2.* when *Glanville* wrote, or than it was in the Time of *Hen. 3.* when *Bracton* wrote, yet it is not possible to assign the certain Time when the Change began; nor have we all the Monuments or Memorials, either of Acts of Parliament, or of Judicial Resolutions, which might induce or occasion such Alterations; for we have no authentick Records of any Acts of Parliament before *9 Hen. 3.* and those we have of that King's Time, are but few. Nor have we any Reports of Judicial Decisions in any constant Series of Time before the Reign of *Edw. 1.* tho' we have the Plea Rolls of the Times of *Hen. 3.* and King *John*, in some remarkable Order. So that Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament, tho' not now extant, might introduce some *New* Laws, and alter some *Old*, which we now take to be the very Common Law itself, tho' the Times and precise Periods of such Alterations are not explicately or clearly known: But tho' those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same *English* Laws now, that they were 600 Years since in the general. As the *Argonauts* Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had suc-

ſucceſſive Amendments, and ſcarce came back with any of its former Materials; and as *Titius* is the ſame Man he was 40 Years ſince, tho' Phyſicians tells us, That in a Tract of ſeven Years, the Body has ſcarce any of the ſame Material Subſtance it had before.

*Secondly*, The 2d Difficulty in the Search of the Antiquity of Laws and their Original, is in Relation to that People unto whom the Laws are applied, which in the Caſe of *England*, will render many Obſervables, to ſhew it hard to be traced. For,

*1ſt*, It is an ancient Kingdom, and in ſuch Caſes, tho' the People and Government had continued the ſame *ab Origine* (as they ſay the *Chineſe* did, till the late Incurſion of the *Tartars*) without the Mixture of other People, or Laws; yet it were an impoſſible Thing to give any certain Account of the Original of the Laws of ſuch a People, unleſs we had as certain Monuments thereof as the *Jews* had of theirs, by the Hand of *Moses*, and that upon the following Accounts, *viz.*

*Fiſt*, We have not any clear and certain Monuments of the original Foundation of the *Engliſh* Kingdom or State, when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain and traditional; and ſince we cannot know the Original of the planting of this Kingdom, we cannot certainly know the Original of the Laws thereof, which may be well preſum'd to be very near as ancient as the Kingdom itſelf. Again, *2dly*, Tho' Tra-

Tradition might be a competent Discoverer of the Original of a Kingdom or State, I mean Oral Tradition, yet such a Tradition were incompetent without written Monuments to derive to us, at so long a Distance, the original Laws and Constitutions of the Kingdom, because they are of a complex Nature, and therefore not orally traducible to so great a Distance of Ages, unless we had the original or authentick Transcript of those Laws as the People the *Jews* had of their Law, or as the *Romans* had of their Laws of the Twelve Tables engraven in Brass. But yet further, 3dly, It is very evident to every Day's Experience, that Laws, the further they go from their original Institution, grow the larger, and the more numerous: In the first Coalition of a People, their Prospect is not great, they provide Laws for their present Exigence and Convenience: But in Process of Time, possibly their first Laws are changed, altered or antiquated, as some of the Laws of the Twelve Tables among the *Romans* were: But whatsoever be done touching their *Old* Laws, there must of Necessity be a Provision of *New*, and other Laws successively answering to the Multitude of successive Exigencies and Emergencies, that in a long Tract of Time will offer themselves; so that if a Man could at this Day have the Prospects of all the Laws of the *Britains* before any Invasion upon them, it would yet be impossible to say, which of them were *New*, and which were *Old*, and the several Seasons and Periods

riods of Time wherein every Law took its Rise and Original, especially since it appears, that in those elder Times, the *Britains* were not reduced to that civiliz'd Estate, as to keep the Annals and Memorials of their Laws and Government, as the *Romans* and other civiliz'd Parts of the World have done. CHAP 4.

It is true, when the Conquest of a Country appears, we can tell when the Laws of conquering People came to be given to the Conquered. Thus we can tell that in the Time of *Hen. 2.* when the Conquest of *Ireland* had obtain'd a good Progress, and in the Time of *K. John*, when it was compleated, the *English* Laws were settled in *Ireland*: But if we were upon this Inquiry, what were the Original of those *English* Laws that were thus settled there; we are still under the same Quest and Difficulty that we are now, viz. What is the Original of the *English* Laws. For they that begin *New Colonies*, Plantations and Conquests; if they settle *New Laws*, and which the Places had not before, yet for the most Part (I don't say altogether) they are the *Old* Laws which obtain'd in those Countries from whence the Conquerors or Planters came.

*Secondly*, the 2d Difficulty of the Discovery of the Original of the *English* Laws is this, That this Kingdom has had many and great Vicissitudes of People that inhabited it, and that in their several Times prevail'd and obtain'd a great Hand in the Government of this Kingdom, whereby it came to pass,



CHAP. 4. pass, that there arose a great Mixture and Variety of Laws: In some Places the Laws of the *Saxons*, in some Places the Laws of the *Danes*, in some Places the Laws of the ancient *Britains*, in some Places, the Laws of the *Mericians*, and in some Places, or among some People (perhaps) the Laws of the *Normans*: For altho', as I shall shew hereafter, the *Normans* never obtain'd this Kingdom by such a Right of Conquest, as did or might alter the established Laws of the Kingdom; yet considering that K. *Will.* 1. brought with him a great Multitude of that Nation, and many Persons of great Power and Eminence, which were planted generally over this Kingdom, especially in the Possessions of such as had oppos'd his coming in, it must needs be suppos'd, that those Occurrences might easily have a great Influence upon the Laws of this Kingdom, and secretly and insensibly introduce *New* Laws, Customs and Usages; so that altho' the Body and Gross of the Law might continue the same, and so continue the ancient Denomination that it first had, yet it must needs receive diverse Accessions from the Laws of those People that were thus intermingled with the ancient *Britains* or *Saxons*, as the Rivers of *Severn*, *Thames*, *Trent*, &c. tho' they continue the same Denomination which their first Stream had, yet have the Accession of divers other Streams added to them in the Tracts of their Passage which enlarge and augment them. And hence grew those several Denominations of the *Saxon*, *Merician*, and *Danish* Laws,  
out

out of which (as before is shewn) the Confessor extracted his Body of the Common Law, and therefore among all those various Ingredients and Mixtures of Laws, it is almost an impossible Piece of Chymistry to reduce every *Caput Legis* to its true Original, as to say, This is a Piece of the *Danish*, this of the *Norman*, or this of the *Saxon* or *British* Law : Neither was it, or indeed is it much material, which of these is their Original ; for 'tis very plain, the Strength and Obligation, and the formal Nature of a Law, is not upon Account that the *Danes*, or the *Saxons*, or the *Normans*, brought it in with them, but they became Laws, and binding in this Kingdom, by Virtue only of their being received and approved here.

*Thirdly*, A Third Difficulty arises from those accidental Emergencies that happened, either in the Alteration of Laws, or communicating or conveying of them to this Kingdom : For first, the Subdivision of the Kingdom into small Kingdoms under the Heptarchy, did most necessarily introduce a Variation of Laws, because the several Parts of the Kingdom, were not under one common Standard, and so it will soon be in any Kingdoms that are cantonized, and not under one common Method of Dispensation of Laws, tho' under one and the same King. *Again*, The Intercourse and Traffick with other Nations, as it grew more or greater, did gradually make a Communication and Transmigration of Laws from us to them, and from them to us.

*Again*,

*Again*, The Growth of Christianity in this Kingdom, and the Reception of Learned Men from other Parts, especially from *Rome*, and the Credit that they obtained here, might reasonably introduce some *New Laws*, and antiquate or abrogate some *Old* ones that seem'd less consistent with the Christian Doctrines, and by this Means, not only some of the Judicial Laws of the *Jews*, but also some Points relating to, or bordering upon, or derived from the Canon or Civil Laws, as may be seen in those Laws of the ancient Kings, *Ina*, *Alphred*, *Canutus*, &c. collected by Mr. *Lambard*.

Having thus far premised, it seems, upon the whole Matter, an endless and insuperable Business to carry up the *English Laws* to their several Springs and Heads, and to find out their first Original; neither would it be of any Moment or Use if it were done: For whenever the Laws of *England*, or the several *Capita* thereof began, or from whence or whomsoever derived, or what Laws of other Countries contributed to the Matter of our Laws; yet most certainly their Obligation arises not from their Matter, but from their Admission and Reception, and Authorization in this Kingdom; and those Laws, if convenient and useful for the Kingdom, were never the worse, tho' they were desumed and taken from the Laws of other Countries, so as they had their Stamp of Obligation and Authority from the Reception and Approbation of this Kingdom by Virtue of the Common Law, of which  
 I this

this Kingdom has been always jealous, especially in relation to the Canon, Civil, and Norman Law, for the Reasons hereafter shewn.

CHAP. 4.

Passing therefore from this unsearchable Inquiry, I shall descend to that which gives the Authority, *viz.* The formal Constituents, as I may call them, of the Common Law, and they seem to be principally, if not only, those three, *viz.* 1<sup>st</sup>. The Common Usage, or Custom, and Practice of this Kingdom, in such Parts thereof as lie in Usage or Custom. 2<sup>dly</sup>. The Authority of Parliament, introducing such Laws; and, 3<sup>dly</sup>. The Judicial Decisions of Courts of Justice, consonant to one another in the Series and Successions of Time.

Three Constituents of the Common Law.

1. As to the first of these, Usage and Custom generally receiv'd, do *Obtinere vim Legis*, and is that which gives Power sometimes to the Canon Law, as in the Ecclesiastical Courts; sometimes to the Civil Law, as in the Admiralty Courts; and again, controuls both, when they cross other Customs that are generally receiv'd in the Kingdom. This is that which directs Differents, has settled some ancient Ceremonies and Solemnities in Conveyances, Wills and Deeds, and in many more Particulars. And if it be enquired, What is the Evidence of this Custom, or wherein it consists, or is to be found? I answer, It is not simply an unwritten Custom, nor barely *Orally* deriv'd down from one Age to another; but it is a Custom that is derived

1. Customs;

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down

CHAP. 4.

down in Writing, and transmitted from Age to Age, especially since the Beginning of *Edw. 1.* to whose Wisdom the Laws of *England* owe almost as much as the Laws of *Rome* to *Justinian*.

2. Statutes.

2. Acts of Parliament. And here it must not be wonder'd at, that I make Acts of Parliament one of the Authoritative Constituents of the Common Law, tho' I had before contradistinguished the one from the other; for we are to know, that although the Original or Authentick Transcripts of Acts of Parliament are not before the Time of *Hen. 3.* and many that were in his Time are perish'd and lost; yet certainly such there were, and many of those Things that we now take for Common Law, were undoubtedly Acts of Parliament, tho' now not to be found of Record. And if in the next Age, the Statutes made in the Time of *Hen. 3.* and *Edw. 1.* were lost, yet even those would pass for Parts of the Common Law, and indeed, by long Usage and the many Resolutions grounded upon them, and by their great Antiquity, they seem even already to be incorporated with the very Common Law; and that this is so, may appear, tho' not by Records, for we have none so ancient, yet by an authentical and unquestionable History, wherein a Man may, without much Difficulty, find, That many of those *Capitala Legum* that are now used and taken for Common Law, were Things enacted in Parliaments or Great Councils under *William 1.* and his Predecessors, Kings  
of

of England, as may be made appear hereafter. CHAP. 4.  
 But yet, those Constitutions and Laws being made before Time of Memory, do now obtain, and are taken as Part of the Common Law and immemorial Customs of the Kingdom; and so they ought now to be esteem'd, tho' in their first Original they were Acts of Parliament.

3. Judicial Decisions. It is true, the 3. Judicial  
Decisions.  
 Decisions of Courts of Justice, tho' by Virtue of the Laws of this Realm they do bind, as a Law between the Parties thereto, as to the particular Case in Question, 'till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.

1<sup>st</sup>. Because the Persons who pronounce those Decisions, are Men chosen by the King for that Employment, as being of greater Learning, Knowledge; and Experience in the Laws than others. 2<sup>dly</sup>. Because they are upon their Oaths to judge according to the Laws of the Kingdom. 3<sup>dly</sup>. Because they have the best Helps to inform their Judgments. 4<sup>thly</sup>. Because

CHAP. 4. they do *Sedere pro Tribunali*, and their Judgments are strengthen'd and upheld by the Laws of this Kingdom, till they are by the same Law revers'd or avoided.

Now Judicial Decisions, as far as they refer to the Laws of this Kingdom, are for the Matter of them of Three Kinds :

Of Three  
Kinds.

*First*, They are either such as have their Reasons singly in the Laws and Customs of this Kingdom, as, Who shall succeed as Heir to the Ancestor, what is the Ceremony requisite for passing a Freehold, what Estate, and how much shall the Wife have for her Dower? And many such Matters wherein the ancient and express Laws of the Kingdom give an express Decision, and the Judge seems only the Instrument to pronounce it ; and in these Things, the Law or Custom of the Realm is the only Rule and Measure to judge by, and in reference to those Matters, the Decisions of Courts are the Conservatories and Evidences of those Laws.

*Secondly*, Or they are such Decisions, as by Way of Deduction and Illation upon those Laws are framed or deduced ; as for the Purpose, Whether of an Estate thus or thus limited, the Wife shall be endowed? Whether if thus or thus limited, the Heir may be barr'd? And infinite more of the like complicated Questions. And herein the Rule of Decision is, *First*, the Common Law and Custom of the Realm, which is  
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the great *Substratum* that is to be maintain'd ; CHAP. 4.  
 and then Authorities or Decisions of former Times in the same or the like Cases, and then the Reason of the Thing itself.

*Thirdly*, Or they are such as seem to have no other Guide but the common Reason of the Thing, unless the same Point has been formally decided, as in the Exposition of the Intention of Clauses in Deeds, Wills, Covenants, &c. where the very Sense of the Words, and their Positions and Relations, give a rational Account of the Meaning of the Parties, and in such Cases the Judge does much better herein, than what a bare grave Grammarian or Logician, or other prudent Men could do ; for in many Cases there have been former Resolutions, either in Point or agreeing in Reason or Analogy with the Case in Question ; or perhaps also, the Clause to be expounded is mingled with some Terms or Clauses that require the Knowledge of the Law to help out with the Construction or Exposition : Both which do often happen in the same Case, and therefore it requires the Knowledge of the Law to render and expound such Clauses and Sentences ; and doubtless a good Common Lawyer is the best Expofitor of such Clauses, &c. *Vide Plowden*, 122, to 130, 140, &c.



## C H A P. V.

*How the Common Law of England stood  
at and for some Time after the coming  
in of King William I.*

CHAP. 5.

Two Qualifications  
of the  
Laws of  
England.

**I**T is the Honour and Safety, and therefore the just Desire of Kingdoms that recognize no Superior but God, that their Laws have those two Qualifications, *viz.* 1<sup>st</sup>. That they be not dependent upon any Foreign Power; for a Dependency in Laws derogates from the Honour and Integrity of the Kingdom, and from the Power and Sovereignty of the Prince thereof. *Secondly*, That they taste not of Bondage or Servitude; for that derogates from the Dignity of the Kingdom, and from the Liberties of the People thereof.

In Relation to the former Consideration, the Kings of this Realm, and their great Councils, have always been jealous and careful, that they admitted not any Foreign Power, (especially such as pretended Authority to impose Laws upon other free Kingdoms or States) nor to countenance the Admission of such Laws here as were derived from such a Power.

Rome, as well Ancient as Modern, pretended a kind of universal Power and Interest; the former by their Victories,  
which

which were large, and extended even to *Britain* itself; and the later upon the Pretence of being Universal Bishop or Vicar-General in all Matters Ecclesiastical; so that upon Pretence of the former, the Civil Law, and upon Pretence of the later, the Canon Law was introduc'd, or pretended to some Kind of Right in the Territories of some absolute Princes, and among others here in *England*: But this Kingdom has been always very jealous of giving too much Countenance to either of those Laws, and has always shewn a just Indignation and Resentment against any Encroachments of this Kind, either by the one Law or the other. It is true, as before is shewn, that in the Admiralty and Military Courts, the Civil Law has been admitted, and in the Ecclesiastical Courts, the Canon Law has been in some Particulars admitted. But still they carry such Marks and Evidences about them, whereby it may be known that they bind not, nor have the Authority of Laws from themselves, but from the authoritative Admission of this Kingdom.

Neither  
Canon nor  
Civil Law  
the Rule of  
Justice  
here.

And, as thus the Kingdom, for the Reasons before given, never admitted the Civil or the Canon Law to be the Rule of the Administration of Common Justice in this Kingdom; so neither has it endured any Laws to be imposed upon the People by any Right of Conquest, as being unsuitable to the Honour or Liberty of the *English* Kingdom, to recognize their Laws as given them at the Will and Pleasure of a Con-

CHAP. 5.

Our Laws  
not im-  
pos'd by  
Conquest.

queror. And hence it was, that altho' the People unjustly assisted King *Hen. 4.* in his Usurpation of the Crown, yet he was not admitted thereunto, until he had declared, that he claimed not as a Conqueror, but as a Successor; only he reserved to himself the Liberty of extending a Pretence of Conquest against the *Scroops* that were slain in Battle against him; which yet he durst not rest upon without a Confirmation in Parliament. *Vide Rot. Parl. 1 H. 4. N° 56. & Pars 2. Ibid. N° 17.*

And upon the like Reason it was, That King *William 1.* tho' he be called the Conqueror, and his attaining the Crown here, is often in History, and in some Records, called *Conquestus Angliæ*; yet in Truth it was not such a Conquest as did, or could alter the Laws of this Kingdom, or impose Laws upon the People *per Modum Conquestus*, or *Jure Belli*: And therefore, to wipe off that false Imputation upon our Laws, as if they were the Fruit or Effect of a Conquest, or carried in them the Badge of Servitude to the Will of the Conqueror, which Notion some ignorant and prejudiced Persons have entertain'd; I shall rip up, and lay open this whole Business from the Bottom, and to that End enquire into the following Particulars, *viz.*

1. Of the Thing called Conquest, what it is, when attained, and the Rights thereof.

2. Of

2. Of the several Kinds of Conquest, and their Effects, as to the Alteration of Laws by the Victor. CHAP. 7.

3. How the *English* Laws stood at the Entry of King *William* the First.

4. By what Title he entred, and whether by such a Right of Conquest as did, or could, alter the *English* Laws.

5. Whether *De Facto* there was any Alteration of the said Laws, and by what Means after his coming in.

*First*, Touching the first of these, *viz.* Conquest, what it is, when attain'd, and the Rights thereof. It is true, That it seems to be admitted as a kind of Law among all Nations, That in Case of a Solemn War between Supream Princes, the Conqueror acquires a Right of Dominion, as well as a Property over the Things and Persons that are fully conquered; and the Reasons assign'd are Principally these, *viz.* Conquest  
what it is;

1<sup>st</sup>. Because both Parties have appealed to the highest Tribunal that can be, *viz.* The Trial by War, wherein the great Judge and Sovereign of the World, *The Lord of Hosts*, seems in a more especial Manner than in other Cases to decide the Controversy.

2<sup>dly</sup>. Because unless this should be a final Decision, Mankind would be destroy'd by endless Broils, Wars and Contentions; therefore, for the Preservation of Mankind, this great Decision ought to be final, and the conquer'd ought to acquiesce in it. 3<sup>dly</sup>. Because if this should not be admitted, and

be

be by, as it were, the tacit Consent of Mankind accounted a lawful Acquisition, there would not be any Security or Peace under any Government: For by the various Revolutions of Dominion acquired by this Means, have been, and are to this Day the Successions of Kingdoms and States preserved. What was once the *Romans*, was before that the *Gracians*, and before them the *Persians*, and before the *Persians*, the *Assyrians*; and if this just Victory were not allowed to be a firm Acquest of Dominion, the present Possessors would be still obnoxious to the Claim of the former Proprietors, and so they would be in a restless State of Doubts, Difficulties and Changes upon the Pretension of former Claims: Therefore, to cut off this Instability and Unsettledness in Dominion and Property, it would seem that the common Consent of all Nations has tacitly submitted, that Acquisition by Right of Conquest, in a Solemn War between Persons not Subjects of each other by Bonds of Allegiance or Fidelity, should be allowed as one of the lawful Titles of acquiring Dominion over the Persons, Places and Things so conquer'd.

But whatever be the real Truth or Justice of this Position, yet we are much at a Loss touching the Things in *Hypothesis*, viz. Whether this be the Effect of every Kind of Conquest? Whether the War be Just or Unjust? What are the Requisites to the Constituting of a just War? Who are the Persons that may acquire? And what are the

the Solemnities requisite for that Acquest? CHAP. 5.

But above all, the greatest Difficulty is, when there shall be said, Such a Victory as acquires this Right? Indeed, if there be a total Deletion of every Person of the Opposing Party or Country, then the Victory is compleat, because none remains to call it in Question. But suppose they are beaten in one Battle, may they not rally again? Or if the greater Part be subdued, may not the lesser keep their Ground? Or if they do not at the present, may they not in the next Age regain their Liberty? Or if they be quiet for a Time, may they not as they have Opportunity, renew their Pretensions? And altho' the Victor, by his Power, be able to quell and suppress them, yet he is beholden to his Sword for it, and the Right that he got by his Victory before, would not be sufficient without a Power and Force to establish and secure him against new Troubles. And on the other Side, if those few subdu'd Persons can by Force regain what they once had a Pretence to, a former Victory will be but a weak Defence; and if it would, they would have the like Pretence to a Claim of Acquest by Victory over him, as he had over them.

It seems therefore a difficult Thing to determine in what indivisible Moment this Victory is so compleat, that *Jure Belli* the Acquest of Dominion is fully gotten, and therefore Victors use to secure themselves against Disputes of that Kind, and as it were to under-pin their Acquest *Jure Belli*,  
 2 that

CHAP. 5. that they might not be lost by the same Means, whereby they were gained by the Continuation of eternal Forces of Standing Armies, Castles, Garrisons, Munitions, and other Acts of Power and Force, so as thereby to over-bear and prevent an ordinary Possibility of the Prevailing of the conquered or subdued People, against the Conqueror or Victor. He that lays the Weight of his Title upon Victory or Conquest, rarely rests in it as a compleat Conquest, till he has added to it somewhat of Consent or Faith of the conquered, submitting voluntarily to him, and then, and not till then, he thinks his Title secure, and his Conquest compleat: And indeed, he has no Reason to think his Title can be otherwise secure; for where the Title is meerly Force or Power, his Title will fail, if the conquered can with like Force or Power over-match his, and so regain their former Interest or Dominion.

Consent.

1. Express'd.  
2. Implied.

Now this Consent is of Two Kinds, either Express'd, or Implied. An express Consent is, when after a Victory the Party conquered do expressly submit themselves to the Victors, either simply or absolutely, by Dedition, yielding themselves, giving him their Faith and their Allegiance; or else under certain Pacts, Conventions, Agreements, or Capitulations, as when the subdued Party, either by themselves, or by Substitutes, or Delegates by them chosen, do yield their Faith and their Allegiance to the Victor upon certain Pacts or Agreements

ments between them ; as for holding or continuing their Religion, their Laws, their Form of Civil Administration, &c. CHAP. 1.

And thus, tho' Force were perhaps the Occasion of this Consent, yet in Truth 'tis Consent only that is the true proximate and fix'd Foundation of the Victor's Right ; which now no longer rests barely upon external Force, but upon the express Consent and Pact of the subdu'd People, and consequently this Pact or Convention is that which is to be the immediate Foundation of that Dominion ; and upon a diligent Observation of most Acquests gotten by Conquest, or so called, we shall find this to be the Conclusion of almost all Victories, they end in Deditious and Capitulations, and Faith given to the Conqueror, whereby oftentimes the former Laws, Privileges, and Possessions are confirmed to the Subdued, without which the Victors seldom continue long or quiet in their New Acquests, without extream Expence, Force, Severity and Hazard.

An implied Consent is, when the Sub- 2. Implied.  
dued do continue for a long Time quiet and peaceable under the Government of the Victor, accepting his Government, submitting to his Laws, taking upon them the Offices and Employments under him, and obeying and owning him as their Governor, without opposing him, or claiming their former Right. This seems to be a tacit Acceptance of, and Assent to him ; and tho' this is gradual, and possibly no deter-



determinate Time is stinted, wherein a Man can say, this Year, or this Month, or this Day, such a tacit Consent was compleated and concluded : For Circumstances may make great Variations in the Sufficiency of the Evidence of such an Assent ; yet by a long and quiet Tract of peaceable Submission to the Laws and Government of the Victor, Men may reasonably conjecture, that the conquered have relinquished their Purpose of regaining by Force what by Force they lost.

But still all this is intended of a lawful Conquest by a Foreign Prince or State, and not an Usurpation by a Subject, either upon his Prince or Fellow Subject ; for several Ages and Discents do not purge the Unlawfulness of such an Usurpation.

2. The  
Kinds and  
Effects of  
Conquest.

*Secondly.* Concerning the several Kinds of Conquests, and their Effects, as to the Alteration of Laws by the Victor. There seems to be a double kind of Conquest, which induces a various Consideration touching the Change of Laws, viz. *Victoria in Regem & Populum*, & *Victoria in Regem tantum*. The Conquest over the People or Country, is when the War is denounced by a Prince or State Foreign, and no Subject, and when the Intention and Denunciation of the War is against the King and People or Country, and the Pretension of Title is by the Sword, or *Jure Belli* ; such were most of the Conquests of ancient Monarchs, viz. The *Assyrian*, *Persian*, *Græcian*, and *Roman* Conquests ; and in such Cases, the Acquisitions of the Victor

Victor were absolute and universal, he gain'd the Interest and Property of the very Soil of the Country subdued; which the Victor might, at his Pleasure, give, sell or arrent: He gain'd a Power of abolishing or changing their Laws and Customs, and of giving New, or of imposing the Law of the Victor's Country. But although this the Conqueror might do, yet a Change of the Laws of the conquered Country was rarely universally made, especially by the *Romans*: Who, though in their own particular Colonies, planted in conquered Countries, they observed the *Roman Law*, which possibly might by Degrees, without any rigorous Imposition, gain and insinuate themselves into the conquered People, and so gradually obtain, and insensibly conform them, at least so many of them as were conterminous to the Colonies and Garrisons to the *Roman Laws*; yet they rarely made a rigorous and universal Change of the Laws of the conquered Country, unless they were such as were foreign and barbarous, or altogether inconsistent with the Victor's Government: But in other Things, they commonly indulged unto the conquered, the Laws and Religion of their Country upon a double Account, viz.

*First*. On Account of Humanity, thinking it a hard and over-severe Thing to impose presently upon the conquered a Change of their Customs, which long Use had made dear to them. And, *2dly*. Upon the Account of

## CHAP. 5.

The *Romans* Indulged the vanquish'd in their Laws and Religion.

of Prudence; for the *Romans* being a wise and experienced People, found that those Indulgences made their Conquests the more easy, and their Enjoyments thereof the more firm, when as a rigorous Change of the Laws and Religion of the People would render them in a restless and unquiet Condition, and ready to lay hold of any Opportunity of Defection or Rebellion, to regain their ancient Laws and Religion, which ordinary People count most dear to them; (though at this Day the Indulgence of a *Paganish* Religion is not used to be allowed by any Christian Victor, as is observed in *Calvin's* Case in the Seventh Report;) and to give One Instance for all, it was upon this Account, That though the *Romans* had wholly subdued *Syria* and *Palestina*, yet they allow'd to the Inhabitants the *Jews*, &c. the Use of their Religion and Laws, so far forth as consisted with the Safety and Security of the Victor's Interest: And therefore, though they reserved to themselves the Cognizance of such Causes as concern'd themselves, their Officers or Revenues, and such Cases as might otherwise disturb the Security of their Empire, as Treasons, Insurrections, and the like; yet 'tis evident they indulged the People of the *Jews*, &c. to judge by their own Law, not only of some Criminal Proceedings, but even of Capital in some Cases, as appears by the History of the Gospels, and Acts of the Apostles.

But


But still this was but an Indulgence, and therefore was resumable by the Victor, unless there intervened any Capitulation between the Conqueror and the Conquered to the contrary; which was frequent, especially in those Cases, when it was not a compleat Conquest, but rather a Dedition upon Terms and Capitulations, agreed between the Conqueror and the Conquered; wherein usually the yielding Party secured to themselves, by the Articles of their Dedition, the Enjoyment of their Laws and Religion; and then by the Laws of Nature and of Nations, both which oblige to the Observation of Faith and Promises, those Terms and Capitulations, were to be observed. Again, *2dly*. When after a full Conquest, the conquered People resumed so much Courage and Power as began to put them into a Capacity of regaining their former Laws and Liberties. This commonly was the Occasion of Terms and Capitulations between the Conquerors and Conquered. Again, *3dly*. When by long Succession of Time, the Conquered had either been incorporated with the conquering People, whereby they had worn out the very Marks and Discriminations between the Conquerors and Conquered; and if they continued distinct, yet by a long Prescription, Usage and Custom, the Laws and Rights of the conquered People were in a Manner settled, and the long Permission of the Conquerors amounted to a tacite Con-

G

cession

CHAP. 5.

Conquest  
upon  
Terms  
and Capi-  
tulations.

CHAP. 3.  cession or Capitulation, for the Enjoyment of their Laws and Liberties.

But of this more than enough is said, because it will appear in what follows, That *William I.* never made any such Conquest of *England*.

Conquest  
over the  
King, but  
not the  
People.

*Secondly*, Therefore I come to the Second Kind of Conquest, *viz.* That which is only *Victoria in Regem*: And this is where the Conqueror either has a real Right to the Crown or chief Government of a Kingdom, or at least has, or makes some Pretence of Claim thereunto; and, in Pursuance of such Claim, raises War, and by his Forces obtains what he so pretends a Title to. Now this Kind of Conquest does only instate the Victor in those Rights of Government, which the conquered Prince, or that Prince to whom the Conqueror pretends a Right of Succession, had; whereby he becomes only a Successor *Jure Belli*, but not a Victor or Conqueror upon the People; and therefore has no more Right of altering their Laws, or taking away their Liberties or Possessions, than the conquered Prince, or the Prince to whom he pretends a Right of Succession, had; for the Intention, Scope and Effect of his Victory extends no further than the Succession, and does not at all affect the Rights of the People. The Conqueror is, as it were, the Plaintiff, and the conquered Prince is the Defendant, and the Claim is  
a Claim

a Claim of Title to the Crown ; and because each of them pretends a Right to the Sovereignty , and there is no other competent Trial of the Title between them, they put themselves upon the great Trial by Battle ; wherein there is nothing in Question touching the Rights of the People, but only touching the Right of the Crown, and that being decided by the Victory, the Victor comes in as a Successor, and not *Jure Victoriæ*, as in relation to the Peoples Rights ; the most Sacred whereof are their Laws and Religion.

Indeed, those that do voluntarily assist the conquered Prince, commonly undergo the same Hazard with him, and do, as it were, put their Interest upon the Hazard and Issue of the same Trial, and therefore commonly fall under the same Severity with the conquered, at least *de facto* ; because, perchance the Victor thinks he cannot be secure without it : But yet Usage, and indeed common Prudence, makes the Conquerors use great Moderation and Discrimination in relation to the Assistants of the conquered Prince ; and to extend this Severity only to the eminent and busy Assistants of the Conquered, and not to the *Gregarii*, or such as either by Constraint or by Necessity were enforced to serve against him ; and as to those also, on whom they exercise their Power, it has been rarely done *Jure Belli aut Victoriæ*, but by a judiciary Proceeding, as in Cases of Treason, because now the great Title by Battle has pronounced for the Right of the Con-

CHAP. 5.

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queror, and at best no Man must dare to say otherwise now, whatsoever Debility was in his Pretension or Claim. We shall see the Instances hereof in what follows.

3d. Quer-  
sion.

How the  
Laws stood  
at W. I.'s  
Entry.

*Thirdly, As to the Third Point, How the Laws of England stood at the Entry of King William I. and it seems plain, that at the Time of his Entry into England, the Laws, commonly call'd, The Laws of Edward the Confessor, were then the standing Laws of the Kingdom. Hoveden tells us, in a Digression under his History of King Henry 2. that those Laws were originally put together by King Edgar, who was the Confessor's Grandfather, viz. Verum tamen post mortem ipsius Regis Edgari usq; ad Coronationem Sancti Regis Edvardi quod Tempus Continet Sexaginta & Septem Annos prece (vel pretio) Leges sopite sunt & Jus prætermisæ sed postquam Rex Edvardus in Regno fuit sublimatus Concilio Baronum Angliæ Legem Annos Sexaginta & Septem Sopitam, excitavit & confirmavit, & ea Lex sic confirmata vocata est Lex Sancti Edvardi, non quod ipse prius invenisset eam sed cum prætermisæ fuisset & oblivioni penitus dedita a morte avi sui Regis Edgari qui primus inventor ejus fuisse dicitur usque ad sua Tempora, viz. Sexaginta & Septem Annos. And the same Passage in totidem Verbis is in the History of Litchfield, cited in Sir Robert Twisden's Prologue to the Laws of King William I. But although possibly those Laws were collected by King Edgar, yet it is evident, by what is before said, they were augmented by the Confessor, by that Ex-  
tract*

tract of Laws before-mentioned, which he made out of that Threefold Law, that obtain'd in several Parts of *England*, viz. The *Danish*, the *Mercian*, and the *West-Saxon* Laws.

This Manual (as I may call it) of Laws, stiled, *The Confessor's Laws*, was but a small Volume, and contains but few Heads, being rather a Scheme or Directory touching some Method to be observed in the Distribution of Justice, and some particular Proceedings relative thereunto, especially in Matters of Crime, as appears by the Laws themselves, which are now printed in Mr. *Lambart's Saxon Laws*, p. 133. and other Places; yet the *English* were very zealous for them, no less or otherwise than they are at this Time for the *Great Charter*; insomuch, that they were never satisfied till the said Laws were reinforced and mingled for the most Part with the Coronation Oath of King *William I.* and some of his Successors.

And this may serve shortly touching this Third Point, whereby we see that the Laws that obtain'd at the Time of the Entry of King *William I.* were the *English* Laws, and principally those of *Edward the Confessor*.

Fourthly, The Fourth Particular is, The Pretensions of King *William I.* to the Crown of *England*, and what kind of Conquest he made; and this will be best rendered and understood by producing the History of that Business, as it is delivered over to us by the ancient Historians that lived in or near

4th. Question.  
What kind of Conquest *William I.* made.

G 3 that



CHAP. 5. that Time: The Sum, or *Totum* whereof, is this.

King *Edward* the *Confessor* having no Children, nor like to have any, had Three Persons related to him, whom he principally favoured, viz. 1<sup>st</sup>. *Edgar Ætheling*, the Son of *Edward*, the Son of *Edmond Ironside*, *Mat. Paris, Anno 1066, Edmundus autem latus ferreum Rex naturalis de stirpe Regum genuit Edwardum & Edwardus genuit Edgarum cui de jure debebatur Regnum Anglorum.* 2<sup>dly</sup>. *Harold*, the Son of *Goodwin*, Earl of *Kent*, the *Confessor's* Father-in-Law, he having married Earl *Goodwin's* Daughter: And 3<sup>dly</sup>, *William* Duke of *Normandy*, who was allied to the *Confessor* thus, viz. *William* was the Son of *Robert*, the Son of *Richard* Duke of *Normandy*, which *Richard* was Brother unto the *Confessor's* Mother. *Vide Hoveden, sub initio Anni primi Willielmi primi.*

There was likewise a great Familiarity, as well as this Alliance, between the *Confessor* and Duke *William*; for the *Confessor* had often made considerable Residencies in *Normandy*. And this gave a fair Expectation to Duke *William* of succeeding him in this Kingdom; And there was also, at least pretended, a Promise made him by the *Confessor*, That Duke *William* should succeed him in the Crown of *England*; and because *Harold* was in great Favour with the King, and of great Power in *England*, and therefore the likeliest Man by his Assistance to advance, or by his Opposition to hinder or temperate the Duke's Expectation, there was

was a Contract made between the Duke and *Harold* in *Normandy* in the *Confessor's* Lifetime, That *Harold* should, after the *Confessor's* Death, assist the Duke in obtaining the Crown of *England*. (*Vide Brompton, Hoveden, &c.*) Shortly after which the *Confessor* died, and then stepp'd up the Three Competitors to the Crown, *viz.*

1. *Edgar Ætheling*, who was indeed favoured by the Nobility, but being an Infant, was overborn by the Power of *Harold*, who thereupon began to set up for himself: Whereupon *Edgar*, with his Two Sisters, fled into *Scotland*; where he, and one of his Sisters, dying without Issue, *Margaret*, his other Sister and Heir, married *Malcolm*, King of *Scots*; from whence proceeded the Race of the *Scottish* Kings.

2. *Harold*, who having at first raised a Power under Pretence of supporting and preserving Duke *William's* Title to this Kingdom, and having by Force suppress'd *Edgar*, he thereupon claimed the Crown to himself; and pretending an Adoption or Bequest of the Kingdom unto him by the *Confessor*, he forgot his Promise made to Duke *William*, and usurped the Crown, which he held but the Space of 9 Months and 4 Days. *Hoveden.*

3. *William*, Duke of *Normandy*, who pretended a Promise of Succession by the *Confessor*, and a Capitulation or Stipulation by *Harold* for his Assistance; and had, it seems,

so far interested the Pope in Favour of his Pretensions, that he pronounced for *William* against both the others.

Hereupon the Duke makes his Claim to the Crown of *England*, gathered a powerful Army, and came over, and upon the 14th of *October*, Anno 1067. gave *Harold* Battle, and overthrew him at that Place in *Suffex*, where *William* afterwards founded *Batle-Abby*, in Memory of that Victory; and then he took upon him the Government of the Kingdom, as King thereof, and upon *Christmas* following was solemnly crown'd at *Westminster* by the Archbishop of *York*; and he declared at his Coronation, That he claimed the Crown not *Jure Belli*, but *Jure Successionis*; and *Brompton* gives us this Account thereof, *Cum nomen Tyranni exhorresceret & nomen legitimi principis induere vellet petiit consecrari*; and accordingly, says the same Author, the Archbishop of *York*, in respect of some present incapacity in the Archbishop of *Canterbury*, *Munus hoc adimplevit ipsumque Gulielmum Regem ad jura Ecclesie Anglicana tuenda & conservanda populumque suum recte regendum, & Leges rectas Statuendum, Sacramento Solemniter adstrinxit*; and thereupon he took the Homage of the Nobility.

This being the true, though short Account of the State of that Business, there necessarily follows from thence those plain and unquestionable Consequences.

- I. First, That the Conquest of King *William* I. was not a Conquest upon the Country

try or People, but only upon the King of it, in the Person of *Harold*, the Usurper; for *William* 1. came in upon a Pretence of Title of Succession to the *Confessor*; and the Prosecution and Success of the Battle he gave to *Harold* was to make good his Claim of Succession, and to remove *Harold*, as an unlawful Usurper upon his Right; which Right was now decided in his Favour, and determined by that great Trial by Battle. CHAP. 5.

*Secondly*, That he acquired in Consequence thereof no greater Right than what was in the *Confessor*, to whom he pretended a Right of Succession; and therefore could no more alter the Laws of the Kingdom upon the Pretence of Conquest, than the *Confessor* himself might, or than the Duke himself could have done, had he been the true and rightful Successor to the Crown, in Point of Descent from the *Confessor*; neither is it material, whether his Pretence were true or false, or whether, if true, it were available or not, to entitle him to the Crown; for whatsoever it was, it was sufficient to direct his Claim, and to qualify his Victory so, that the *Jus Belli* thereby acquired could be only *Victoria in Regem, sed non in Populum*, and put him only in the State, Capacity and Qualification of a Successor to the King, and not as Conqueror of the Kingdom. 2.

*Thirdly*, And as this his antecedent Claim kept his Acquest within the Bounds of a Successor, and restrained him from the unlimited 3.

limited Bounds and Power of a Conqueror; so his subsequent Coronation, and the Oath by him taken, is a further unquestionable Demonstration, that he was restrain'd within the Bounds of a Successor, and not enlarged with the Latitude of a Victor; for at his Coronation he binds himself by a solemn Oath to preserve the Rights of the Church, and to govern according to the Laws, and not absolutely and unlimitedly according to the Will of a Conqueror.

4. *Fourthly*, That if there were any Doubt whether there might be such a Victory as might give a Pretension to him, of altering Laws, or governing as a Conqueror; yet to secure from that possible Fear, and to avoid it, he ends his Victory in a Capitulation; namely, he takes the ancient Oath of a King unto the People, and the People reciprocally giving or returning him that Assurance that Subjects ought to give their Prince, by performing their Homage to him as their King, declared by the Victory he had obtain'd over the Usurper, to be the Successor of the *Confessor*: And consequently, if there might be any Pretence of Conquest over the Peoples Rights, as well as over *Harold's*, yet the Capitulation or Stipulation removes the Claim or Pretence of a Conqueror, and enstates him in the regulated Capacity and State of a Successor. And upon all this it is evident, That King *William I.* could not abrogate or alter the ancient Laws of the Kingdom, any more than if he

he had succeeded the *Confessor* as his lawful Heir, and had acquir'd the Crown by the peaceable Course of Descent, without any Sword drawn.

CHAP. 3.

And thus much may suffice, to shew that King *William I.* did not enter by such a Right of Conquest, as did or could alter the Laws of this Kingdom.

Therefore I come to the last Question I proposed to be considered, *viz.* Whether *de Facto* there was anything done by King *William I.* after his Accession to the Crown, in Reference either to the Alteration or Confirmation of the Laws, and how and in what Manner the same was done : And this being a Narrative of Matters of Fact, I shall divide into those Two Inquiries, *viz.* 1<sup>st</sup>. What was done in Relation to the Lands and Possessions of the *English* : And 2<sup>dly</sup>, What was done in Relation to the Laws of the Kingdom in general ; for both of these will be necessary to make up a clear Narrative touching the Alteration or Suspension, Confirmation or Execution of the Laws of this Kingdom by him.

5th Question.  
Whether  
*W. I.* alter'd the  
Laws.

*First*, Therefore touching the former, *viz.* What was done in Relation to the Lands and Possessions of the *English*. Those Two Things must be premised, *viz.* First, a Matter of Right, or Law ; which is this, That in Case this had been a Conquest upon the Kingdom, it had been at the Pleasure of the Conqueror to have taken all the Lands of the Kingdom into his own Possession, to have put a Period to all former Titles,

Titles, to have cancelled all former Grants, and to have given, as it were, the Date and Original to every Man's Claim, so as to have been no higher nor ancients than such his Conquest, and to hold the same by a Title derived wholly from and under him. I do not say, that every absolute Conqueror of a Kingdom will do thus, but that he may if he will, and have Power to effect it.

*Secondly*, The Second Thing to be premised is, a Matter of Fact, which is this ; That Duke *William* brought in with him a great Army of Foreigners, that would have expected a Reward of their Undertaking, and therefore were doubtless very craving and importunate for Gratifications to be made them by the Conqueror. *Again*, it is very probable, that of the *English* themselves, there were Persons of very various Conditions and Inclinations ; some perchance did adhere to the Duke, and were assistant to him openly, or at least under-hand, towards the bringing him in ; and those were sure to enjoy their Possessions privately and quietly when the Duke prevailed. *Again*, some did, without all Question, adhere to *Harold*, and those in all Probability were severely dealt with, and dispossessed of their Lands, unless they could make their Peace. *Again*, possibly there were others who assisted *Harold*, partly out of Fear and Compulsion ; yet those, possibly, if they were of any Note or Eminence, fared little better than the rest. *Again*, there were some that pro-

probably stood Neuters, and medled not; and those, though they could not expect much Favour, yet they might in Justice expect to enjoy their own. *Again*, it must needs be supposed, That the Duke having so great an Army of Foreigners, so many ambitious and covetous Minds to be satisfied, so many to be rewarded in Point of Gratitude; and after so great a Concussion as always happens upon the Event of a Victory, it must needs, upon those and such like Accounts, be evident to any Man that considers Things of this Nature, that there were great Outrages and Oppressions committed by the Victor's Soldiers and their Officers, many false Accusations made against innocent Persons, great Disturbances and Evictions of Possessions, many right Owners being unjustly thrown out, and consequently many Occupations and Usurpations of other Men's Rights and Possessions, and a long while before those Things could be reduced to any quiet and regular Settlement.

These general Observations being premised, we will now see what *de Facto* was done in Relation to Men's Possessions, in Consequence of this Victory of the Duke.

What was  
done after  
the Con-  
quest.

*First*, It is certain that he took into his Hands all the Demefn Lands of the Crown, which were belonging to *Edward the Confessor* at the Time of his Death, and avoided all the Dispositions and Grants thereof made

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made by *Harold*, during his short Reign; and this might be one great End of his making that noble Survey in the fourth Year of his Reign, called generally *Doomsday-Read*, in some Records, as *Rot. Winton*, &c. thereby to ascertain what were the Possessions of the Crown in the Time of the *Confessor*, and those he entirely resumed: And this is the Reason why in some of our old Books it is said, *Ancient Demesne* is that which was held by King *William* the Conqueror; and in others 'tis said, *Ancient Demesne* is that which was held by King *Edward the Confessor*, and both true in their Kind; and in this Respect, *viz.* That whatsoever appeared to be the *Confessor's* at the Time of his Death, was assumed by King *William* into his own Possession.

2. *Secondly*, It is also certain, That no Person simply, and *quatenus* an *English* Man, was dispossess'd of any of his Possessions, and consequently their Land was not pretended unto as acquired *Jure Belli*, which appears most plainly by the following Evidences, *viz.*

*First*, That very many of those Persons that were possessed of Lands in the Time of *Edward the Confessor*, and so returned upon the Book of *Doomsday*, retain'd the same unto them and their Descendants, and some of their Descendants retain the same Possessions to this Day, which could not have been, if presently *Jure Belli ac Victoria*

*universalis*, the Lands of the *English* had been vested in the Conqueror. And again, CHAP. 5.

*Secondly*, We do find, that in all Times, even suddenly after the Conquest, the Charters of the ancient *Saxon* Kings were pleaded and allowed, and Titles made and created by them to Lands, Liberties, Franchises and Regalities, affirm'd and adjudg'd under *William* 1. Yea, when that Exception has been offered, That by the Conquest those Charters had lost their Force, yet those Claims were allowed as in 7 *E.* 3. *Fines*, as mentioned by Mr. *Selden*, in his Notes upon *Eadmerus*, which could not be, if there had been such a Conquest as had vested all Mens Rights in the Conqueror.

*Thirdly*, Many Recoveries were had shortly after this Conquest, as well by Heirs as Successors of the Seisin of their Predecessors before the Conquest. We shall take one or two Instances for all; namely, that famous Record *apud Pinendon*, by the Archbishop of *Canterbury*, in the Time of King *William* 1. of the Seisin and Title of his Predecessors before the Conquest: See the whole Process and Proceedings thereupon in the End of Mr. *Selden's* Notes upon *Eadmerus*; and see *Spelman's Glossary*, Title *Drenches*. Upon these Instances, and much more that might be added, it is without Contradiction, That the Rights and Inheritances of the *English quæ Tales*, were not abrogated or impeach'd by this Conquest, but continued notwithstanding the same; for, as is before observ'd, it was *Jure Belli quoad Regem, sed non quoad Populum*.

But

CHAP. 5.

What Persons  
*William I.*  
 dispossessed.

But to descend to some Particulars: The *English* Persons that the Conqueror had to deal with, were of Three Kinds, *viz.* *First*, Such as adhered to him against *Harold* the Usurper; and, without all Question, those continued the Possession of their Lands, and their Possessions were rather encreased by him, than any Way diminished. *Secondly*, Such as adhered to *Harold*, and opposed the Duke, and fought against him; and doubtless, as to those, the Duke after his Victory used his Power, and dispossest them of their Estates: Which Thing is usual upon all Conclusions and Events of this Kind, upon a double Reason; *1st*, To secure himself against the Power of those that oppos'd him, and to weaken them in their Estates, that they should not afterwards be enabled to make Head against him. And, *2dly*, To gratify those that assisted him, and to reward their Services in that Expedition; and to make them firm to his Interest, which was now twisted with their own: For it can't be imagined, but that the Conqueror was assisted with a great Company of Foreigners, some that he favour'd, some that had highly deserved for their Valour, some that were necessitous Soldiers of Fortune, and others that were either ambitious or covetous: All whose Desires, Deserts, or Expectations, the Conqueror had no other Means to satisfy, but by the Estates of such as had appeared open Enemies to him; and doubtless, many innocent Persons suffered in this Kind, under false Sug-

Suggestions and Accusations, which occasioned great Exclamations by the Writers of those Times against the Violences and Oppressions which were used after this Victory. And, *Thirdly*, Such as stood Neuters, and meddled not on either Side during the Controversy: And doubtless, for some Time after this great Change, many of those suffered very much, and were hardly used in their Estates, especially such as were of the more eminent Sort.

*Gervasius Tilburicensis*, who wrote in the Time of *Hen. 2. Libro 1. Cap. Quid Mordrum & quare sic dictum*, gives us a large Account of what he had traditionally learned touching this Matter, to this Effect, *viz. Post Regni Conquisitionem & Perduellum Subjectionem, &c. Nomine autem Successionis a temporibus subactæ Gentis nihil sibi Vendicarent, &c. i. e.* After the Conquest of the Kingdom, and Subjection of the Rebels, when the King himself and his great Men had surveyed their new Acquisitions; and strict Inquiry was made, who there were that, fighting against the King, had saved themselves by Flight: From these, and the Heirs of such as were slain in Battle, fighting against him, all Hopes of Succession, or of possessing their Estates, were lost; for the People being subdued, they held their Lives as a Favour, &c.

But *Gervase*, as he speaks so liberally in Relation to the Conquest, and the *Subactæ Gens*, as he terms us; so it should seem, he was in great Measure mistaken in this Re-

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lation:

CHAP. 5.

Lands of  
Neuters  
not for-  
feited.

lation: For it is most plain, That those that were not engaged visibly in the Assistance of *Harold*, were not, according to the Rules of those Times, disabled to enjoy their Possessions, or make Title of Succession to their Ancestors, or transmit to their Posterity as formerly, tho' possibly some Oppressions might be used to particular Persons here and there to the contrary. And this appears by that excellent Monument of Antiquity, set down in Sir *H. Spelman's Glossary*, in the Title of *Drenches* or *Drenges*, which I shall here transcribe, viz.

*Edwinus de Sharborne, Et quidam alii qui ejeti fuerunt & Terris suis abierunt ad conquestorem & dixerunt ei, quod nunquam ante conquestum, nec in conquestum, nec post, fuerunt contra Regem ipsum in Concilio, aut in auxilio sed tenuerunt se in pace, Et hoc parati sunt probare qualiter Rex vellet Ordinare, Per quod idem Rex facit Inquiri per totam Angliam si ita fuit, quod quidem probatum fuit, propter quod idem Rex praecepit ut omnes illi qui sic tenuerunt se in pace in forma praedicta quod ipsi rebaberent omnes Terras & Dominationes suas adeo integre & in pace ut unquam habuerent vel tenuerunt ante conquestum suum, Et quod ipsi in posterum vocarentur Drenges.*

Church  
Lands not  
confisca-  
ted.

But it seems the Possessions of the Church were not under this Discrimination, for they being held not in Right of the Person, but of the Church, were not subject to any Confiscation by the Adherence of the  
Pos

Possessor to *Harold* the Usurper: And therefore, tho' it seems *Stigand* Archbishop of *Canterbury*, at the coming in of *William* 1. had been in some Opposition against him, which probably might be the true Cause why he perform'd not the Office of his Coronation, which of Right belonged to him, tho' some other Impediments were pretended, *Vide Eadmerus in initio Libri*, and might also possibly be the Reason why a considerable Part of his Possessions were granted to *Odo* Bishop of *Bayonne*, but were afterwards recovered by *Lanfrank*, his Successor, at *Pinendon*, in pleno Comitatu, ubi Rex precepit totum Comitatum absque mora considerare, & homines Comitatus omnes Francigenos & precipue Anglos in antiquis Legibus & Consuetudinibus peritos, in unum convenire.

To this may be added those several Grants and Charters made by King *William* 1. mentioned in the History of *Ely*, and in *Eadmerus*, for restoring to Bishopricks and Abbies such Lands, or Goods, as had been taken away from them, viz.

Charters  
for re-  
storing  
Lands to  
Churches  
&c.

*Willielmus Dei gratia Rex Anglorum, Lanfranco Archiepiscopo Cantuar' & Galfrido Episcopo Constantiarum & Roberto Comiti de ou & Richardo filio Comitis Gilberti & Hugoni de Monteforti, suisque aliis proceribus Regni Anglie salutem. Summonete Vicecomites meos ex meo precepto, & ex parte mea eis dicite ut reddant Episcopatibus meis & Abbatibus totum Dominium omnesque Dominicas terras quas de Dominio Episcopatum meorum, & Abbatiarum, Episcopi mei & Abbates*

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*Abbates eis vel lenitate timore vel cupiditate dederunt vel habere consenserunt vel ipsi violentia sua inde abstraxerunt, & quod hactenus injuste possiderunt de Dominio Ecclesiarum mearum. Et nisi reddiderint sicut eos ex parte mea summonsbitis, vos ipsos velint nolint, constringite reddere; Et quod si quilibet alius vel aliquis vestrum quibus hanc Justitiam imposui ejusdem querelæ fuerit reddat similiter quod de Domino Episcopatum vel Abbatiarum mearum habuit ne propter illud quod inde aliquis vestrum habebit, minus exerceat super meos Vicecomites vel alios, quicunque teneant Dominium Ecclesiarum mearum, quod Precipio, &c.*

*Willielmus Rex Anglor' omnibus suis fidelibus suis & Vicecomitibus in quorum Vicecomitatibus Abbatia de Heli Terras habet salutem. Precipio ut Abbatia pred. habeat Omnes consuetudines suas scilicet Saccham & Socham Toll & Team & Inganganetheof, Hamsocna, & Grithbrice Fithwite & Ferdwite infra Burgum & extra & omnes alias forisfacturas in terra sua super suos homines sicut habuit Die qua Rex Edwardus fuit vivus & mortuus, & sicut mea iussione dirationatæ apud Keneteford per plures Scyras ante meos Barones, viz. Galsfridum Constantientem Ep. & Baldewine Abbatem, &c. Teste Rogero Bigot.*

*Willielmus Rex Angl. Lanfranco Archiepo, & Rogero Comiti Moritonie, & Galsfrido Constantien Ep. salutem. Mando vobis & Precipia ut iterum facialis congregari omnes Scyras quæ intersuerunt placito habito de Terris Ecclesia de Heli, antequam mea conjux in Normaniam novissime veniret, cum quibus etiam sint de Baronibus meis, qui competenter adesse poterint & predicta*

*prædicto placito interfuerint & qui terras ejusdem Ecclesiæ tenent; Quibus in unum congregatis eligantur plures de illis Anglis qui sciunt quomodo Terræ jacebant præfata Ecclesiæ Die qua Rex Edwardus Obiit, & quod inde dixerint ibidem jure jurando testentur; quo facto restituantur Ecclesiæ terræ quæ in Dominico suo erant die obitus Regis Edwardi; Exceptis his quas homines clamabant se sibi dedisse; illas vero Literis mihi significate quæ sint, & qui eas tenent; Qui autem tenent Theinlandes quæ proculdubio debent teneri de Ecclesiâ faciant concordiam cum Abbate quam Meliorem poterint, & si noluerunt terræ remaneant ad Ecclesiâ, Hoc quoque detinentibus Socham & Saccam fiat, &c.*

*Willielmus Rex Anglorum, Lanfranco Archiepiscopo, & G. Episcopo & R. Comiti M. salutem, &c. Defendite ne Remigius Episcopus novas consuetudines requirat infra Insulam de Heli, Nolo enim quod ibi habeat nisi illud quod Antecessor ejus habebat Tempore Regis Edwardi Scilicet qua die ipse Rex mortuus est. Et si Remig. Episcopus inde Placitare voluerit placitet inde sicut fecisset tempore Regis Edw. & placitum istum sit in vestra præsentia; De custodia de Norguic Abbatem Si meonem quietum esse demittite; Sed ibi munitionem suam conduci faciat & custodiri. Facite remanere placitum de Terris quas Calumniantur Willielmus de ou, & Radulphus filius Gualeranni, & Robertus Gernon; si inde placitare noluerint sicut inde placitassent tempore Regis Edwardi, & sicut in eodem tempore Abbatia consuetudines suas habebat, Volo ut eas omnino faciatis habere sicut Abbas per Char-*



tas suas, & per Testes suos eas deplacitare poterit.

Ecclesiastical Jurisdiction separated from the Temporal.

I might add many more Charters to the foregoing, and more especially those famous Charters in *Spelman's Councils*, Vol. 2. Fol. 14. & 165. whereby it appears, That King William 1. *Communi Concilio, & Concilio Archiepiscoporum, Episcoporum & Abbatum, & omnium Principum & Baronum Regni*, instituted the Courts for holding Pleas of Ecclesiastick Causes, to be separate and distinct from those Courts that had Jurisdiction of Civil Causes. *Sed de his plusquam satis.*

And thus I conclude the Point I first propounded; viz. How King William 1. after his Victory, dealt with the Possessions of the *English*, whereby it appears that there was no Pretence of an Universal Conquest, or that he was a Victor in *Populum*; neither did he claim the Title of *English* Lands upon that Account, but only made Use of his Victory thus far, to seize the Lands of such as had oppos'd him: Which is universal in all Cases of Victories, tho' without the Pretence of Conquest.

2d Question.

*Secondly*, Therefore I come to the Second general Question, viz. What was done in Relation to the Laws? It is very plain, that the King, after his Victory, did, as all wise Princes would have done, endeavour to make a stricter Union between *England* and *Normandy*; and in order thereunto, he endeavoured to bring in the *French* instead of the *Saxon* Language, then used in *England*: *Deliberavit*

*liberavit* (says *Holcot*) *quomodo Linguam Saxoniam possit destruere, & Anglicam & Normanicam idiomate concordare & ideo ordinavit quod nullus in Curia Regis placitaret nisi in Lingua Gallica, &c.* From whence arose the Practice of Pleading in our Courts of Law in the *Norman* or *French* Tongue, which Custom continued till the Statute of 36 E. 3. c. 15.

CHAP. 5.  
William 1.  
Endeavoured a Union, in the Language and Laws of England and Normandy.

And as he thus endeavoured to make a Community in their Language, so possibly he might endeavour to make the like in their Laws, and to introduce the *Norman* Laws into *England*; or as many of 'em as he thought convenient; and it is very propable, that after the Victory, the *Norman* Nobility and Soldiers were scattered through the whole Kingdom, and mingled with the *English*, which might possibly introduce some of the *Norman* Laws and Customs insensibly into this Kingdom: And to that End the Conqueror did industriously mingle the *English* and *Normans* together, shuffling the *Normans* into *English* Possessions here, and putting the *English* into Possessions in *Normandy*, and making Marriages among them, especially between the Nobility of both Nations.

This gave the *English* a Suspicion, that they should suddenly have a Change of their Laws before they were aware of it. But it fell out much better: For first, there arising some Danger of a Defection of the *English*, countenanced by the Archbishop of *York* in the *North*, and *Frederick*, Abbot of *St. Albans* in the *South*; the King, by the Perswasions of *Lanfrank*, Archbishop of *Canterbury*, *Pro bono*

## The History of the

*pacis apud Berkhamstead juravit super Animas reliquias Sancti Albani tactisque Sacrosanctis Evangeliiis (ministrante juramento Abbate Frederico) ut bonas & approbatas antiquas Regni Leges quas sancti & pii Angliae Reges ejus Antecessores, & maxime Rex Edwardus statuit inviolabiliter observaret; Et sic pacificati ad propria leti recesserunt. Vide Mat. Paris, in Vita Frederici Abbatis Sancti Albani.*

But altho' now, upon this Capitulation, the ancient *English* Laws were confirm'd, and namely, the Laws of St. *Edward the Confessor*; yet it appeared not what those Laws were: And therefore, in the Fourth Year of his Reign, we are told by *Hoveden*, in a Digression he makes in his History under the Reign of King *Hen. 2.* and also in the Chronicle of *Lithfield*.

*Willielmus Rex, Anno quarto Regni sui Consilio Baronum suorum fecit Summonari per Universos Consulatos Angliae, Anglos Nobiles & Sapientes & sua Lege eruditos ut eorum jura & consuetudines ab ipsis audiret, Electis igitur de singulis totius Patriae Comitatibus viri duodecim, jurejurando confirmaverunt ut quoad possint recto tramite neque ad Dextram neque ad Sinistram partem divertentes Legum suarum consuetudinem & sancitam patefacere nihil præmittentes nihil addentes, nihil prævaricando mutantes, &c.* And then sets down many of those ancient Laws approv'd and confirm'd by the King, and *Commune Concilium*; wherein it appears, that he seems to be most pleased with those Laws that came under the Title of *Lex Danica*, as most consonant to the *Norman Customs*.

*Quo*

*Quo auditu mox universi compatrioti qui Leges dixerint Tristes effecti, uno ministerio deprecati sunt quatenus permetteret Leges sibi proprias & consuetudines antiquas habere in quibus vixerunt Patres, & ipsi in iis nati & nutriti sunt, quia durum Valde sibi foret suscipere Leges ignotas, & judicare de iis quæ nesciebant; Rege vero ad flectendum ingrato existente, tandem eum persecuti sunt deprecantes quatenus pro Anima Regis Edwardi qui eas sub diem suum eis concesserat Barones & Regnum & cujus orant Leges non aliorum extraneorum cogere quam sub Legibus perseverare patriis; Unde Consilio habito Precatui Baronem tandem acquievit, &c.*

CHAP. 9.

The Confessor's  
Laws confirmed.

*Gervasius Tilburienſis, who lived near that Time, speaks shortly, and to the Purpose, thus: Propositis Legibus Anglicanis secundum triplicitatem earum Distinctionem, i. e. Merchenlage, Westsaxon-lage, & Dane-lage quasdam earum reprobans quasdam autem approbans illis transmarinas Legis Neustrie quas ad Regni Pacem tuendam efficacissime videbantur, adiecit.*

So that by this, there appears to have been a double Collection of Laws; viz.

First, The Laws of the Confessor, which were granted and confirmed by King William, and are also called the Laws of King William, which are transcribed in Mr. Selden's Notes upon Eadmerus, Page 173. the Title whereof is thus, viz. *Hæ sunt Leges & Consuetudines quas Willielmus Rex concessit universo populo Angliæ post subactam Terram eadem sunt quas Edwardus Rex cognatus ejus observavit ante eum*: And these seem to be the very

very same that *Ingulfus* mentions to have been brought from *London*, and placed by him in the Abbey of *Crowland* in the fifteenth Year of the same King *William*, *attuli eadem Vice mecum Londini in meum Monasterium Legum Volumen, &c.*

And others added.

Secondly, There were certain additional Laws at that Time establish'd, which *Gervasius Tilburienſis* calls, *Leges Neustrie quæ efficacissimæ videbantur ad tuendam Regni pacem*; which seems to be included in those other Laws of King *William* transcribed in the same Notes upon *Eadmerus*, Pag. 189, 193, &c. which indeed were principally designed for the Establishment of King *William* in the Throne, and for the securing of the Peace of the Kingdom, especially between the *English* and *Normans*, as appears by these Instances, *viz.*

The Law *de Mordro*; or the Common Fine for a *Norman* or *Frenchman* slain, and the Offender not discovered: The Law for the Oath of Allegiance to the King: The Introduction of the Trial by single Combat, which many Learned Men have thought was not in Use here in *England* before *Will. 1.* And the Law touching Knights Service, which *Bracton*, *Lib. 2.* supposes to be introduced by the Conqueror, *viz. Quod omnes Comites Milites & Servientes & universi liberi homines totius Regni habeant & teneant se semper bene in Armis & in Equis ut decet & quod sint semper prompti & bene parati ad Servitium suum integrum nobis explendum & peragendum cum semper Opus affuerit secundum quod nobis de Feodo debent & Tenementis suis de Jure facere*

*facere & sicut illis statuimus per Commune Concilium totius Regni prædicti, & illis dedimus & concessimus in Feodo jure hereditario.* Wherein we may observe, that this Constitution seems to point at Two Things, viz. The assizing of Men for Arms, which was frequent under the Title *De assidenda ad Arma*, and is afterwards particularly enforced and rectified by the Statute of *Winton*, 13 Ed. 1. and next of Conventional Services reserved by *Tenures* upon Grants made out of the Crown or Knights Service, called in *Latin*, *Forinsecum*, or *Regale Servitium*.

And *Note*, That these Laws were not imposed *ad Libitum Regis*, but they were such as were settled *per Commune Concilium Regni*, and possibly at that very Time when Twelve out of every County were return'd to ascertain the *Confessor's* Laws, as before is mentioned out of *Hoveden*, which appears to be as sufficient and effectual a Parliament as ever was held in *England*.

By all which it is apparent, *First*, That *William 1.* did not pretend, nor indeed could he pretend, notwithstanding this Nominal Conquest, to alter the Laws of this Kingdom without common Consent *in Communi Concilio Regni*, or in Parliament. And, *Secondly*, That if there could be any Pretence of any such Right, or if in that turbulent Time something of that Kind had happened; yet by all those solemn Capitulations, Oaths, and Concessions, that Pretence was wholly avoided, and the ancient Laws of the Kingdom settled, and were not to be altered, or

added unto, at the Pleasure of the Conqueror, without Consent in Parliament.

In the Seventeenth Year of his Reign, (or as some say, the Fifteenth) he began that great Survey, recorded in Two Books, called, *The Great Doomsday Book*, and *Little Doomsday Book*, and finished it in the Twentieth Year of his Reign, *Anno Domini 1068*, as appears by the learned Preface of Mr. *Selden* to *Eadmerus*, and indeed by the Books themselves. The Original Record of which is still extant, remaining in the Custody of the Vice-Chamberlains of his Majesty's *Exchequer*. This Record contains a Survey of all the ancient Demefn Lands of the Kingdom, and contains in many Manors, not only the Tenants Names, with the Quantity of Lands and their Values, but likewise the Number and Quality of the Resients or Inhabitants, with divers Rights, Privileges, and Customs claimed by them; and being made and found by Verdict or Presentment of Juries in every Hundred or Division upon their Oaths, there was no receding from, or avoiding what was written in this Record: And therefore as *Gervasius Tilburienfis* says, Page 41. *Ob hoc nos eundem Librum Judiciarium Nominamus; Non quod in eo de propositis aliquibus dubiis feratur sententia, sed quod ab eo sicut ab ultimo Die Judicii non licet ulla ratione discedere.*

And thus much shall suffice touching the Fifth General Head; namely, of the Progress made after the Coming-in of King

*William*, relating to the Laws of *England*, CHAP. 5.  
their Establishment, Settlement, and Alteration. If any one be minded to see what this Prince did in reference to Ecclesiasticks, let him consult *Eadmerus*, and the learned Notes of Mr. *Selden* upon it, especially Page 167, 168, &c. where he shall find how this King divided the Episcopal Consistory from the County Court, and how he restrain'd the Clergy and their Courts from exercising Ecclesiastical Jurisdiction upon Tenants *in Capite*.

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**CHAP.**



## C H A P. VI.

*Concerning the Parity or Similitude of the  
Laws of England and Normandy, and  
the Reasons thereof.*

## CHAP. 6.

Our Laws  
not deri-  
ved from  
the *Nor-*  
*mans.*

THE great Similitude that in many Things appears between the Laws of *England*, and those of *Normandy*, has given some Occasion to such as consider not well of Things, to suppose that this happened by the Power of the Conqueror, in conforming the Laws of this Kingdom to those of *Normandy*; and therefore will needs have it, that our *English* Laws still retain the Mark of that Conquest, and that we received our Laws from him as from a Conqueror; than which Assertion, (as it appears even by what has before been said) nothing can be more untrue. Besides, if there were any Laws derived from the *Normans* to us, as perhaps there might be some, yea, possibly many; yet it no more concludes the Position to be true, that we received such Laws *per Modum Conquestus*, than if the Kingdom of *England* should at this Day take some of the Laws of *Persia*, *Spain*, *Egypt*, or *Assyria*, and by Authority of Parliament settle them here. Which tho' they were for their Matter Foreign, yet their obligatory Power, and their formal Nature

or

or Reason of becoming Laws here, were not at all due to thole Countries, whose Laws they were, but to the proper and intrinsical Authority of this Kingdom by which they were received as, or enacted into, Laws : And therefore, as no Law that is Foreign, binds here in *England*, till it be received and authoritatively engrafted into the Law of *England* ; so there is no Reason in common Prudence and Understanding for any Man to conclude, that no Rule or Method of Justice is to be admitted in a Kingdom, tho' never so useful or beneficial, barely upon this Account, That another People entertain'd it, and made it a Part of their Laws before us.

But as to the Matter itself, I shall consider, and enquire of the following Particulars, *wiz.*

1. How long the Kingdom of *England* and Dutchy of *Normandy* stood in Conjunction under one Governor.

2. What Evidence we have touching the Laws of *Normandy*, and of their Agreement with ours.

3. Wherein consists that Parity or Disparity of the *Englisch* and *Norman* Laws.

4. What might be reasonably judged to be the Reason and Foundation of that Likeness, which is to be found between the Laws of both Countries.

*First*, Touching the Conjunction under one Governor of *England* and *Normandy*, we are

1.

are to know, That the Kingdom of *England* and Dutchy of *Normandy* were *de facto* in Conjunction under these Kings, viz. *William 1. William 2. Henry 1. King Stephen, Henry 2. and Richard 1.* who, dying without Issue, left behind him *Arthur* Earl of *Britain*, his Nephew, only Son of *Geoffry* Earl of *Britain*, second Brother of *Richard 1.* and *John* the youngest Brother to *Richard 1.* who afterward became King of *England* by usurping the Crown from his Nephew *Arthur*. But the Princes of *Normandy* still adhered to *Arthur*, sicut *Domino Ligeo suo dicentes Judicium & Consuetudinem esse illarum Regionum ut Arthurus Filius Fratris Senioris in Patrimonio sibi debito & hereditate Avunculo suo succedat eodem jure quod Gaulfridus Pater ejus esset habiturus si Regi Richardo defuncto supervivisset.*

Elder Brother dying in Life of the Father, his Son to inherit.

And therein they said true, and the Laws of *England* were the same, Witness the Succession of *Richard 2.* to *Edward 3.* also the Laws of *Germany*, and the ancient *Saxons* were accordant hereunto; and it was accordingly decided in a Trial by Battle, under *Otho* the Emperor, as we are told by *Radulphus, de Diceto sub Anno 945.* And such are the Laws of *France* to this Day, Vide *Chopinus de Domanio Francie, Lib. 2. Tit. 12.* And such were the ancient Customs of the *Normans*, as we are told by the *Grand Coutumier, cap. 99.* And such is the Law of *Normandy*, and of the Isles of *Jersey* and *Guernsey* (which some Time were Parcel thereof) at this Day, as is agreed by *Terrier*, the best Expositor of their Customs, *Lib. 2. cap.*

cap. 2. And so it was adjudg'd within my Remembrance in the Isle of *Jersey*, in a Controversy there, between *John Perchard* and *John Rowland*, for the Goods and Estate of *Peter Perchard*. CHAP. 6.

But nevertheless, *John* the Uncle of *Arthur* came by Force and Power, *Et Rotomagus Gladio Ducatus Normannie accinctus est per Ministerium Rotomagensis Archiepiscopi*, as *Mat. Paris* says; and shortly after also usurped the Crown of *England*, and imprisoned his Nephew *Arthur*, who died in the Year 1202, being as was supposed murdered by his said Uncle, *Vide Mat. Paris, in fine Regni Regis Ricardi Primi*, and *Walsingham* in his *Ypodigma Neustrie sub eodem Anno 1202*.

And to countenance his Usurpation in *Normandy*, and to give himself the better Pretence of Title, he by his Power so far prevailed there, that he obtained a Change of the Law there, purely to serve his Turn, by transferring the *Right of Inheritance* from the Son of the elder Brother to the younger Brother, as appears by the *Grand Contumier*, cap. 99. But withal, the *Gloss* takes Notice of it as an Innovation, and brought in by Men of Power, tho' it mentions not the particular Reason, which was as aforesaid.

The King of *France* (of whom the Dutchy of *Normandy* was holden) highly resented the Injury done by King *John* to his Nephew *Arthur*, who, as was strongly suspected, came not fairly to his End. He summoned King *John* as Duke of *Normandy* into *France*, to give an Account of his Actions, and upon



his Default of appearing, he was by King Philip of France forejudged of the said Dutchy, *Vide Mat. Paris, in initio Regni Johannis*; and this Sentence was so effectually put in Execution, that in the Year 1204, *Mat. Paris* tells us, *Tota Normannia, Turania Andegavia, & Piclavia cum Civitatibus & Castellis & Rebus aliis præter Rupellam, Toar, & Mar Castellam sunt in Regis Francorum Dominium devoluta.*

But yet he retained, tho' with much Difficulty, the Islands of *Jersey* and *Guernsey*, and the uninterrupted Possession of some Parts of *Normandy* for some Time after, and both he and his Son King *Hen. 3.* kept the Stile and Title of Dukes of *Normandy*, &c. 'till the 43d Year of King *Hen. 3.* at which Time for 3000 *Livres Tournois*, and upon some other Agreements, he resigned *Normandy* and *Anjou* to the King of *France*, and never afterwards used that Title, as appears by the Continuation of *Mat. Paris, sub Anno 1260*, only the four Islands, some Time Parcel of *Normandy*, were still, and to this Day, are enjoyed by the Crown of *England*, viz. *Jersey, Guernsey, Sarke, and Aldernay*, tho' they are still governed under their ancient *Norman Laws*.

Secondly, As to the Second Enquiry, What Evidence we have touching the Laws of *Normandy*: The best, and indeed only common Evidence of the ancient Customs and Laws of *Normandy*, is that Book which is called, *The Grand Contumier of Normandy*, which in later Years has been illustrated, not

*Normandy*  
resigned  
by King  
*John.*

The Con-  
tumier of  
*Normandy*

not only with a *Latin* and *French* Gloss, but CHAP. 6.  
also with the Commentaries of *Terrier*, a  
*French* Author.

This Book does not only contain many of the ancients Laws of *Normandy*, but most plainly it contains those Laws and Customs which were in Use here in the Time of King *Hen. 2.* King *Rich. 1.* and King *John*, yea, and such also as were in Use and Practice in that Country after the Separation of *Normandy* from the Crown of *England*, for we shall find therein, in their Writs and Processes, frequent Mention of King *Rich. 1.* and the entire Text of the 110th Chapter thereof is an Edict of *Philip* King of *France*, after the Severance of *Normandy* from the Crown of *England*. (I speak not of those additional Edicts which are annex'd to that Book of a far later Date.) So that we are not to take that Book as a Collection of the Laws of *Normandy*, as they stood before the Accession or Union thereof to the Crown of *England*; but as they stood long after, under the Time of those Dukes of *Normandy* that succeeded *William 1.* and it seems to be a Collection made after the Time of *K. Hen. 3.* or at least after the Time of *K. John*, and consequently it states their Laws and Customs as they stood in Use and Practice about the Time of that Collection made, which Observation will be of Use in the ensuing Discourse.

*Thirdly*, Touching the Third Particular, viz. The Agreement and Disparity of the Laws of *England* and *Normandy*. It is very

CHAP. 6. true, we shall find a great Suitableness in their Laws, in many Things agreeing with the Laws of *England*, especially as they stood in the Time of King *Hen. 2.* the best Indication whereof we have in the Collection of *Glanville*; the Rules of Discents, of Writs, of Process, of Trials, and some other Particulars, holding a great Analogy in both Dominions, yet not without their Differences and Disparities in many Particulars, *viz.*

Difference between the *Contumier* and the Laws of *England*.

*First*, Some of those Laws are such as were never used in *England*; for Instance, There was in *Normandy* a certain Tribute paid to the Duke, called *Monya*, *i. e.* a certain Sum yielded to him (in Consideration that he should not alter their Coin) payable every three Years, *Vide Contumier, cap. 15.* But this Payment was never admitted in *England*; indeed it was taken for a Time, but was ousted by the first Law of King *Hen. 1.* as an Usurpation. Again, by the Custom of *Normandy*, the Lands descended to the Bastard Eigne, born before Marriage of the same Woman, by whom the same Man had other Children after Marriage, *Contumier, cap. 27.* But the Laws of *England* were always contrary, as appears by *Glanville, Lib. 7. cap. 13.* And the Statute of *Merton*, which says, *Nolumus Leges Anglicanas Mutare, &c.* Again, by the Laws of *Normandy*, if a Man died without Issue, or Brother, or Sister, the Lands did descend to the Father, *Contumier, cap. 15. Terrier, cap. 2.* But in *Eng-*

England, this Law seems never to have been used. CHAP. 6.

2dly, Again, Some Laws were used in Normandy, which were in Use in England long before the supposed Norman Conquest, and therefore could in no Possibility have their original Force, or any binding Power here upon that Pretence: For Instance, it appears by the *Custumier* of Normandy, that the Sheriff of the County was an Annual Officer, and so 'tis evident he was likewise in England before the Conquest: And among the Laws of Edward the Confessor, it is provided, *Quod Aldermanni in Civitatibus eandem habeant Dignitatem qualem habent Ballivi hundredorum in Ballivis suis sub Vicecomitem*: Again, Wreck of the Sea, and Treasure Trove was a Prerogative belonging to the Dukes of Normandy, as appears by the *Contumier*, cap. 17, & 18. and so it was belonging to the Crown of England before the Conquest, as appears by the Charter of Edward the Confessor to the Abby of Ramsey of the Manor of Ringstede, *cum toto ejectu Maris quod Wreccum dicitur*, and the like, *vide ibid.* of Treasure Trove, & *vide* the Laws of Edward the Confessor, cap. 14. So Fealty, Homage, and Relief, were incident to Tenures by the Laws of Normandy, *Vide Contumier*, cap. 29. And so they were in England before the Conquest, as appears by the Laws of Edward the Confessor, cap. 35. and the Laws of Canutus, mentioned by Brompton, cap. 8. So the Trial by Jury of Twelve Men was the usual Trial among the Normans in



most Suits, especially in Assizes, & *Juris Uturms*, as appears by the *Contumier*, cap. 92, 93, & 94. and that Trial was in Use here in *England* before the Conquest, as appears in *Brompton* among the Laws of King *Elibred*, cap. 3. which gives some Specimen of it, viz. *Habeant placita in singulis Wapentachiis & exeant Seniores duodecim Thani vel Prepositus cum iis & jurent quod neminem innocentem accusare nec Noxium concealare.*

3dly, Again, In some Things, tho' both the Law of *Normandy* and the Law of *England* agreed in the Fact, and in the Manner of Proceeding, yet there was an apparent Discrimination in their Law from ours: As for Instance, The Husband seized in Right of the Wife, having Issue by her, and she dying, by the Custom of *Normandy* he held but only during his Widowhood, *Contumier*, cap. 119. But in *England*, he held during his Life by the Curtesy of *England*.

4thly, But in some Things, the Laws of *Normandy* agreed with the Laws of *England*, especially as they stood in the Times of *Hen. 2.* and *Rich. 1.* so that they seem to be as it were Copies or Counterparts one of another; tho' in many Things, the Laws of *England* are since changed in a great Measure from what they then were? For Instance, at this Day in *England*, and for very many Ages past, all Lands of Inheritance, as well *Socage Tenures*, as of Knights Service, descend to the eldest Son, unless in *Kent* and some other Places where the Custom

Custom directs the Descent to all the Males, and in some Places to the youngest; but the ancient Law used in *England*, though it directed Knights Services and Serjeanties to descend to the eldest Son, yet it directed Vassalagies and Soccage Lands to descend to all the Sons, *Glarvil. Lib. 7. cap. 3.* and so does the Laws of *Normandy* to this Day. *Vide Contumier, cap. 26. & post hic, cap. 11.*

Again, *Leprosy* at this Day does not impede the Descent; but by the Laws in Use in *England*, in the elder Times, unto the Time of King *John*, and for some Time afterwards, *Leprosy* did impede the Descent, as *Placito Quarto Johannis*, in the Case of *W. Fulch*, a Judge of that Time, and accordingly were the Laws of *Normandy*. *Vide Le Contumier, cap. 27.*

Again, At this Day, by the Law of *England*, in Cases of Trials by Twelve Men, all ought to agree, and any one dissenting, no Verdict can be given; but by the Laws of *Normandy*, tho' a Verdict ought to be by the concurring Consent of Twelve Men, yet in Case of Dissent or Disagreement of the Jury, they used to put off the lesser Number that were Dissenters, and added a kind of *Tales* equal to the greater Number so agreeing, until they had got a Verdict of Twelve Men that concurred, *Contumier, c. 95.* And we may find some ancient Footsteps of the like Use here in *England*, tho' long since antiquated, *Vide Bracton, Lib. 4. cap. 19.* where he speaks thus, *Contingit etiam multotiens quod Juratores in veritate dicenda sunt*

Old Law  
of Trials  
by Jury.

CHAP. 6. *sibi contrarii ita quod in unam concordare non possunt sententiam, Quo casu de Consilio Curie assortietur Assisa, ita quod apponantur alii juxta numerum majoris partis que dissenserit, vel saltem quatuor vel sex & adjungantur aliis, vel etiam per seipsos sine aliis, de veritate discutiant & judicent, & per se respondeant & eorum veredictum allocabitur & tenebitur cum quibus ipsi convenirent.*

And of Descents.

Again, At this Day, by the Laws of England, a Man may give his Lands in Fee-simple, which he has by Descent, to any one of his Children, and disinherit the rest: But by the ancient Laws used here, it seems to be otherwise; as *Mich. 10. Johannis Glanv. Lib. 7. cap. 2. the Case of William de Causeia.* And accordingly were the Laws of Normandy, as we find in the *Grand Coutumier, cap. 36. Quand le Pere avoit plusieurs fills, ils ne peut faire de son Heritage le un Meilleur que le autre*; and yet it seems to this Day, in England, it holds some Resemblance in Cases of Frank-Marriage, viz. That the *Dowry*, in Case she will have any Part of her Father's other Lands, ought to put her Lands in *Hochpot*.

Again, By the Law of England, the younger Brother shall not exclude the Son of the elder, who died in the Life-time of the Father: And this was the ancient Law of Normandy, but received some Interruption in Favour of King John's Claim, *Vide Coutumier, cap. 25. & hic ante*; and indeed, generally the Rule of Descents in Normandy was the same in most Cases with that of Descents

Descents with us at this Day; as for Instance, That the Descent of the Line of the Father shall not resort to that of the Mother, *Et e converso*; and that the Course was otherwise in Cases of Purchases. But in most Things the Law of *Normandy* was consonant to the Law with us, as it was in the Time of King *Richard I.* and King *John*; except in Cases of Descents to *Bastard eigne*, excluding *Mulier puisne*, as aforesaid.

Again, at this Day there are many Writs now in Use which were anciently also in Use here, as well as in *Normandy*: As Writs of Rights, Writs of Dower, Writs *De novel Disseisin*, *de Mortdancestor*, *Juris utrum*, *Darein presentment*, &c. And some that are now out of Use, though anciently in Use here in *England*; as Writs *De Feodo vel Vado*, *De Feodo vel Warda*, &c. All which are taken Notice of by *Glanville*, *Lib. 13. cap. 28, 29.* And the very same Forms of Writs in Effect were in Use in *Normandy*, as appears by the *Contuiner per Totum*, and the Writ *De Feodo vel Vado*, (*ibid. cap. 11.*) according to *Glanville*, *Lib. 13. cap. 27.* runs thus, *viz. Rex Vicecomiti salutem: Summone per bonos summonitores duodenim liberos & legales homines de vicineto quod sint coram me vel Justiciis meis eo die parati Sacramento Recognoscere utrum N. teneat unam Carucatam Terre in illa villa que R. clamat versus eum per Breve meum in Feodo an in vadio, invadiatem ei ab ipso R. vel ab H. antecessore ejus, (vel aliter si sit Feodum vel hereditas ipsius N. an in vadio invadiata ei ab ipso R. vel*

CHAP. 6.

Their Writs.

CHAP. 6. *R. vel ab H. &c. Et interim terram illam videant, &c. Vide ibid.*

And according to the *Grand Contumier*, that Writ runs thus, viz. *Si Rex fecerit te securum de clamore suo prosequend' summonneas Recognitores de Viceneto quod sint ad primas Affisas Ballivæ, ad cognoscendum utrum Carucata Terræ in B. quod. G. deforceat R. sit Feodum tenentis vel vadium novum dictum per manus G. post Coronationem Regis Richardi & pro quanta, & utrum sit propinquior Heres ad redimendum vadium, & videatur interum Terræ, &c.* So that there seems little Variance, either in the Nature or in the Form of those Writs used here in the Time of *Henry 2.* And those used in *Normandy* when the *Contumier* was made.

Times of  
Limita-  
tion.

Again, The Use was in *England* to limit certain notable Times, within the Compass of which those Titles which Men design'd to be relieved upon, must accrue: Thus it was done in the Time of *Henry 3.* by the Statute of *Merton*, cap. 8. at which Time the Limitation in a Writ of Right was from the Time of King *Henry 1.* and by that Statute it is reduced to the Time of King *Henry 2.* and for Affizes of *Mortdancestor* they were thereby reduced from the last Return of King *John* out of *Ireland*, which was 12 *Johannis*, and for Affizes of *Novel Disseisin*, a *prima Transfretatione Regis in Normanniam*, which was 5 *Hen. 3.* and which before that had been *post ultimum redditum Henricus 3. de Britannia*, as appears by *Bracton*. And this Time of Limitation was also

also afterwards, by the Statutes of *Westm. 1. cap. 39.* and *West. 2. cap. 2. 46.* reduced unto a narrow Scantlet, the Writ of Right being limited to the First Coronation of King *Richard 1.*

CHAP. 6.

But before the Limitation set by that Statute of *Merton*, there were several Limitations set for severals Writs; for we find among the Pleas of King *John's* Time, the Limitation of Writs, *De Tempore quo Rex Henricus avus noster fuit vivus & Mortuus*; and in a Writ of Aile, *Die quo Rex Henricus obiit* in the Time of *Henry 2.* as appears by *Glarville, Lib. 13. cap. 3.* there were then divers Limitations in Use, as in *Mortdancestors, post prima Coronationem nostram, viz. Henrici secundi, Glarvil. Lib. 1. cap. 1.* and touching Assizes of Novel Disseisin, *Vide ibid. cap. 32.* where he tells us, *Cum quis intra Assisam, &c.* And the Time of Limitation in an Assize, was then *post ultimam meam Transfretationem, (viz. Henrici primi) in Normanniam, Lib. 13. cap. 33.* But in a Writ of Right, as also in a Writ of Customs and Services, it was *de Tempore Regis Henrici avi mei, viz. Hen. 1. vid. ib. Lib. 12. cap. 10, 16.* and it seems very apparent, that the Limitations anciently in *Normandy*, for all Actions Ancestral was *post primam Coronationem Regis Henrici secundi*, as appears expressly in the *Contumier, cap. III. De Feofe & Gage.*

So that anciently the Time of Limitation in *Normandy* was the same as in *England*, and indeed borrowed from *England, viz. In all Actions Ancestrel from the Coronation* of

of Henry 2. And thus in those Actions wherein the Limitation was anciently from the Coronation of King *Richard 1.* was substituted as in the Writ *De Feoffe & Gage*, in the *Contumier*, cap. 111. *De Feoffe & Forme*, cap. 112. In the Writ *De Ley Apparisan*, ib. cap. 24. & cap. 22. *Afcun Gage ne peut estre requife en Normandy, fi il ne fuit engage post le Coronement de Roy Richard ou deins quarante annus*: So that the old Limitation, as well for the Redemption of Mortgages, as for bringing those Writs above-mentioned, was *post Coronationem Regis Henrici Secundi*; but altered, as it seems, by King *Philip*, the Son of *Lewis* King of *France*, after King *John's* Ejection out of *Normandy*, and since the Time from the Coronation of King *Richard 1.* is estimated to bear Proportion to 40 Years. It is probable this Change of the Limitation by King *Philip* of *France*, was about the Beginning of the Reign of King *Henry 3.* or about 30 or 40 Years after the Coronation of *Richard 1.* from whose Coronation about 30 Years were elapsed, 5 aut 6 *Henrici 3.* for anciently the Limitation in this Case was 30 Years.

4. Fourthly, I now come to the Fourth Inquiry, viz. How this great Parity between the Laws of *England* and *Normandy* came to be effected; and before I come to it, I shall premise Two Observables, which I would have the Reader to carry along with him through the whole Discourse, viz. First, That this Parity of Laws does not at all infer a Necessity, that they should be imposed

imposed by the *Conqueror*, which is sufficiently shewn in the foregoing Chapters; and in this it will appear that there were divers other Means that caused a Similitude of both Laws, without any Supposition of imposing them by the *Conqueror*. Secondly, That the Laws of *Normandy* were in the greater Part thereof borrowed from ours, rather than ours from them, and the Similitude of the Laws of both Countries did in greater Measure arise from their Imitation of our Laws, rather than from our Imitation of theirs, though there can't be denied a Reciprocal Imitation of each others Laws was, in some Measure at least, had in both Dominions: And these Two Things being premised, I descend to the *Means* whereby this Parity or Similitude of the Laws of both Countries did arise, as follow, *viz.*

*First*, Mr. *Camden* and some others have thought, there was ever some Congruity between the ancient Customs of this Island and those of the Country of *France*, both in Matters Religious and Civil; and tells us of the ancient *Druids*, who were the common Instructors of both Countries. *Gallia Causidicos docuit facunda Britannos*: And some have thought, that anciently both Countries were conjoined by a small Neck of Land, which might make an easier Transition of the Customs of either Country to the other; but those Things are too remote Conjectures, and we need them not

Causes of a  
congruity  
of Laws.



CHAP. 6. to solve the Congruity of Laws between  
*England and Normandy.* Therefore,

Commerce,  
 &c. be-  
 tween the  
*English*  
 and *Nor-*  
*mans.*

*Secondly*, It seems plain, that before the *Normans* coming in Way of Hostility, there was a great Intercourse of Commerce and Trade, and a mutual Communication, between those Two Countries; and the Consanguinity between the Two Princes gave Opportunities of several Interviews between them and their Courts in each others Countries: And it is evident by History, that the *Confessor*, before his Accession to the Crown, made a long Stay in *Normandy*, and was there often, which of Consequence must draw many of the *English* thither, and of the *Normans* hither; all which might be a Means of their mutual Understanding of the Customs and Laws of each others Country, and gave Opportunities of Incorporating and ingrafting divers of them into each other, as they were found useful or convenient; and therefore the Author of the Prologue to the *Grand Customier* thinks it more probable, That the Laws of *Normandy* were derived from *England*, than that ours were derived from thence.

*Thirdly*, 'Tis evident, that when the Duke of *Normandy* came in, he brought over a great Multitude, not only of ordinary Soldiers, but of the best of the Nobility and Gentry of *Normandy*; hither they brought their Families, Language and Customs, and the Victor used all Art and Industry to incorporate them into this Kingdom: And the more effectually to make both People become

become one Nation, he made Marriages between the *English* and *Normans*, transplanting many *Norman* Families hither, and many *English* Families thither; he kept his Court sometimes here, and sometimes there; and by those Means insensibly derived many *Norman* Customs hither, and *English* Customs thither, without any severe Imposition of Laws on the *English* as Conqueror: And by this Method he might easily prevail to bring in, even without the Peoples Consent, some Customs and Laws that perhaps were of Foreign Growth; which might the more easily be done, considering how in a short Time the People of both Nations were intermingled; they were mingled in Marriages, in Families, in the Church, in the State, in the Court, and in Councils; yea, and in Parliaments in both Dominions, though *Normandy* became, as it were, an Appendix to *England*, which was the nobler Dominion, and received a greater Conformity of their Laws to the *English*, than they gave to it.

*Fourthly*, But the greatest Means of the Assimilation of the Laws of both Kingdoms was this: The Kings of *England* continued Dukes of *Normandy* till King *John's* Time, and he kept some Footing there notwithstanding the Confiscation thereof by the King of *France*, as aforesaid; and during all this Time, *England*, which was an absolute Monarch, had the Prelation or Preference before *Normandy*, which was but a Feudal Dutchy, and a small Thing in respect of *England*;

CHAP. 6. *England*; and by this Means *Normandy* became, as it were, an Appendant to *England*, and successively received its Laws and Government from *England*; which had a greater Influence on *Normandy* than that could have on *England*; infomuch that oftentimes there issued Precepts into *Normandy* to summon Persons there to answer in Civil Causes here; yea, even for Lands and Possessions in *Normandy*; as *Placito i Jobannis*, a Precept issued to the Seneschal of *Normandy*, to summon *Robert Jeronymus*, to answer to *John Marshal*, in a Plea of Land, giving him 40 Days Warning; to which the Tenant appeared, and pleaded a Recovery in *Normandy*: And the like Precept issued for *William de Bosco*, against *Jeoffry Rusbam*, for Lands in *Corbeshine* in *Normandy*.

And on the other Side, *Trin. 14 Jobannis*, in a Suit between *Francis Borne* and *Thomas Adorne*, for certain Lands in *Ford*. The Defendant pleaded a Concord made in *Normandy* in the Time of King *Richard 1.* upon a Suit there before the King, for the Honour of *Bonn* in *Normandy*, and for certain Lands in *England*, whereof the Lands in Question were Parcel, before the Seneschal of *Normandy*, *Anno 1099.* But it was excepted against, as an insufficient Fine, and varying in Form from other Fines; and therefore the Defendant relied upon it as a Release.

By these, and many the like Instances, it appears as follows, viz.

First,

*First*, That there was a great Intercourse CHAP. 6.  
between *England* and *Normandy* before and  
after the Conqueror, which might give  
a great Opportunity of an Assimilation  
and Conformity of the Laws in both Coun-  
tries. *Secondly*, That a much greater Con-  
formation of Laws arose after the Conque-  
ror, during the Time that *Normandy* was  
enjoyed by the Crown of *England*, than  
before. And *Thirdly*, That this Similitude  
of the Laws of *England* and *Normandy* was  
not by Conformation of the Laws of *Eng-  
land* to those of *Normandy*, but by Confor-  
mation of the Laws of *Normandy* to those  
of *England*, which now grew to a great  
Height, Perfection and Glory; so that  
*Normandy* became but a Perquisite or Ap-  
pendant of it.

And as the Reason of the Thing speaks  
it, so the very Fact itself attests it. For

*First*, It is apparent, That in Point of  
Limitation in Actions Ancestral, from the  
Time of the Coronation of King *Henry 2.*  
it was anciently so here in *England* in *Glan-  
ville's* Time, and was transmitted from hence  
into *Normandy*; for it is no way reasonable  
to suppose the contrary, since *Glanville* men-  
tions it to be enacted here, *Concilio præcerum*;  
and though this be but a single Point, or In-  
stance, yet the Evidence thereof makes out  
a Criterion, or probable Indication, that  
many other Laws were in like Manner so  
sent hence into *Normandy*.

K

*Secondly*,

*Secondly*, It appears, That in the Succession of the Kings of *England*, from King *William 1.* to King *Henry 2.* the Laws of *England* received a great Improvement and Perfection, as will plainly appear from *Glanville's* Book, written in the Time of King *Henry 2.* especially if compared with those *Sums* or Collections of Laws, either of *Edward the Confessor*, *William 1.* or *Henry 1.* whereof hereafter.

So that it seems, by Use, Practice, Commerce, Study and Improvement of the *English* People, they arrived in *Henry 2d's* Time to a greater Improvement of the Laws; and that in the Time of King *Richard 1.* and King *John*, they were more perfected, as may be seen in the Pleadings, especially of King *John's* Time: And tho' far inferior to those of the Times of Succeeding Kings, yet they are far more regular and perfect than those that went before them. And now if any do but compare the *Contumier* of *Normandy*, with the Tract of *Glanville*, he will plainly find that the *Norman* Tract of Laws followed the Pattern of *Glanville*, and was writ long after it, when possibly the *English* Laws were yet more refined and more perfect; for it is plain beyond Contradiction, that the Collection of the Customs and Laws of *Normandy* was made after the Time of King *Henry 2.* for it mentions his Coronation, and appoints it for the Limitation of Actions Ancestrel, which must at least be 30 Years after; nay, the *Contumier* appears to have been

2

made

made after the Act of Settlement of *Normandy* in the Crown of *France*; for therein is specified the Institution of *Philip* King of *France*, for appointing the Coronation of King *Richard* 1. for the Limitation of Actions which was after the said *Philip*'s full Possession of *Normandy*.

Indeed, if those Laws and Customs of *Normandy* had been a Collection of the Laws they had had there before the coming in of King *William* 1. it might have been a Probability that their Laws, being so near like ours, might have been transplanted from thence hither; but the Case is visibly otherwise, for the *Contumier* is a Collection after the Time of King *Richard* 1. yea, after the Time of King *John*, and possibly after *Henry* 3d's Time, when it had received several Repairings, Amendments and Polishings, under the several Kings of *England*, *William* 1. *William* 2. *Henry* 1. King *Steven*, *Henry* 2. *Richard* 1. and King *John*; who were either knowing themselves in the Laws of *England*, or were assisted with a Council that were knowing therein.

And as in this Tract of Time the Laws of *England* received a great Advance and Perfection, as appears by that excellent Collection of *Glanville*, written even in *Henry* 2's Time, when yet there were near 30 Years to acquire unto a further Improvement before *Normandy* was lost; so from the Laws of *England* thus modelled, polished and perfected, the same Draughts were drawn upon the Laws of

CHAP. 6. *Normandy*, which received the fairest Lines from the Laws of *England*, as they stood at least in the Beginning of King *John's* Time, and were in Effect in a great Measure the Defloration of the *English* Laws, and a Transcript of them, though mingled and interlarded with many particular Laws and Customs of their own, which altered the Features of the Original in many Points.

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C H A P.

## C H A P. VII.

*Concerning the Progress of the Laws of England after the Time of King William 1. until the Time of King Edward 2.*

**T**HAT which precedes in the Two foregoing Chapters, gives us some Account of the Laws of *England*, as they stood in and after the great Change which happened under King *William 1.* commonly called *The Conqueror*. I shall now proceed to the History thereof in the ensuing Times, until the Reign of King *Edward 2.* CHAP. 7.


*William 1.* having Three Sons; *Robert* the eldest, *William* the next, and *Henry* the youngest, disposed of the Crown of *England* to *William* his second Son, and the Dutchy of *Normandy* to *Robert* his eldest Son; and accordingly *William 2.* commonly called, *William Rufus*, succeeded his Father in this Kingdom. We have little memorable of him in relation to the Laws, only that he severely press'd and extended the *Forest Laws*. K. W. 2.

*Henry 1.* Son of *William 1.* and Brother of *William 2.* succeeded his said Brother in the Kingdom of *England*, and afterwards expelled his eldest Brother *Robert* out of the Dutchy of *Normandy* also. He pro-

K 3

ceeded



CHAP. 7.  ceeded much in the Benefit of the Laws, viz.

Restored  
and re-  
pair'd the  
Laws.

*First*, He restored the Free-Election of Bishops and Abbots, which before that Time he and his Predecessors invested, *per Annulum & Bacculum*; yet reserving those Three Ensigns of the Patronage thereof, viz. *Conge d' Eslire*, Custody of the Temporalties, and Homage upon their Restitution. *Vide Hoveden, in Vita sua.*

But *Secondly*, The great Essay he made, was the composing an Abstract or Manual of Laws, wherein he confirm'd the Laws of *Edward the Confessor*, *Cum illis Emendationibus quibus eam Pater meus emendavit Baronum suorum Concilio*; and then adds his own Laws, some whereof seem to taste of the Canon Law. The whole Collection is transcribed in the Red Book of the *Exchequer*; from whence it is now printed in the End of *Lambard's Saxon Laws*, and therefore not needfull to be here repeated.

They, for the most Part, contain a Model of Proceedings in the County Courts, the Hundred Courts, and the Courts Leet; the former to be held Twelve Times in the Year, the latter twice; and also of the Courts Baron. These were the ordinary usual Courts, wherein Justice was then, and for a long Time after, most commonly administred; also they concern Criminal Proceedings, and the Punishment of Crimes, and some few Things touching Civil Actions and Interests, as in Chapter 70, directing Descents, viz.

Of de-  
scents.

*Si quis sine Liberis decesserit Pater aut Mater ejus in Hereditatem succedant, vel Frater vel Soror, si Pater & Mater defint, si nec hos habeat, Frater vel Soror Patris vel Matris, & deinceps in quantum Genetaliū, qui cum propiores in parentela sint hereditario Jure succedant; Et dum virilis sexus extiterit & hereditas ab inde sit Femina non hereditetur; primum Patris Feodum primogenitus Filius habeat. Emptiones vero & deinceps Acquisitiones det cui magis velit, sed si Bockland habeat quam ei Parentes dederint, Mittat eam extra cognationem suam.* CHAP. 7.

I have observ'd and insert'd this Law, for Two Reasons, viz. *First*, To justify what I before said, That the Laws of Normandy took the *English* Laws for their Pattern in many Things; *Vide le Contumier, cap. 25, 26, 36, &c.* And *Secondly*, To see how much the Laws of *England* grew and increased in their Particularity and Application between this Time and the Laws of *William I.* which in Chapter 36, has no more touching Descents but this, viz. *Si quis intestatus obierit, liberi ejus hereditatem equaliter dividant.* But Process of Time grafted thereupon, and made particular Provisions for particular Cases, and added Distributions and Subdivisions to those General Rules.

These Laws of King *Henry I.* are a kind of Miscellany, made up of those ancient Laws, called, *The Laws of the Confessor*, and King *William I.* and of certain Parts of the Canon and Civil Law, and of other Provisions, that Custom and the Prudence

of the King and Council had thought upon, chosen, and put together.

King *Stephen* succeeded, by Way of Usurpation, upon *Maud* the sole Daughter and Heir of King *Hen. 1.* The Laws of *Hen. 1.* grew tedious and ungrateful to the People, partly because new, and so not so well known, and partly because more difficult and severe than those ancient Laws, called, *The Confessor's*; for *Walsingham*, in his *Ypodigma Neustrie*, tells us, That the *Londoners* petitioned Queen *Maud*, *ut liceret eis uti Legibus sancti Edvardi & non legibus Patris sui Henrici, quia graves erant*; and that her Refusal gave Occasion to their Defection from her, and strengthened *Stephen* in his Usurpation; who according to the Method of Usurpers, to secure himself in the Throne, was willing and ready to gratify the Desires of the People herein; and furthermore, took his Oath, *1st*, That he would not retain in his Hands the Temporalties of the Bishops: *2dly*, That he would remit the Severity of the *Forest Laws*; and *3dly*, That he would also remit the Tribute of *Danegelt*: But he performed nothing.

His Times were troublesome, he did little in relation to the Laws; nor have we any Memorial of any Record touching his Proceedings therein, only there are some few *Pipe Rolls* of his Time, relating to the Revenue of the Crown.

*Henry 2.* the Son of *Maud*, succeeded *Stephen*, he reigned long, viz. about Thirty Five Years; and tho' he was not without great

great Troubles and Difficulties, yet he built up the Laws and the Dignity of the Kingdom to a great Height and Perfection. For,

CHAP. 7.

*First*, In the Entrance of his Government he settled the Peace of the Kingdom; he also reformed the Coin, which was much adulterated and debased in the Times and Troubles of King Stephen, *Et Leges Henrici avi sui præcepit per totum Regnum inviolabiliter observari.* Hoveden.

Settles  
Peace, and  
reforms  
the Coin.

*Secondly*, Against the Insolencies and Usurpations of the Clergy; he by the Advice of his Council or Parliament at *Clarendon*, enacted those Sixteen Articles mentioned by *Mat. Paris, sub Anno 1164.* They are long, and therefore I remit you thither for the Particulars of them.

Constitu-  
tions of  
*Clarendon.*

'Tis true, *Thomas Becket*, Archbishop of *Canterbury*, boldly and insolently took upon him to declare many of those Articles void, especially those Five mentioned in his Epistle to his Suffragans, recorded by *Hoveden, viz.* 1<sup>st</sup>, That there should be no Appeal to the Bishop without the King's *Licence.* 2<sup>dly</sup>, That no Archbishop or Bishop should go over the Seas at the *Pope's* Command without the King's *Licence.* 3<sup>dly</sup>, That the Bishop should not excommunicate the King's Tenants *in Capite* without the King's *Licence.* 4<sup>thly</sup>, That the Bishop should not have the Conuzance of Perjury, or *Fidei Læsionis.* And, 5<sup>thly</sup>, That the Clergy should be convened before Lay Judges, and that the King's Courts

CHAP. 7. Courts should have Conuzance of Churches  
and of Tythes.

Improv'd  
the Laws.

*Thirdly*, He raised up the Municipal Laws of the Kingdom to a greater Perfection, and a more orderly and regular Administration than before; 'tis true, we have no Record of judicial Proceedings so ancient as that Time, except the Pipe Rolls in the *Exchequer*, which are only Accounts of his Revenue: But we need no other Evidence hereof than the Tractate of *Glanville*, which tho' perhaps it was not written by that *Ranulphus de Glanvilla*, who was *Justitiarius Anglie* under *Hen. 2.* yet it seems to be wholly written at that Time; and by that Book, tho' many Parts thereof are at this Day antiquated and altered, and in that long Course of Time, which has elapsed since that King's Reign, much enlarged, reformed, and amended; yet by comparing it with those Laws of the *Confessor* and Conqueror, yea, and the Laws of his Grandfather King *Hen. 1.* which he confirmed; it will easily appear, that the Rule and Order, as well as the Administration of the Law, was greatly improved beyond what it was formerly, and we have more Footsteps of their Agreement and Concord herein with the Laws, as they were used from the Time of *Edw. 1.* and downwards, than can be found in all those obsolete Laws of *Hen. 1.* which indeed were but disorderly, confused and general Things, rather the Cases and Shells of directing the Way of Administration

tion than Institutions of Law, if compared with *Glanville's* Tractate of our Laws. CHAP. 7.

*Fourthly*, The Administration of the Common Justice of the Kingdom, seems to be wholly dispensed in the County Courts, Hundred Courts, and Courts Baron, except some of the greater Crimes reformed by the Laws of King *Hen. 1.* and that Part thereof which was sometimes taken up by the *Justitarius Anglica*: This doubtless bred great Inconvenience, Uncertainty, and Variety in the Laws, *viz.*

*First*, by the Ignorance of the Judges, which were the Freeholders of the County: For altho' the Alderman or Chief Constable of every Hundred was always to be a Man learned in the Laws; and altho' not only the Freeholders, but the Bishops, Barons, and great Men, were by the Laws of King *Hen. 1.* appointed to attend the County Court; yet they seldom attend there, or if they did, in Process of Time they neglected the Study of the *English* Laws, as great Men usually do. Inconveniences in the Laws.

*Secondly*, Another Inconvenience was, That this also bred great Variety of Laws, especially in the several Counties: For the Decisions or Judgments being made by divers Courts, and several Independent Judges and Judicatories, who had no common Interest among them in their several Judicatories, thereby in Process of Time every several County would have several Laws, Customs, Rules, and Forms of Proceeding, which is always the Effect of several Independent

CHAP. 7. dependant Judicatories administred by several Judges.

*Thirdly*, A Third Inconvenience was, That all the Business of any Moment was carried by Parties and Factions: For the Freeholders being generally the Judges, and Conversing one among another, and being as it were the Chief Judges, not only of the Fact, but of the Law; every Man that had a Suit there, sped according as he could make Parties; and Men of great Power and Interest in the County did easily overbear others in their own Causes, or in such wherein they were interested, either by Relation of Kindred, Tenure, Service, Dependence, or Application.

Remedied;  
By Or-  
daining.

And altho' in Cases of false Judgment, the Law, even as then used, proved a Remedy by Writ of false Judgment before the King or his Chief Justice; and in Case the Judgment was found to be such in the County Court, all the Suiters were considerably amerced, (which also continued long after in Use with some Severity) yet this proved but an ineffectual Remedy for those Mischiefs.

Justices  
*Itinerant*.

Therefore the King took another and a more effectual Course; for in the 22d Year of his Reign, by Advice of his Parliament held at *Northampton*, he instituted Justices *itinerant*, dividing the Kingdom into Six Circuits, and to every Circuit allotting Three Judges, Knowing or Experienced in the Laws of the Realm: These Justices  
with

with their several Circuits are declared by CHAP. 7.  
*Hoveden, sub eodem Anno, i. e. 22 H. 2. viz.*

1. *Hugo Gressy, Walterus filius Roberti, & Robertus Maunsel*, for *Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, Buckingham, Essex, and Hartford Counties.*

2. *Hugo de Gundevilla, W. filius Radulphi, & W. Basset*, for *Lincoln, Nottingham, Derby, Stafford, Warwick, Northampton, and Leicester Counties.*

3. *Robertus filius Bernardi, Richardus Giffard, & Rogerus filius Ramsfey*, for *Kent, Surrey, Sussex, Hampshire, Berks, and Oxon Counties.*

4. *W. filius Stephani, Bertein de Verdun, & Turstavi filius Simonis*, for *Hereford, Gloucester, Worcester, and Salop Counties.*

5. *Radulphus filius Stephani, W. Ruffus, & Gilbertus Pipard*, for the Counties of *Wils, Dorset, Somerset, Devon, and Cornwall.*

6. *Robertus de Watts, Radulphus de Glanvilla, & Robertus Picknot*, for the Counties of *York, Richmond, Lancaster, Copland, Westmorland, Northumberland, and Cumberland.*

*Hi, (Consilio Archiepiscoporum, Episcoporum, Comitum & Baronum Regni, &c. apud Nottingham existentium) missi sunt per singulos Angliæ Comitatus & iuraverunt quod cuilibet ius suum conservarent ille sum. Hoveden fo. 313. & Mat. Paris, in Anno 1176. And that these Men were well known in the Law, appears by their Companion Radulphus de Glanvilla, who seems to be the Author of the Treatise De*  
I Legibus



CHAP. 7. *Legibus Angliæ*, and was afterwards made  
*Justitiarius Angliæ*.

To those Justices, was afterwards committed the Conuzance of all Civil and Criminal Pleas happening within their Divisions, and likewise Pleas of the Crown, Pleas touching Liberties, and the King's Rights; and the better to acquaint them with their Business, there were certain Assises which were first enacted at *Clarendon*, and afterwards confirmed at *Northampton*; they were not much unlike the *Capitula Itineris* mentioned in our old *Magna Charta*, but not so perfect, and are set down by *Hoveden ubi supra*, and are too long to be here inserted: I shall only take Notice of this one, viz. Establishing Descents, because I shall hereafter have Occasion to use it, *Si quis obierit Francus Tenens heredes ipsius remaneant in talem Seisina qualem Pater suus, &c.*

\*Note, Notwithstanding what our Author here writes, it appears by *Glanville* and others, That the Common Pleas was then also in Being, and *Magna Charta* has only fix'd that Court to a certain Place which before was moveable and uncertain.

\*But besides those Courts in *Eyre*, there were two great standing Courts, viz. The *Exchequer*, and the Court of *King's-Bench*, *Vel Curiam coram ipso Rege, vel ejus Justiciario*; and it was provided by the above-mentioned *Assise*, *Quod Justiciæ faciant omnes Justicias & Rectitudines Spectantes ad Dominium Regis, & ad Coronam suam, per breve Domini Regis vel illorum qui in ejus Loco erunt de Feodo dimidii Militis & infra, Nisi tam grandis sit querela quod non possit deduci sine Domino Rege vel talis quam Justiciæ ei reponunt pro dubitatione sua, vel ad illos qui in Loco ejus erunt, &c.*

Neither do I find any distinct Mention of the Court of *Common Bench* in the Time of this

this King, tho' in the Time of King *John* CHAP. 7. there is often mention made thereof, and the Rolls of that Court of King *John's* Time are yet extant upon Record, & *vide post. sub Richardi Primi.*

The Limitation of the Assise of *Novel Dis-* Limita-  
*seisin*, is by those Assises appointed to be, a tion.  
*tempore quo Dominus Rex venit in Angliam*  
*proximam post Pacis factam inter ipsum, & Re-*  
*gem filium suum.*

The same King afterwards, in the Twenty fifth Year of his Reign, divided the Limits of his *Itinerant Justices* into Four Circuits or Justices  
Divisions, and to each Circuit assigned a Itinerant,  
greater Number of Justices, *viz.* Five at least, which are thus set down in *Hoveden*,  
*Folio 337. viz.*

*Anno 1179, 25 H. 2. Magno Concilio celebrato apud Windesbores, Communi Consilio Archiepiscoporum Comitum & Baronum & coram Rege Filio suo, Rex divisit Angliam in quatuor Partes, & unicuique partium prefecit viros sapientes ad faciendum Justitiam in Terra sua in hunc Modum.*

1. *Ricardus Episcopus Winton, Ricardus Thesaurarius Regis, Nicholaus filius Tuoldi, Thomas Basset & Robertus de Whitefield*, for the Counties of *Southampton, Wilts, Gloucester, Somerset, Devon, Cornwall, Berks and Oxon.*

*Galfridus Eliensis Episcopus, Nicholaus Capellanus Regis, Gilbertus Pipard, Reginald de Wisebeck Capellanus Reges & Gaulfridus Hofce*, for the Counties of *Cambridge, Huntingdon, Nor-*

CHAP. 7. Northampton, Leicester, Warwick, Winchester,  
Hereford, Stafford and Salop

3. *Jobannes Episcopus Norwicensis, Hugo Murdac Clericus Regis, Michael Bellei, Richardus de le Pec, & Radulphus Brito*, for Norfolk, Suffolk, Essex, Hartford, Middlesex, Kent, Surrey, Sussex, Bucks and Bedford.

4. *Galfredus de Luci, Jobannes Comyn, Hugo de Gaerst, Radulphus de Glanvilla, W. de Bendings, Alanus de Furnellis*, for the Counties of Nottingham, Derby, York, Northumberland, Westmorland, Cumberland, and Lancaster.

*Isti sunt Justiciæ in Curia Regis constituti ad audiendum clamores Populi.*

This Prince did these Three notable Things, viz.

He improved the Laws.

*First*, By this Means, he improved and perfected the Laws of *England*, and doubtless transferred over many of the *English* Laws into *Normandy*, which, as before is observed, caused that great Suitableness between their Laws and ours; so that the Similitude did arise much more by a Conformation of their Laws to those of *England*, than by any Conformation of the *English* Laws to theirs, especially in the Reigns of King *Hen. 2.* and his Two Sons, King *Richard*, and King *John*, both of whom were also Dukes of *Normandy*.

Check'd the Pope.

*Secondly*, He check'd the Pride and Insolence of the *Pope* and the *Clergy*, by those Constitutions made in a Parliament at *Clarendon*, whereby he restrained the Exorbitant Power

Power of the Ecclesiasticks, and the Exemption they claimed from Secular Jurisdiction. CHAP. 7.  
And,

*Thirdly*, He subdued and conquered Conquered Ireland.  
*Ireland*, and added it to the Crown of *England*, which Conquest was begun by *Richard* Earl of *Stigule* or *Strongbow*, 14 *H. 2.* But was perfected by the King himself in the Seventeenth Year of his Reign, and for the greater Solemnity of the Business, was ratified by the Fealties of the Bishops and Nobles of *Ireland*, and by a *Bull* of Confirmation from *Pope Alexander*, who was willing to interest himself in that Business, to ingratiate himself with the King, and to gain a Pretence for that arrogant Usurpation of disposing of Temporal Dominions, *Vide Hoveden, Anno 14 H. 2.*

*Richard 1.* eldest Son of King *Henry 2.* K. Rich. 1.  
succeeded his Father. I have seen little of Record touching the Juridical Proceedings, either of him, or his said Father, other than what occurs in the *Pipe-Rolls* in the *Exchequer*, which both in the Time of *Hen. 2. Rich. 1.* and King *John*, and all the succeeding Kings, are fairly preserved; and the best Remembrances that we have of this King's Reign in relation to the Law, are what *Roger Hoveden's Annals* have delivered down to us, viz.

*First*, He instituted a Body of Naval Laws His Naval Laws, &c.  
in his Return from the *Holy Land*, in the Island of *Oleron*, which are yet extant with some Additions; *De quibus, Vide Mr. Selden's Mare Clausum, Lib. 2. cap. 24.* and I suppose  
L they

they are the same which are attributed to him by *Mat. Paris*, Anno 1196. and he constituted Justices to put them in Execution.

Articles of  
Justices  
*Itinerant*.

Secondly, He observed the same Method of distributing Justice as his Father had begun, by Justices *Itinerant per singulos Angliæ Comitatus*, to whom he deliver two Kinds of Extracts or Articles of Inquiry, viz. *Capitula Coronæ*, much reformed and augmented from what they were before, and *Capitula de Judeis*; the whole may be read in *Hoveden*, fo. 423. sub Anno 5 R. 1. and by those Articles it appears, That at that Time there was a settled Court for the *Common-Pleas*, as well as for the *King's Bench*; tho' it seems that Pleas of Land were then indifferently held in either, as appears by the first and second Articles thereof, where we have, *Placita per breve Domini Regis, vel per breve Capitalis Justitiæ, vel a Capitali Curia Regis coram eis (Justiciis) missa*: The former whereof seems to be the *Common-Pleas*, which held Pleas by Original Writ, which Writ was under the King's Teste when he was in *England*; but when he was beyond the Seas, it was under the Teste of the *Justiciarius Angliæ*, as the *Custor Regni* in the King's Absence.

The Power which the Justices *Itinerant* had to hold Pleas in Writs of Right, or the Grand Assize, was sometimes limited, as here by the *Articuli Coronæ* under *Hen. 2.* to half a Knight's Fee, or under: For here in these Articles it is, *De Magnis Assisis quæ sunt de*

*centum Solidis & infra.* But in the next Commissions, Instructions, or *Capitula Coronæ*, it is, *De Magnis Assis usque ad decem Libratas Terre & infra.* CHAP. 7.

In his eighth Year, he established a Common Rule for *Weights and Measures* throughout *England*, called *Affisa de Mensuris*, wherein we find the Measure of Woollen Cloths was then the same with that of *Magna Charta*, 9 H. 3. viz. *De duobus ulnis infra Lifuras.* Weights and Measures.

In the Year before his Death, the like Justices Errant went through many Counties of *England*, to whom Articles, or *Capitula placitorum Coronæ*, not much unlike the former were delivered. *Vide Hoveden, sub Anno 1198. fo. 445.*

And in the same Year, he issued Commissions in the *Trent*, *Hugh de Neville* being Chief Justice; and to those were also delivered Articles of Inquiry, commonly called *Affisa de Foresta*, which may be read at large in *Hoveden, sub eodem Anno.* These gave great Discontent to the Kingdom, for both the Laws of the Forest, and their Execution were rigorous and grievous.

King *John* succeeded his said Brother, both in the Kingdom of *England*, and Duchy of *Normandy*; the Evidence that we have, touching the Progress of the Laws of his Time, are principally Three, viz. *First*, His Charters of Liberties. *2dly*, The Records of Pleadings and Proceedings in his Courts; And *3dly*, The Course he took for settling the *English* Laws in *Ireland*. K. John.

L 2

1. Touch-

1. Touching the first of these, his Charters of the Liberties of *England*, and of the *Forest*, were hardly, and with Difficulty, gained by his Baronage at *Stanes*, *Anno Dom.* 1215. The Collection of the former was, as *Mat. Paris* tells us, upon the View of the Charter or Law of King *Hen. 1.* which says, he contained *quasdam Libertates & Leges a Rege Eduardo Sancto, Ecclesie & Magnatibus concessas, exceptis quibusdam Libertatibus quas idem Rex de suo adjecit*; and that thereupon the Baronage fell into a Resolution to have those Laws granted by King *John*. But as it is certain, that the Laws added by King *Hen. 1.* to those of the *Confessor* were many more, and much differing from his; so the Laws contained in the Great Charter of King *John*, differed much from those of King *Hen. 1.* Neither are we to think, that the Charter of King *John* contained all the Laws of *England*, but only or principally such as were of a more comprehensive Nature, and concerned the Common Rights and Liberties of the Church, Baronage and Commonalty which were of the greatest Moment, and had been most invaded by King *John's* Father and Brother.

The lesser Charter, or *De Foresta*, was to reform the Excesses and Encroachments which were made, especially in the Time of *Rich. 1.* and *Hen. 2.* who had made New Afforestations, and much extended the Rigour of the Forest Laws: And both these Charters do in Substance agree with that  
*Magna*

*Magna Charta*, & *de Foresta*, granted and confirmed 9 Hen. 3. I shall not need to recite them, or to make any Collections or Inferences from them; they are both extant in the *Red Book* of the *Exchequer*, and in *Mat. Paris*, *sub Anno* 1215, and the Record and the Historian do *Verbatim* agree. CHAP. 7.

As to the Second Evidence we have of the Progress of the Laws in King *John's* Time, they are the Records of Pleadings and Proceedings which are still extant: But altho' this King endeavoured to bring the Law, and the Pleadings and Proceedings thereof, to some better Order than he found it; for saving his Profits whereof he was very studious, and for the better Reduction of it into Order and Method, we find frequently in the Records of his Time, Fines imposed, *pro Stultiloquio*, which were no other than Mulcts imposed by the Court for barbarous and disorderly Pleading: From whence afterwards that Common Fine arose, *Pro pulchre placitando*, which was indeed no other than a Fine for want of it; and yet for all this, the Proceeding in his Courts were rude, imperfect, and defective, to what they were in the ensuing Times of *Edw. 1. &c.* But some few Observables I shall take Notice of upon the Perusal of the Judicial Records of the Time of King *John*, *viz.* 2. Records, &c.

1st. That the Courts of *King's-Bench* and *Common-Pleas* were then distinct Courts, and distinct. His Courts, &c.



CHAP. 7. distinctly held from the Beginning to the End of King *John's* Reign.



2dly, That as yet, neither one nor both of those Courts dispatch'd the Business of the Kingdom, but a great Part thereof was dispatch'd by the *Justices Itinerant*, which were sometimes in Use, but not without their Intermiſſions, and much of the Publick Business was dispatch'd in the County Courts, and in other inferior Courts; and so it continued, tho' with a gradual Decrease till the End of King *Edw. 1.* and for some Time after: And hence it was, That in those elder Times, the Profits of those County Courts for which the Sheriff answered in his Farm, *de Proficuis Comitatus*; also Fines were levied there, and *post Fines*, and Fines *pro licentia concordandi*, and great Fines there answered; Fines *pro Inquisitionibus habendi*, Fines for Misdemeanors, tho' called Amerciaments, arose to great Sums, as will appear to any who shall peruse the ancient *Viscontiels*.

But, as I said before, the Business of Inferior Courts grew gradually less and less, and consequently their Profits and Business of any Moment came to the Great Courts, where they were dispatch'd with greater Justice and Equality. Besides, the greater Courts observing what Partiality and Brocade was used in the inferior Courts, gave a pretty quick Ear to Writs of false Judgment, which was the Appeal the Law allowed from erroneous Judgments in the County Courts; and this, by Degrees, wasted the Credit and Business of those inferior Courts.

3dly,

3dly, That the Distinction between the *King's-Bench* and *Common-Bench*, as to the Point of *Communia placita*, was not yet, nor for some Time after, settled; and hence it is, that frequently in the Time of King *John*, we shall find that *Common Pleas* were held in *B. R.* yea, in *Mich. & Hill.* 13 *Jobannis*, a Fine is levied *coram ipso Rege*, between *Gilbert Fitz Roger* and *Helwise* his Wife, Plaintiffs, and *Robert Barpyard* Tenant of certain Lands in *Kirby*, &c.

And again, whereas there was frequently a Liberty granted anciently by the Kings of *England*, and allowed, *Quod non implucitur nisi coram Rege*; I find *inter Placita de diversis Terminis secundo Jobannis*, That upon a Suit between *Henry de Rochula*, and the Abbot of *Leicester* before the Justices *de Banco*, the Abbot pleaded the Charter of King *Richard* 1. *Quod idem Abbas pro nullo respondeat nisi coram ipso Rege vel Capitali Justitiario suo*; and it is ruled against the Abbot, *Quia omnia Placita quæ coram Justic. de Banco tenentur, coram Domino Rege vel ejus Capitali Justitiario teneri intelliguntur*. But this Point was afterwards settled by the Statute of *Magna Charta*, *Quod Communia placita non sequantur Curiam nostram*.

4thly. That the four Terms were then held according as was used in After-times with little Variance, and had the same Denominations they still retain.

5thly. That there were oftentimes considerable Sums of Money, or Horses, or other Things given to obtain Justice; sometimes

CHAP. 7. 'tis said to be, *pro habenda Inquisitione ut supra*, and *inter placita incerti temporis Regis Johannis*. The Men of *Yarmouth* against the Men of *Hastings* and *Winchelsea*, *Afferunt Domino Regi tres Palfridos, & sex Asturias Narenfes ad Inquisitionem habendam per Legales, &c.* and frequently the same was done, and often accounted for in the *Pipe-Rolls*, under the Name of *Oblata*; and to remedy this Abuse, was the Provision made in King *John's* and King *Hen. 3d's* Charters, *Nulli Vendemus Justitiam vel Rectum*. But yet *Fines* upon Originals being certain, having continued to this Day, notwithstanding that Provision; but those enormous *Oblata's* before mentioned, are thereby remedied and taken away.

6thly, That in all the Time of King *John*, the Purgation *per Ignem & Aquam*, or the Trial by *Ordeal*, continued as appears by frequent Entries upon the *Rolls*; but it seems to have ended with this King, for I do not find it in Use in any Time after; Perchance the Barbarousness of the Trial, and Persuasions of the Clergy, prevailed at length to antiquate it, for many Canons had been made against it.

7thly, In this King's Time, the Descent of *Socage* as well as Knight's Service Lands to the eldest Son prevailed in all Places, unless there was a special Custom, that the Lands were partible *inter Masculos*; and therefore, *Mich. secundo Johannis*, in a *rationabili parte Bonorum*, by *Gilbert Beville* against *William Beville* his elder Brother for Lands in *Guntthorpe*, the Defendant pleaded,  
Quod

*Quod Nunquam parita vel partibilia fuere*; and CHAP. 7.  
 because the Defendant could not prove it, Judgment was given for the Demandant :  
 And by Degrees it prevail'd so, that where-  
 as at this Time the Averment came on the  
 Part of the Heir at Law, that the Land  
*nunquam parita vel partibilis extetit*; in a  
 little Time after the Averment was turn'd  
 on the other Hand, viz. That tho' the Land  
 was Socage, yet unless he did aver and prove  
 that it was *partita & partibilis*, he failed in  
 his Demand.

*Thirdly*, The third Instance of the *Progress*  
 of King *John's* Reign, in Relation to the  
 Common Law, was his settling the same in  
*Ireland*, which he made his more immediate  
 and particular Business : But hereof we  
 shall add a particular Chapter by itself,  
 when we have shewn you what Proceedings  
 and Progress was made therein in the Time  
 of *Edw. 1.* The many and great Troubles  
 that fell upon King *John* and the whole  
 Kingdom, especially towards the latter End  
 of his Reign, did much hinder the good  
 Effect of settling the Laws of *England*, and  
 consequently the Peace thereof, which might  
 have been bottom'd, especially upon the  
*Great Charter*. But this Unfortunate Prince  
 and Kingdom were so entangled with in-  
 testine Wars, and with the Invasion of  
 the *French*, who assisted the *English* Barons  
 against their King, and by the Advantages  
 and Usurpations that the *Pope* and the *Clergy*  
 made

CHAP. 7. made by those Distempers, that all ended  
 in a Confusion with the King's Death.

I come therefore to the long and trouble-  
 K. Hen. 3. some Reign of Hen. 3. who was about  
 nine Years old at his Father's Death; he  
 being born in *Festo sancti Remigii* 1207, and  
 History of King John died in *Festo sancti Luca*, 1216,  
 his Char- and the young King was crown'd the 28th  
 ters. of *October*, being then in the tenth Year of  
 his Age, and was under the Tutelage of  
*William* Earl-Marshal.

The Nobility were quick and earnest, not-  
 withstanding his Minority, to have the Li-  
 berties and Laws of the Kingdom confirm'd;  
 and Preparatory thereto, in the Year 1223,  
 Writs issued to the several Counties to en-  
 quire, by twelve good and lawful Knights,  
*Que fuerunt Libertates in Anglia tempore Regni*  
*Henrici avi sui*, returnable *quindena Pasche*.  
 What Success those Inquisitions had, or what  
 Returns were made thereof, appears not:  
 But in the next Year following, the young  
 King standing in Need of a Supply of Money  
 from the Clergy and Laity, none would be  
 granted, unless the Liberties of the King-  
 dom were confirm'd, as they were express'd  
 and contain'd in the two Charters of King  
 John; which the King accordingly granted  
 in his Parliament at *Westminster*, and they  
 were accordingly proclaim'd, *Ita quod Chartæ*  
*utrorumque Regum in nulla inveniatur dissimiles*,  
*Mat. Paris. Anno 1224.*

In the Year 1227, The King holding his  
 Parliament at *Oxford*, and being now of full  
 Age;

Age; by ill Advice, causes the two Charters he had formerly granted to be cancell'd, *Hanc occasionem pretendens, quod Chartæ illæ concessæ fuerunt & Libertates scriptæ & signatæ dum ipse erat sub Custodia, nec sui Corporis aut sigilli aliquam potestatem habuit, unde viribus carere debuit, &c.* Which Fact occasion'd a great Disturbance in the Kingdom: And this Inconstancy in the King, was in Truth the Foundation of all his future Troubles, and yet was ineffectual to his End and Purpose; for those Charters were not avoidable for the King's Nonage, and if there could have been any such Pretence, that alone would not avoid them, for they were Laws confirm'd in Parliament.

But the Great Charter, and the Charter of the *Forest*, did not expire so; for in 1253, they were again seal'd and publish'd: And because after the Battle of *Evesham*, the King had wholly subdued the Barons, and thereby a Jealousy might grow, that he again meant to infringe it; in the Parliament at *Marlbridge*, cap. 5. they are again confirm'd. And thus we have the great Settlement of the Laws and Liberties of the Kingdom establish'd in this King's Time: The Charters themselves are not every Word the same with those of King *John*, but they differ very little in Substance.

This Great Charter, and *Charta de Foresta*, was the great Basis upon which this Settlement of the *English* Laws stood in the Time of this King and his Son; there were also some additional Laws of this King yet extant, which

CHAP. 7. which much polish'd the Common Law,  
*viz.* The Statutes of *Merton* and *Marlbridge*,  
 and some others.

We have likewise two other principal  
 Monuments of the great Advance and Per-  
 fection that the *English* Laws attain'd to un-  
 der this King, *viz.* The Tractate of *Bracton*,  
 and those Records of Plea, as well in both  
 Benches, as before the *Justices Itinerant*, the  
 Records whereof are still extant.

*Bracton's*  
*Treatise,*

Touching the former, *viz.* *Bracton's* Tra-  
 ctate, it yields us a great Evidence of the  
 Growth of the Laws between the Times of  
*Henry 2.* and *Hen. 3.* If we do but compare  
*Glanville's* Book with that of *Bracton*, we  
 shall see a very great Advance of the Law  
 in the Writings of the latter, over what they  
 are in *Glanville*. It will be needless to in-  
 stance Particulars; some of the Writs and  
 Process do indeed in Substance agree, but  
 the Proceedings are much more regular and  
 settled, as they are in *Bracton*, above what  
 they are in *Glanville*. The Book itself in  
 the Beginning seems to borrow its Method  
 from the Civil Law; but the greatest Part  
 of the Substance is either of the Course of  
 Proceedings in the Law known to the Au-  
 thor, or of Resolutions and Decisions in the  
 Courts of *King's-Bench* and *Common-Bench*,  
 and before *Justices Itinerant*, for now the in-  
 ferior Courts began to be of little Use or  
 Esteem.

Records,  
*Temp.*  
*Hen. 2.*

As to the Judicial Records of the Time  
 of this King, they were grown to a much  
 greater Degree of Perfection, and the Plead-  
 ings

ings more orderly, many of which are extant: But the great Troubles, and the Civil Wars, that happen'd in his Time, gave a great Interruption to the legal Proceedings of Courts; they had a particular Commission and Judicatory for Matters happening in Time of War, stiled, *Placita de Tempore Turbationis*, wherein are many excellent Things: They were made principally about the Battle of *Evesham*, and after it; and for settling of the Differences of this Kingdom, was the *Dictum*, or *Edictum de Kenelworth* made, which is printed in the old *Magna Charta*.

We have little extant of Resolutions in this King's Time, but what are either remember'd by *Bracton*, or some few broken and scatter'd Reports collected by *Fitzherbert* in his Abridgment. There are also some few Summs or Constitutions relative to the Law, which tho' possibly not Acts of Parliament, yet have obtain'd in Use as such; as *De districtione Scaccarii*, *Statutum Panis & Cervise* *Dies Communes in Banco* *Statutum Hibernie*, *Stat. de Scaccario*, *Judicium Collisrigii*, and others.

We come now to the Time or *Edw. 1. K. Ed. 1.* who is well stiled our *English Justinian*; for in his Time the Law, *quasi per Saltum*, obtained a very great Perfection. The Pleadings are short indeed, but excellently good and perspicuous: And altho' for some Time some of those Imperfections and ancient inconvenient Rules obtain'd; as for Instance, in Point of Descents, where the middle Brother held  
 I of



CHAP. 7. of the eldest, and dying without Issue, the Lands descended to the youngest, upon that old Rule in the Time of *Hen. 2. Nemo potest esse Dominus & Heres*, mention'd in *Glanville*, at least if he had once receiv'd Homage, 13 *E. 1. Fitz Avovery* 235. Yet the Laws did never in any one Age receive so great and sudden an Advancement, nay, I think I may safely say, all the Ages since his Time have not done so much in Reference to the orderly settling and establishing of the distributive Justice of this Kingdom, as he did within a short Compass of the thirty-five Years of his Reign, especially about the first thirteen Years thereof.

Indeed many Penal Statutes and Provisions, in Relation to the Peace and good Government of the Kingdom, have been since made. But as touching the Common Administration of Justice between Party and Party, and accommodating of the Rules, and of the Methods and Orders of Proceeding, he did the most, at least of any King since *William 1.* and left the same as a fix'd and stable Rule and Order of Proceeding, very little differing from that which we now hold and practice, especially as to the Substance and principal Contexture thereof.

It would be the Business of a Volume to set down all the Particulars, and therefore I shall only give some short Observations touching the same.

*First,*

First, He perfectly settled the Great Charter, and *Charta de Foresta*, not only by a Practice consonant to them in the Distribution of Law and Right, but also by that solemn Act passed 25 E. 1. and stiled *Confirmationes Cartarum*.

Secondly, He established and distributed the several Jurisdictions of Courts within their proper Bounds. And because this Head has several Branches, I shall subdivide the same, *viz.*

1. He check'd the Incroachments and Insolencies of the *Pope* and the *Clergy*, by the Statute of *Carlisle*.

2. He declared the Limits and Bounds of the Ecclesiastical Jurisdiction, by the Statute of *Circumspecte Agatis & Articuli Cleri*. For note, Tho' this later Statute was not published till *Edw. 2.* yet was compiled in the Beginning of *Edw. 1.*

3. He established the Limits of the Court of *Common Pleas*, perfectly performing the Direction of *Magna Charta*, *Quod Communia placita non sequantur Curia nostra*, in relation to *B. R.* and in express Terms extending it to the Court of *Exchequer* by the Statute of *Articuli super Chartas*, cap. 4. It is true, upon my First reading of the *Placita de Banco* of *Edw. 1.* I found very many Appeals of Death, of Rape, and of Robbery therein; and therefore I doubted, whether the same were not held at least by Writ in the *Common Pleas* Court: But upon better Inquiry, I found many of the Records before *Justices Itine-*

CHAP. 7. *Itinerant* were enter'd or fill'd up among the Records of the *Common Pleas*, which might occasion that Mistake.

4. He establish'd the Extent of the Jurisdiction of the Steward and Marshal. *Vide Articuli super Chartas, cap. 3.* And,

5. He also settled the Bounds of Inferior Courts, not only of Counties, Hundreds, and Courts Baron, which he kept within their proper and narrow Bounds, for the Reasons given before; and so gradually the Common Justice of the Kingdom came to be administred by Men knowing in the Laws, and conversant in the great Courts of *B. R.* and *C. B.* and before *Justices Itinerant*; and also by that excellent Statute of *Westminster 1. cap. 35.* he kept the Courts of Great Men within their Limits, under several Penalties, wherein ordinarily very great Inroachments and Oppressions were exercised.

3. The *Third* general Observation I make is, He did not only explain, but excellently enforc'd, *Magna Charta*, by the Statute *De Tallagio non concedenda, 34 E. 1.*

4. *Fourthly*, He provided against the Interruption of the Common Justice of the Kingdom, by Mandates under the Great Seal, or Privy Seal, by the Statute of *Articuli super Chartas, cap. 6.* which, notwithstanding *Magna Charta*, had formerly been frequent in Use.

5. *Fifthly*, He settled the Forms, Solemnities, and Efficacies of Fines, confining them to the  
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the *Common-Pleas*, and to *Justices Itinerant*, and appointed the Place where they brought the Records after their Circuits, whereby one common Repository might be kept of Assurances of Lands; which he did by the Statute *De modo levandi Fines*, 18 E. 1.

*Sixthly*, He settled that great and orderly Method for the Safety and Preservation of the Peace of the Kingdom, and suppressing of Robberies, by the Statute of *Winton*.

*Seventhly*, He settled the Method of Tenures, to prevent Multiplicity of Penalties, which grew to a great Inconvenience, and remedied it by the Statute of *Quia Emptores Terrarum*, 18 E. 1.

*Eighthly*, He settled a speedier Way for Recovery of Debts, not only for Merchants and Tradesmen, by the Statutes of *Acton*, *Burnel*, & *de Mercatoribus*, but also for other Persons, by granting an Execution for a Moiety of the Lands by *Elegit*.

*Ninthly*, He made effectual Provision for Recovery of Advowsons and Presentations to Churches, which was before infinitely lame and defective, by Statute *Westminster 2. cap. 1.*

*Tenthly*, He made that great Alteration in Estates from what they were formerly, by Statute *Westminster 2. cap. 1.* whereby Estates of Fee-Simple, conditional at Common Law, were turn'd into Estates-Tail, not removable from the Issue by the ordinary Methods of Alienation; and upon this Statute, and for the Qualifications hereof, are the Super-

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structures

CHAP. 7. structures built of 4 *H. 7. cap. 32.* 32 *H. 8.*  
and 33 *H. 8.*

11. *Eleventhly*, He introduced quite a new Method, both in the Laws of *Wales*, and in the Method of their Dispensation, by the Statute of *Rutland*.
12. *Twelfthly*, In brief, partly by the Learning and Experience of his Judges, and partly by his own wise Interposition, he silently and without Noise abrogated many ill and inconvenient Usages, both in his Courts of Justice, and in the Country. He rectified and set in Order the Method of collecting his Revenue in the *Exchequer*, and removed obsolete and illeivable Parts thereof out of Charge; and by the Statutes of *Westminster 1.* and *Westminster 2.* *Gloucester* and *Westminster 3.* and of *Articuli super Chartas*, he did remove almost all that was either grievous or impractical out of the Law, and the Course of its Administration, and substituted such apt, short, pithy, and effectual Remedies and Provisions, as by the Length of Time, and Experience had of their Convenience, have stood ever since without any great Alteration, and are now as it were incorporated into, and become a Part of the Common Law itself.

Upon the whole Matter, it appears, That the very Scheme, Mold and Model of the Common Law, especially in relation to the Administration of the Common Justice between Party and Party, as it was highly rectified and set in a much better Light and  
Order

Order by this King than his Predecessors left it to him, so in a very great Measure it has continued the same in all succeeding Ages to this Day; so that the Mark or *Epocha* we are to take for the true Stating of the Law of *England*, *what it is*, is to be considered, stated and estimated from what it was when this King left it. Before his Time it was in a great Measure rude and unpolish'd, in comparison of what it was after his Reduction thereof; and on the other Side, as it was thus polished and ordered by him, so has it stood hitherto without any great or considerable Alteration, abating some few Additions and Alterations which succeeding Times have made, which for the most part are in the subject Matter of the Laws themselves, and not so much in the Rules, Methods, or Ways of its Administration.

As I before observed some of those many great Accessions to the Perfection of the Law under this King, so I shall now observe some of those Boxes or Repositories where they may be found, which are of the following Kinds, *viz.*

Reposi-  
tories of  
the Law.

*First*, The Acts of Parliament in the Time of this King are full of excellent Wisdom and Perspicuity, yet Brevity; but of this, enough before is said.

*Secondly*, The Judicial Records in the Time of this King. I shall not mention those of the *Chancery*, the Close-Patent and Charter Rolls, which yet will very much evidence

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CHAP. 7. the Learning and Judgment of that Time ;  
 but I shall mention the Rolls of Judicial  
 Proceedings, especially those in the *King's-  
 Bench* and *Common-Pleas*, and in the *Eyres*.  
 I have read over many of them, and do  
 generally observe,

1. That they are written in an excellent  
 Hand.

2. That the Pleading is very short, but  
 very clear and perspicuous, and neither loose  
 or uncertain, nor perplexing the Matter  
 either with Impropropriety, Obscurity, or Mul-  
 tiplicity of Words : They are clearly and  
 orderly digested, effectually representing  
 the Business that they intend.

3. That the Title and the Reason of the  
 Law upon which they proceed (which many  
 times is expressly delivered upon the Record  
 itself) is perspicuous, clear and rational ;  
 so that their short and pithy Pleadings and  
 Judgments do far better render the Sense  
 of the Business, and the Reasons thereof,  
 than those long, intricate, perplexed, and  
 formal Pleadings, that oftentimes of late  
 are unnecessarily used.

3. *Thirdly*, The Reports of the Terms and  
 Years of this King's Time, a few broken  
 Cases whereof are in *Fitzherbert's* Abridg-  
 ment ; but we have no successive Terms or  
 Years thereof, but only ancient Manuscripts  
 perchance, not running through the whole  
 Time of this King, yet they are very good,  
 but very brief : Either the Judges then spoke  
 less, or the Reporters were not so ready  
 handed as to take all they said. And hence

this

this Brevity makes them the more obscure. CHAP. 7.  
 But yet in those brief Interlocutions between the Judge and the Pleaders, and in their Definitions, there appears a great deal of Learning and Judgment. Some of those Reports, tho' broken, yet the best of their Kind, are in *Lincolns-Inn* Library.

*Fourthly*, The Tracts written or collected in the Time of this wise and excellent Prince, which seem to be of Two Kinds, 4.  
*viz.* Such as were only the Tractates of private Men, and therefore had no greater Authority than private Collections, yet contain much of the Law then in Use, as *Fleta* the Mirror, *Britton* and *Thornton*; or else, *2dly*, They were Sums or Abstracts of some particular Parts of the Law, as *Novæ Narrationes*, *Hengam Magna & Parva*, *Cadit assisa Summa*, *De Bastardia Summa*; by all which, compared even with *Bracton*, there appears a Growth and a Perfecting of the Law into a greater Regularity and Order.

And thus much shall serve for the several Periods or Growth of the Common Law until the Time of *Edw. I.* inclusively, wherein having been somewhat prolix, I shall be the briefer in what follows, especially seeing that from this Time downwards, the Books and Reports printed give a full Account of the ensuing Progress of the Law.



## C H A P. VIII.

*A Brief Continuation of the Progress of the Laws, from the Time of King Edward 2. inclusive, down to these Times.*

CHAP. 8.

**H**AVING in the former Chapter been somewhat large in Discourſing of the Progress of the Laws, and the incidental Additions they received in the ſeveral Reigns of King *William 2.* King *Hen. 1.* King *Stephen*, King *Hen. 2.* King *Richard 1.* King *John*, King *Hen. 3.* and King *Edw. 1.* I ſhall now proceed to give a brief Account of the Progress thereof in the Time of *Edw. 2.* and the ſucceeding Reigns, down to theſe Times.

K. E. 2.

*Edward 2.* ſucceeding his Father, tho' he was an unfortunate Prince, and by reaſon of the Troubles and Unevenneſs of his Reign, the very Law itſelf had many Interruptions, yet it held its Current in a great Meaſure according to that Frame and State that his Father had left it in.

Befides the Records of Judicial Proceedings in his Time, many whereof are ſtill extant, there were ſome other Things that occur'd in his Reign which gave us ſome kind of Indication of the State and Condition of the Law during that Reign: As,

*First,*

*First*, The Statutes made in his Time and especially that of 17 E. 2. stiled *De Prerogativa Regis*, which tho' it be called a Statute, yet for the most part is but a Sum or Collection of certain of the King's Prerogatives that were known Law long before; as for Instance, The King's Wardship of Lands in *Capite* attracting the Wardship of Lands held of others; The King's Grant of a Manor not carrying an Advowson Appendant unless named; The King's Title to the Escheat of the Lands of the *Normans*, which was in Use from the first Defection of *Normandy* under King *John*; The King's Title to Wreck, Royal Fish, Treasure Trove and many others, which were ancient Prerogatives to the Crown.

CHAP. 8.

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*Secondly*, The Reports of the Years and Terms of this King's Reign; these are not printed in any one entire Volume, or in any Series or Order of Time, only some broken Cases thereof in *Fitzherbert's* Abridgment, and in some other Books dispersedly; yet there are many entire Copies thereof abroad very excellently reported, wherein are many Resolutions agreeing with those of *Edw. 1st's* Time. The best Copy of these Reports that I know now extant, is that in *Lincoln's-Inn* Library, which gives a fair Specimen of the Learning of the Pleaders and Judges of that Time

2.

King *Edw. 3.* succeeded his Father; his Reign was long, and under it the Law was improved to the greatest Height. The Judges

K. Ed. 3.

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and

CHAP. 8. and Pleaders were very learned : The Pleadings are somewhat more polished than those in the Time of *Edw. 1.* yet they have neither Uncertainty, Prolixity, nor Obscurity. They were plain and skilful, and in the Rules of Law, especially in relation to Real Actions, and Titles of Inheritance, very learned and excellently polished, and exceeded those of the Time of *Edw. 1.* So that at the latter End of this King's Reign the Law seemed to be near its *Meridian*.

The Reports of this King's Time run from the Beginning to the End of his Reign, excepting some few Years between the 10th and 17th, and 30th and 33d Years of his Reign; but those Omitted Years are extant in many Hands in old Manuscripts.

The Book of Assizes is a Collection of the Assizes that happened in the Time of *Edw. 3.* being from the Beginning to the End extracted out of the Books and Assizes of those that attended the Assizes in the Country.

The *Justices Itinerant* continued by intermitting Vicissitudes till about the 4th of *Edw. 3.* and some till the 10th of *Edw. 3.* Their Jurisdiction extended to Pleas of the Crown or Criminal Causes, Civil Suits and Pleas of Liberties, and *Quo Warranto's*; the Reports thereof are not printed, but are in many Hands in Manuscript, both of the Times of *Edw. 1.* *Edw. 2.* and *Edw. 3.* full of excellent Learning. Some few broken Reports of those

those *Eyres*, especially of *Cornwall*, *Nottingham*, *Northampton*, and *Derby*, are collected by *Fitzherbert* in his Abridgment. CHAP. 8.

After the 10th of *Edw. 3.* I do not find any Justices Errant *ad Communia Placita*, but only *ad Placita Forestæ*; other Things that concerned those *Justices Itinerant* were supplied and transacted in the *Common Bench* for *Communia Placita*, in the *King's-Bench* and *Exchequer* for *Placita de Libertatibus*, and before Justices of Assize, *Nisi Prius*, *Oyer* and *Terminer*, and Gaol Delivery for Assizes and Pleas of the Crown.

And thus much for the Law in the Time of *Edw. 3.*

*Richard 2.* succeeding his Grandfather, *K. Rich. 2.* the Dignity of the Law, together with the Honour of the Kingdom, by reason of the Weakness of this Prince, and the Difficulties occurring in his Government, seem'd somewhat to decline, as may appear by comparing the Twelve last Years of *Edw. 3.* commonly called *Quadragesms*, with the Reports of King *Richard 2.* wherein appears a visible Declination of the Learning and Depth of the Judges and Pleaders.

It is true, we have no printed continued Report of this King's Reign; but I have seen the entire Years and Terms thereof in a Manuscript, out of which, or some other Copy thereof, I suppose *Fitzherbert* abstracted those broken Cases of this Reign in his Abridgment,

In

In all those former Times, especially from the End of *Edw. 3.* back to the Beginning of *Edw. 1.* the Learning of the Common Law consisted principally in Assizes and Real Actions; and rarely was any Title determined in any Personal Action, unless in Cases of Titles to Rents, or Services by Replevin; and the Reasons thereof were principally these, *viz.*

*First*, Because these ancient Times were great Favourers of the Possessor, and therefore if about the Time of *Edw. 2.* a Disseisor had been in Possession by a Year and a Day, he was not to be put out without a Recovery by Assize. Again, if the Disseisor had made a Feoffment, they did not countenance an Entry upon the Feoffee, because thereby he might lose his Warranty, which he might save if he were Impleaded in an Assize or Writ of Entry; and by this Means Real Actions were frequent, and also Assizes.

*Secondly*, They were willing to quiet Men's Possessions, and therefore after a Recovery or Bar in an Assize or Real Action, the Party was driven to an Action of a higher Nature.

*Thirdly*, Because there was then no known Action wherein a Person could recover his Possession, other than by an Assize or a Real Action; for till the End of *Edw. 4.* the Possession was not recovered in an *Ejectione firma*, but only Damages.

*Fourthly*, Because an Assize was a speedy and effectual Remedy to recover a Possession,

sion, the Jury being ready Impannell'd and at the Bar the first Day of the Return. And altho' by Disusage, the Practisers of Law are not so ready in it, yet the Course thereof in those Times was as ready and as well known to all Professors of the Law as the Course of *Ejectione firme* is now. CHAP. 8.

Touching the Reports of the Years and Terms of *Hen. 4.* and *Hen. 5.* I can only say, They do not arrive either in the Nature of the Learning contained in them, or in the Judiciousness and Knowledge of the Judges and Pleaders, nor in any other Respect arise to the Perfection of the last Twelve Years of *Edw. 3.* K. *Hen. 4.*  
K. *Hen. 5.*

But the Times of *Hen. 6.* as also of *Edw. 4.* *Edw. 5.* and *Hen. 7.* were Times that abounded with Learning and excellent Men. There is little Odds in the Usefulness or Learning of these Books, only the first Part of *Hen. 6.* is more barren, spending itself much in Learning of little Moment, and now out of Use; but the second Part is full of excellent Learning. K. *Hen. 6.*  
K. *Ed. 4.*  
K. *Ed. 5.*  
and  
K. *H. 7.*

In the Times of those Three Kings, *Hen. 6.* *Edw. 4.* and *Hen. 7.* the Learning seems to be much alike. But these Two Things are observable in them, and indeed generally in all Reports after the Time of *Edw. 3.* viz.

*First,* That Real Actions and Assizes were not so frequent as formerly, but many Titles of Land were determined in Personal

CHAP. 8. **nal Actions; and the Reasons hereof seem to be,**

1<sup>st</sup>, Because the Learning of them began by little and little to be less known or understood.

2<sup>dly</sup>, The ancient Strictness of preserving Possession to Possessors till Eviction by Action, began not to be so much in Use, unless in Cases of Descents and Discontinuances, the latter necessarily drove the Demandant to his *Formedon*, or his *Cui in Vita*, &c. But the Descents that told Entry were rare, because Men preserved their Rights to enter, &c. by continual Claims.

3<sup>dly</sup>, Because the Statute of 8 H. 6. had helped Men to an Action to recover their Possessions by a Writ of Forcible Entry, even while the Method of Recovery of Possessions by Ejectments was not known or used.

2. The *Second* Thing observable is, That tho' Pleadings in the Times of those Kings were far shorter than afterwards, especially after *Hen. 8.* yet they were much longer than in the Time of King *Edw. 3.* and the Pleaders, yea and the Judges too, became somewhat too curious therein, so that that Art or Dexterity of Pleading, which in its Use, Nature and Design, was only to render the Fact plain and intelligible, and to bring the Matter to Judgment with a convenient Certainty, began to degenerate from its primitive Simplicity, and the true Use and End thereof, and to become a Piece of Nicety and Curiosity; which how these latter Times have improved, the Length of the Pleadings, the many and unnecessary Repe-  
titions,

titions, the many Miscarriages of Causes upon small and trivial Niceties in Pleading, have too much witnessed. CHAP. 8.

I should now say something touching the Times since *Hen. 7.* to this Day, and therefore shall conclude this Chapter with some general Observations touching the Proceedings of Law in these later Times.

And first, I shall begin where I left before, touching the Length and Nicety of Pleadings, which at this Day far exceeds not only that short yet perspicuous Course of Pleading which was in the Time of *Hen. 6. Edw. 4. and Hen. 7.* but those of all Times whatsoever, as our vast Presses of Parchment for any one Plea do abundantly witness.

And the Reasons thereof seem to be these, viz.

*First*, Because in ancient Times the Pleadings were drawn at the Bar, and the Exceptions (also) taken at the Bar, which were rarely taken for the Pleasure or Curiosity of the Pleader, but only when it was apparent that the Omission or the Matter excepted to was for the most part the very Merit and Life of the Cause, and purposely omitted or mispleaded because his Matter or Cause would bear no better: But now the Pleadings being first drawn in Writing, are drawn to an excessive Length, and with very much Labouriousness and Care enlarged, lest it might afford an Exception not intended by the Pleader, and which



**CHAP. 8.** which could be easily supplied from the Truth of the Case; lest the other Party should catch that Advantage which commonly the adverse Party studies, not in Contemplation of the Merits or Justice of the Cause, but to find a slip to fasten upon, tho' in Truth, either not material to the Merits of the Plea, or at least not to the Merits of the Cause, if the Plea were in all Things conform to it.

*Secondly*, Because those Parts of Pleading which in ancient Times might perhaps be material, but at this Time are become only mere Styles and Forms, are still continued with much Religion, and so all those ancient Forms at first introduced for Convenience, but now not necessary, or it may be antiquated as to their Use, are yet continued as Things wonderfully material, tho' they only swell the Bulk, but contribute nothing to the Weight of the Plea.

*Thirdly*, These Pleas being mostly drawn by Clerks, who are paid for Entries and Copies thereof, the larger the Pleadings are, the more Profits come to them, and the dearer the Clerk's Place is, the dearer he makes the Client pay.

*Fourthly*, An Overforwardness in Courts to give Countenance to frivolous Exceptions, tho' they make nothing to the true Merits of the Cause; whereby it often happens that Causes are not determined according to their Merits, but do often miscarry for inconsiderable Omissions in Pleading.

But

But, *Secondly*, I shall consider what is the Reason that in the Time of *Edw. 1.* one Term contained not above two or three Hundred Rolls, but at this Day one Term contains two Thousand Rolls or more.

CHAP. 8.

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The Reasons whereof may be these, *viz.*

*1st*, Many petty Businesses, as Trespasses and Debts under 40 s. are now brought to *Westminster*, which used to be dispatched in the County or Hundred Courts; and yet the Plaintiffs are not to be blamed, because at this Day those inferior Courts are so ill served, and Justice there so ill administered, that they were better seek it (where it may be had) at *Westminster*, tho' at somewhat more Expence.

*2dly*, Multitudes of Attorneys practising in the Great Courts at *Westminster*, who are ready at every Market to gratify the Spleen, Spite or Pride, of every Plaintiff.

*3dly*, A great Increase of People in this Kingdom above what they were anciently; which must needs multiply Suits.

*4thly*, A great Increase of Trade and Trading Persons, above what there were in ancient Times, which must have the like Effect.

*5thly*, Multitudes of new Laws, both Penal and others, all which breed new Questions, and new Suits at Law, and in particular, the Statute touching the devising of Lands, *cum multis aliis.*

*6thly*, Multiplication of Actions upon the Case, which were rare formerly, and thereby

CHAP. 8. thereby Wager of Law ousted, which discouraged many Suits: For when Men were sure, that in case they rested upon a bare Contract without Specialty, the other Party might wage his Law, they would not rest upon such Contracts without reducing the Debt into a Specialty, if it were of any Value, which created much Certainty, and accorded many Suits.

And herewith I shall conclude this Chapter, shewing what Progress the Law has made, from the Reign of King *Edw. I.* down to these Times.

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C H A P.

## C H A P. IX.

*Concerning the settling of the Common Law  
of England in Ireland and Wales: And  
some Observations touching the Isles of  
Man, Jersey and Guernley, &c.*

**T**HE Kingdom of *Ireland* being con-  
quered by *Hen. 2.* about the Year 1171. CHAP. 9.  
He in his Great Council at *Oxon*, constituted *Ireland.*  
his younger Son, *John*, King thereof, who  
prosecuted that Conquest so fully, that he  
introduced the *English* Laws into that King-  
dom, and swore all the great Men there  
to the Observation of the same, which  
Laws were, after the Decease of King *John*,  
again reinforc'd by the Writ of King *Hen. 3.*  
reciting that of King *John*, *Rot. Claus.*  
10 *H. 3. Memb. 8. & 10. Vide infra, &*  
*Pryn. 252, 253, &c.*

And because the Laws of *England* were  
not so suddenly known there, Writs from  
Time to Time issued from hence, containing  
divers *Capitula Legum Angliæ*, and command-  
ing their Observation in *Ireland*, as *Rot. Parl.*  
11 *H. 3.* the Law concerning Tenancy by  
Curtesy, *Rot. Claus.* 20 *H. 3. Memb. 3. Dorso.*  
The Law concerning the Preference of the  
Son born after Marriage, to the Son born  
of the same Woman before Marriage, or  
*Bastard eigne & Mulier puisne, Rot. Claus.*  
N 20 *H.*

CHAP. 9. 2C H. 3. Memb. 4. in Dorso: So the Law concerning all the Parceners inheriting without doing Homage, and several Transmissions of the like Nature.

For tho' King *Hen. 2.* had done as much to introduce the *English* Laws there, as the Nature of the Inhabitants or the Circumstances of the Times would permit; yet partly for want of Sheriffs, that Kingdom being then not divided into Counties, and partly by reason of the Instability of the *Irish*, he could not fully effect his Design: And therefore, King *John*, to supply those Defects as far as he was able, divided *Leinster* and *Munster* into the several Counties of *Dublin*, *Kildare*, *Meath*, *Uriel*, *Catherlogh*, *Kilkenny*, *Wexford*, *Waterford*, *Cork*, *Limerick*, *Tiperary*, and *Kerry*; and appointed Sheriffs and other Officers to govern 'em after the Manner of *England*; and likewise caused an Abstract of the *English* Laws under his Great Seal to be transmitted thither, and deposited in the *Exchequer* at *Dublin*: And soon after, in an *Irish* Parliament, by a general Consent, and at the Instance of the *Irish*, he ordain'd, That the *English* Laws and Customs should thenceforth be observ'd in *Ireland*; and in order to it, he sent his Judges thither, and erected Courts of Judicature at *Dublin*.

Vide 4th  
Inst. 149.

But notwithstanding these Precautions of King *John*, yet for that the *Brebon* Law, and other *Irish* Customs, gave more of Power to the great Men, and yet did not restrain the Common People to so strict and regular

a Discipline as the Laws of *England* did. Therefore the very *Engliſh* themſelves became corrupted by them, and the *Engliſh* Laws ſoon became of little Uſe or Eſteem, and were look'd upon by the *Iriſh* and the degenerate *Engliſh* as a Yoke of Bondage; ſo that King *Hen. 3.* was oftentimes neceſſitated to revive 'em, and by ſeveral ſucceſſive Writs to enjoin the Obſervation of them. And in the Eleventh Year of his Reign, he ſent the following Writ, viz.

*Henrici Rex, &c. Baronibus Militibus & aliis liberi Tenentibus Lageniæ, ſalutem, &c. Satis ut credimus veſtra auditit discretio, quod cum bonæ memoriæ Johannes, quondam Rex Angliæ Pater noſter venit in Hiberniam, ipſe duxit ſecum viros diſcretos & Legis peritos, quorum Communi Conſilio, & ad inſtantiam Hibernienſium Statuit & præcepit Leges Anglicanas teneri in Hibernia, ita quod Leges eaſdem in ſcriptis readactas reliquit ſub ſigillo ſuo ad Scaccar. Dublin. Cum igitur Conſuetudo & Lex Angliæ fuerit, quod ſi aliquis deſponſaverit aliquam Mulierem, ſive Viduam ſive aliam hæreditatem habentem, & ipſe poſtmodum ex ea prolem ſuſciterit, cujus clamor auditus fuerit infra quatuor parietes idem Vir ſi ſupervixerit ipſam uxorem ſuam, habebit tota vita ſua Cuſtodiam Hæreditatis uxoris ſuæ, licet ea forte habuerit Hæredem de primo viro ſuo qui fuerit Plenæ ætatis vobis Mandamus injungentes quatenus in loquela quæ eſt in Curia Willm. Com. Mareſc. inter Mauritium Fitz Gerald Petent. & Gaſfridum de Marisco*

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Ju-

*Justiciarium nostrum Hiberniæ tenentem, vel in alia Loquela quæ fuerit in Casu prædicto nullo modo Justitiam in contrar' facere præsumatis.*

*Teste Rege apud Westm. 10 Decemb. Anno 11<sup>o</sup> Regni Nostri.*

And Note, In the same Year another Writ was sent to the Lord Justice, commanding him to aid the Episcopal Excommunications in Ireland with the Secular Arm, as in England was used.

And about this Time, *Hubert de Burgo*, the Chief Justice of England, and Earl of Kent, was made Earl of Connaught, and Lord Justice of Ireland during Life; and because he could not personally attend, he on March the 10th, 1227, appointed *Richard de Burgo*, to be his Deputy, or Lord Justice, to whom the King sent the following Writ:

*Rex dilecto & fideli suo Richardo de Burgo Justiciario suo Hiberniæ salutem. Mandamus vobis firmiter præcipientes, quatenus certo die & loco faciatis venire coram vobis, Archiepiscopos, Episcopos, Abbates, Priores, Comites & Barones, Milites & libere Tenentes & Ballivos singulorum Comitatum, & coram eis publice legi faciatis Chartam Domini Johannis Regis Patris nostri, cui sigillum suum appensum est, quam fieri fecit, & jurari a Magnatibus Hiberniæ de Legibus & consuetudinibus Anglorum observandis in Hibernia, & Præcipiatis eis ex parte nostra, quod Leges illas & consuetudines in Charta prædicta contentas de cetero firmiter teneant & observent. Et hoc*

*hoc idem per singulos Comitatus Hiberniæ clamari faciatis, & teneri prohibentes firmiter ex parte nostra & forisfacturam nostram, ne quis contra hoc Mandatum nostrum, venire præsumat. Eo excepto quod nec de morte nec de catallis Hibernensium occisorum nihil statuatur ex parte nostra citra quindecim dies a Sancti Michaelis, Anno Regni Nostri 12°. Super quo respectum dedimus Magnat. nostri de Hib. usque ad Terminum prædicti Teste Meipso apud Westm. 8° die Maii, Anno Regni Nostri 12°.*

And about the 20th Year of *Hen. 3.* several Writs were sent into *Ireland*, especially directing several Statutes which had been made in *England* to be put in Use, and to be observed in *Ireland*; as the Statute of *Merton* in the Case of Bastardy, &c.

But yet it seems by the frequent Grants that were made afterwards to particular Native *Irish* Men, *quod legibus utantur Anglicanis*, That the Native *Irish* had not the full Privilege of the *English* Laws, in Relation at least to the Liberties of *English* Men, till about the Third of *Edw. 3.* *Vide Rot. Claus. 2 E. 3. Memb. 17.*

As the Common Law of *England* was thus by King *John* and *Hen. 3.* introduced into *Ireland*, so in the Tenth of *Hen. 7.* all the precedent Statutes of *England* were there settled by the Parliament of *Ireland*. 'Tis true, many ancient *Irish* Customs continued in *Ireland*, and do continue there even unto this Day; but such as are contrary to the



CHAP. 9. Laws of *England* are disallow'd, *Vide Davis's Reports*, the Case of *Tanistry*.

*Wales.*

As touching *Wales*, That was not always the Feudal Territory of the Kingdom of *England*; but having been long governed by a Prince of their own, there were very many Laws and Customs used in *Wales*, utterly strange to the Laws of *England*, the Principal whereof they attribute to their King *Howell Dda*.

After King *Edw. I.* had subdued *Wales*, and brought it immediately under his Dominion; He first made a strict Inquisition touching the *Welsh* Laws within their several *Commotes* and *Seigniores*, which Inquisitions are yet of Record: After which, in the 12th of *Edw. I.* the Statute of *Rutland* was made, whereby the Administration of Justice in *Wales* was settled in a Method very near to the Rule of the Law of *England*. The Preamble of the said Statute is notable, viz.

*Edvardus Dei gratia Rex Angliæ Dominus Hiberniæ & Dux Aquitaniæ omnibus Fidelibus suis de Terra sua de Snodon & de aliis terris suis in Wallia Salutem in Domino. Divina Providentia quæ in sua Dispositione non fallitur, inter alia sue Dispensationis Munera, quibus nos & Regnum nostrum Angliæ decorari dignata est, Terram Walliæ cum incolis suis prius nobis juri Feodali subjectum, tam sui gratia in proprietatis nostræ Dominium, obstaculis quibuscunque cessantibus, totaliter & cum integritate convertit, &*  
Coro:

*Coronia Regni prædicti tantum partem corporis ejusdem annexuit & univit. Nos, &c.* CHAP. 9.

According to the Method in that Statute prescribed, has the Method of Justice been hitherto administered in *Wales*, with such Alterations and Additions therein as have been made by the several subsequent Statutes of 27 and 34 H. 8. &c.

Touching the *Isle of Man*. This was sometimes Parcel of the Kingdom of *Norway*, The Isle of Man. and governed by particular Laws and Customs of their own, tho' many of them hold Proportion, or bear some Analogy, to the Laws of *England*, and probably were at first and originally derived from hence; seeing the Kingdom of *Norway* as well as the *Isle of Man* have anciently been in Subjection to the Crown of *England*. *Vide Legis Willi. Primi*, in *Lambard's Saxon Laws*.

*Berwick* was sometimes Parcel of *Scotland*, Berwick. but was won by Conquest by King *Edw. 1.* and after that lost by King *Edw. 2.* and afterwards regained by *Edw. 3.* It was governed by the Laws of *Scotland*, and their own particular Customs, and not according to the Rules of the Common Law of *England*, further than as by Custom it is there admitted, as in *Liber Parliamenti*, 21 E. 1. in the Case of *Moyne and Barilemew*, pro Dote in *Berwick*; yet now by Charter, they send Burgeses to the Parliament of *England*.

Touching the *Islands* of *Jersey*, *Guernsey*, *Jersey*, *Sark*, and *Alderney*; They were anciently Guernsey, &c. a Part

a Part of the Dutchy of *Normandy*, and in that Right, the Kings of *England* held them till the Time of King *John*; but although King *John*, as is before shewn, was unjustly deprived of that Dutchy, yet he kept the *Islands*; and when after that, they were by Force taken from him, he by the like Force regained them, and they have ever since continued in the Possession of the Crown of *England*.

As to their Laws, they are not governed by the Laws of *England*, but by the Laws and Customs of *Normandy*. But not as they are at this Day; for since the actual Division and Separation of those *Islands* from that Dutchy, there have been several New Edicts and Laws made by the Kings of *France* which have much altered the old Law of *Normandy*, which Edicts and Laws bind not in those *Islands*, they having been ever since King *John*'s Time at least under the actual Allegiance of *England*.

And hence it is, that tho' there be late Collections of the Laws and Customs of *Normandy*, as *Terrier* and some others, yet they are not of any Authority in those *Islands*; for the Decision of Controversies, as the *Grand Contumier* of *Normandy* is, which is (at least in the greatest Part thereof) a Collection of the Laws of *Normandy* as they stood before the Disjoining of those *Islands* from the Dutchy, viz. before the Time of King *Hen. 3.* tho' there be in that Collection some Edicts of the Kings of *France* which were made after that Disjunction; and

and those Laws, as I have shewn before, tho' in some Things they agree with the Laws of *England*, yet in many Things they differ, and in some are absolutely repugnant. CHAP. 9.

And hence it is, that regularly Suits arising in those *Islands* are not to be tried or determined in the King's Courts in *England*, but are to be heard, tried, and determined in those *Islands*, either before the ordinary Courts of *Jurats* there, or by the *Justices Itinerant* there, commissioned under the Great Seal of *England*, to determine Matters there arising; and the Reason is, because their Course of Proceedings, and their Laws, differ from the Course of Proceedings and the Laws of *England*.

And altho' it be true, that in ancient Times, since the Loss of *Normandy*, some scattering Instances are of Pleas moved here touching Things done in those *Islands*, yet the general settled Rule has been to remit them to those *Islands*, to be tried and determined there by their Law; tho' at this Day the Courts at *Westminster* hold Plea of all transitory Actions wheresoever they arise, for it cannot appear upon the Record where they did arise.

*Mic. 42 E. 2. Rot, 45, coram Rege.* A great Complaint was made by Petition, against the Deputy Governor of those *Islands*, for divers Oppressions and Wrongs done there: This Petition was by the Chancellor delivered into the Court of *B. R.* to proceed upon it, whereupon there were Pleadings on both Sides; but because it appeared to  
be

CHAP. 9. be for Things done and transacted in the said *Islands*, Judgment was thus given : *Et quia Negotiam prædictæ in Curia hic terminari non potest, eo quod Juratores Insulæ prædictæ coram Justitiariis hic venire non possunt, nec de Jure debent, nec aliqua Negotia infra Insula prædicta emergentia terminari non debent, nisi secundum Consuet. Insulæ Prædictæ. Idro Recordum retro traditur Cancellario ut inde fiat Commissio Domini Regis ad Negotia prædicta in Insula prædicta audienda & Terminanda secundum Consuet. Insulæ prædictæ.*

And accordingly 14 Junii, 1565, upon a Report from the Attorney General, and Advice with the two Chief Justices, a general Direction was given by the Queen and her Council, That all Suits between the *Islanders*, or wherein one Party was an *Islander*, for Matters arising within the *Islands*, should be there heard and determined.

But still this is to be taken with this Distinction and Limitation, viz. That where the Suit is immediately for the King, there the King may make his Suit in any of the Courts here, especially in the Court of *King's-Bench*: For Instance, in a *Quare Impedit* brought by the King in *B. R.* here for a Church in those *Islands*; so in a *Quo Warranto* for Liberties there; so a Demand of Redemption of Lands sold by the King's Tenant within a Year and a Day according to the Custom of *Normandy*; so in an Information for a Riot, or grand Contempt against a Governor deputed by the King. These and the like Suits have been maintained

tained by the King in his Court of *King's-Bench* here, tho' for Matters arising within those *Islands*: This appears, *Paschæ* 16 E. 2. *coram Rege*, Rot. 82. *Mich.* 18 E. 2. Rot. 123, 124, 125. & *Pas.* 1 E. 3. Rot. 59. CHAP. 9

And for the same Reason it is, that a Writ of *Habeas Corpus* lies into those *Islands* for one imprisoned there, for the King may demand, and must have an Account of the Cause of any of his Subjects Loss of Liberty; and therefore a Return must be made of this Writ, to give the Court an Account of the Cause of Imprisonment; for no Liberty, whether of a *County Palatine*, or other, holds Place against those *Brevia Mandatoria*, as that great Instance of punishing the Bishop of *Durham* for refusing to execute a Writ of *Habeas Corpus* out of the *King's Bench*, 33 E. 1. makes evident.

And as Pleas arising in the *Islands* regularly, ought not in the first Instance to be deduced into the Courts here, (except in the King's Case;) so neither ought they to be deduced into the King's Courts here in the second Instance; and therefore if a Sentence or Judgment be given in the *Islands*, the Party grieved thereby, may have his Appeal to the King and his Council to reverse the same if there be Cause. And this was the Course of Relief in the Dutchy of *Normandy*, viz. by Appeal to the Duke and his Council; and in the same Manner, it is still observed in the Case of erroneous Decrees or Sentences in those *Islands*, viz. To appeal to the King and his Council

But

But the Errors in such Decrees or Sentences are not examined by Writ of Error in the *King's-Bench*, for these Reasons, *viz.*

1<sup>st</sup>. Because the Courts there, and those here, go not by the same Rule, Method, or Order of Law.

And 2<sup>dly</sup>, Because those *Islands*, though they are Parcel of the Dominion of the Crown of *England*, yet they are not Parcel of the Realm of *England*, nor indeed ever were; but were anciently Parcel of the Dutchy of *Normandy*, and are those Remains thereof which the Power of the Crown and Kingdom of *France* have not been able to wrest from the Kings of *England*.

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## C H A P. X.

*Concerning the Communication of the Laws  
of England unto the Kingdom of Scot-  
land.*

**B**ECAUSE this Inquiry will be of Use, CHAP. 10.  
not only in itself, but also as a Parallel  
Discovery of the Transmision of the *Eng-  
lish* Laws into *Scotland*, as before is shewn  
they were into *Normandy*; I shall in this  
Chapter pursue and solve their several  
Queries, *viz.*

1<sup>st</sup>, What Laws of *Scotland* hold a Con-  
gruity and Suitableness with those of *Eng-  
land*.

2<sup>dly</sup>, Whether these be a sufficient Ground  
for us to suppose, that that Similitude or  
Congruity began with a Conformation of  
their Laws to those of *England*. And,

3<sup>dly</sup>, What might be reasonably judged  
to be the Means or Reason of the Confor-  
mation of their Laws unto the Laws of  
*England*.

As to the *First* of these Inquiries; It is I.  
plain, beyond all Contradiction, that many  
of the Laws of *Scotland* hold a Congruity  
and Similitude, and many of them a perfect  
Identity with the Laws of *England*, at least  
as



CHAP. 10. as the *English* Laws stood in the Times of *Hen. 2. Richard 1. King John, Henry 3. and Edw. 1.* And altho' in *Scotland*, Use hath always been made of the Civil Law, in point of Direction or Guidance, where their Municipal Laws, either Customary or Parliamentary failed; yet as to their particular Municipal Laws, we shall find a Resemblance, Parity and Identity, in their Laws with the Laws of *England*, anciently in Use; and we need go no further for Evidence hereof, than the *Regiam Majestatem*, a Book published by Mr. *Skeen* in *Scotland*. It would be too long to Instance in all the Points that might be produced; and therefore I shall single out some few, remitting the Reader for his further Satisfaction to the Book itself.

Dower of the Wife to be the Third Part of her Husband's Lands of Inheritance; the Writ to recover the same; the Means of forfeiting thereof by Treason or Felony of the Husband or Adultery of the Wife; are in great Measure conformable to the Laws of *England*. *Vide Regiam Majestatem, Lib. 2. cap. 16, 17.* and *Quoniam Attachiamento, cap. 85.*

The Exclusion of the Descent to the elder Brother by his receiving Homage, which tho' now antiquated in *England*, was anciently received here for Law, as appears by *Glanville, Lib. 7. cap. 1.* and *Vide Regiam Majestatem, Lib. 2. cap. 22.*

The Exclusion of Daughters from Inheritances by a Son: The Descent to all the

Daughters in Coparcenary for want of Sons; CHAP. 10.  
 the chief House allotted to the eldest Daughter upon this Partition; the Descent to the Collateral Heirs, for want of Lineal, &c.  
*Ibid. cap. 24, 25, 26, 27, 28, 33, 34.* But this is now altered in some Things *per Stat. Rob. cap. 3.*

The full Ages of Males 21, of Females 14, to be out of Ward in Socage 16. *Ibid. cap. 42.*

That the Custody of Idiots belonged to the King, *Ibid. cap. 46.*

The Custody of Heirs in Socage belong to the next of Kin, to whom the Inheritance can't descend. *Vide Regiam Majest. cap. 47.*

The Son born before Marriage, or *Bastard eigne*, not to be legitimate by the Marriage after, nor was he hereditary by the ancient Laws of *Scotland*, though afterward altered in Use, as it seems, *Regiam Majest. cap. 51.*

The Confiscation of *Bona Usurarium*, after their Death, conform to the old Law here used. *Ibid. cap. 54.* tho' now antiquated.

The Laws of Escheats, for want of Heirs, or upon Attainder. *Ibid. cap. 55.*

The Acquittal of Lands given in *Frank-Marriage*, till the fourth Degree be past, *Ibid. cap. 57.*

Homage, the Manner of making it with the Persons, by, or to whom, as in *England*, *Ibid. cap. 61, 62, 63, &c.*

The Relief of an Heir in Knights Service, of full Age, *Regiam Majestatem, cap. 17.*

The

~ The Preference of the Sister of the whole Blood, before the Sister of the half Blood. *Quoniam Attachimento*, cap. 89.

The single Value of the Marriage, and Forfeiture of the double Value, precisely agree with the Statute of *Marlbridge*. *Ibid.* cap. 91.

The Forfeiture of the Lord's disparaging his Ward in Marriage, agrees with *Magna Charta*, and the Statute of *Marlbridge*. *Quoniam Attachimento*, cap. 92.

The Preference of the Lord by Priority to the Custody of the Ward. *Ibid.* cap. 95.

The Punishment of the Ravisher of a Ward, by two Years Imprisonment, &c. as here. *Ibid.* cap. 90.

The Jurisdiction of the Lord in *Infangtheof*. *Ibid.* cap. 100.

Goods confiscate, and Deodands, as here, *Liber De Modo tenendi Cur. Baron.* cap. 62. 63, 64.

And the like of Waifs. *Ibid.* cap. 65.

Widows, not to marry without Consent of the Lord, Statute *Mesui.* 2. cap. 23.

Wreck of the Sea, defined precisely as in the Statute *Westm.* 2. *Vide Ibid.* cap. 25.

The Division of the Deceased's Goods, one Third to the Wife, another Third to the Children, and another to the Executor, &c. conformable to the ancient Law of *England*, and the Custom of the *North* to this Day. *Lib.* 2. cap. 37.

Also the Proceedings to recover Possessions, by *Mortdancer*, *Juris Utrum*, *Affise de Novel disseisin*, &c. The Writs and Process are

are much the same with those in *England*, and are directed according to *Glanville*, and the old Statutes in the Time of *Edw. 1.* and *Hen. 3.* *Vide Regiam Majestat. Lib. 3. cap. 27 to 36.* CHAP. 10.

Many more Instances might be given of many of the Municipal Laws of *Scotland*, either precisely the same with those in *England*, or very near, and like to them: Tho' it is true, they have some particular Laws that hold not that Conformity to ours, which were introduced either by particular or common Customs, or by Acts of their Parliaments. But, by what has been said and instanced in, it appears, That like as between the Laws of *England* and *Normandy*, so also between the Laws of *England* and *Scotland*, there was anciently a great Similitude and Likeness.

I come therefore to the *Second Thing* I proposed to enquire into, viz. what Evidence there is, That those Laws of *Scotland* were either desumed from the *English* Laws, or from *England*, transmitted thither in such a Manner, as that the Laws here in *England* were as it were the Original or prime Exemplar, out of which those parallel or similar Laws of *Scotland* were copied or transcribed into the Body of their Laws: And this appears evident on the following Reasons, viz. 2d Inquiry.

*First*, For that *Glanville* (which, as has been observed, is the ancientest Collection we have of *English* Laws) seem to be even 1.

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CHAP. 10. transcribed in many entire *Capita* of the Laws above-mentioned, and in some others where *Glanville* doubts, that Book doubts; and where *Glanville* follows the Practice of the Laws then in Use, tho' altered in succeeding Times, at least after the Reign of *Edw. 1.* there the *Regiam Majestatem* does accordingly; for Instance, *viz.*

*Glanville, Lib. 7. cap. 1.* determines, That a Man can't give away part of the Lands which he held by Hereditary Descent unto his Bastard, without the Consent of his Heir, and that he may not give all his Purchases from his eldest Son; and this is also declared to be the Law of *Scotland* accordingly, *Regiam Majestatem, Lib. 2. cap. 19, 20.* Tho' since *Glanville's* Time, the Law has been altered in *England*.

Also *Glanville, Lib. 7. cap. 1.* makes a great Doubt, Whether the second Son, being enfeoffed by the Father, and dies without Issue; whether the Land shall return to the Father, or descend to his eldest, or to his youngest Brother; and at last gives such a Decision as we find almost in the same Terms and Words recited in the Question and Decisions laid down in *Regiam Majestatem, Lib. 2. cap. 22.*

Again, *Glanville, Lib. 7. cap. 1.* makes it a difficult Question in his Time, Whether the eldest Son dying in the Life-time of his Father, having Issue, the Nephew or the youngest Son shall inherit; and gives the Arguments *pro & contra*: And *Regiam Majestatem,*

*jeftatem*, cap. 33. seems to be even a Transcript thereof out of *Glanville*. CHAP. 10.

And further, the Tract concerning Affizes, and the Time of Limitation, the very Form of the Writs, and the Method of the Process, and the Directions touching their Proceedings are but Transcripts of *Glanville*, as appears by comparing *Regiam Majestatem*, Lib. 3. cap. 36. with *Glanville*, Lib. 13. cap. 32. and the Collector of those Laws of *Scotland* in all the before-mentioned Places, and divers others, quotes *Glanville* as the Pattern at least of those Laws.

But Secondly, A second Evidence is, because many of the Laws which are mentioned in the *Regiam Majestatem quoniam Archiamonto*, and other Collections of the *Scottish* Laws, are in Truth very Translations of several Statutes made in *England* in the Times of King *Hen. 3.* and King *Edw. 1.* For Instance; the Statute of their King *Robert 2. cap. 1.* touching Alienations to Religious Men, is nothing else but an Enacting of the Statute of *Mortmain*, 13 *E. 1. cap. 13.* The Law above-mentioned, touching the Disparagement of Wards, is desumed out of *Magna Charta*, cap. 6. and the Statute of *Merton*, cap. 6. So the Law abovesaid, against Ravishers of Wards, is taken out of *Westm. 2. cap. 35.* So the said Law of the double Value of Marriage, is taken out of *Westm. 1. cap. 22.* The Law concerning Wreck of the Sea, is but a Transcript out of *Westm. 1. cap. 4.* and divers other Instances of like Nature might be given, whereby it may

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appear,

appear, that very many of those Laws in *Scotland* which are a part of their *Corpus Juris*, bear a Similitude to the Laws of *England*, and were taken as it were out of those Common or Statute Laws here, that obtain'd in the Time of *Edw. 1.* and before, but especially such as were in Use or Enacted in the Time of *Edw. 1.* and the Laws of *England*, relative to those Matters, were as it were the Original and Exemplar from whence those Similar or Parallel Laws of *Scotland* were derived or borrowed.

3d Inquiry.

*Thirdly*, I come now to consider the Third Particular, *viz.* By what Means, or by what Reason this Similitude of Laws in *England* and *Scotland* happened, or upon what Account, or how the Laws of *England* at least in many Particulars, or *Capita Legum*, came to be communicated unto *Scotland*, and they seem to be principally these two, *viz.* *First*, The Vicinity of that Kingdom to this. And *Secondly*, The Subjection of that Kingdom unto the Kings of *England*, at least for some considerable Time.

1. Touching the former of these; *First*, It is very well known, that *England* and *Scotland* made but one Island, divided not by the Sea or any considerable Arm thereof, but only by the Interjacency of the River *Tweed*, and some Desert Ground, which did not hinder any easy common Access of the People of the one Kingdom to the other: And by this Means, *First*, The Intercourse of Commerce between that Kingdom and this was very frequent and usual, especially

especially in the *Notbern* Counties, and this Intercourse of Commerce brought unto those of *Scotland* an Acquaintance and Familiarity with our *English* Laws and Customs, which in Process of Time were adopted and received gradually into *Scotland*. CHAP. IX.

Again, *Secondly*, This Vicinity gave often Opportunities of transplanting of Persons of either Nation into the other, especially in those *Notbern* Parts, and thereby the *English* transplanted and carried with them the Use of their Native Customs of *England*, and the *Scots* transplanted hither, became acquainted with our Customs, which by occasional Remigrations were gradually translated and became diffus'd and planted in *Scotland*; and it is well known, that upon this Account some of the Nobility and great Men of *Scotland* had Possessions here as well as there: The Earls of *Angus* were not only Noblemen of *Scotland*, but were also Barons of Parliament here, and sate in our *English* Parliaments, as appears by the Summons to Parliament, *Tempore Edvardi Tertii*,

Again, *Thirdly*, The Kings of *Scotland* had Feodal Possessions here; for Instance, The Counties of *Cumberland*, *Northumberland* and *Westmoreland*, were anciently held of the Crown of *England* by the Kings of *Scotland*, attended with several Vicissitudes and Changes until the Feast of St. *Michael*, 1237, at which Time *Alexander* King of *Scotland* finally released his Pretensions thereunto, as appears by the Deed thereof enter'd into the Red-Book of the *Exchequer*, and the Par-



liament Book of 20 *E. 1.* and in Consideration thereof, *Hen. 3.* gave him the Lands of *Penreth* and *Sourby*, *Habend' sibi Heredibus suis Regibus Scotiae*, and by Virtue of that Special Limitation, they came to *John* the eldest Son of the eldest Daughter of *Alexander* King of *Scotland*, together with that Kingdom; but the Land of *Tindale*, and the Manor of *Huntingdon*, which were likewise given to him and his Heirs, but without that Special Limitation, *Regibus Scotiae*, fell in Coparcenry, one Moiety thereof to the said *John* King of *Scotland*, as the Issue of the eldest Daughter, and the other Moiety to *Hastings*, who was descended from the younger Daughter of the said *Alexander*: But those Possessions came again to the Crown of *England* by the Forfeiture of King *John* of *Scotland*, who through the Favour of the King of *England* he had Restitution of the Kingdom of *Scotland*, yet never had Restitution of those Possessions he had in *England*, and forfeited and lost by his levying War against the Kingdom of *England*, as aforesaid.

And thus I have shewn, that the Vicinity of the Kingdoms of *England* and *Scotland*, and the Consequence thereof, viz. Translations of Persons and Families, Intercourse of Trade and Commerce, and Possessions obtained by the Natives of each Kingdom in the other, might be one Means for communicating our Laws to them.

But

But *Secondly*, There was another Means far more effectual for that End, *viz.* The Superiority and Interest that the Kings of *England* obtain'd over the Crown and Kingdom of *Scotland*, whereby it is no Wonder that many of our *English* Laws were transplanted thither by the Power of the *English* Kings. This Interest, Dominion, or Superiority of the Kings of *England* in the Realm of *Scotland* may be considered these Two Ways, *viz.* 1<sup>st</sup>, How it stood antecedently to the Reign of King *Edw. 1.* And 2<sup>dly</sup>, How it stood in his Time.

Touching the former of those, I shall not trouble myself with collecting Arguments or Authorities relating thereto; he that desires to see the whole Story thereof, let him consult *Walsingham*, sub *Anno 18 Edw. 1.* as also *Rot. Parl. 12 R. 2. Pars secunda, N<sup>o</sup> 3. Rot. Claus. 29 E. 1. M. 10. Dorso*, and the Letter of the Nobility to the *Pope* asserting it, *Ibid.*

And this might be one Means, whereby the Laws of *England* in elder Times might in some Measure be introduced into *Scotland*.

But I rather come to the Times of King *Edw. 1.* who was certainly the greatest Refiner of the *English* Laws, and studiously endeavoured to enlarge the Dominions of the Crown of *England*, so to extend and propagate the Laws of *England* into all Parts subject to his Dominion. This Prince, besides the ancient Claim he made to the Superiority of the Crown of *England* over

CHAP. 10. that of *Scotland*, did for many Years actually enjoy that Superiority in its full Extent, and the Occasion and Progress thereof was thus, as it is related by *Walsingham*, and consonantly to him appears by the Records of those Times, viz. King *Edw. 1.* having formerly received the Homage and Fealty of *Alexander* King of *Scots*, as appears *Rot. Claus. 5 E. 1. M. 5. Dorso*, was taken to be *Superior Dominus Scotia Regni*.

*Alexander* dying, left *Margaret* his only Daughter, and she dying without Issue, about 18 *E. 1.* there fell a Controversy touching the Succession of the Crown of *Scotland*, between the King of *Norway* claiming as Tenant by the Curtesy, *Robert de Bruce* descended from the younger Daughter of *David* King of *Scots*, and *John de Baliol* descended from the elder Daughter, with divers other Competitors.

All the Competitors submit their Claim to the Decision of *Edw. 1.* King of *England* as *Superior Dominus Regni Scotia*, who thereupon pronounced his Sentence for *John de Baliol*, and accordingly put him in Possession of the Kingdom, and required and received his Homage.

The King of *England*, notwithstanding this, kept still the Possession, & Insignia of his Superiority; his Court of *King's-Bench* sat actually at *Roxborough* in *Scotland*, *Mich. 20, 21 Ed. 1. coram Rege*, and upon Complaint of Injuries done by the said *John* King of *Scots*, now restor'd to his Kingdom, he summoned him often to answer in his Courts,  
*Mich.*

*Micb. 21, 22 Edw. 1. Northumb. Scot.* He CHAP. 10.  
 was summoned by the Sheriff of *Northum-*  
*berland* to answer to *Walbesi* in the King's  
 Court, *Pas. 21. E. 1. coram Rege. Rot. 34.* He  
 was in like manner summoned to answer  
*John Mazune* in the *King's-Bench* for an In-  
 jury done to him, and Judgment given  
 against the King of *Scots*, and that Judgment  
 executed.

*John* King of *Scots*, being not contented  
 with this Subjection, did in the 24th Year  
 of King *Edw. 1.* resign back his Homage  
 to King *Edward*, and bid Defiance to him;  
 wherefore King *Edw. 1.* the same Year with  
 a powerful Army entered *Scotland*, took the  
 King of *Scots* Prisoner, and the greatest part  
 of that Kingdom into his Possession, and  
 appointed the Earl *Warren* to be *Custos Regni*,  
*Cressingham* to be his Treasurer, and *Ormsby*  
 his Justice, and commanded his Judges of  
 his Courts of *England* to issue the King of  
*England's* Writs into *Scotland*.

And when in the 27th Year of his Reign,  
 the *Pope*, instigated by the *French* King, in-  
 terpos'd in the Behalf of the King of *Scotland*,  
 he and his Nobility resolutely denied the  
*Pope's* Intercession and Mediation.

Thus the Kingdom of *Scotland* continued  
 in an actual Subjection to the Crown of  
*England* for many Years; for *Rot. Claus.*  
*33 E. 1. Membr. 13. Dorso*, and *Rot. Claus.*  
*34 E. 1. Memb. 3. Dorso*; several Provisions  
 are made for the better ordering of the  
 Government of *Scotland*.

What

What Proceedings there were herein in the Time of *Edw. 2.* and what Capitulations and Stipulations were afterwards made by King *Edw. 3.* upon the Marriage of his Sister by *Robert de Bruce* touching the Relaxation of the *Superius Dominium* of *Scotland*, is not pertinent to what I aim at, which is, to shew how the *English* Laws that were in Use and Force in the Time of *Edw. 1.* obtained to be of Force in *Scotland*, which is but this, *viz.*

King *Edward 1.* having thus obtained the actual Superiority of the Crown of *Scotland*, from the Beginning of the Reign until his 20th Year, and then placing *John de Baliol* in that Kingdom, and yet continuing his Superiority thereof, and keeping his Courts of Justice, and exercising Dominion and Jurisdiction by his Officers and Ministers in the very Bowels of that Kingdom, and afterwards upon the Defection of this King *John*, in the 24th of *Edw. 1.* taking the whole Kingdom into his actual Administration, and placing his own Judges and great Officers there, and commanding his Courts of *King's-Bench* (&c.) here, to Issue their Process thither, and continuing in the actual Administration of the Government of that Kingdom during Life : It is no Wonder that those Laws which obtained and were in Use in *England*, in and before the Time of this King, were in a great Measure translated thither; and possibly either by being enacted in that Kingdom, or at least for so long Time, put in Use and

and Practice there, many of the Laws in Use and Practice here in *England* were in his Time so rivetted and settled in that Kingdom, that 'tis no Wonder to find they were not shaken or altered by the liberal Concessions made afterwards by King *Edw. 3.* upon the Marriage of his Sister; but that they remain Part of the Municipal Laws of that Kingdom to this Day. CHAP. 10.

And that which renders it more evident, That this was one of the greatest Means of fixing and continuing the Laws of *England* in *Scotland*, is this, viz. This very King *Edw. 1.* was not only a Martial and Victorious, but also a very Wise and Prudent Prince, and one that very well knew how to use a Victory, as well as obtain it: And therefore knew it was the best Means of keeping those Dominions he had powerfully obtain'd, by substituting and translating his own Laws into the Kingdom which he had thus subdued. Thus he did upon his Conquest of *Wales*; and doubtless thus he did upon his Conquest of *Scotland*, and those Laws which we find there so nearly agreeing with the Laws of *England* used in his Time, especially the Statutes of *Westm. 1.* and *Westm. 2.* are the Monuments and Footsteps of his Wisdom and Prudence.

And, as thus he was a most Wise Prince, and to secure his Acquests, introduced many other Laws of his Native Kingdom into *Scotland*; so he very well knew the Laws of *England* were excellent Laws fitted for the due Administration of Justice to the Constitution

stitution of the Governed, and fitted for the Preservation of the Peace of a Kingdom, and for the Security of a Government: And therefore he was very solicitous, by all prudent and careful Means imaginable, to graft and plant the Laws of *England* in all Places where he might, having before-hand used all possible Care and Industry for Rectifying and Refining the *English* Laws to their greatest Perfection.

Again, It seems very evident, that the Design of King *Edw. I.* was by all Means possible to unite the Kingdom of *Scotland* (as he had done the Principality of *Wales*) to the Crown of *England*, so that thereby *Britain* might have been one entire Monarchy, including *Scotland* as well as *Wales* and *England* under the same Sceptre; and in order to the accomplishing thereof, there could not have been a better Means than to make the Interest of *Scotland* one with *England*, and to knit 'em as it were together in one Communion, which could never have been better done than by establishing one Common Law and Rule of Justice and Commerce among them; and therefore he did, as Opportunity and Convenience served, translate over to that Kingdom as many of our *English* Customs and Laws as within that Compass of Time he conveniently could.

And thus I have given an Essay of the Reasons and Means, how and why we find so many Laws in *Scotland* parallel to those in *England*, and holding so much of Congruity and Likeness to them.

And

And the Reason why we have but few of <sup>CHAP. 10.</sup> their Laws that correspond with ours of a later Date than *Edw. 1.* or at least *Edw. 2.* is because since the Beginning of *Edw. 3.* that Kingdom has been distinct, and held little Communion with us till the Union of the two Crowns in the Person of King *James 1.* (or rather the happy Union of the two Kingdoms under her late Majesty *Queen Anne*) and in so great an Interval it must needs be, that by the Intervention and Succession of new Laws, much of what was so ancient as the Times of *Edw. 1.* and *Edw. 2.* have received many Alterations: So that it is a great Evidence of the Excellency of our *English* Laws, that there remain to this Day so many of them in Force in that Part of *Great Britain* continuing to bear Witness, that once that excellent Prince *Edw. 1.* exercised Dominion and Jurisdiction there.

And thus far of the Communion of the Laws of *England* to *Scotland*, and of the Means whereby it was effected; from whence it may appear, That as in *Wales*, *Ireland* and *Normandy*, so also in *Scotland*, such Laws which in those Places have a Congruity or Similitude with the Laws of *England*, were derived from the Laws of *England*, as from their Fountain and Original, and were not derived from any of those Places to *England*.



## C H A P. XI.

*Touching the Course of Descents in England.*

CHAP. II.

Excel-  
lency of  
our Laws.

**A**MONG the many Preferences that the Laws of *England* have above others, I shall single out Two particular Titles which are of Common Use, wherein their Preference is very visible, and the due Consideration of their Excellence therein, may give us a handsome Indication or Specimen of their Excellencies above other Laws in other Parts or Titles of the same also.

Two In-  
stances.

Those Titles, or *Capitula Legum*, which I shall single out for this Purpose, are these Two, *viz.* 1<sup>st</sup>, The hereditary Transmission of Lands from Ancestor to Heir, and the Certainty thereof: And 2<sup>dly</sup>, The Manner of Trial by Jury, which, as it stands at this Day settled in *England*, together with the Circumstances and Appendixes thereof, is certainly the best Manner of Trial in the World; and I shall herein give an Account of the successive Progress of those *Capitula Legis*, and what Growth they have had in Succession of Time till they arriv'd to that State and Perfection which they have now obtain'd.

First, of  
Descents.

*First*, Then, touching Descents and hereditary Transmissions: It seems by the Laws of

of the *Greeks* and *Romans*, that the same Rule was held both in Relation to Lands and Goods, where they were not otherwise disposed of by the Ancestor, which the *Romans* therefore called *Successio ab intestato*; but the Customs of particular Countries, and especially here in *England*, do put a great Difference, and direct a several Method in the Transmission of Goods or Chattels, and that of the Inheritances of Lands.

Now as to hereditary Transmissions or Successions, commonly called with us *Descents*, I shall hold this Order in my Discourse, *viz.*

*First*, I shall give some short Account of the ancient Laws both of the *Jews*, the *Greeks*, and the *Romans*, touching this Matter. 1.

*Secondly*, I shall observe some Things wherein it may appear, how the particular Customs or Municipal Laws of other Countries varied from those Laws, and the Laws here formerly used. 2.

*Thirdly*, I shall give some Account of the Rules and Laws of Descents or hereditary Transmissions as they formerly stood, and as at this Day they stand in *England*, with the successive Alterations, that Process of Time, and the Wisdom of our Ancestors, and certain Customs grown up, tacitly, gradually, and successively have made therein. 3.

And First, touching the Laws of Succession, as well of Descent of Inheritances of Lands, as also of Goods and Chattels, which

CHAP. II. which among the *Jews* was the same in both.

Among  
the *Jews*.

Mr. *Selden*, in his Book *De Successionibus apud Hebraeos*, has given us an excellent Account, as well out of the Holy Text as out of the Comments of the *Rabins*, or *Jewish* Lawyers, touching the same, which you may see at large in the 5th, 6th, 7th, 12th and 13th Chapters of that Book; and which, for so much thereof as concerns my present Purpose, I shall briefly comprize under the Eight following Heads, *viz.*

*First*, That in the Descending Line, the Descent or Succession was to all the Sons, only the eldest Son had a double Portion to any one of the rest, *viz.* If there were three Sons, the Estate was to be divided into four Parts, of which the eldest was to have two Fourth Parts, and the other two Sons were to have one Fourth Part each.

*Secondly*, If the Son died in his Father's Life-time, then the Grandson, and so in *Infinitum*, succeeded in the Portion of his Father, as if his Father had been in Possession of it, according to the *Jus Representationis* now in Use here.

*Thirdly*, The Daughter did not succeed in the Inheritance of the Father as long as there were Sons, or any Descendants from Sons in Being; but if any of the Sons died in the Life-time of his Father having Daughters, but without Sons, the Daughters succeeded in his Part as if he himself had been possessed.

*Fourthly*,

*Fourthly*, And in Case the Father left only Daughters and no Sons, the Daughters equally succeeded to their Father as in Co-partnership, without any Prelation or Preference of the eldest Daughter to two Parts, or a double Portion. CHAP. II.


*Fifthly*, But if the Son had purchased an Inheritance and died without Issue, leaving a Father and Brothers, the Inheritance of such Son so dying did not descend to the Brothers, (unless in Case of the next Brother's taking to Wife the Deceased's Widow to raise up Children to his deceased Brother) but in such Case the Father inherited to such Son entirely.

*Sixthly*, But if the Father in that Case was dead, then it came to the Brothers, as it were as Heirs to the Father, in the same Manner as if the Father had been actually possess'd thereof; and therefore the Father's other Sons and their Descendants *in Infinitum* succeeded; but yet especially, and without any double Portion to the eldest, because tho' in Truth the Brothers succeeded as it were in Right of Representation from the Father, yet if the Father died before the Son, the Descent was *de Facto* immediately from the Brother deceased to the other Brothers, in which Case their Law gave not a double Portion; and in Case the Father had no Sons or Descendants from them, then it descended to all the Sisters.

*Seventhly*, If the Son died without Issue, and his Father or any Descendants from him were extant, it went not to the Grand-

P

father

CHAP. II.  father or his other Descendants ; but if the Father was dead without Issue, then it descended to the Grandfather, and if he were dead, then it went to his Sons and their Descendants, and for want of them, then to his Daughters or their Descendants, as if the Grandfather himself had been actually possess'd and had died, and so *mutatis mutandis* to the *Proavus*, *Abavus*, *Atavus*, &c. and their Descendants.

*Eighly*, But the Inheritance of the Son never resorted to the Mother, or to any of her Ancestors, but both she and they were totally excluded from the Succession.

The double Portion.

The double Portion therefore that was *Jus Primogenitura*, never took Place but in that Person that was the *Primogenitus* of him from whom the Inheritance immediately descended, or him that represented him ; as if *A.* had two Sons, *B.* and *C.* and *B.* the eldest had two Sons, *D.* and *E.* and then *B.* died, whereas *B.* should have had a double Portion, *viz.* two Thirds in Case he had survived his Father ; but now this double Portion shall be equally divided between *D.* and *E.* and *D.* shall not have two Thirds of the two Thirds that descended from *A.* to them. *Vide Selden, ut supra.*

Thus much of the Laws or Rules touching Descents among the *Jews*.

Descents among the *Græcians*.

Among the *Græcians*, the Laws of Descents in some Sort resemble those of the *Jews*, and in some Things they differed. *Vide Petit's Leges Antica, Cap. 1. Tit. 6. De Testamentis*

mentis & Hereditario Jure, where the Text of their Law runs thus, viz. CHAP. II.

*Omnes legitimi Filii Hereditatem Paternam ex equo inter se Heriscunto, si quis intestatus moritur relictis Filiabus qui eas in Uxores ducunt heredes sunt, si nulla supersint, bi ab intestato hereditatem cernunt: Et primo quidem Fratres defuncti Germani, & legitimi Fratrum Filii hereditatem simul adeunto; si nulli Fratres aut Fratrum Filii supersint, iis geniti eadem Lege hereditatem cernunt: Masculi autem iis geniti etiam si remotiori cognationis sint Gradu, preferuntor, si nulli supersint, Paterni proximi, ad sobrinorum usque Filios, Materni defuncti propinqui simili Lege Hereditatem adeunto; si e neutra cognatione supersint intra definitum Gradum proximus cognatus Paternus, addito Notho Nothave; supersite Legitima Filia Nothus Hereditatem Patris ne adito.*

This Law is very obscure, but the Sense thereof seems to be briefly this, viz. That all the Sons equally shall inherit to the Father; but if he have no Sons, then the Husbands of the Daughters; and if he have no Children, then his Brothers and their Children; and if none, than his next Kindred on the Part of his Father, preferring the Males before the Females; and if none of the Father's Line, *ad Sobrinorum usque Filios*, then to descend to the Mother's Line. *Vide Petit's Gloss* thereon.

P 2

Among

## CHAP. II.

Descents  
among the  
Romans.

Among the *Romans* it appears, that the Laws of Successions or Descents did successively vary, for the Laws of the Twelve Tables did exclude the Females from Inheriting, and had many other Streightnesses and Hardships which were successively remedied: First, by the Emperor *Claudius*, and after him by *Adrian*, in his *Senatus Consultus Tertullianus*, and after him by *Justinian* in his Third Institutes, *Tit. De Hereditatibus quæ ab intestato deferuntur*, and the two ensuing Titles. And again, all this was further explained and settled by the *Novel Constitutions* of the said *Justinian*, stiled the *Authentica Novella*, cap. 18. *De Hereditatibus ab intestato venientibus & agnatorum Jure sublato*. Therefore omitting the large Inquiry into the Successive Changes of the *Roman Law* in this particular, I shall only set down how, according to that Constitution, the *Roman Law* stands settled therein.

Descents or Successions from any Person are of Three Kinds, viz. 1<sup>st</sup>, *In the Descending Line*. 2<sup>dly</sup>, *The Ascending Line*. 3<sup>dly</sup>, *The Collateral Line*; and this latter is either *in Agnatos a Parte Patris*, or *in Cognatos a Parte Matris*.

1. Descending Line.

1. *In the Descending Line*, These Rules are by the *Roman Law* directed, viz.

I. The Descending Line, (whether Male or Female, whether immediate or remote) takes Place, and prevents the Descent or Suc-

Succession Ascending or Collateral in infinitum. CHAP. II.

2. The remote Descents of the Descending Line succeed in *Stirpem*, i. e. in that Right which his Parent should have had.

3. This Descent or Succession is equal in all the Daughters, all the Sons, and all the Sons and Daughters, without preferring the Male before the Female; so that if the common Ancestor had three Sons and three Daughters, each of them had a sixth Part; and if one of them had died in the Life of the Father, having three Sons and three Daughters, the sixth Part that belonged to that Party should have been divided equally between his or her six Children, and so in infinitum in the Descending Line.

2. In the Ascending Line, there are these two Rules, viz.

2.  
Ascending Line.

1. If the Son dies without Issue, or any descending from him, having a Father and a Mother living, both of them shall equally succeed to the Son, and prevent all others of the Collateral Line, except Brothers and Sisters, and if only a Father, or only a Mother, he or she shall succeed alone.

2. But if the Deceased leaves a Father and a Mother, with a Brother and a Sister, *ex utrisque Parentibus conjuncti*, they all Four shall equally succeed to the Son by equal Parts without Preference of the Males.

3. In the Collateral Line, (i. e. where the Person dies without Father or Mother, Collateral Line.

P 3

Son



CHAP. II. Son or Daughter, or any descending from them in the Right Line) the Rules are these, *viz.*

1. The Brothers and Sisters, *ex utrisque Parentibus conjuncti*, and the immediate Children of them, shall exceed equally without Preference of either Sex, and the Children from them shall succeed *in stirpes*; as if there be a Brother and Sister, and the Sister dies in the Life of the Descendant leaving one or more Children, all such Children shall succeed in the Moiety that should have come to their deceased Mother, had she survived.

2. But if there be no Brothers or Sisters, *ex utrisque Parentibus conjuncti*, nor any of their immediate Children, then the Brothers and Sisters of the half Blood and their immediate Children shall succeed *in Stirpes* to the Deceased, without any Prerogative to the Male.

3. But if there be no Brothers or Sisters of the whole or half Blood, nor any of their immediate Children (for the Grandchildren are not provided for by the Law) then the next Kindred are called to the Inheritance.

(But by the Author's Leave, I think the Grandchildren are impliedly provided for, as they succeed their Father or Mother *Jure representationis*.)

4. And if the next Kindred be in an equal Degree, whether on the Part of the Father as *Agnati*, or on the Part of the Mother as *Cognati*, then they are equally called to the

the Inheritance, and succeeded in *Capita*, CHAP. II.  
and not in *Stirpes*.

Thus far of the settled Laws of the *Jews*, *Greeks*, and *Romans*, but the Particular or Municipal Laws and Customs of almost every Country derogate from those Laws, and direct Successions in a much different Way. For Instance.

By the Customs of *Lombardy*, according Laws of Lombardy.  
to which the Rules of the Feuds, both in their Descents and in other Things, are much directed; their Descents are in a much different Manner, *viz.*

*Leges Feudarum, Lib. I. Tit. I.* If a Feud Of Feuds.  
be granted to one Brother who dies without Issue, it descends not to his other Brother unless it be specially provided for in the first Infeudation: If the Donee dies, having Issue Sons and Daughters, it descends only to the Sons; whereas by the *Roman Law* it descends to both: The Brother succeeds not to the Brother unless specially provided for, *& Ibid. Tit. 50.* The Ascendants succeed not, but only the Descendants, neither does a Daughter succeed *nisi ex Pacto, vel nisi sit Feodum Fæmineum*

If we come nearer Home to the Laws of Descents in Normandy.  
*Normandy*, Lands there are of Two Kinds, *viz.* Partible, and not Partible; the Lands that are partible, are Valvasories, Burgages, and such like, which are much of the Nature of our Socage Lands; these descend to all the Sons, or to all the Daughters: Lands not partible, are Fiefs and Dignities,  
P 4 they

CHAP. II. they descend to the eldest Son, and not to all the Sons ; but if there be no Sons, then to all the Daughters, and become partible.

The Rules and Directions of their Descents are as follow, viz.

1. For want of Sons or Nephews,<sup>s</sup> it descends to the Daughters; if there be no Sons or Daughters, or Descendants from them, it goes to Brothers, and for want of Brothers, to Sisters, (observing as before the Difference between Lands partible and not partible) and accordingly the Descent runs to the Posterity of Brothers to the seventh Degree; and if there be no Brothers nor Sisters, nor any Descendants from them within the Seventh Degree, it descends to the Father, and if the Father be dead, then to the Uncles and Aunts and their Posterity, (as above is said in the Case of Brothers and Sisters) and if there be none, then to the Grandfather.

So that according to their Law, the Father is *postponed* to the Brother and Sister, and their Issues, but is preferred before the Uncle : Tho' according to the *Jewish* Law, the Father is preferred before the Brother; by the *Roman* Law, he succeeds together equally with the Brother; but by the *English* Law, the Father cannot take from his Son by an immediate Descent, *but may take as Heir to his Brother, who was Heir to his Son by Collateral Descent*.

2. If

2. If Lands descended from the Part of the Father, they could never resort by a Descent to the Line of the Mother; but in Case of Purchases by the Son who died without Issue, for want of Heirs of the Part of the Father, it descended to the Heirs of the Part of the Mother according to the Law of England. CHAP. II.

3. The Son of the eldest Son dying in the Life of the Father, is preferred before a younger Son surviving his Father as the Law stands here now settled, tho' it had some Interruption, 4. *Johannis*.

4. On Equality of Degrees in Collateral Descents, the Male Line is preferred before the Female.

5. Altho' by the Civil Law, *Fratres ex utroque Parente conjuncti præferuntur Fratribus consanguineis tantum vel uterinis*; yet it should seem by the Contumier of Normandy, *Fratres consanguineis ei ex eodem Patre sed diversa Matre*, shall take by Descent together with the Brothers, *ex utroque conjuncti*, upon the Death of any such Brothers. But *Quere* hereof, for this seems a Mistake; for, as I take it, the half Blood hinders the Descent between Brothers and Sisters by their Laws as well as ours.

6. Leprosy was amongst them an Impediment of Succession, but then it seems it ought to be first solemnly adjudged so by the Sentence of the Church.

Upon all this, and much more that might be observed upon the Customs of several Countries, it appears, That the Rules of  
Suc-

CHAP. II. Successions, or hereditary Transmissions, have been various in several Countries according to their various Laws, Customs, and Usages.

And now, after this brief Survey of the Laws and Customs of other Countries, I come to the Laws and Usages of *England* in relation to Descents, and the Growth that those Customs successively have had, and whereunto they are now arrived.

Descents  
in Eng-  
land.

*First*, Touching hereditary Successions : It seems, that according to the ancient *British* Laws, the eldest Son inherited their Earldoms and Baronies ; for they had great Dignities and Jurisdictions annex'd to them, and were in Nature of Principalities, but that their ordinary Freeholds descended to all their Sons ; and this Custom they carried with them into *Wales*, whither they were driven. This appears by *Statutum Wallie*, 12 E. 1. and which runs thus, viz.

Among  
the *Welsh*.  
Statute  
12 Ed. 1.

*Aliter usitatum est in Wallia quam in Anglia quoad Successionem hereditatis ; eo quod hereditas partibilis est inter heredes Masculos, & a tempore cujus non extiterit Memoria partibilis extitit. Dominus Rex non vult quod consuetudo illa abrogetur ; sed quod hereditates remaneant partibiles, inter consimiles heredes sicut esse Consueverunt ; & fiat partitio illius sicut fieri consuevit. Hoc excepto Bastardi non habeant de cetero hereditates & etiam quod non habeant purpartes, cum legitimis nec sine legitimis.*

Where-

Whereupon Three Things are observable, CHAP. II.  
*viz.* 1<sup>st</sup>, That at this Time the hereditary  
 Succession of the eldest Son was then known  
 to be the common and usual Law in *Eng-*  
*land.* 2<sup>dly</sup>, That the Succession of all the  
 Sons was the ancient customary Law among  
 the *British* in *Wales*, which by this Statute  
 was continued to them. 3<sup>dly</sup>, That before  
 this Time, Bastards were admitted to in-  
 herit in *Wales* as well as the Legitimate  
 Children, which Custom is thereby abro-  
 gated; and although we have but few Evi-  
 dences touching the *British* Laws before  
 their Expulsion hence into *Wales*, yet this  
 Usage in *Wales* seems sufficiently to evi-  
 dence this to have been the ancient *British*  
 Law.

Secondly, As to the Times of the Saxons  
 and Danes, their Laws collected by *Brompton*  
 and *Mr. Lambard*, speak not much concern-  
 ing the Course of Descents; yet it seems  
 that commonly Descents of their ordinary  
 Lands at least, except Baronies and Royal  
 Inheritances, descended also to all the Sons:  
 For amongst the Laws of King *Canutus*, in  
*Mr. Lambard* is this Law, *viz.* N<sup>o</sup> 68. *Sive*  
*quis incuria sive Morte repentina fuerit intestato*  
*mortuus, Dominus tamen nullam rerum suarum*  
*Partem (præter eam quæ jure debetur Hereoti*  
*nomine) sibi assumito. Verum eas Judicio suo*  
*Uxori, Liberis & cognatione proximis iuste*  
*(pro suo cuique jure) distributio.*

Upon which Law, we may observe these  
 five Things, *viz.*

1<sup>st</sup>, That

1<sup>st</sup>, That the Wife had a Share, as well of the Lands for her Dower, as of the Goods.

2<sup>dly</sup>, That in reference to hereditary Successions, there then seem'd to be little Difference between Lands and Goods, for this Law makes no Distinction.

3<sup>dly</sup>, That there was a Kind of settled Right of Succession, with Reference to Proximity and Remoteness of Blood, or Kin, *Ea cognatione proximis pro suo cuique jure.*

4<sup>bly</sup>, That in Reference to Children, they all seem'd to succeed alike, without any Distinction between Males and Females.

5<sup>bly</sup>, That yet the Ancestor might dispose of by his Will as well Lands as Goods, which Usage seems to have obtained here unto the Time of Hen. 2. as will appear hereafter. *Vide Glanville.*

Thirdly, It seems that, until the Conquest, the Descent of Lands was at least to all the Sons alike, and for ought appears to all the Daughters also, and that there was no Difference in the hereditary Transmission of Lands and Goods, at least in Reference to the Children: This appears by the Laws of King Edward the Confessor, confirm'd by King William 1. and recited in Mr. Lambard, Folio 167. as also by Mr. Selden in his Notes upon Eadmerus, viz. *Leg. 36 Tit. De Intestatorum Bonis*; Pag. 184. *Si quis Intestatus obierit, Liberi ejus Hereditatem equaliter dividunt.*

But this equal Division of Inheritances among all the Children was found to be very inconvenient: For,

1<sup>st</sup>, It

1<sup>st</sup>, It weakened the Strength of the Kingdom, for by frequent parcelling and subdividing of Inheritances, in Process of Time they became so divided and crumbled, that there were few Persons of able Estates left to undergo publick Charges and Offices. CHAP. II.

2<sup>dly</sup>, It did by Degrees bring the Inhabitants to a low Kind of Country living, and Families were broken; and the younger Sons, which had they not had those little Parcels of Land to apply themselves to, would have betaken themselves to Trades, or to Civil or Military, or Ecclesiastical Employments, neglecting those Opportunities, wholly apply'd themselves to those small Divisions of Lands, whereby they neglected the Opportunities of greater Advantage of enriching themselves and the Kingdom.

And therefore King *William* 1. having by his Accession to the Crown gotten into his Hands the Possessions and Demesns of the Crown, and also very many and great Possessions of those that oppos'd him, or adhered to *Harold*, disposed of those Lands or great Part of them to his Countrymen, and others that adhered to him, and reserved certain honorary Tenures, either by Baronage, or in Knights-Service or Grand Serjeancy, for the Defence of the Kingdom, and possibly also, even at the Desire of many of the Owners, changed their former Tenures into Knights-Service, which Introduction of new Tenures was nevertheless



CHAP. II. less not done without Consent of Parliament; as appears by the additional Laws before mentioned, that King *William* made by Advice of Parliament, mentioned by Mr. *Selden* in his Notes on *Eadmerus*, Page 191. amongst which this was one, viz.

*Statuimus etiam & firmiter precipimus ut omnes Comites Barones Milites & Servientes & universi liberi Homines totius Regni nostri habeant & teneant se semper in Armis & in Equis ut decet & oportet, & quod sint semper prompti & bene parati ad Servitium suum integrum nobis explendum & peragendum, cum semper opus fuerit secundum quod nobis de Feodis debent & tenentur Tenementis suis de Jure facere & sicut illis statuimus per Commune Concilium totius Regni nostri, Et illis dedimus & concessimus in Feodo Jure hereditario.——*

Whereby it appears, that there were two Kinds of Military Provisions; one that was set upon all Freeholds by common Consent of Parliament, and which was usually called *Affisa Armorum*; and another that was Conventional and by Tenure, upon the Infeudation of the Tenant, and which was usually called *Knights Service*, and sometimes Royal, sometimes Foreign Service, and sometimes *Servitium Loricæ*.

And hence it came to pass, that not only by the Customs of *Normandy*, but also according to the Customs of other Countries, those honorary Fees, or Infeudations, became descendible to the Eldest, and not to  
all

all the Males. And hence also it is, that in *Kent*, where the Custom of all the Males taking by Descent generally prevails, and that pretend a Concession of all their Customs by the Conqueror, to obtain a Submission to his Government, according to that Romantick Story of their *Moving Wood*: But even in *Kent* itself, those ancient Tenements or Fees that are held anciently by Knights Service, are descendible to the Eldest Son, as Mr. *Lambard* has observed to my Hands in his *Perambulation*, Page 533, 553. out of 9 H. 3. *Fitz. Prescription* 63. 26 H. 8. 5. and the Statute of 31 H. 8. *cap.* 3. And yet even in *Kent*, if Gavelkind Lands escheat, or come to the Crown by Attainder or Dissolution of Monasteries, and be granted to be held by Knights Service, or *per Baroniam*, the Customary Descent is not changed, neither can it be but by Act of Parliament, for it is a Custom fix'd to the Land.

But those honorary Infeudations made in ancient Times, especially shortly after the Conquest, did silently and suddenly assume the Rule of Descents to the Eldest, and accordingly held it; and so altho' possibly there were no Acts of Parliament of those Elder Times, at least none that are now known of, for altering the ancient Course of Descents from all the Sons to the Eldest, yet the Use of the Neighbouring Country might introduce the same Usage here as to those honorary Possessions.

And



And because those honorary Infeudations were many, and scattered almost through all the Kingdom, in a little Time they introduced a Parity in the Succession of Lands of other Tenures, as Socages, Valvasories, &c. So that without Question, by little and little, almost generally in all Counties of *England* (except *Kent*, who were most tenacious of their old Customs in which they gloried, and some particular Feuds and Places where a contrary Usage prevailed) the generality of Descents or Successions, by little and little, as well of Socage Lands as Knights Service, went to the eldest Son, according to the Declaration of King *Edw. I.* in the Statute of *Wales* above mentioned, as will more fully appear by what follows.

In the Time of *Hen. I.* as we find by his 70th Law, it seems that the whole Land did not descend to the eldest Son, but begun to look a little that Way, viz. *Primum Patris Feudum, primogenitus Filius habeat.* And as to *Collateral Descents*, that Law determines thus: *Si quis sine Liberis decesserit Pater aut Mater ejus in hereditatem succedat vel Frater vel Soror si Pater & Mater defint, si nec hos, habeat Soror Patris vel Matris, & deinceps in Quintum Geniculum; qui cum propinquiore in parentela sint hereditario jure succedant, & dum Virilis sexus extiterit & hereditas ab inde sit, Fæminea non hereditur.*

*Vide Ante.*  
Chap. 7.  
and *Lambard*,  
ut  
*supra.*

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By

By this Law it seems to appear;

1. The eldest Son, tho' he had *Jus primogeniture*, the principal Fee of his Father's Land, yet he had not all the Land.

2. That for want of Children, the Father or Mother inherited before the Brother or Sister.

3. That for want of Children, and Father, Mother, Brother, and Sister, the Land descended to the Uncles and Aunts to the fifth Generation.

4. That in Successions Collateral, Proximity of Blood was preferred.

5. That the Male was preferred before the Female, *i. e.* The Father's Line was preferred before the Mother's, unless the Land descended from the Mother, and then the Mother's Line was preferred.

How this Law was observed in the interval between *Hen. 1.* and *Hen. 2.* we can give no Account of; but the next Period that we come to is, the Time of *Hen. 2.* wherein *Glanville* gives us an Account how the Law stood at that Time: *Vide Glanville, Lib. 7.* Wherein, notwithstanding it will appear, that there was some Uncertainty and Unsettledness in the Business of Descents or Hereditary Successions, tho' it was much better polished then formerly, the Rules then of Succession were either in Reference to Goods, or Lands. *1<sup>st</sup>*, As to Goods, one Third Part thereof went to the Wife, another Third Part went to the Children, and the other Third was left to the Disposition

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of

CHAP. II. of the Testator; but if he had no Wife, then a Moiety went to the Children, and the other Moiety was at the Deceased's Disposal. And the like Rule if he had left a Wife, but no Children. *Glanv. lib. 7. cap. 5. & Vide lib. 2. cap. 29.*

But as to the Succession of Lands, the Rules are these.

*First*, If the Lands were Knights Service, they generally went to the eldest Son; and in case of no Sons, then to all the Daughters; and in case of no Children, then to the eldest Brother.

*Secondly*, If the Lands were Socage, they descended to all the Sons to be divided; *Si fuerit Soccagium & id antiquitus divisum*; only the Chief House was to be allotted to the Purparty of the Eldest, and a Compensation made to the rest in lieu thereof: *Si vero non fuerit antiquitus divisum, tunc Primogenitus secundum quorundam Consuetudinem totam Hereditatem obtinebit, secundum autem quorundam Consuetudinem postnatus Filius Heres est. Glanville, lib. 7. cap. 3.* So that altho' Custom directed the Descent variously, either to the eldest or youngest, or to all the Sons, yet it seems that at this Time, *Jus Commune*, or Common Right, spoke for the eldest Son to be Heir, no Custom intervening to the contrary.

*Thirdly*, As the Son or Daughter, so their Children *in infinitum*, are preferred in the Descent before the Collateral Line or Uncles.

*Fourthly*,

*Fourthly*, But if a Man had two Sons, and the eldest Son died in the Life-time of his Father, having Issue a Son or Daughter, and then the Father dies; it was then controverted, whether the Son or Nephew should succeed to the Father, tho' the better Opinion seems to be for the Nephew, *Glanvil. lib. 7. cap. 3.* CHAP. II.

*Fifthly*, A Bastard could not inherit, *Ibid. cap. 13, or 17.* And altho' by the Canon or Civil Law, if *A.* have a Son born of *B.* before Marriage, and after *A.* marries *B.* this Son shall be legitimate and heritable; yet according to the Laws of *England* then, and ever since used, he was not heritable, *Glanvil. lib. 7. cap. 15.*

*Sixthly*, In case the Purchaser died without Issue, the Land descended to the Brothers; and for want of Brothers, to the Sisters; and for want of them, to the Children of the Brothers or Sisters; and for want of them, to the Uncles; and so onward according to the Rules of Descents at this Day; and the Father or Mother were not to inherit to the Son, but the Brothers or Uncles, and their Children. *Ibid. cap. 1. & 4.*

And it seems, That in all Things else the Rules of Descents in reference to the Collateral Line were much the same as now; as namely, That if Lands descended of the Part of the Father, it should not resort to the Part of the Mother, or *e converso*; but in the Case of Purchasers, for want of

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Heirs

CHAP. II. Heirs of the Part of the Father, it resorted to the Line of the Mother, and the nearer and more worthy of Blood were preferred: So that if there were any of the Part of the Father, tho' never so far distant, it hindered the Descent to the Line of the Mother, though much nearer.

But in those Times it seems there were two Impediments of Descents or hereditary Successions which do not now obtain, viz.

*First*, Leprosy, if so adjudged by Sentence of the Church: This indeed I find not in *Glanville*; but I find it pleaded and allowed in the Time of King *John*, and thereupon the Land was adjudged from the Leprous Brother to the Sister. *Pasch. 4 Johannis.*

*Secondly*, There was another Curiosity in Law, and it was wonderful to see how much and how long it prevailed; for we find it in Use in *Glanville*, who wrote *Temp. Hen. 2.* in *Bracton Temp. Hen. 3.* in *Fleta Temp. Edw. 1.* and in the broken Year of 13 *E. 1.* *Fitzb. Avowry 235.* *Nemo potest esse Tenens & Dominus, & Homagium repellit Perquisitum*: And therefore if there had been three Brothers, and the eldest Brother had enfeoffed the second, reserving Homage, and had received Homage, and then the second had died without Issue, the Land should have descended to the youngest Brother and not to the eldest Brother, *Quia Homagium repellit perquisitum*, as'tis here said, for he could not pay Homage to himself.

*Vide* for this, *Brañon*, *Lib. 2. cap. 30. Glanvil.* CHAP. II.  
*Lib. 7. cap. 1. Fleta, Lib. 6. cap. 1.*

But at this Day the Law is altered, and so it has been for ought I can find ever since 13 E. 1. Indeed, it is antiquated rather than altered, and the Fancy upon which it was grounded has appear'd trivial ; for if the eldest Son enfeoff the second, reserving Homage, and that Homage paid, and then the second Son dies without Issue, it will descend to the Eldest as Heir, and the Seigniori is extinct. It might indeed have had some Colour of Reason to have examined, whether he might not have waved the Descent, in case his Services had been more beneficial than the Land : But there could be little Reason from thence to exclude him from the Succession. I shall mention no more of this Impediment, nor of that of Leprosy, for that they both are vanished and antiquated long since ; and, as the Law now is, neither of these are any Impediment of Descents.

And now passing over the Time of King *John* and *Richard* 1. because I find nothing of Moment therein on this Head, unless the Usurpation of King *John* upon his eldest Brother's Son, which he would fain have justified by introducing a Law of preferring the younger Son before the Nephew descended from the elder Brother : But this Pretension could no way justify his Usurpation, as has been already shewn in the Time of *Hen. 2.*

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Next,



Next, I come to the Time of *Hen. 3.* in whose Time the Tractate of *Bracton* was written, and thereby in *Lib. 2. cap. 30. & 31.* and *Lib. 5. cap. .* It appears, That there is so little Variance as to Point of Descents between the Law as it was taken when *Bracton* wrote, and the Law as afterwards taken in *Edw. 1's* Time, when *Britton* and *Fleta* wrote, that there is very little Difference between them, as may easily appear by comparing *Bracton ubi supra, & Fleta, Lib. 5. cap. 9. Lib. 6. cap. 1, 2.* that the latter seem to be only Transcripts or Abstracts of the former. Wherefore I shall set down the Substance of what both say, and thereby it will appear, that the Rules of Descents in *Hen. 3.* and *Edw. 1's* Time were very much one.

*First,* At this Time the Law seems to be unquestionably settled, that the eldest Son was of Common Right Heir, not only in Cases of Knight Service Lands, but also of Socage Lands, (unless there were a special Custom to the contrary, as in *Kent* and some other Places) and so that Point of the Common Law was fully settled.

*Secondly,* That all the Descendants *in infinitum*, from any Person that had been Heir, if living, were inheritable *Jure representationis*; as, the Descendants of the Son, of the Brother, of the Uncle, &c. And also,

*Thirdly,* That the eldest Son dying in the Life-time of the Father, his Son or Issue was

was to have the Preference as Heir to the Father before the younger Brother, and so the Doubt in *Glanville's* Time was settled, *Glanvil. Lib. 7, cap. 3. Cum quis autem moriatur habens Filium postnatum, & ex primogenito Filio premortuo Nepotem, Magna quidem Juris dubitatio solet esse uter illorum preferendus sit alii in illa Successione, scilicet, utrum Filius aut Nepos?*

*Fourthly*, The Father, or Grandfather, could not by Law inherit immediately to the Son.

*Fifthly*, Leprosy, Though it were an Exception to a Plaintiff, because he ought not to converse in the Courts of Law, as *Brañon, Lib. 5. cap. 20* yet we no where find it to be an Impediment of a Descent.

So that upon the whole Matter, for any Thing I can observe in them, the Rules of Descents then stood settled in all Points as they are at this Day, except some few Matters (which yet soon after settled as they now stand) *viz.*

*First*, That Impediment or Hindrance of a Descent from him that did Homage to him that received it, seems to have been yet in Use, at least till 13 *E. 1.* and in *Fleta's* Time, for he puts the Case and admits it.

*Secondly*, Whereas both *Brañon* and *Fleta* agree, that half Blood to him that is a Purchaser is an Impediment of a Descent; yet in the Case of a Descent from the Common Ancestor, half Blood is no Impedi-

ment. As for Instance; *A.* has Issue *B.* a Son and *C.* a Daughter by one *Venter*, and *D.* a Son by another *Venter*: If *B.* purchases in Fee and dies without Issue, it shall descend to the Sister, and not to the Brother of the half Blood; but if the Land had descended from *A.* to *B.* and he had entred and died without Issue, it was a Doubt in *Bracton* and *Britton's* Time, whether it should go to the younger Son, or to the Daughter? But the Law is since settled, that in both Cases it descends to the Daughter, *Et seifina facit Stipitem & primum Gradum. Et possessio Fratris de Feodo simplici facit Sororem esse hæredem.*

Thus upon the whole it seems, That abating those small and inconsiderable Variances, the States and Rules of Descents as they stood in the Time of *Hen. 3.* or at least in the Time of *Edw. 1.* were reduced to their full Complement and Perfection, and vary nothing considerably from what they are at this Day, and have continued ever since that Time.

I shall therefore set down the State and Rule of Descents in Fee-Simple as it stands at this Day, without meddling with particular Limitations of Entails of Estates, which vary the Course of Descents in some Cases from the Common Rules of Descents or hereditary Successions; and herein we shall see what the Law has been and continued touching the same ever since *Bracton's* Time, who wrote in the Time of *Hen. 3.* now above 400 Years since, and by that we shall

shall see what Alterations the Succession of Time has made therein. CHAP. II.

And now to give a short Scheme of the Rules of Descents; or hereditary Successions, of the Lands of Subjects as the Law stands at this Day, and has stood for above four hundred Years past, *viz.*

All possible hereditary Successions may be distinguished into these 3 Kinds, *viz.* either, 1<sup>st</sup>, *In the Descending Line*, as from Father to Son or Daughter, Nephew or Niece, *i. e.* Grandson or Grandaughter. Or,

2<sup>dly</sup>, *In the Collateral Line*, as from Brother to Brother or Sister, and so to Brother and Sisters Children. Or,

3<sup>dly</sup>, *In an Ascending Line*, either direct, as from Son to Father or Grandfather, (which is not admitted by the Law of *England*) or in the transversal Line, as to the Uncle or Aunt, Great-Uncle or Great-Aunt, &c. And because this Line is again divided into the Line of the Father, or the Line of the Mother, this transverse ascending Succession is either in the Line of the Father, Grandfather, &c. on the Blood of the Father; or in the Line of the Mother, Grandmother, &c. on the Blood of the Mother; The former are called *Agnati*, the latter *Cognati*: I shall therefore set down a Scheme of Pedigrees as high as Great-Grandfather and Great-Grandmothers Grandfathers, and as low as Great-Grandchild; which nevertheless will be applicable to more remote Successions with a little Variation, and will explain the whole Nature of Descents or hereditary Successions. The

## The PATERAL Line.

## The MATERNAL Line.

|                                                             |                                                             |
|-------------------------------------------------------------|-------------------------------------------------------------|
| <i>Tritavus</i> , or Great-Grandfather's Great-Grandfather. | <i>Tritavia</i> , or Great-Grandmother's Great-Grandmother. |
| <i>Atavus</i> , or Great-Grandfather's Grandfather.         | <i>Atavia</i> , or Great-Grandmother's Grandmother.         |
| <i>Abavus</i> , or Great-Grandfather's Father.              | <i>Abavia</i> , or Great-Grandmother's Mother.              |
| <i>Proavita Magna</i> .<br>Great-Grand-Aunt.                | <i>Proavia</i> , or<br>Great-Grandmother.                   |
| <i>Propatruus Magnus</i> .<br>Gr. Great-Uncle.              | <i>Proavunculus</i> .<br>Gr. Great-Uncle.                   |
| <i>Amata Magna</i> .<br>Great-Aunt.                         | <i>Avia</i> , or<br>Grandmother.                            |
| <i>Patruus Magnus</i> .<br>Great-Uncle.                     | <i>Avunculus Mag.</i><br>Great-Uncle.                       |
| <i>Amata</i> , or<br>Aunt.                                  | <i>Matertera</i> .<br>Mother's Sister.                      |
| <i>Soror</i> , his<br>Sister.                               | <i>Consobrina</i> . A Mother's<br>Sister's Daughter.        |
| <i>Nepos</i> .<br>Nephew.                                   | <i>Consobrinus</i> . A Mother's<br>Brother's Son.           |
| <i>Neptis</i> .<br>Niece.                                   | <i>Consobrina</i> . A Mother's<br>Brother's Daughter.       |
| <i>Nepos</i> .<br>Nephew.                                   | <i>Filius Primus</i> ;<br>eldest Son.                       |
| <i>Neptis</i> .<br>Niece.                                   | <i>Neptis</i> , or<br>Grandaughter.                         |

Note, The Descendants from all these Six in the next Degree, if Male, is called *Pro-nepos*, if Female, *Proneptis*, i. e. Great Grandson, or Great Grandaughter.

This Pedigree, with its Application, will CHAP. II.  
 give a plain Account of all Hereditary Successions under their several Cases and Limitations, as will appear by the following Rules, taking our Mark or *Epocha* from the FATHER and MOTHER.


But first, I shall premise certain general Rules, which will direct us much in the Course of Descents as they stand here in *England* : (*Viz.*)

*First*, In Descents, the Law prefers the 1. Rule, worthiest of Blood : As,

1<sup>st</sup>, In all Descents immediate, the Male is preferred before the Female, whether in Successions Descending, Ascending, or Collateral : Therefore in Descents, the Son inherits and excludes the Daughter, the Brother is preferred before the Sister, the Uncle before the Aunt.

2<sup>dly</sup>, In all Descents immediate, the Descendants from Males are to be preferred before the Descendants from Females : And hence it is, That the Daughter of the eldest Son is preferred in Descents from the Father before the Son of the younger Son ; and the Daughter of the eldest Brother, or Uncle, is preferred before the Son of the younger ; and the Uncle, nay, the Great-Uncle, *i. e.* the Grandfather's Brother, shall inherit before the Uncle of the Mothers Side.

*Secondly*, In Descents, the next of Blood 2. Rule. is preferred before the more remote, tho' equally or more worthy. And hence it is,  
 1<sup>st</sup>, The

 1<sup>st</sup>, The Sister of the whole Blood is preferred in Descents before the Brother of the half Blood, because she is more strictly joined to the Brother of the whole Blood (*viz.* by Father and by Mother) than the half Brother, though otherwise he is the more worthy.

2<sup>dly</sup>, Because the Son or Daughter being nearer than the Brother, and the Brother or Sister than the Uncle, the Son or Daughter shall inherit before the Brother or Sister, and they before the Uncle.

3<sup>dly</sup>, That yet the Father or Grandfather, or Mother or Grandmother, in a direct ascending Line, shall never succeed immediately the Son or Grandchild; but the Father's Brother (or Sisters) shall be preferred before the Father himself; and the Grandfather's Brother (or Sisters) before the Grandfather: And yet upon a strict Account, the Father is nearer of Blood to the Son than the Uncle, yea than the Brother; for the Brother is therefore of the Blood of the Brother, because both derive from the same Parent, the Common Fountain of both their Blood. And therefore the Father at this Day is preferred in the Administration of the Goods before the Son's Brother of the whole Blood, and a Remainder limited *Proximo de Sanguine* of the Son shall vest in the Father before it shall vest in the Uncle. *Vide Littleton, Lib. 1. fol. 8, 10.*

3<sup>d</sup> Rule.

Thirdly, That all the Descendants from such a Person as by the Laws of *England* might

might have been Heir to another, hold the same Right by Representation as that Common Root from whence they are derived; and therefore,

CHAP. II.

1<sup>st</sup>, They are in Law in the same Right of Worthiness and Proximity of Blood, as their Root that might have been Heir was, in case he had been living: And hence it is, that the Son or Grandchild, whether Son or Daughter of the eldest Son, succeeds before the younger Son; and the Son or Grandchild of the eldest Brother, before the youngest Brother; and so through all the Degrees of Succession, by the Right of Representation, the Right of Proximity is transferred from the Root to the Branches, and gives them the same Preference as the next and worthiest of Blood.

2<sup>dly</sup>, This Right transferred by Representation is infinite and unlimited in the Degrees of those that descend from the Represented; for *Filius* the Son, the *Nepos* the Grandson, the *Abnepos* the Great-Grandson, and so *in infinitum* enjoy the same Privilege of Representation as those from whom they derive their Pedigree have, whether it be in Descents Lineal, or Transversal; and therefore the Great-Grandchild of the eldest Brother, whether it be Son or Daughter, shall be preferred before the younger Brother, because tho' the Female be less worthy than the Male, yet she stands in Right of Representation of the eldest Brother, who was more worthy than the younger. And upon this Account it is,

3<sup>dly</sup>, That



3dly, That if a Man have two Daughters, and the eldest dies in the Life of the Father, leaving six Daughters, and then the Father dies; the youngest Daughter shall have an equal Share with the other six Daughters, because they stand in Representation and Stead of their Mother, who could have had but a Moiety.

4. Rule. *Fourthly*, That by the Law of *England*, without a special Custom to the contrary, the eldest Son, or Brother, or Uncle, excludes the younger; and the Males in an equal Degree do not all inherit: But all the Daughters, whether by the same or divers *Venters*, do inherit together to the Father, and all the Sisters by the same *Venter* do inherit to the Brother.

5. Rule. *Fifthly*, That the last actual Seisin in any Ancestor, makes him, as it were the Root of the Descent equally to many Intents as if he had been a Purchaser; and therefore he that cannot, according to the Rules of Descents, derive his Succession from him that was last actually seised, tho' he might have derived it from some precedent Ancestor, shall not inherit. And hence it is, That where Lands descend to the eldest Son from the Father, and the Son enters and dies without Issue, his Sister of the whole Blood shall inherit as Heir to the Brother, and not the younger Son of the half Blood, because he cannot be Heir to the Brother of the half Blood: But if the eldest Son had survived

vived the Father and died before Entry, the youngest Son should inherit as Heir to the Father, and not the Sister, because he is Heir to the Father that was last actually seised. And hence it is, That tho' the Uncle is preferred before the Father in Descents to the Son; yet if the Uncle enter after the Death of the Son, and die without Issue, the Father shall inherit to the Uncle, *quia Scisina facit Stipitem.*

*Sixthly*, That whosoever derives a Title to any Land, must be of the Blood to him that first purchased it: And this is the Reason why, if the Son purchase Lands and dies without Issue, it shall descend to the Heirs of the Part of the Father; and if he has none, then to the Heirs on the Part of the Mother; because, tho' the Son has both the Blood of the Father and of the Mother in him, yet he is of the whole Blood of the Mother, and the Consanguinity of the Mother are *Consanguinei Cognati* of the Son. 6. Rule.

And of the other Side, if the Father had purchased Lands, and it had descended to the Son, and the Son had died without Issue, and without any Heir of the Part of the Father, it should never have descended in the Line of the Mother, but escheated: For tho' the *Consanguinei* of the Mother were the *Consanguinei* of the Son, yet they were not of Consanguinity to the Father, who was the Purchaser; but if there had been none of the Blood of the Grandfather, yet it might have

have resorted to the Line of the Grandmother, because her *Consanguinei* were as well of the Blood of the Father, as the Mother's Consanguinity is of the Blood of the Son: And consequently also, if the Grandfather had purchased Lands, and they had descended to the Father, and from him to the Son; if the Son had entred and died without Issue, his Father's Brothers or Sisters, or their Descendants, or, for want of them, his Great-Grandfather's Brothers or Sisters, or their Descendants, or, for want of them, any of the Consanguinity of the Great-Grandfather, or Brothers or Sisters of the Great-Grandmother, or their Descendants, might have inherited, for the Consanguinity of the Great-Grandmother was the Consanguinity of the Grandfather; but none of the Line of the Mother, or Grandmother, viz. the Grandfather's Wife, should have inherited, for that they were not of the Blood of the first Purchaser. And the same Rule *e converso* holds in Purchases in the Line of the Mother or Grandmother, they shall always keep in the same Line that the first Purchaser settled them in.

But it is not necessary, That he that inherits be always Heir to the Purchaser; it is sufficient if he be of his Blood, and Heir to him that was last seised. The Father purchases Lands which descended to the Son, who dies without Issue, they shall never descend to the Heir of the Part of the Son's Mother; but if the Son's Grandmother has a Brother, and the Son's Great-Grandmother hath

hath a Brother, and there are no other Kindred, they shall descend to the Grandmother's Brother; and yet if the Father had died without Issue, his Grandmother's Brother should have been preferred before his Mother's Brother, because the former was Heir of the Part of his Father tho' a Female, and the latter was only Heir of the Part of his Mother; but where the Son is once seized and dies without Issue, his Grandmother's Brother is to him Heir of the Part of his Father, and being nearer than his Great Grandmother's Brother, is preferred in the Descent.

But *Note*, This is always intended so long as the Line of Descent is not broken; for if the Son alien those Lands, and then repurchase them again in Fee, now the Rules of Descents are to be observ'd as if he were the original Purchaser, and as if it had been in the Line of the Father or Mother.



*Seventhly*, In all Successions, as well in the Line Descending, Transversal, or Ascending, the Line that is first derived from a Male Root has always the Preference. 7. Rule.

Instances whereof in the *Line Descending*, &c. *viz.*

*A.* has Issue two Sons *B.* and *C.* *B.* has Issue a Son and a Daughter *D.* and *E.* *D.* the Son has Issue a Daughter *F.* and *E.* the Daughter has Issue a Son *G.* Neither *C.* nor any of his Descendants, shall inherit so long as there are any Descendants

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from

CHAP. II. from *D.* and *E.* and neither *E.* the Daughter, nor any of her Descendants, shall inherit so long as there are any Descendants from *D.* the Son, whether they be Male or Female.

So in Descents Collateral, as Brothers and Sisters, the same Instances apply'd thereto, evidence the same Conclusions.

But in Successions in the Line Ascending, there must be a fuller Explication ; because it is darker and more obscure, I shall therefore set forth the whole Method of *Transversal Ascending Descents* under the Eight ensuing Rules, viz.

Rules in  
the Line  
*Ascending.*

1. Rule.

*First*, If the Son purchases Lands in Fee-Simple, and dies without Issue, those of the Male Line ascending, *usque infinitum* shall be preferred in the Descent, according to their Proximity of Degree to the Son ; and therefore the Father's Brothers and Sisters and their Descendants shall be preferred before the Brothers, of the Grandfather and their Descendants ; and if the Father had no Brothers nor Sisters, the Grandfather's Brothers and their Descendants, and for want of Brothers, his Sisters and their Descendants, shall be preferr'd before the Brothers of the Great Grandfather : For altho' by the Law of *England* the Father or Grandfather cannot immediately inherit to the Son, yet the Direction of the Descent to the *Collateral Ascending Line*, is as much as if the Father or Grandfather had been by Law inheritable ; and therefore as in Case  
the

the Father had been inheritable, and should have inherited to the Son before the Grandfather, and the Grandfather, before the Great Grandfather, and consequently if the Father had inherited and died without Issue, his eldest Brother and his Descendants should have inherited before the younger Brother and his Descendants; and if he had no Brothers but Sisters, the Sisters and their Descendants should have inherited before his Uncles or the Grandfather's Brothers and their Descendants. So though the Law of *England* excludes the Father from inheriting, yet it substitutes and directs the Descent as it should have been, had the Father inherited, viz. It lets in those first that are in the next Degree to him.

*Secondly*, The second Rule is this: That <sup>2. Rule.</sup> the Line of the Part of the Mother shall never inherit as long as there are any, tho' never so remote; of the Line of the Part of the Father; and therefore, tho' the Mother has a Brother, yet if the *Atavus* or *Atavia Patris* (*i. e.* the Great-Great-Great-Grandfather, or Great-Great-Great-Grandmother of the Father) has a Brother or a Sister, he or she shall be preferred, and exclude the Mother's Brother, though he is much nearer.

*Thirdly*, But yet further. The Male Line <sup>3. Rule.</sup> of the Part of the Father ascending, shall in *Æternum* exclude the Female Line of the Part of the Father ascending; and therefore

fore in the Case proposed of the Son's purchasing Lands and dying without Issue, the Sister of the Father's Grandfather, or of his Great-Grandfather, and so *in infinitum* shall be preferred before the Father's Mother's Brother, tho' the Father's Mother's Brother be a Male, and the Father's Grandfather or Great-Grandfather's Sister be a Female, and more remote, because she is of the Male Line, which is more worthy than the Female Line, though the Female Line, be also of the Blood of the Father.


## 4. Rule.

*Fourthly*, But as in the Male Line ascending, the more near is preferred before the more remote; so in the Female Line descending, so it be of the Blood of the Father, it is preferred before the more remote. The Son therefore purchasing Lands, and dying without Issue, and the Father, Grandfather, and Great-Grandfather, and so upward, all the Male Line being dead without any Brother or Sister, or any descending from them; but the Father's Mother has a Sister or Brother, and also the Father's Grandmother has a Brother, and likewise the Father's Great-Grandmother has a Brother: Tho' it is true, that all these are of the Blood of the Father; and tho' the very remotest of them, shall exclude the Son's Mother's Brother; and tho' it be also true, that the Great-Grandmother's Blood has passed through more Males of the Father's Blood than the Blood of the Grandmother or Mother of the Father; yet in this Case, the

the Father's Mother's Sister shall be preferred before the Father's Grandmother's Brother, or the Great Grandmother's Brother, because they are all in the Female Line, viz. *Cognati* (and not *Agnati*), and the Father's Mother's Sister is the nearest, and therefore shall have the Preference as well as in the Male Line ascending, the Father's Brother or his Sister shall be preferred before the Grandfather's Brother. CHAP. II.

*Fifthly*, But yet in the last Case, where 5. Rule. the Son purchases Lands and dies without Issue, and without any Heir on the Part of the Grandfather, the Lands shall descend to the Grandmother's Brother or Sister, as Heir on the Part of his Father; yet if the Father had purchased this Land and died, and it descended to his Son who died without Issue, the Lands should not have descended to the Father's Mother's Brother or Sister, for the Reasons before given in the *Third Rule*: But for want of Brothers or Sisters of the Grandfather, Great-Grandfather, and so upwards in the Male ascending Line, it should descend to the Father's Grandmother's Brother or Sister which is his Heir of the Part of his Father, who should be preferred before the Father's Mother's Brother, who is in Truth the Heir of the Part of the Mother of the Purchaser, tho' the next Heir of the Part of the Father of him that last died seized; and therefore, as if the Father that was the Purchaser had died without Issue, the Heirs



CHAP. II.  of the Part of the Father, whether of the Male or Female Line, should have been preferred before the Heirs of the Part of the Mother; so the Son, who stands now in the Place of the Father, and inherits to him primarily, in his Father's Line, dying without Issue, the same Devolution and hereditary Succession should have been as if his Father had immediately died without Issue, which should have been to his Grandmother's Brother, as Heir of the Part of the Father, though by the Female Line, and not to his Mother's Brother, who was only Heir of the Part of his Mother, and who is not to take till the Father's Line both Male and Female be spent.

6. Rule.

*Sixthly*, If the Son purchases Lands and dies without Issue, and it descends to any Heir of the Part of the Father, and then if the Line of the Father (after Entry and Possession) fail, it shall never return to the Line of the Mother; tho' in the first Instance, or first Descent from the Son, it might have descended to the Heir of the Part of the Mother; for now by this Descent and Seisin it is lodged in the Father's Line, to whom the Heir of the Part of the Mother can never derive a Title as Heir, but it shall rather escheat: But if the Heir of the Part of the Father had not entered, and then that Line had failed, it might have descended to the Heir of the Part of the Mother as Heir to the Son,

to

to whom immediately, for want of Heirs CHAP. II.  
 of the Part of the Father, it might have  
 descended.

*Seventhly*, And upon the same Reason, 7. Rule.  
 if it had once descended to the Heir of  
 the Part of the Father of the Grandfather's  
 Line, and that Heir had entred, it should  
 never descend to the Heir of the Part of  
 the Father of the Grandmother's Line, be-  
 cause the Line of the Grandmother was not  
 of the Blood or Consanguinity of the Line  
 the Grandmother's Side.

*Eighthly*, If for Default of Heirs of the 8. Rule.  
 Purchaser of the Part of the Father, the  
 Lands descend to the Line of the Mother,  
 the Heirs of the Mother of the Part of her  
 Father's Side, shall be preferred in the  
 Succession before her Heirs of the Part of  
 her Mother's Side, because they are the  
 more worthy.

And thus the Law stands in Point of  
 Descents or Hereditary Successions in *Eng-  
 land* at this Day, and has so stood and  
 continued for above four Hundred Years  
 past, as by what has before been said,  
 may easily appear. And *Note*, The most  
 Part of the Eight Rules and Differences  
 above specified and explained, may be  
 collected out of the Resolutions in the  
 Case of *Clare versus Brook, &c.* in *Plowden's  
 Commentaries*, Folio 444.



## C H A P. XII.

*Touching Trials by Jury.*

**H**AVING in the former Chapter some-CHAP. 12.  
 what largely treated of the Course of  
 Descents, I shall now with more Brevity  
 consider that other Title of our Law which  
 I before propounded (in order to evidence  
 the Excellency of the Laws of *England* above  
 those of other Nations,) *viz. The Trial by a*  
*Jury of Twelve Men*; which upon all Ac-  
 counts, as it is settled here in this Kingdom,  
 seems to be the best Trial in the World: I  
 shall therefore give a short Account of the  
 Method and Manner of that Trial, *viz.*

*First*, The Writ to return a Jury, issues 1.  
 to the Sheriff of the County: And,

*1st*, He is to be a Person of Worth and  
 Value, that so he may be responsible for  
 any Defaults, either of himself or his Of-  
 ficers. And, *2dly*, *Is sworn*, faithfully and  
 honestly to execute his Office. This Officer  
 is entrusted to elect and return the Jury,  
 which he is obliged to do in this Manner:  
 1. Without the Nomination of either  
 Party. 2. They are to be such Persons  
 as for Estate and Quality are fit to serve  
 upon that Employment. 3. They are to  
 be of the Neighbourhood of the Fact to  
 be

be inquired, or at least of the County or Bailiwick. And, 4. Anciently Four, and now Two of them at least are to be of the Hundred. *But Note, This is now in great Measure altered by Statute.*

2. *Secondly*, Touching the Number and Qualifications of the Jury.

*1st*, As to their Number, though only Twelve are sworn, yet Twenty-four are to be returned to supply the Defects or Want of Appearance of those that are challenged off, or make Default. *2dly*, Their Qualifications are many, and are generally set down in the Writ that summons them, *viz.* 1. They are to be *Probi & legales Homines*. 2. Of sufficient Freeholds, according to several Provisions of Acts of Parliament. 3. Not Convict of any notorious Crime that may render them unfit for that Employment. 4. They are not to be of the Kindred or Alliance of any of the Parties. And, 5. Not to be such as are prepossessed or prejudiced before they hear their Evidence.

3. *Thirdly*, The Time of their Return.

Indeed, in Assizes, the Jury is to be ready at the Bar the first Day of the Return of the Writ: But in other Cases, the Pannel is first returned upon the *Venire Facias*, or ought to be so, and the Proofs or Witnesses are to be brought or summoned by *Distringas* or *Habeas Corpora* for their Appearance at the Trial, whereby the Parties may have Notice of the Jurors, and of their Sufficiency and Indifferency, that so they may make their

their Challenges upon the Appearance of the Jurors if there be just Cause. CHAP. 12.

*Fourthly*, The Place of their Appearance.

4.

If it be in Cases of such Weight and Consequence as by the Judgment of the Court is fit to be tried at the Bar, then their Appearance is directed to be there; but in ordinary Cases, the Place of Appearance is in the Country at the Assizes, or *Nisi Prius*, in the County where the Issue to be tried arises: And certainly this is an excellent Constitution. The great Charge of Suits is the Attendance of the Parties, the Jury-Men and Witnesses: And therefore tho' the Preparation of the Causes in Point of pleading to Issue, and the Judgment, is for the most Part in the Courts at *Westminster*, whereby there is kept a great Order and Uniformity of Proceedings in the whole Kingdom, to prevent Multiplicity of Laws and Forms; yet those are but of small Charge, or Trouble, or Attendance, one Attorney being able to dispatch forty Mens Business with the same Ease, and no greater Attendance than one Man would dispatch his own Business: But the great Charge and Attendance is at the Trial, which is therefore brought Home to the Parties in the Countries, and for the most Part near where they live.

*Fifthly*, The Persons before whom they are to appear.

5.

If the Trial be at the Bar, it is to be before that Court where the Trial is; if in the Country, then before the Justices of Assizes, or *Nisi Prius*, who are Persons well acquainted

CHAP. 12, acquainted with the Common Law, and for the most Part are Two of those Twelve ordinary Justices who are appointed for the Common Dispensation of Justice in the Three great Courts at *Westminster*. And this certainly was a most wise Constitution: For

1<sup>st</sup>, It prevents Factions and Parties in the Carriage of Business, which would soon appear in every Cause of Moment, were the Trial only before Men residing in the Counties, as Justices of the Peace, or the like, or before Men of little or no Place, Countenance or Preheminence above others; and the more to prevent Partiality in this Kind, those Judges are by Law prohibited to hold their Sessions in Counties where they were born or dwell.

2<sup>dly</sup>, As it prevents Factions and Part-takings, so it keeps both the Rule and the Administration of the Laws of the Kingdom uniform; for those Men are employed as Justices, who as they have had a Common Education in the Study of the Law, so they daily in Term-time converse and consult with one another; acquaint one another with their Judgments, sit near one another in *Westminster-Hall*, whereby their Judgments and Decisions are necessarily communicated to one another, either immediately or by Relations of others, and by this Means their Judgments and their Administrations of Common Justice carry a Consonancy, Congruity and Uniformity one to another, whereby both the Laws and the Administrations thereof are preserved from that Con-

Confusion and Disparity that would unavoidably ensue, if the Administration was by several incommunicating Hands, or by provincial Establishments: And besides all this, all those Judges are solemnly sworn to observe and judge according to the Laws of the Kingdom, according to the best of their Knowledge and Understanding.

*Sixthly*, When the Jurors appear, and are called, each Party has Liberty to take his Challenge to the Array itself, if unduly or partially made by the Sheriff; or if the Sheriff be of Kin to either Party, or to the Polls, either for Insufficiency of Freehold, or Kindred or Alliance to the other Party, or such other Challenges, either Principal, or to the Favour, as renders the Juror unfit and incompetent to try the Cause, and the Challenge being confess'd or found true by some of the rest of the Jury, that particular incompetent Person is withdrawn.

*Seventhly*, Then Twelve, and no less, of such as are indifferent and are return'd upon the principal Pannel, or the Tales, are sworn to try the same according to their Evidence.

*Eighthly*, Being thus sworn, the Evidence on either Part is given in upon the Oath of Witnesses, or other Evidence by Law allowed, (as Records and ancient Deeds, but later Deeds and Copies of Records must be attested by the Oaths of Witnesses) and other Evidence in the open Court, and in the Presence of the Parties, their Attornies, Council and all By-standers, and before

the



CHAP. 12.

Bills of  
Exception.

the Judge and Jury, where each Party has Liberty of excepting, either to the Competency of the Evidence, or the Competency or Credit of the Witnesses, which Exceptions are publickly stated, and by the Judges openly or publickly allowed or disallowed, wherein if the Judge be partial, his Partiality and Injustice will be evident to all By-standers; and if in his Direction or Decision he mistake the Law, either through Partiality, Ignorance, or Inadvertency, either Party may require him to seal a Bill of Exception, thereby to deduce the Error of the Judge (if any were) to a due Ratification or Reversal by Writ of Error.

9.  
Excellen-  
cy of this  
Trial.

*Nimblely*, The Excellency of this open Course of Evidence to the Jury in Presence of the Judge, Jury, Parties and Council, and even of the adverse Witnesses, appears in these Particulars:

*1st*, That it is openly; and not in private before a Commissioner or Two, and a couple of Clerks, where oftentimes Witnesses will deliver that which they will be ashamed to testify publickly.

*2dly*, That it is *Ore Tenus* personally, and not in Writing, wherein oftentimes, yea too often, a crafty Clerk, Commissioner, or Examiner, will make a Witness speak what he truly never meant, by his dressing of it up in his own Terms, Phrases, and Expressions; whereas on the other Hand, many times the very Manner of a Witness's delivering his Testimony will give a probable

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Indi

Indication whether he speaks truly or falsely; and by this Means also he has Opportunity to correct, amend, or explain his Testimony upon further Questioning with him, which he can never have after a Deposition is set down in Writing.

3dly, That by this Course of personal and open Examination, there is Opportunity for all Persons concern'd, *viz.* The Judge, or any of the Jury, or Parties, or their Council or Attornies, to propound occasional Questions, which beats and boults out the Truth much better than when the Witness only delivers a formal Series of his Knowledge without being interrogated; and on the other Side, preparatory, limited, and formal Interrogatories in Writing, preclude this Way of occasional Interrogations, and the best Method of searching and sifting out the Truth is choak'd and suppress'd.

4thly, Also by this personal Appearance and Testimony of Witnesses, there is Opportunity of confronting the adverse Witnesses, of observing the Contradiction of Witnesses sometimes of the same Side, and by this Means great Opportunities are gain'd for the true and clear Discovery of the Truth.

5thly, And further, The very Quality, Carriage, Age, Condition, Education, and Place of Commorance of Witnesses, is by this Means plainly and evidently set forth to the Court and the Jury, whereby the Judge and Jurors may have a full Information of them, and the Jurors, as they see Cause, may give

CHAP. 12.

give the more or less Credit to their Testimony, for the Jurors are not only Judges of the Fact, but many Times of the Truth of Evidence; and if there be just Cause to disbelieve what a Witness swears, they are not bound to give their Verdict according to the Evidence or Testimony of that Witness; and they may sometimes give Credit to one Witness, tho' oppos'd by more than one. And indeed, it is one of the Excellencies of this Trial above the Trial by Witnesses, that altho' the Jury ought to give a great Regard to Witnesses and their Testimony, yet they are not always bound by it, but may either upon reasonable Circumstances, induc'ing a Blemish upon their Credibility, tho' otherwise in themselves in Strictness of Law they are to be heard, pronounce a Verdict contrary to such Testimonies, the Truth whereof they have just Cause to suspect, and may and do often pronounce their Verdict upon one single Testimony, which Thing the Civil Law admits not of.

*Vide prox.  
Pag.*

10. *Tenthly*, Another Excellency of this Trial is this; That the Judge is always present at the Time of the Evidence given in it: Herein he is able in Matters of Law emerg'ing upon the Evidence to direct them; and also, in Matters of Fact, to give them a great Light and Assistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies, and by shewing them his Opinion even in Matter of Fact, which is a great

Advantage and Light to Lay-Men: And thus, as the Jury assists the Judge in determining the Matter of Fact, so the Judge assists the Jury in determining Points of Law, and also very much in investigating and enlightning the Matter of Fact, whereof the Jury are Judges.

*Eleventbly*, When the Evidence is fully given, the Jurors withdraw to a private Place, and are kept from all Speech with either of the Parties till their Verdict is delivered up, and from receiving any Evidence other than in open Court, where it may be search'd into, discuss'd and examin'd. In this Recess of the Jury they are to consider their Evidence, and if any Writings under Seal were given in Evidence, they are to have them with them; they are to weigh the Credibility of Witnesses, and the Force and Efficacy of their Testimonies, wherein (as I before said) they are not precisely bound to the Rules of the Civil Law, viz. To have two Witnesses to prove every Fact, unless it be in Cases of Treason, nor to reject one Witness because he is single, or always to believe Two Witnesses if the Probability of the Fact does upon other Circumstances reasonably encounter them; for the Trial is not here simply by Witnesses, but by Jury; nay, it may so fall out, that the Jury upon their own Knowledge may know a Thing to be false that a Witness swears to be true, or may know a Witness to be incompetent or incredible, tho' nothing

II.

In Treason,  
Two Witnesses.

S.

thing

CHAP. 12. thing be objected against him, and may give their Verdict accordingly.

12. *Twelfthly*, When the whole Twelve Men are agreed, then, and not till then, is their Verdict to be received; and therefore the Majority of Assentors does not conclude the Minority, as is done in some Countries where Trials by Jury are admitted: But if any one of the Twelve dissent, it is no Verdict, nor ought to be received. It is true, That in ancient Times, as *Hen. 2.* and *Hen. 3.*'s Time, yea, and by *Fleta* in the Beginning of *Edw. 1.*'s Time, if the Jurors dissented, sometimes there was added a Number equal to the greater Party, and they were then to give up their Verdict by Twelve of the old Jurors, and the Jurors so added; but this Method has been long Time antiquated, notwithstanding the Practice in *Bracton's* Time, *lib. 4. cap. 9.* and *Fleta, lib. 4. cap. 9.* for at this Day the entire Number first empanell'd and sworn are to give up an unanimous Verdict, otherwise it is none. And indeed this gives a great Weight, Value and Credit to such a Verdict, wherein Twelve Men must unanimously agree in a Matter of Fact, and none dissent; though it must be agreed, that an ignorant Parcel of Men are sometimes governed by a few that are more knowing, or of greater Interest or Reputation than the rest.

Verdict  
unanimous.

13. *Thirteenthly*, But if there be Matter of Law that carries in it any Difficulty, the Jury may, to deliver themselves from the Danger of an Attaint, find it specially, that so it may be

Special  
Verdict.

be decided in that Court where the Verdict is returnable; and if the Judge over-rule the Point of Law contrary to Law, whereby the Jury are perswaded to find a general Verdict (which yet they are not bound to do, if they doubt it,) then the Judge, upon the Request of the Party desiring it, is bound by Law in convenient Time to seal a Bill of Exceptions, containing the whole Matter excepted to; that so the Party grieved, by such Indiscretion or Error of the Judge, may have Relief by Writ of Error on the Statute of *Westminster* 2.

Bill of  
Excep-  
tions.

*Fourteenthly*, Altho' upon general Verdicts given at the Bar in the Courts at *Westminster*, the Judgment is given within Four Days, in Presumption that there cannot be any considerable Surprise in so solemn a Trial, or at least it may be soon espied; yet upon Trials by *Nisi prius* in the Country, the Judgment is not given presently by the Judge of *Nisi prius*, unless in Cases of *Quare Impedit*: But the Verdict is returned after Trial into that Court from whence the Cause issued, that thereby, if any Surprise happened either through much Business of the Court, or through Inadvertency of the Attorney or Council, or through any Miscarriage of the Jury, or through any other Casualty, the Party may have his Redress in that Court from whence the Record issued.

14.

Judgment.

And thus stands this excellent Order of Trial by Jury, which is far beyond the Trial by Witnesses according to the Proceedings

ceedings of the Civil Law, and of the Courts of Equity, both for the Certainty, the Dispatch, and the Cheapness thereof: It has all the Helps to investigate the Truth that the Civil Law has, and many more. For, as to Certainty,

1<sup>st</sup>, It has the Testimony of Witnesses, as well as the Civil Law and Equity Courts.

2<sup>dly</sup>, It has this Testimony in a much more advantageous Way than those Courts for Discovery of Truth.

3<sup>dly</sup>, It has the Advantage of the Judge's Observation, Attention, and Assistance, in Point of Law by way of Decision, and in Point of Fact by way of Direction to the Jury.

4<sup>thly</sup>, It has the Advantage of the Jury, and of their being *de Vicincto*, who oftentimes know the Witnesses and the Parties: And,

5<sup>thly</sup>, It has the unanimous Suffrage and Opinion of Twelve Men, which carries in itself a much greater Weight and Preponderation to discover the Truth of a Fact, than any other Trial whatsoever.

And as this Method is more certain, so it is much more expeditious and cheap; for oftentimes the Session of one Commission for the Examination of Witnesses for one Cause in the Ecclesiastical Courts, or Courts of Equity, lasts as long as a whole Session of *Nisi prius*, where a Hundred Causes are examined and tried.

And

And thus much concerning Trials in Civil Causes. As for Trials in Causes Criminal, they have this further Advantage, That regularly the Accusation, as preparatory to the Trial, is by a Grand Jury : So that as no Man's Interest, according to the Course of the Common Law, is to be tried or determined without the Oaths of a Jury of twelve Men ; so no Man's Life is to be tried but by the Oaths of Twelve Men, and by the Preparatory Accusation or Indictment by Twelve Men or more precedent to his Trial, unless it be in the Case of an Appeal at the Suit of the Party.

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1. OK.

THE  
AUTHOR'S  
PREFACE.

**I**N the ensuing TRACTATE,  
I shall make an *Essay* of Re-  
duction of the several Titles  
of the Law into Distributions and  
Heads (according to an *Analytical*  
*Method*). But the Particulars  
thereof are so many, and the  
Connexions of Things so various  
therein, that as I shall beforehand  
confess that I cannot reduce it to  
an exact *Logical Method*, so I  
must declare that I do despair  
at the First, yea, the Second or  
Third *Essay*, to reduce all the  
A 3 (confi-



## The P R E F A C E.

(considerable) Titles thereof under this Method : But many Things will be omitted, and possibly therefore, as they shall occur to my Memory, will perchance be disorderly shuffled in under such of the Distributions as may not be so proper for them, or at least inserted brokenly, without their just Dependence, till upon a Second or Third, or, perhaps, further *Essay*, the Scheme or Abstract may be entirely new fram'd.

However, the following *Essay* will do thus much Good, *viz.*

*First*, It will discover that it is not altogether impossible, by much Attention and Labour, to reduce the Laws of *England* at least into a tolerable *Method* or *Distribution*.

*Secondly*,

## The P R E F A C E.

*Secondly*, It will give Opportunity both to myself and others, as there shall occur new Thoughts or Opportunities, to rectify, and to reform what is amiss in this, and to supply what is wanting ; whereby, in Time, a more *Methodical System* or *Reduction* of the Titles of the Law, under Method, may be discover'd.

*Thirdly*, That although, for the most part, the most *Methodical Distributors* of any Science rarely appear subtile or acute in the Sciences themselves, because while they principally study the former, they are less studious and advertent of the latter ; yet a Method, even in the *Common Law*, may be a good Means to help the Memory to find out *Media* of Probation, and to assist in the Method of Study.

A 4

And

## THE PREFACE.

And altho' the Laws of *England* are generally distributed into the *Common Law*, and *Statute Law*, I shall not distribute my *Analysis* according to that Method, but shall take in and include 'em both together, as constituting one *Common Bulk* or *Matter* of the Laws of *England*. Nor shall I confine myself to the Method or Terms of the *Civil Law*, nor of others who have given general *Schemes* and *Analysis's* of Laws; but shall use that Method, and those Words or Expressions that I shall think most conducive to the Thing I aim at.

The Laws of this Kingdom do respect either,

1. *Civil Rights*; or,
2. *Crimes* and *Misdemeanors*.

This

## The PREFACE

This I shall substitute as the general Matter of the Laws of *England*, not troubling myself with Criticisms or Propriety of Words, in which Respect the very Word *Civil* includes also Matters *Criminal*, because Civil Constitutions give the Denomination of Crimes, and the Rules and Method of their Punishment; but it shall be sufficient that I use such Expressions as either are in themselves proper to express the Thing I mean, or that by my Usage and Application of them, I render them serviceable to that Purpose and End.

I shall therefore divide the Laws of this Kingdom, in relation to their Matter, into Two Kinds.

I. The

## The P R E F A C E.

1. The *Civil Part*, which concerns *Civil Rights*, and their *Remedies*.
2. The *Criminal Part*, which concerns *Crimes* and *Misdeemeanors*.

And these, to avoid Confusion, I shall dispose into several *Sections*.

And *First*, I begin with the Law as it relates to *Civil Matters*.

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T H E

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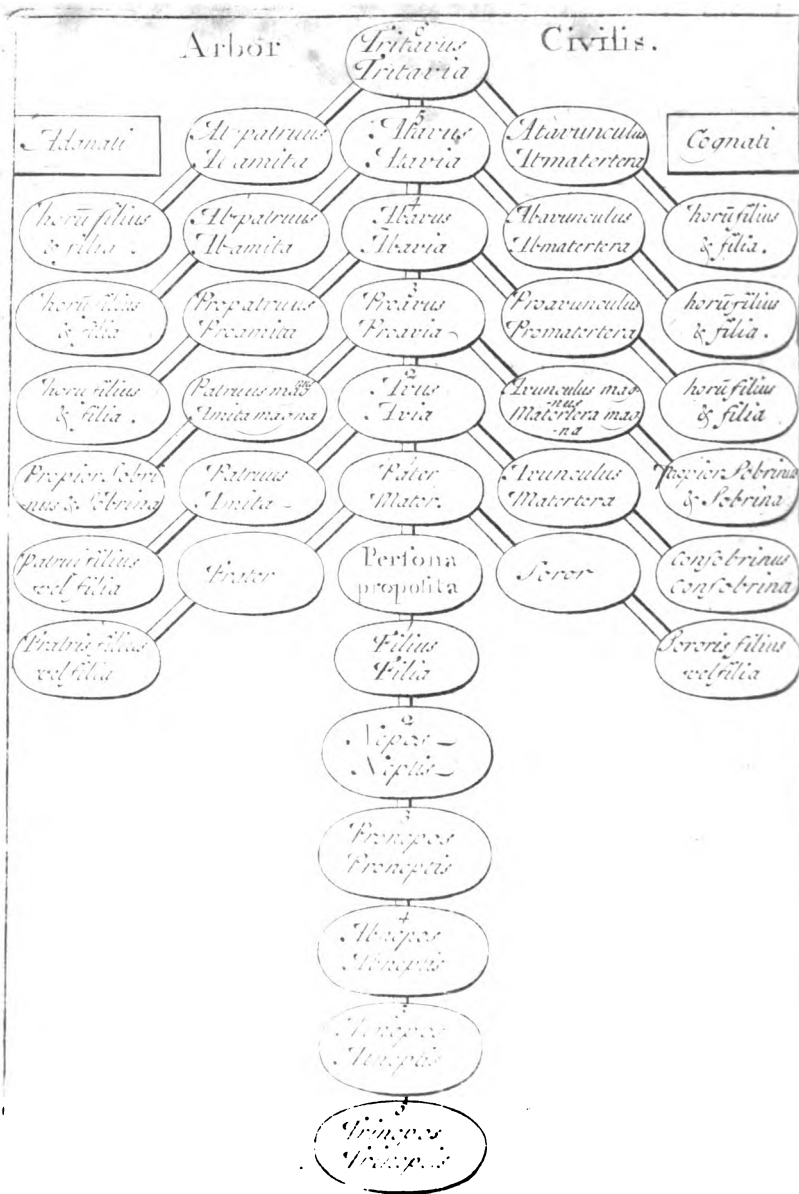
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THE





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THE  
ANALYSIS  
OF THE  
LAW.

---

SECT. I.

*Of the Civil Part of the Law (in general).*

**T**HE Civil Part of the Law concerns,  
 1. Civil Rights or Interests.  
 2. Wrongs or Injuries relative to those Rights.  
 3. Relief or Remedies applicable to those Wrongs.

Now all Civil Rights or Interests are of Two Sorts ;

1. *Jura Personarum*, or Rights of Persons,
2. *Jura Rerum*, or Rights of Things.

The Civil Rights of Persons are such as do either,

1. Immediately concern the Persons themselves : Or,
2. Such as relate to their Goods and Estate,

B

As

## The Analysis of the Law.

As to the Persons themselves, they are either,

1. Persons Natural ; Or,
2. Persons Civil or Politick, *i. e.* Bodies Corporate.

Persons Natural are consider'd Two Ways :

1. Absolutely and simply in themselves.
2. Under some Degree or Respect of Relation. *Vide Sect. 2.*

In Persons Natural, simply and absolutely considered, we have these several Considerations, *viz.*

1. The Interest which every Person has in himself.
2. Their Capacities or Abilities (which respect their Actions.)

I. *1<sup>st</sup>*, The Interest which every Person has in himself, principally consists in Three Things, *viz.*

1. The Interest he has in the Safety of his own Person. And the Wrongs that reflect upon that, are, 1. Assaults.
2. Affrays. 3. Woundings.
2. The Interest he has in his Liberty, or the Freedom of his Person. The Injury whereto, is *Duress*, and *Unlawful Imprisonment*.
3. The Interest he has in his Name and Reputation. The Injury whereto, is Scandal and Defamation.

As to the other Interest of Goods and Estate, though in Truth they have a Habitude, and are under some Respect to the Person ; yet because they are in their own Nature Things separate and distinct from  
the

## The Analysis of the Law.

3

the Person, they will more properly come in under the *Jura Rerum*. *Vide Sect. 23, &c.*

2dly, The Capacity that every Person has; which is a Power that the Law variously assigns to Persons, according to the Variety of certain Conditions (or Circumstances) wherein they are, either *To take*, or *To dispose*.

II.

And under this Head, we have,

*First*, The Capacities themselves, which are especially Two;

1. Capacities which a Man has in his own Right.
2. Capacities which he has in *auter Droit*, or another's Right.

Now Capacities which a Man has in his own Right, are either,

1. To acquire or take.
2. To alien or transfer.

And both these are either,

1. Of Things Personal.
2. Of Things Real.

The Second Kind of Capacities are in *auter Droit*, another's Right; as, Executors, Corporations, *Cestuy que Use*, &c. Whereof hereafter.

*Secondly*, The various Conditions (or Circumstances) of Persons, with Relation to those Capacities, consisting of,

1. Ability.
2. Non-ability.

And all Persons are (presum'd) in Law able in either of those former Capacities (of Taking, or Disposing), which by Law are not disabled: And those that are so

B 2

disabled



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disabled come under the Title of *Non-ability*, though that *Non-ability* is various in its Extent, viz. To some more, to some less (as in the several Instances following.)

1. Aliens: Here comes in the Learning of Aliens, as Naturalization, Denization, &c.
2. Attainted of Treason or Felony; here of Attainders.
3. Persons outlawed in Personal Actions.
4. Infants; here of the Non-ability of Infants.
5. *Feme Coverts*; here of their Disability.
6. Ideots and Lunatics; here of that Learning.
7. Persons under some illegal Restraint or Force, as *Duress*, *Manels*.
8. *Villeins*; (now antiquated.)
9. Bastards; and here of Legitimation.

Bacon's  
Hist. Part  
1. p. 88.  
Vide § 14.

Vide § 18.

## S E C T. II.

*Of the Relation of Persons, and the Rights thereby arising.*

NOW as to Persons consider'd in respect of Relation, the Rights thereby arising are of Three Kinds, viz.

1. Political.
2. OEconomical.
3. Civil.

The

## The Analysis of the Law.

5

The Political Relation of Persons, and the Rights emergent thereupon, are,

1. The *Magistrate*.
2. The *People* or *Subject*.

The Magistrate is either,

1. Supreme.
2. Subordinate.

The Supreme Magistrate is either,

1. Legislative : *The Parliament*. (With whose Rights I shall not here inter-meddle.)
2. Executive : *The King*.

And in as much as the King is by the Law the Head of the Kingdom and People, the Laws of the Kingdom, *co Intuitu*, have lodg'd in him certain Rights, the better to enable him to govern and protect his People. And although under this Consideration I shall be constrained to take in and include many Rights of Things; yet because they do belong to the King under this Relation, *as King*, and I have no other Place or Division so apt to dispose of them as this, I shall here bring them in together.

And the Rights that belong to the King, as King, are of Two Kinds :

1. Such Rights as concern his Person.
  2. Such Rights as concern his Prerogative.
- (Of each of these in their Order.)

B 3

S E C T.

## S E C T. III.

*Of such Rights as relate to the King's Person.*

**T**HE Rights which more immediately concern the King's Person, include these Two Things, *viz.*

1. The Manner of his Title, or Acquest thereof.
  2. The Capacities of the King.
- I.** 1. The Manner of Acquest of the Regal Title or Dignity, is either,
1. A Lawful Acquest; or,
  2. An Unlawful Acquest.

An Hereditary Acquest of Title, is by the Municipal Laws and Constitutions of this Kingdom, when the Crown descends to the next of Blood, according to the Laws and Customs of *England* in Cases of Hereditary Descents.

And here all those Rules that have been observ'd in the Law touching this Point, may be inserted.

2. An Unlawful Acquest of the Regal Title is,
1. *By Usurpation*; when a Subject by Wrong invades the Crown, or intrudes upon him that has the lawful Right thereto; as was done by King *Stephen*, King *John*, *Henry* the Fourth, and *Richard* the Third.

And

And herein may be considered what Power the Law allows to such an Ufurper, and what it denies him.

2. *By Conquest*; when a Foreigner either, *Victoria in*

1. Vanquishes the King, as *William the Regem.*  
First did *Harold*.

2. Or subjects the Kingdom; which *Victoria in*  
never happen'd with respect to *Eng- Populum.*  
*land* since the *Romans*.

The King's Capacity (as he is King) is of II.  
Two Kinds.

1. His Political Capacity.

2. His Natural Capacity.

As to his Political Capacity; he is a sole Corporation, of a more transcendent Nature and Constitution than other Corporations, whereby he is discharged from many Incapacities, which in the Case of other Persons would,

1. Obstruct his Succession, as Alienee, &c.

2. Disable his Actions, as Infancy; or  
Coverture in the Case of a Queen, &c.

Then as to his Natural Capacity, as he is King: The great Concerns of Government requiring a great Assistance to the King's Natural Capacity, the Laws and Customs of the Kingdom have furnish'd him with divers assisting Councils, which are of Two Kinds, *viz.*

1. His Ordinary Councils.

2. His Extraordinary Councils.

His Ordinary Councils are Three, *viz.*

I.

1. *Privatum Concilium*, His Privy Council.

And here may be taken in, all such Laws

## The Analysis of the Law.

as direct, bound, or limit the Privy Council, either,

1. In Matters of Publick Interest touching the King.
2. Or in Matters of Private Interest between Party and Party.
2. *Legale Concilium*, or his Council at Law ; which consisting of the Lord Chancellor, Lord Treasurer, Lord Privy Seal, Judges of both Benches, Barons of the *Exchequer*, Master of the Rolls, &c. is the King's Council of Advice in Matters of Law.
3. *Concilium Militare*, his Council in Time of War, or publick Hostility, *viz.*

1. In Matters at Land,  $\left\{ \begin{array}{l} \text{Earl Constable.} \\ \text{Earl Marshal.} \end{array} \right.$

2. In Matters at Sea, the Lord Admiral. The Jurisdiction of whom, *Vide post*, p. 14.

II. The King's Extraordinary Councils are of Two Kinds :

1. Secular or Temporal.
2. Ecclesiastical or Spiritual.

The King's Extraordinary Secular Councils are, 1. *The House of Peers* ; 2. *The House of Commons* ; in their Capacity of Informing, Advising, and Counselling the King in Matters that are,

1. Publick Benefits.
2. Publick Grievances.

And here all the Learning of Parliaments properly comes in, *viz.* The Persons of whom it consists ; the Members of each House ; the Manner of their Summons ; the Places that send Members to the House of Commons ; and how to be Qualify'd, how Elected,

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Elected, and the Qualifications of the Electors; what the Privileges of Parliament are; the Method of passing Bills, &c. and how adjourn'd, Prorogued or Dissolv'd.

The Extraordinary Ecclesiastical Councils are,

1. The Upper House } Of Convocation.
2. The Lower House }

And hither may be referr'd all Laws and Constitutions touching the Convocation.

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### S E C T. IV.

#### *Concerning the Prerogatives of the King.*

**H**AVING shewn you what Rights belong to the King's Person, we come now to those Rights which concern his Prerogatives.

And those Prerogatives are of Two Kinds:

1. Direct and Substantive Prerogatives.
2. Incidental and Relative Prerogatives.

The Direct and Substantive Prerogatives may be distributed under Three Branches, viz.

1. *Jura Majestatis, vel Summi Imperii, i. e.* The Right of Dominion.
2. *Potestas Jurisdictionis, vel Mixti Imperii, i. e.* The Power of Jurisdiction.
3. *Census Regalis*, or, The Royal Revenues.

I

Which

## The Analysis of the Law

Which I shall subdivide according to their Order.

II.

*See the Incidental and Relative Prerogatives in Sect. 9*

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### S E C T. V.

*Concerning the King's Rights of Dominion  
or Power of Empire.*

**T**HE *Jura Summæ Majestatis*, or Rights of the King's Empire or Dominion, are either,

1. In relation to his own Subjects; or,
2. In relation to Foreigners.

In relation to his own Subjects, they respect,

1. Times of Peace.
2. Times of War.

And *First*, Of the Rights of Dominion, which respect Times of Peace.

These Rights, though they are exercisable also in Times of War and Insurrection, yet seeing they do more immediately respect the Well-ordering of a Kingdom, and preserving its Peace and Tranquility, I shall here insert them : And though they are various in their Kinds, and some of them seem to refer to the Powers of Jurisdiction, yet I shall endeavour to reduce them to these Eight Heads following; *viz.*

1. His Rights in relation to the Laws.
2. In relation to Tributes and Publick Charges.
3. In

## The Analysis of the Law.

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3. In relation to the Publick Peace of the Kingdom.
4. In relation to Publick Injuries and Oppressions.
5. In relation to Publick Annoyances.
6. In relation to his constituting the great Officers of the Kingdom.
7. In relation to his ordering and regulating Trade and Commerce.
8. In supervising, regulating, and supplying the Defects of others.
- 1<sup>st</sup>, In relation to the Laws of this Kingdom :

I.

1. In the Making of Laws.
2. In the Relaxation of Laws.

*As to the making Laws*, his Right consists in three Particulars :

1. In the making of Statute Laws, or Acts of Parliament; for though the King cannot make such Laws himself without the Consent of both Houses of Parliament, yet no Law can be made to bind the Subject without him.
2. In the making of Spiritual Laws, or Canons Ecclesiastical, which, if kept within the Bounds of Ecclesiastical Cognizance, are admitted here in this Kingdom: As these Laws cannot be made without the King's Consent, so neither can the King ordain such Laws without the Clergy in Convocation assembled.

So that in both these Kinds of Laws, the King's Power of Making is only a Qualified and Coordinate Power. But,

I

3. In



## The Analysis of the Law.

3. In making and issuing of Proclamations, which in some Instances are to be taken for Laws, as in calling Parliaments, declaring War, &c. herein the King's Power is more absolute, as being made by him alone; yet the King cannot by these introduce a new Law, so as to alter or transfer Properties, or impose new Penalties or Forfeitures beyond what are establish'd by Statute or Common Law.

And as to his Power in the *Relaxation* of Laws already made, it respects either,

1. *Temporal Laws*; which being enacted by Parliament, the King cannot abrogate or annul such a Law: But in some Cases of Penal Laws, he may, in Respect of Persons, Times, or Places, sometimes dispense with them.

Here may come in all the Learning touching Dispenfations and *Non obftantes*.

2. *Ecclesiastical Laws*, wherein the King has a greater Latitude of Dispensation; for if such Laws are not confirm'd by Parliament, the King may revoke and annul them at his Will and Pleasure.

And here all the Learning of *Commendams*, *Dispensationes ad Plura*, and all Ecclesiastical Defects and Incapacities dispensed with by the King, fall under Consideration.

2dly, In relation to Tributes and Publick Charges, wherein is consider'd,

1. What

3. By

## The Analysis of the Law.

3. By pardoning them, as to the King's Prosecution.

And herein, of Pardons, what may be pardon'd, when, how, and by what Words, &c.

5thly, In relation to Publick Annoyances: For the King has the great Care thereof; and the Prosecution and Punishment of the same, as far as they are publick, is by Law committed to him.

And this is commonly exercis'd about Bridges, Ferries, Highways, &c.

Though these Particulars, and some of the foregoing, more regularly come in under *Pleas of the Crown, and Criminal Matters*, in the Second Part of this Treatise.

6thly, In Relation to his constituting great Officers, viz.

1. *Civil Officers*, as Lord Chancellor, Treasurer, Privy-Seal, Earl Marshal, Lord Admiral, Judges, &c.

And here may be consider'd,

1. The Manner of their Constitution,
2. Their Office, Business, or Employment.

2. *Ecclesiastical Officers*, as Archbishops, Bishops, Deans, Archdeacons, &c.

And here may come in,

1. The Manner of their Constitution, as their Election, Consecration, Investiture, Restitution of Temporalities, &c.
2. The Exercise of their Office, viz., How far the King may enlarge, limit, or restrain it,

7thly,

7thly, In relation to the Regulation of Trade and Commerce.

1. His Right of { Coining New Monies.  
Authenticating Foreign  
Coin.

And here comes in all Matters touching the Variety and Legality of Coins; and of Contracts, Orders, and Instructions, relating to it.

2. His Designation of Places of Publick Commerce;

As Ports, Fairs, Markets.

And here of such various Learning as relates thereto;

As how they are created { By Charter.  
By Prescrip-  
tion.

What is a good Grant thereof; and what not, if granted to the Prejudice of another; and of the Writ *Ad quod Dampnum*.

Also what is a Sale in Market Overt, and of the Effects thereof in altering Properties, &c. And of Forestalling, as when a Market may be forestalled, and when not.

3. His Right in instituting and regulating the Instruments of Publick Commerce, with Respect to

Undue { Weights.  
Measures.  
Excessive Prices,  
&c.

8thly, In relation to his supervising, regulating, and supplying the Neglects or Defects of other Magistrates;

1. Of

## The Analysis of the Law.

1. Of Civil Magistrates, } } By Writs of Error.  
                                           } } By Writs of Appeal, &c.
2. Of Ecclesiastical Magistrates ; by Devolution,

1. Of Causes by Appeal to him.

2. Of Presentations, by Lapse.

Thus far of the King's Prerogatives, with Respect to Peace : Next, of those that relate to War and Commotions.

These may be term'd *Jura Militia*, and consist,

1. In raising of Men.

2. In building of Forts.

And regard either,

1. Domestick Insurrections of his Subjects : Or,

2. Foreign Hostilities of Enemies.

1. With Regard to his Subjects,

1. He may raise Men to suppress their Insurrections by Force.

2. He may punish them by Martial Law during such Insurrection or Rebellion, but not after it is suppress'd.

2. In Relation to Foreigners : These Rights are to be consider'd, *viz.*

1. The Power of denouncing War, and concluding Peace.

And herein Leagues and Truces may be consider'd, with their various Effects.

Also what shall be said an Enemy.

2. The Authorizing of,

- 1, *Publick Envoys* :

2. Embassadors : And,

3. Plenipotentiaries,

3. The

## The Analysis of the Law.

17

3. The Power of granting or issuing Letters of Marque and Reprizal.

And herein consider the Inducements, Ends and Effects thereof.

4. The Power of granting Safe Conducts.

And here of the Uses and Effects thereof.

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## S E C T. VI.

*Of the Potestas Jurisdictionis ; or, The King's Right or Power of Jurisdiction.*

**H**itherto of the *Jura Summi Imperii*, or Rights of Empire or Dominion: Now we come to the *Jura mixti Imperii*, or *Potestas Jurisdictionis*, wherein the King generally acts by his Delegates, Officers or Representatives.

This *Potestas Jurisdictionis*, or Power of Jurisdiction, seems principally to be of Two Kinds, *viz.*

1. Extraordinary.
2. Ordinary.

The Extraordinary Power of Jurisdiction residing in the King, though for the most part exercised by his Officers and Ministers, consists in Three Things ;

1. In commanding home any of his Subjects from foreign Parts ;
2. In prohibiting any of his Subjects from going beyond the Seas :

C

1. By

1. By Proclamation.
2. By the special Writ of *Ne exeat Regnum*.
3. In commanding any of his Subjects to undertake an Office or Dignity within the Realm.

<sup>2</sup> *Inst.* 47,  
48.

And here the Learning touching these may be inserted, as where, when, and how these Commands or Instructions are to issue; and when, and in what Cases not; what the Penalty if not obeyed, and in what Manner inflicted.

The King's Ordinary or Usual Power of Jurisdiction, is of Two Kinds,

1. Ecclesiastical.
2. Temporal or Civil.

I. Ordinary Ecclesiastical Jurisdiction, or rather Jurisdiction touching Ecclesiastical Matters. As this anciently belong'd to the Crown, but was for some Time usurped by the Pope; so by the Statute of 26 *Hen.* 8. it was again restored to the Crown.

And this is of Two Kinds;

1. Voluntary Jurisdiction.
2. Contentious Jurisdiction.
1. Ecclesiastical Voluntary Jurisdiction, may be exercised by the King in several Instances relating to Ecclesiastical Matters: As,
  1. In convening Ecclesiastical Assemblies, as Synods, Convocations, &c.
  2. In such Acts of Voluntary Ecclesiastical Jurisdiction, wherein the King has a Power to concur with the Ordinary.

3. And

3. And in many Cases, to do what the Ordinary cannot do; as in constituting Appropriations, uniting of Churches, erecting Ecclesiastical Benefices or Dignities, dispensing with Irregularities, exempting from Ecclesiastical Jurisdiction, with Relation to his Free Chapels; in pardoning Crimes relating to Ecclesiastical Jurisdiction, and the Execution of their Sentences, wherein a private Interest is not concern'd; in suspending the Effects of their Sentences (even) in Causes criminal; and an infinite more of the like Nature.

This is a large Field, full of many Titles, and of various Learning.

2. As to Ecclesiastical Contentious Jurisdiction: 'Tis true, the King meddles not with it as to the Exercise thereof; for that would be both an Injury to the Excellency of his Majesty, and also a Wrong to the Subject in depriving them from their Right of Appeal, if there be Cause for the same; for if the King should be the Judge upon the first Instance, the Party cannot afterwards appeal.

And therefore, in Cases of Ecclesiastical Contentious Jurisdiction, his Power is exercised by Way of Interposition, in Three Instances, *viz.*

C 2

I. By



## The Analysis of the Law.

1. By his Power of committing
- |   |                                                                |
|---|----------------------------------------------------------------|
| { | <i>Jurisdictionem Ordinariam, Et Jurisdictionem Delegatam,</i> |
|---|----------------------------------------------------------------|

To Commissioners of his own Nomination under the Great Seal.

2. By suspending their Proceedings ; which is done, not by his immediate Authority, but the Administration of his Temporal Courts, who, by a Power derived from the King, suspend their Proceedings by Prohibition, if there be Cause.

3. By the last Devolution of Appeal ; wherein, though the King himself does not judge in Person, yet he appoints Commissioners under the Great Seal to receive and determine the Appeal.

And thus much of the King's Ecclesiastical Jurisdiction.

Now as to the Temporal or Civil Jurisdiction of the King : This, as well as his Ecclesiastical Jurisdiction, is of Two Kinds, viz.

1. Voluntary.
2. Contentious.

I. His *Voluntary Temporal Jurisdiction* consists,

1<sup>st</sup>, In erecting of Courts by his Great Seal, so that they be Courts of the Common Law ; for a Court of Equity cannot be now erected but by Act of Parliament.

2<sup>dly</sup>, In the *Erection* and *Collation* of,

1. Juris-

1. Jurisdictions.
  2. Regalities.
  3. Liberties.
  4. Franchises.
  5. Exemptions.
  6. Privileges: And,
  7. Dignities. *Viz.*
  1. In erecting and collating of *Jurisdictions*, *viz.*
    1. Exempt Jurisdictions.
    2. Non-exempt Jurisdictions.
    1. *Exempt Jurisdictions*; as the Jurisdiction of Counties Palatine, Jurisdiction not to be impleaded *extra Muros*, Conusance of Pleas, &c.
    2. *Non-exempt Jurisdictions*; as Leets, Torns, Power to hold Pleas, &c.
  2. In the Collation of *Regal Powers*; as of coining Money, pardoning Offenders, constituting Justices, &c.
- But see how far these are resumed by Stat. 28 H. 8.
3. In the Collation of *Liberties*, as Forests, Parks, Chafes, Warrens, Ferries, Gaols, Return of Writs, Ports of the Sea, Fairs, Markets, Tolls, and many others of like Nature.
  4. In the Collation of Franchises, as creating of Free Boroughs, giving Power of sending Burgesses to Parliament, creating and dividing Counties, erecting of Corporations.
  5. In *Exemptions* of all Kinds; as from Suit at the County, Torn, or Hundred Court; also from serving on Juries,

## The Analysis of the Law.

and from paying Tolls, Customs, Subsidies, &c.

6. In the Collation of *Privileges*; as En- denization of Aliens, Privileges against Arrests and Imprisonment, and En- franchising Villeins by his Presence formerly.
7. In the Creation and Collation of *Dig- nities*; as Dukes, Marquesses, Earls, Viscounts, Barons, &c.

And thus far of the King's Temporal Vo- luntary Jurisdiction.

II. As to the King's *Temporal Contentious Jurisdiction* before mentioned: This is not exercised by the King in his own proper Person, for the Reasons before given in the Head of *Ecclesiastical Contentious Jurisdiction*; for though Instances have been of the King of *England* sitting in the Court of *King's Bench*, and though the Stile of that Court is *Coram Rege*, and the Chief Justices there were anciently called *Locum Tenentes Domini Regis*, yet when the King sat there in Per- son, the Judgment or Opinion of the Court was always given by the Justices.

The King always exercises this *Contentious Temporal Jurisdiction* by his Judges or Justices, which he creates or constitutes Four Ways:

1. *By Writ*, as the Chief Justice of the *King's Bench*.
2. *By Patent*, as the ordinary Judges of the Establish'd Courts at *Westminster*.
3. *By Commission*, as Justices of *Oyer and Terminer*, *Gaol-delivery*, *Affize*, and *Nisi prius*. *Vide infra*.
4. *By*

4. *By Charter*, as the Judges in Courts of Corporations and inferior Courts.

S E C T. VII.

*Concerning the Censu Regalis ; or, The King's Royal Revenue.*

**I** Come now to speak of the *Censu Regalis*, or the King's Royal Revenue : And here I shall not say much of his Houses, Manors, Lauds, Fee-Farms, or Free Rents, because these are common to him with other Persons; but I shall only speak of his Royal Revenue, or *Censuales Prærogative*, and that *Censu Regalis*, of which the Law takes Notice as of common Right belonging to him, as he is King.

And the Kinds of those Revenues are Two, *viz.*

1. Ecclesiastical.
2. Temporal.

His Ecclesiastical Revenues are of Two Kinds ;

1. Extraordinary.
2. Ordinary.

1. His *Extraordinary* Revenues Ecclesiastical are those Subsidies and Tenths, and other Ecclesiastical Supplies granted occasionally by the Clergy in their several Convocations.

*Note ;* In those *Occasional Supplies* the Law takes Notice, That the King has an

## The Analysis of the Law.

Inheritance, though depending upon the Bounty of his Subjects, and therefore he may grant an *Exemption* from them; as likewise he may do to particular Persons from Temporal Subsidies hereafter mentioned for the same Reason.

2. His *Ordinary* Revenues Ecclesiastical are likewise of Two Kinds;
  1. Constant or Annual.
  2. Contingent or Casual.

The *Constant* or *Annual* Revenue Ecclesiastical, is his Tenths of Ecclesiastical Benefices, Extraparochial Tithes, and some other Things of Ecclesiastical Nature, that possibly might come to him by the Dissolution of Monasteries.

Hither may be referr'd Proxies, (Procurations,) Pensions, Tithes, Appropriations, &c.

The *Casual* or *Uncertain* Ecclesiastical Revenues are,

1. His First Fruits of all the Ecclesiastical Benefices; settled in him by Stat. 26 H. 8.
2. The Temporalities of Bishops; which though they are in the Crown by reason of the King's Right of Patronage, yet I may call them *Spiritual*, because they are Part of the Revenues of an Ecclesiastical Corporation: And on the same Reason.
3. *Corrodies* also; as being of the Foundation of Ecclesiastical Corporations.

I

4. And

4. And also *Lapse* itself; which though it be not reckoned a Revenue, because not to be sold, yet it is equivalent to a Revenue; for it yields a Preferment for his Clerk.

## S E C T. VIII.

### *Of the King's Temporal Revenue.*

I Come now to that Part of the King's *Census Regalis* which I call *Temporal*: And this is likewise of Two Kinds;

1. Extraordinary.
2. Ordinary.

1. The *Extraordinary* Temporal Revenue may be further divided into,

1. The Ancient.
2. The Modern.

The *Ancient* Temporal *Extraordinary* Revenues are of several Kinds, as, Rushw.  
Coll. Vol. 1.  
p. 481.

1. Hidage, Cornage, Scutage.
2. Aids: *Ad Corpus redimendum, Ad filium primogenitum Militem faciendum, Ad filiam primogenitam Mariandam.*

The *Modern*, are the Subsidies and Supplies granted by Parliaments.

2. The *Ordinary Census Regalis Temporalis* is also of Two Kinds, viz.

1. Common.
2. Special.

1<sup>st</sup>, The

## The Analysis of the Law.

## I.

1<sup>st</sup>, The *Common Censur Regalis Temporalis* is either, Certain, or Casual.

1. *Certain*; as his *Rents* and *Demesns*, which are either,

1. Newly acquir'd by Dissolution, Surrender, Exchange: Or,

2. Ancient; as, *Antiqua Dominia Coronæ*, i. e. Ancient *Demesns*.

Here insert what they were, what the Tenants Privileges were, &c.

2. The *Casual Ordinary Temporal Revenues*; as,

Profits of his Tenures, and the like.

## II.

2<sup>dly</sup>, The *Special Ordinary Censur Regalis*; which in its Original was annex'd to the Crown for the Support of the Kingly State and Dignity; and this is of several Kinds, viz.

1. *Purveyance*, or Buying at the King's Price; which is since taken away.

2. *Prisage*, i. e. One Tun of Wine for every Ten Tuns laden in every Ship; and from Aliens, in lieu thereof, Two Shillings for every Tun.

Here add who are exempted from *Prisage*, &c.

3. *Customs*, great and small, *Magna & Antiqua Custuma*.

4. *Bona Vacantia*, as Waifs, Strays, *Wreckum Maris*.

5. *Royal Fish*, as Whale and Sturgeon.

6. *Bona Forisfacta, vel Confiscata*; as,

1. *Bona Felonum, vel Felonum de se*.

2. *Bona Fugitivorum*.

3. *Bona Uilagatorum, & in Exigendis possitorum,*

7. *Royal*

7. *Royal Escheat* ; as
  1. *Terræ Normannorum.*
  2. *Terræ Alienigenorum.*
  3. *Terræ Proditorum.*
8. *Royal Mines.* 2. *Inst.* p. 576, 577.
9. *Maritime Increases*, by reason of *Illuvio Maris.*
10. *Profits of his Courts* ; as,
  1. His Fees of the Seal.
  2. Fines upon Original Writs.
  3. Post-Fines, or Fines *pro Licentia Concordandi.*
  4. Fines for Misdemeanors, and those are either *Common* or *Royal.*
  5. Common Fines on Vills, Townships, or Hundreds, for the Escape of Murderers, Felons, and the like.
  6. Amerciaments.
11. *Custody of Ideots and Lunaticks Lands*: *vide* § 1. The latter upon Account, not so the former.
12. *Profits of his Forests.*
13. *Treasure Trove.*

## S E C T. IX.

### *Of the Relative Prerogatives of the Crown.*

**T**HUS far have I gone with the *Direct* or *Substantive Prerogatives* of the Crown: Now I come to those that are *Dependant* and *Relative*, which are of several Kinds, *viz.*  
*The*



## The Analysis of the Law.

### The Prerogatives :

1. *Of his Presence*, in relation to Breach of the Peace, Seizure of Villeins, Arrests, &c.
2. *Of his Possessions*: That no Man can enter upon him, but is driven to his Suit by Petition. And here of *Traverse*, *Monstrans de Droit*, *Amoveas Manus*, &c. when, in what Cases, and how to be brought.
3. *Of his Demesns*. The Rights and Exemptions of *Ancient Demesn*. *Vide supra*, p. 26.
4. *Of his Grants*, how to be expounded.
5. *Of his Suits*; as,
  1. In what Courts, and Election of Courts.
  2. In what Writs.
  3. In his Procefs.
  4. In his Pleadings.
  5. In his Judgments.
  6. In his Executions.
6. *Of his Debtors and Accountants*, in their Debts and Accounts.
7. In relation to *his Treasure*, and of his Officers employed therein.
8. In relation to *Persons related to him*; as,
  1. His *Queen Consort*; and here of her *separate Capacity*, her *Revenue*, *Aurum Regina*.
  2. His Children; his eldest Son, eldest Daughter, &c.
  3. His Ministers attending his Person, or his Courts, or his publick Service,

And

And herein,

1. Of Privilege.

2. Of Protection.

And thus I have gone through the *Analysis*, or Scheme of the King's Prerogative; by which (though it be but hastily and imperfectly done) may be seen, of what vast Dimension this one, though great, Title of the Law is, and what a vast Number of great and considerable Titles fall into it; insomuch, that if I should pursue any one of these subordinate Titles, though it might seem but narrow, and here express'd but by a Word or Two. as *Wreck, Waif, Toll, Custom, &c.* there is not one of these, but in the bare *Analysis* of it, and of the several Incidents and Rivulets that would be found to fall into it, would grow as large as this brief Abstract of this great Head has done, and it may be much larger, as the *Capillary Veins* and *Arteries* in the Body take up more Room and Extension than the great Trunks, out of which their small Ramifications are drawn.

## S E C T. X.

*Of the Subordinate Magistrates: And First of Ecclesiastical.*

**T**HUS far of the *Supream Magistrate*, and of the *Rights* annex'd to him by reason of his Office: The next Consideration

## The Analysis of the Law.

tion is of *Subordinate Magistrates*, which I shall consider in the same Method as the former, *viz.* not only in their own Persons, but also in those *Rights* they have annex'd to them by reason of their Offices or Magistracy.

All *Subordinate Magistracy* is derived from the *Supream*, either immediately or mediately, either by express *Grant* from him, or by something that implies or supposes it in its Original, *viz.* *Custom* or *Prescription*: And this Magistracy may be distinguish'd into these Kinds, *viz.*

1. Magistrates Ecclesiastical.
2. Magistrates Temporal.

I. Ecclesiastical Magistrates: Such namely as have a Jurisdiction annex'd, are of Two Kinds;

1. Ordinary.
2. Extraordinary.

The *Ordinary* Ecclesiastical Magistrates are also of Two Kinds, *viz.*

1. Such as have Ecclesiastical Jurisdiction annex'd to their Places and Offices primarily and originally, as Archbishops, Bishops, Archdeacons.
2. Such as have their Jurisdiction by Substitution and Delegation from them, as Chancellors, Officials, Surrogates, Vicars General, Guardians of the Spiritualities, &c.

The *Extraordinary* Ecclesiastical Magistrates, are certain Persons appointed by the King's Commission for hearing and determining Matters of Ecclesiastical Cognizance

nuzance (the King being supream Head in Matters Ecclesiastical.) And this is either,

1. In the first Instance, such as were anciently *Commissioners* in *Matters Ecclesiastical*, either *ad universalitatem Causarum*, or in particular Cases.
2. In the second Instance, as *Commissions of Appeal*, and of *Review*.

And because those Magistrates have Ecclesiastical Jurisdiction annexed, here might be brought in the whole Particulars thereof, and amongst 'em principally these, *viz.*

1. In Matters of *Crime*, as Adultery, Fornication, Incest, &c.
2. In Matters of *Interest*, as,
  1. *De Testamentis & Administratio- num Commissione*. (Here of that Matter.)
  2. *De Matrimonio & Divortio*: And here, who may marry, what is a lawful Marriage; the Kinds of Divorces, and their Consequences or Effects;
    1. In Dissolving, or not.
    2. In Bastardizing, or not.
3. In Cases of general *Bastardy*, when written to by the Temporal Courts.
4. In Cases of Tithes.
5. In Cases of Dilapidations.
6. In Cases of Ability of Clerks, Institution, Destitution or Deprivation, Suspension, Sequestration, &c. of Ecclesiastical Benefices.

7. Of

## The Analysis of the Law.

7. Of the Difference between *Jurisdiction Voluntary*, as Admissions, Institutions, Probate of Wills, Commission of Administrations, and *Contentious Jurisdiction*.
8. Of their Sentences and Coertion, namely *Excommunication*, and the Effects thereof, in reference to,
  1. Disabling the Party.
  2. Imprisoning the Party.
9. The Method of restraining the Exceeding of their Jurisdiction;
  1. By Prohibitions.
  2. By *Præmunire*.
10. The Means of Redressing their Errors,  
By *Appeal*: The Method and Effects thereof.
11. Of the several Courts belonging to their several Jurisdictions; as,  
To Archbishops, their Court of Audience, Prerogative Court, and Court of Arches.  
To Bishops, their several Consistories, and Chanceries, their Chancellors, &c.
12. Their Power of Visitation. To what it extends :
 

|                           |   |            |
|---------------------------|---|------------|
| To Corporations           | } | Spiritual. |
|                           | } | Lay.       |
| When to Hospitals.        |   |            |
| When to Universities, &c. |   |            |

## S E C T.

S E C T. XI.

*Concerning Temporal Magistrates.*

**T**HE Temporal Magistrates are of Three Kinds, *viz.*

1. Military.
  2. Maritime.
  3. Civil, or Common Law Magistrates.
1. The *Military*, were the Constable and Marshal, whose Power (as far as the Common Law takes Notice of it) consisted of Two Parts, *viz.*
1. Of a Kind of *Mixtum Imperium*, which principally was for the Preservation of Peace, and Ordering the Army in Time of War.
  2. A Jurisdiction belonging to their Court Martial: Whereof before.
2. The *Maritime*, is the Admiral, and those deriving Power under him. Their Power likewise consists of,
1. A Kind of *Mixtum & Subordinatum Imperium* over the Officers and Seamen, especially in the King's Fleets and Yards.
  2. *Potestatem Jurisdictionis*, in relation to Matters arising upon the High Sea.
- And here of the Admiral's Jurisdiction, and the Remedy, if he exceeds in it;
1. By Prohibition.
  2. Action on the Stat. 2 H. 4.

D

3. The

## The Analysis of the Law.

3. The *Common Law*, or *Civil Magistrate*; I mean such as are instituted either by the *Common Law*, by Statute, or by Custom: These, in relation to Things Temporal, are various.

And because these Magistrates consist not only of natural Persons, as they are such, but of natural Persons constituted in some Degree of Empire, Power, or Jurisdiction; here will aptly fall in the Diversity, the Jurisdiction and Powers of the several Courts, and of the Officers, both Ministerial and Judicial. These, though I shall not prosecute in all their Branches and Extents, yet I shall give some short Account of them, *viz.*

The Subordinate Civil Magistrates are of Two Kinds:

1. Such as have not only a *Civil Power*, which I may call *Potestatem mixti Imperii*, but also have a Power of Jurisdiction.
2. Such as have a Kind of *Civil Power*, or *Mixtum Imperium*, but without Jurisdiction. *Vide Sect. 12.*

1. As to the former:

*The Persons* that exercise this Power or Jurisdiction, are called *Judges*, or *Judicial Officers*.

*The Places* or *Tribunals* wherein they exercise their Power, are called *Courts*.

And the *Right* by which they exercise that Power, is called *Jurisdiction*.

This

This therefore yields us these Considerations.

*The Courts themselves*, what they are, how they are constituted.

*What their Jurisdiction is*, and the Extent thereof.

*Who the Judges are*, and how made, whether by Commission, Charter, Prescription, Custom, or by Course of the Common Law.

1. The Courts are of Two Kinds;

1. Courts of Record.

2. Not of Record.

*First, Of Courts of Record*, there is this Diversity, *viz.*

1. Supream.

2. Superior.

3. Inferior.

*1st*, The *Supream Court* of this Kingdom is the High Court of Parliament, consisting of the King, and both Houses of Parliament.

*2dly*, Those Courts I call *Superior*, are indeed of several Ranks and Degrees, and every one nevertheless are to keep within the Bounds and Confines of their several Jurisdictions by Law assign'd them. And they are,

1. More Principal.

2. Less Principal.

1. The *more Principal* are,

The Courts of the Lords House in Parliament.



## The Analysis of the Law.

The Great Courts at } *Chancery,*  
*King's Bench,*  
*Westminster ; as,* } *Common Pleas,*  
*Exchequer.*

Justices Itinerant, } *Ad Communia*  
*Placita,*  
*Ad Placita Fo-*  
*restæ.*

2. The *less Principal*, are such as are held,

1. *By Commission.* } *Gaol-delivery,*  
*Oyer & Terminer,*  
*Affize,*  
*Nisi prius,*  
*And divers others.*

2. *By Custom, or* } As the Courts } *Lancaster*  
*Charter :* } of the Coun- } *Chester,*  
*ties Palatine of* } *Durham.*

3. *By Virtue of Act of* } *Grand Sessions,*  
*Parliament, and the* } *Sewers,*  
*King's Commission :* } *Justices of*  
*As the Courts of* } *Peace,*  
*And divers*  
*others.*

3dly, *Inferior Courts of Record.* Tho' there  
 be a Subordination of most Courts to  
 some other, yet for Distinction's Sake  
 I shall call those *Inferior Courts* which  
 are ordinarily so called ; as,  
*Corporation Courts.*  
*Courts Leet.*  
*Sheriffs Torns.*

*Secondly, Courts not of* } *Courts Baron,*  
*Record* are divers : As, } *County Courts,*  
*And others.*

But

But I am not solicitous of pursuing this Matter of *Courts* and their *Jurisdiction* overlargely; because all the Learning of them is already put together in the *Treatises* of *Crompton*, my Lord *Coke*, and others, who have written of the *Jurisdiction of Courts*.

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## S E C T. XII.

### *Of Inferior Magistrates, Sine Jurisdictione.*

**I**T now follows, that somewhat be said of those Magistrates that have a certain *Imperium*, but without *Jurisdiction*; and these are called *Ministerial Officers*.

Some Officers indeed are simply Ministerial, as Clerks and Officers in Courts, *Custos Brevium*, Prothonotaries, the Remembrancers and Chamberlains of the *Exchequer*, &c.

But these, though they have a Superintendency over their Subordinate Ministers, and a Ministerial Administration in Courts of Justice and elsewhere, I shall not meddle with in this Place, but refer them to the several Courts to which they belong.

For those that I here intend are of a more publick and common Kind, and are principally these, viz.,

1. *The Sheriff of the County*, who is the greatest Ministerial Officer; and I therefore call him a Magistrate, because he is a Conservator of the Peace

## The Analysis of the Law.

of the County, and executes the Pro-  
cesses of the King's Courts.

Here are considerable,

How constituted :

How discharged :

What his Power, his Office, his  
Duty.

This is a large Subject : See those  
that have written of this Office.

2. *Mayors of Corporations.* And here of  
Heads and Governors of Colleges, &c.

3. *Constables, and Head Constables.*

These, though they have not any Ju-  
risdiction to hold Conuzance of any  
Fact, yet are Conservators of the Peace,  
and have a Kind of *Mixtum Imperium*  
relative to it.

4. *Bailiffs of Liberties, Serjeants of the Mace,*  
and all that have a Power vested in  
them by Law for the Execution of  
Justice, are within the Precincts and  
Extents of their several Offices a Kind  
of Magistrates; for a Subjection is by  
Law required of others to them, in re-  
lation to that Power wherewith they  
are invested, and the Execution there-  
of.

Thus far of Magistrates both *Supream* and  
*Subordinate*, and the several *Rights* that are  
*Intuitu* & *sub ratione Officii* annex'd to them.

S E C T.

S E C T. XIII.

*Of the Rights of the People or Subject.*

**H**AVING gone thro' the Distribution of *Magistrates*, I come now to the other Term of Relation, namely, of *Subjects*.

And the *Rights* of *Subjects* are of these Two Kinds, viz.

1. *Rights of Duty*, to be perform'd.
2. *Rights of Privilege*, to be enjoy'd.

1st, As to the First of these, they are such *Duties* as are to be paid or perform'd by them; either, I.

1. To the King, as *Supream Executive Magistrate*: Or,

2. To *Inferior* or *Subordinate Magistrates*.  
The *Rights* or *Duties* to be perform'd by the People to the King himself, are,

1. *Reverence* and *Honour*, *Fidelity* and *Subjection*.

All which come under the Name of *Allegiance*; and the Extent of this is declared, and Assurance thereof given, by the Oaths of *Allegiance*, &c. of *Supremacy* by 1 *Eliz.* of *Obedience* by 3 *Jac.* 1.

2. *Payments of those Rights and Dues*, Customs, Subsidies, &c. which either by the Common Law, or by Act of Parliament, are settled on the King.

The *Rights* to be perform'd to *Inferior Magistrates*, are,

D 4

1. *Reve-*

## The Analysis of the Law.

1. *Reverence and Respect* to them, according to their Place and Authority.
2. A *just Subjection* to their lawful Power and Authority, as far as by Law it extends.

### II.

*2dly*, The *Rights* and *Liberties* to be enjoy'd by the People, both in relation to the King, and all his *subordinate* Magistrates, are,  
That they be protected by them, and treated according to the *Laws* of the Kingdom, in relation to,

1. Their Lives.
2. Their Liberties.
3. Their Estates.

And here falls in all the Learning upon the Stat. of *Magna Charta*, and *Charta de Foresta*, which concerns the *Liberty* of the Subject, especially *Magna Charta*, cap. 29. and those other Statutes that relate to the Imprisonment of the Subject without due Process of Law, as the Learning of *Habeas Corpus's*, and the *Returns* thereupon;

Where the Party is to be bailed,

Where to be remanded.

Where to be discharged.

Hither also refer those *Laws* that relate to Taxes and Impositions; as,

2 *Inst.* 59.

3 *Ca.* 1.

The Stat. *De Tallagio non concedendo*.

The Petition of *Right*, &c.

Also, the Statutes and Laws concerning *Monopolies*.

Commissions of *Martial Law*.

Commitments by the Lords of the *Council*.

And concerning the *Trial* of Mens Lives,  
Liberty

Liberties, or Estates; otherwise than according to the known *Laws* of the Land.

These, and many more of this Nature, are common Heads of those *Liberties* and *Rights* that the People are to enjoy under the Magistrate.

And thus far concerning the *Capita Legis*, in Reference to the *Political Relation* of the Magistrate, both *Supream* and *Subordinate* of the one Part, and the *Subditi* or *Subject* on the other Part: For though *Subject*, in a more strict and peculiar Sense, is the Correlative of the Prince; yet in a more large and comprehensive Sense, it is a Correlative to any *inferior* Magistrate also, according to a more limited and restrained Subjection.

## S E C T. XIV.

*Of the Rights of Persons under Relations Oeconomical: And first, of Husband and Wife.*

**T**HUS far of the *Rights* of Persons under a *Political Relation*: Now concerning the *Rights* of Persons under a *Relation Oeconomical*.

And they are these three Pairs;

1. Husband and Wife.
2. Parent and Child.
3. Master and Servant.

And I shall here *note* once for all, That in *Oeconomical Relations*, as in the former, I shall not only take in the Persons themselves,  
but

## The Analysis of the Law.

but also those *Jura Rerum* that concern them under that Relation; which though they may be of a distinct Consideration under *Jura Rerum*, yet in this, and what follows, I shall (as before I have done) take in those *Jura Rerum* that have a Kind of Connexion with the *Jura Personarum*, under their several Relations.

In the Consideration of this Relation of *Husband* and *Wife*, are these Things considerable, *viz.*

1. In relation to the Persons themselves.
  2. In relation to certain Connexes, Consequences, or Incidents, belonging to Persons under this Relation.
- I. 1<sup>st</sup>, As to the former, these *Capita Legis* and legal Enquiries fall in, *viz.*
1. The Persons that by Law may intermarry, the Limits whereof are prescribed by the Stat. 31 H. 8. restraining it to the Degrees prohibited by the *Levitical* Law.  
And yet a Marriage within those Degrees is not void, but voidable by Sentence of *Divorce*.
  2. The Age of *Consent* to the Marriage:  
In the Male, Fourteen.  
In the Female, Twelve.  
*Note*, The *Effects* of Marriages *infra Annos Nubiles*.
  3. The *Differences* of Marriages; as,  
*A Marriage de Facto*.  
What is requisite to the Constitution thereof;

And

And what Effect it has.

And a Marriage *de Jure*,

What it is, and the Effects:

And how each may be tried.

4. What *dissolves* the Marriage.

And here of Divorces, *viz.*

*Co. on Lit.*

235. 2.

1. *A Mensa & Thoro* only; as,

1. *Causa Adulterii.*

2. *Causa Sævitiæ.*

2. *A Vinculo Matrimonii*; as,

1. *Causa Consanguinitatis vel Affinitatis.*

2. *Causa Præcontractus.*

3. *Causa Frigiditatis.*

And here the *Effects* of such Divorce,

In relation { To the Parties themselves.  
                  { To their Children.

2dly, 'The Second Thing is, in relation II.  
to those *Incidents* and *Consequences* that arise  
upon the Intermarriage, *viz.*

1. What Things the Husband acquires by 1 *Rel. A-*  
the Intermarriage, *viz.* brid. 342.

Personal *Things* in Possession.

Real *Chattels* to dispose.

And here,

What shall be a Possession,

What a Disposition.

2. What Things he acquires by the Death  
of his Wife:

1. In relation to Chattels real;

By *surviving* her. *Vide Sect. 33.*

2. In relation to Inheritances; as,

*Tenant by the Curtesy*, if he have Issue  
inheritable by her.

Here of *Tenants by Curtesy.*

*Bacon's*

Hist. 105.

3. What



## The Analysis of the Law.

3. What Things he acquires not by the Intermarriage, or Death.

*Note*, Personal Things in Action, are in him to discharge by the Marriage; but not to enjoy them by Marriage, or Death, unless he be her Executor or Administrator.

4. What Acts of the Husband during the Marriage bind the Wife.

And here of Discontinuances.

5. What Acts of the Wife during Coverture bind the Husband, and what not.

And here of

Her Contracts,

Her Wills,

Her Receipts.

6. What Acts bind herself, and what not.

And here of Fines by Judgment against her.

7. What the Wife acquires by the Marriage or Death of the Husband.

1. In relation to Honorary Titles and Precedence.

2. In relation to Inheritances.

And here of *Dower*, the Kinds of it, When and how due.

Also of *Quarantine*.

3. In relation to Chattels.

Here *De rationabili parte Bonorum*.

And *Bona paraphernalia*.

8. Remedies by the Wife against the Husband,

1. In *Casu Sevitiæ*.

2. In *Casu Alimonie*.

Either

Either in the Spiritual Court :  
Or Temporal.

9. In what Actions they must sever.  
In what they may join or sever.
10. What Relation of *Proximity* either has  
to the other in case of Survivorship, as  
to the Administration of each other's  
Goods.

## S E C T. XV.

*Concerning the Relation of Parent and Child.*

**I** Come now to the Second *Oeconomical Relation*, *i. e.* *Father*, or *Mother*, and *Children* ; and therein we are to consider,

### I. The Father's Interest in the Child :

1. In his *Custody* or *Wardship*.
2. In the *Value* of his Marriage.
3. In his *Disposal*.

The Father has the *Disposal*.

1. Of his Child's *Education*.
2. Of his *Custody* to another.

*Vide* the late Act, how far the Mother, surviving the Father, is interested in those *Rights*.

### II. The Child's Interest in the Father or Mother,

To be maintain'd by him in case of Impotency, by Stat. 43 *Eliz.*

### III. The reciprocal Interest of each :

Whereby they may,

1. Maintain each other's Suits.

2. Ju-

## The Analysis of the Law.

2. Justify the Defence of each other's Persons.

1 Sid. 114,  
115.

Here inquire how far forth the Grand-child, after the Death of the Father, is a Child within these Considerations.

### S E C T. XVI.

*Of the Relation of Master and Servant.*

**T**ouching the third *Oeconomical Relation*, of Master and Servant, little is to be said.

But here consider,

1. The *Kinds* of Servants.
2. The *Nature* of Retainers.
3. The *Acts* that may be done reciprocally by the Master or Servant to each other,
  1. In maintaining their Suits.
  2. In defending their Persons.

### S E C T. XVII.

*Concerning Relations Civil.*

**I** Have done with *Relations Political*, and also *Oeconomical*, and therefore come now to those which I call *Civil*; though, 'tis true, that

that Term in a general Acceptation, is also applicable to the Two former Relations.

But in a limited and legal Sense I distinguish *Civil Relations* into four Kinds, viz.

1. *Ancestor and Heir.*
2. *Lord and Tenant.*
3. *Guardian and Pupil.*
4. *Lord and Villein.*

## S E C T. XVIII.

### *Concerning Ancestor and Heir.*

**T**HIS Relation I made distinct from that of *Parent and Child*, because many Persons are *Ancestors*, as to the Transmission of Hereditary Successions, that are not Parents; and many inherit as *Heirs* that are not Children to those from whom they inherit. And although the Business of Hereditary Successions will fall in hereafter, when we come to speak of the *Jura Rerum*, and the Manner of transferring of Properties, yet I shall mention it here also. And first, consider,

- I. Who cannot be Ancestor or Heir.
1. A Bastard may be *Ancestor* in relation to his own Children, or their Descendants, but not to any else.

But a Bastard cannot be *Heir*.

*Ante p. 4.*

Add here, of *Bastards*;

Who a Bastard by the Laws of England.

By

## The Analysis of the Law.

By what Name he may take : By Purchase, &c.

2. In a right ascending Line, the Son is not an Ancestor to transmit to his Father or Grandfather by Hereditary Succession.
3. The Half-blood is an Impediment of Descent, *viz.*  
Of Lands;  
Not of Dignities.

*Inf. Sect.*  
30, 33.

- II. Who may be *Ancestor* or *Heir*.  
And here all the Rules of *Hereditary Successions* may come in: Whether,
1. In *Linea Descendente*, from Father to Son, or Nephew.
  2. In *Linea Ascendente*, from Nephew to Uncle.
  3. In *Linea Transversali*, from Brother to Brother.

## S E C T. XIX.

*Concerning Lord and Tenant.*

**U**nder the Relation between *Lord* and *Tenant*, these Titles fall, *viz.*

- 1st, The *Tenure itself*:  
What it is;  
How created :  
What the Fruits thereof.

*Inf. Sect.*  
24.

1. *Rent* :  $\left\{ \begin{array}{l} 1. \text{ Service.} \\ 2. \text{ Charge.} \\ 3. \text{ Seck.} \end{array} \right.$

2. *Services*

2. Services of Two Kinds:
    1. Of *Common Right* incident to *Tenures*; as,  
Fealty:  
What it is.
    2. *Conventional Services*; as,  
Homage,  
Knights Service,  
Grand or Petit Serjeanty.
  - 2dly, Certain Perquisites arising from it;  
as,  
Wardship;  
Marriage;  
Escheat;  
Relief;  
And also Escheat, which is either,  
*Ex defectu Sanguinis*, for want of *Postea*,  
Heirs: Or, *Sec. 33.*  
*Ex Delicto Tenentis*, as by Attainder.
- And these several Titles may be branched into exceeding many Particulars.

## S E C T. XX.

### *Concerning Guardian and Pupil.*

**T**HE Third Sort of *Civil Relations* are *Pupil* and *Guardian*. And herein are considerable,

- I. With respect to the *Guardian*, what and how many Sorts of *Custodies* there are: As, 3 Co. 37. b.
  1. *Guardian* by Nature, the Father;

E

And

## The Analysis of the Law.

And in some } The Mother.  
Respects, } The Grandfather.

*Quere*, In what Cases, and to what Intents.

2. *Guardian* by Nurture.

3. *Guardian* by Socage:

Who shall be;

For how long Time.

4. *Guardian* by Knights Service.

*Vide Sect. prox' supra.*

II. With respect to the *Pupil* or *Heir*, is considerable;

1. When he shall be said of full Age

1. By Common Law.

2. By Custom.

2. What he is enabled or disabled to do:

1. In relation to Lands.

2. In relation to Goods or Contracts.

And here,

Where he shall be bound;

Where not.

These may come in here, but more properly before, under *Capacity*, *Sect. I.*

## S E C T. XXI.

*Of Lord and Villein.*

**T**HIS Title is at this Day of little Use, and in Effect is altogether antiquated; and therefore I refer myself herein wholly to *Littleton*.

S E C T.

S E C T. XXII.

*Concerning Persons or Bodies Politick,  
i. e. Corporations.*

**I** HAVE done with the *Jura Personarum Naturalium*, consider'd under their several Relations, *Political*, *Oeconomical*, and *Civil*; and therefore I now come to *Persons Politick*, or *Corporations*, that is, *Bodies created by Operation of Law*.

I. The Highest and Noblest *Body Politick*, is the King, who though he be a *Body Natural*, yet to many Purposes is also a *Body Politick* or *Corporate*, as has been already shewn, and shall not now resume. Therefore *Bodies Corporate*, in respect of the Nature of them, I divide into Two Kinds, *viz.*

1. Ecclesiastical.
2. Temporal.

I. *Ecclesiastical Corporations* are distinguish'd in their Constitution, thus; *viz.*

1. In the Title of it.
2. In the Manner of it.
3. In the Nature of it.

1. In the *Title* of their Constitution, they are,

1. By Prescription.
2. By Charter; as all new *Ecclesiastical Corporations*, founded within Memory, are.

2. In the *Manner* of their Constitution, they are,

E 2

1. Ele-



## The Analysis of the Law.

1. Elective.
2. Presentative.
3. Donative.

And here,  
Of Institution.  
Induction.

By whom to be made;  
And when;  
And the Effects thereof.  
Also of *Lapse*,  
And *Devolution*;  
When, and how.

3. In the *Nature* of their Constitution,  
they undergo many *Diversifications*, and  
are,

1. *With Cure*, as Parson, Vicar, &c.  
*Without Cure*, as Prebend.
2. *Regular*, as Abbot, Prior.  
*Secular*, as Master of Hospital,  
Parson, Vicar, &c.
3. *With Dignity*, as Bishops, Deans,  
Chancellors; or,  
*Without Dignity*, or *Simple Benefices*,  
as Parson, Vicar, Prebend.
4. *Sole*, as Bishop, Dean, Parson,  
Vicar, Prebend; or,  
*Aggregate*, as Dean and Chapter,  
Master and Confraternity.

And under every of these Distinctions,  
the following Connexes fall in, and are  
considerable, viz.

1st, How they may *acquire*;  
And what is requisite thereto.

1. By *Charter* or *Deed*.
2. By *Licence* to purchase in *Mortmain*.

2

And

And here of *Mortmain*, which is equally applicable to all Sorts of Corporations, whether *Ecclesiastical* or *Secular*.

2dly, How they may *alien*.

Here fall in the several *Disabling* Statutes of 1st, 13th, and 18th of *Eliz.* and the *Enabling* Statute 32 *H. 8. &c.* and what *Circumstances* and *Qualifications* are requisite to enable such Alienations: And if by *Demise*, or otherwise.

3dly, How they are *dissolv'd*, and the *Effects* of such Dissolutions; as,

What becomes of

*Their Lands;*

*Their Goods.*

And this is likewise applicable to *Lay Corporations*.

II. Now as to *Temporal* or *Lay Corporations*;

They are of Two Kinds:

1. *Special Corporations*, i. e. erected to some *Special Purposes*, as where the Grant is to a Monk, or to the *Good Men* of *If-lington* in Fee-Farm.

So Church-wardens are, by the Common Law, a *Special Corporation* to take Goods or personal Things to the Use of the Parish.

2. *General Corporations*; which are distinguish'd thus;

1. In respect of the *Title* of their Corporation,

1. By Charter.

2. By Prescription.

## The Analysis of the Law,

2. In respect of their *Quality* or *Condition*, they are either,

1. *Sole*, as the Chamberlain of *London*, as to Bonds taken by him for the Use of Orphans, is a *Sole Corporation*.

2. *Aggregate*, as Mayor and Commonalty, Master and Scholars, Master and Confreres of an Hospital, &c.

And here,

The Manner of their *Visitation*:

And by whom.

3. In respect of the *Rules* of their Constitution, where the Members are,

1. Elective.

2. Donative.

And as common *Inciducts* to Corporations are considerable,

1. How they are *dissolvable*.

By *Quo Warranto*.

2. The *Effect* of such Dissolution.

3. How the particular Members are removable.

4. Their *Remedy*, if wrongfully remov'd.

By *Mandamus*.

And here comes in the Learning of *Writs of Restitution* in the *King's Bench*, of Persons unduly disfranchis'd.

Hitherto of the *Distribution* of the Heads and Branches of the *Law* touching the *Jura Personarum*, or *Rights of Persons*.

S E C T.

## S E C T. XXIII.

*Concerning the Jura Rerum, and the  
General Division thereof.*

**H**AVING done with the *Rights of Persons*, I now come to the *Rights of Things*. And though according to the usual Method of Civilians, and our ancient Common Law Tractates, this comes in the second Place after the *Jura Parsonarum*, and therefore I have herein pursu'd the same Course, yet that must not be the Method of a young Student of the Common Law, but he must begin his Study here at the *Jura Rerum*; for the former Part contains Matter proper for the Study of one that is well acquainted with those *Jura Rerum*.

And although the Connexion of *Things* to *Persons* has in the former Part of these *Distributions* given Occasion to mention many of those *Jura Rerum*, as particularly annex'd to the Consideration of *Persons* under their several Relations, yet I must again resume many of them, or at least refer unto them; and this without any just Blame of Tautology, because there they are consider'd only as incidental and relatively; but here they are consider'd absolutely in their own Nature or Kind, and with relation to themselves, or their own Nature, and the several *Interests* in them, and *Transactions* of them.

E. 4

And

## The Analysis of the Law.

And in this Business I shall proceed in the Method following, *viz.*

1. I shall consider the *Things* themselves, about which the *Jura Rerum* are conversant, and give their general *Distributions*.
2. I shall consider the several *Rights* in those *Things*, or to them belonging, and the Manner of the Production, Creation, and Translation of those *Rights*.
3. I shall consider the *Wrongs, Injuries, or Causes of Action, arising by Wrongs or Injuries done to those Rights*.
4. I shall consider the several *Remedies* that relate either to the Retaining or Recovering of those *Rights*.

*First*, Therefore I proceed to the Consideration of the *Things* themselves, and their Distributions. *Bracton* (and others) following the *Civil Law*, in his *Second Book, cap. 11. De Rerum Divisione*, makes many Distributions of *Things*; but I shall only use such a Distribution as may be comprehensive enough to take in the general Kinds of Things, whereof the Law of *England* takes Notice, without confining myself to the Distributions of others, but where I find it necessary for my Purpose.

*Things* therefore in general may be thus distributed; *viz.*

1. Some Things are *Temporal* or *Lay*.
2. Some Things are *Ecclesiastical* or *Spiritual*.

Those

Those Things that are *Temporal* or *Lay*,  
are of Two Kinds ;

1. Some are *Juris publici*.

2. Some are *Juris privati*.

1<sup>st</sup>, Those Things that are *Juris publici*,  
are such as, at least in their own Use, are  
common to all the King's Subjects; and are  
of these Kinds, *viz.*

1. *Common Highways*.

2. *Common Bridges*.

3. *Common Rivers*.

4. *Common Ports*, or Places for Arrival  
of Ships.

And this lets in the various Learning  
touching those Things. As for Instance :

Who are to repair *Highways* or *Bridges*.

1. By *Tenure*.

2. By *Custom*, or of *Common Right*.

Also concerning Nuisances in *them*.

And in *Common Rivers* or *Ports*.

And how to be remedied.

✂ But this we shall meet with when  
we come to *Pleas of the Crown*.

2<sup>dly</sup>, Those Things that are *Juris privati*,  
are of Two Kinds :

1. Things *Personal*.

2. Things *Real*.

Things *Personal* are again of Two Kinds :

1. Things in *Possession*.

2. Things in *Action*.

Things *Personal in Possession* ; as,  
*Money, Jewels, Plate, Household-Stuff, Cat-*  
*tle of all Sorts, Emblements, &c.*

Things

## The Analysis of the Law.

Things in *Action* are Rights of Personal Things, which nevertheless are not in Possession ; as,

1. *Debts* due, either,
  1. By *Contract* ;
  2. By *Specialty* ;
    1. By *Deed* or *Obligation*.
    2. By *Recognizance*.
2. *Goods*, whereof the Party is *devest-  
ed*, or out of Possession.
3. *Rights of Damages* uncertain ; as,  
*Covenants* broken.
4. *Legacies* not paid or deliver'd.
5. *Personal Things* in *Contingency* ; as,  
*Accounts*, and many more.

Also *Annuities* which are *partly in Possession*, for that they are grant-able over ; and *partly in Action*, be-cause not recoverable but by *Action*.

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S E C T.

S E C T. XXIV.

*Concerning Things Real, and their Distribution.*

**T***Hings Real* are of Two Kinds :

1. *Corporeal.*

2. *Incorporeal,*

*Corporeal Things Real* are such as are *measurable*.

And they again are of Two Kinds ;

1. *Simple.*

2. *Aggregate.*

I. *Things Corporeal* which are *Simple*, are generally comprehended under the Name of *Lands* ; which yet are distributed into several Kinds, according to their several *Qualifications*, and accordingly are demandable in *Writs* ; as,

A *Messuage*, a *Cottage*, a *Mill*, a *Tost*, a *Garden*, an *Orchard*, *Arable Land*, *Meadow*, *Pasture*, *Wood*, *Marsh*, *Moor*, *Furze* and *Heath*, and divers other Appellations.

And here the Learning comes in touching the *Names of Things*, by which they either,

1. *Pass in Assurances* ; or,

2. Are demandable by *Writs*, &c.

*Things Corporeal Aggregate*, are such as consist of *Things of several Natures*, whether they be all *Corporeal*, or the principal Part *Corporeal*, but the other Part *Incorporeal* ; because that Part which is *Corporeal* in them, gives,



## The Analysis of the Law.

gives it the Denomination of *Corporal*; and they pass without *Deed* for the most part, as *Things Corporal* do, and are of several Kinds, viz.

1. *Honours*, consisting of many *Manors*.
2. *Manors*, consisting of,
  1. *Things Corporal*, as *Demefns*.
  2. *Things Incorporeal*, as *Reversions*, *Services*.

And here of *Manors*, how created.

And the *Incidents* to them; as,  
*Court-Baron*.

Also of the Distribution of them into,

1. *Manors in Right*, where there are *Demefns* and *Freeholders*.
2. *Manors in Reputation*, as *Conventiary* or *Customary Manors*, consisting of *Copyholders* only.
3. *Rectories*, consisting of *Glebe* and *Tithes*.  
And although *Rectories* Presentative may seem more properly to come under *Things Ecclesiastical*; yet since at this Day many *Rectories* and *Tithes* are also become *Lay Fees*, I bring them in under this Distribution.
4. *Vills*, *Hamlets*, *Granges*, *Farms*, &c. are a Kind of *Corporal Things Aggregate*; for they consist of *Houses*, *Lands*, *Meadows*, *Pastures*, *Woods*, &c.

And here comes in,

1. *Parcel*, or *Nient Parcel*.
  1. What *Parcel* in *Right*.
  2. What *Parcel* in *Reputation*.

And the Effects thereof in Point of *Conveyance*.

2. All

2. All the Learning of *Incidents, Appendants, Appurtenances, &c.* as,

1. What may be *appendant, appurtenant, regardant.*

2. How and where they *pass by general Words*, without naming them.

II. *Things Incorporeal* are of a large Extent, but may be reducible unto these Two general Kinds, *viz.*

1. Things Incorporeal, *not in their own Nature*, but so called in respect of the Degree or Circumstance wherein they stand; as,

*Reversions.*

*Remainders.*

*The Estate of Lands.*

Here of *Reversions* and *Remainders*; what they are, how transferr'd.

1. By Deed.

2. By Livery without Deed.

Also how a *Reversion* may pass by the Name of *Lands*, or by the Name of a *Remainder*, or *e converso*.

2. Things Incorporeal *in their own Nature*: And those are of very great Variety, and hardly reducible into general Distributions, and therefore I am forced to take them by Tale, *viz.*

1. *Rents* reserved or granted; as *Rent-Service, Rent-Charge, Rent-Seck.*

And here of *Rents*; the several Kinds of them; how created, how transferr'd, *viz. By Deed.*

*How*

## The Analysis of the Law.

*How apportioned, how extinguished; what the ordinary Remedy to recover it, viz. Distress.*

But of *Distresses*, see hereafter in *Remedies*.

2. *Services Personal incident to Tenures*; as, *Homage Fealty*, and *Knights Service*; what *Services* are *entire*, what *severable*.

3. *Advowsons* of all Sorts,

*Donative.*

*Presentative.*

And here of *Right of Patronage*, *Right of Foundership*; how raised; how transferr'd; what *Incidents* to it.

4. *Tithes* of all Sorts,

*Personal.*

*Prædial.*

And *Mix'd*.

And here again of *Tithes*, their *Kinds*, their *Discharges*, &c. may be referr'd hither, and that more properly than before.

5. *Commons* of all Sorts; as *Common of Estovers*, and of *Pasture*, *appendant* and *appurtenant*; for *Cattle certain*, and for *Cattle sans Number*, *Separabilis Pastura*; and what may be done by those *Commoners*,

1. In relation to other *Commoners* by *Admeasurement*.

2. In relation to the Lord by *Distress* or *Action*.

I

And

And all the Learning hereof may be added here, though we shall meet with it again hereafter.

6. All Kinds of *Proficua capienda in alieno solo*; as *Herbage, Pawnage, &c.*
7. All Kinds of *Pensions, Proxies, (Procurations) &c.*
8. *Offices* of all Sorts.

And here of *Offices*, their Distribution, what may be incident or appurtenant to them.

9. *Franchises* and *Liberties* of all Sorts, many of which have been before mentioned, and may be transferr'd hither.

And here I shall again shortly distribute them into these two Kinds, viz.

1. Such as are *Flowers of the Crown*, and Part of the King's Royal Revenue, as *Waifs, Strays, Felons Goods, Vide Sect. Goods of Persons outlaw'd, Prifage, Wreck, Treasure Trove, Royal Fish, Royal Forfeitures, Fines, Issues, Amerciaments, Forests, &c.*
2. Such as are not Parcel of the King's Royal Revenue, but either lodg'd in him, or created by him, as *Counties Palatine, Markets, Fairs, Tolls, Courts Leet, Hundred Courts, Liberty to hold Pleas, Returns of Writs, Bailiwicks of Liberties, Warrens, Ferries, and the like.*

And

## The Analysis of the Law.

And every one of these yield a large Field of Learning, *viz.*

1. How they may be created or acquired

1. What are acquired by *Prescription* or *Custom*.

2. What in Point of *Charter*.

2. Where one Liberty may be granted to the Prejudice of another, or not.

3. How these several Liberties are to be *used* ; what their Nature, &c.

4. How they may be *lost*, either by *Nonuser*, *Misuser*, *Nonclaim in Eyre*.

And therefore, though I have mentioned these *Liberties* and *Franchises* before, in Relation to the King's *Voluntary Jurisdiction* in creating them, yet the full Discussion and Learning of every of them may be hither referr'd.

10. *Villeins* : And here that Learning may come in. *Vide ante*, *Señt.* 21.

11. *Dignities*, as *Dukes*, *Marquesses*, *Earls*, *Viscounts*, *Barons*, &c.

And thus far touching *Incorporeal Real Things Temporal*.

Their common *Incident* is, That they *pass not* from one to another *without Deed*. And to these several Titles, may be reduced all the Learning of each *Particular*.

S E C T.

S E C T. XXV.

Concerning Things Ecclesiastical or  
Spiritual.

I HAVE done with *Things Temporal*, and come to those that are *Ecclesiastical* or *Spiritual*: And though the Possessions of Ecclesiastical Persons, the Offices, Courts, and Jurisdictions Ecclesiastical, and Tithes also, might come in under this general Head; yet because these Things fall in the former Title under *Temporal Things*, and for that the Rule for them both is the same, I shall not need to repeat it here, only I will remove what before came under the Title *Corporations*, because it may be thought to come in more conveniently in this Place.

*Ecclesiastical Things* are of Two Kinds, viz.

1. Such as are Ecclesiastical or Spiritual in their Use.
  2. Such as are so in their Nature.
- I. Of the former Sort, are,

*Churches,*  
*Chapels,*  
*Church-Yards, &c.*

(Which lets in the Learning touching  
*Repairs.*)

And these are of Two Kinds.

1. *Parochial.*

And here falls in,  
The Bounds of Parishes;  
Relief of the Poor;

F

And

## The Analysis of the Law.

And other *Parochial Charges*.

And these are either,

1. In *Right*.
2. In *Representation*.
2. Not *Parochial*; as,  
*Chapels of Ease*.

II. Such as are Ecclesiastical in their Nature, are either,

*Dignities*, or,  
*Benefices*.

Ecclesiastical *Dignities* are of Two Kinds,  
*viz.*

1. *Superior*; as,  
*Archbishopricks*,  
*Bishopricks*,
2. *Inferior*; as *Dignities* in *Cathedral Churches*, as,  
*Dean*,  
*Chancellor*,  
*Precentor*.

Ecclesiastical *Benefices* are likewise of Two Kinds:

1. *With Cure*; as,  
*Parsonages*,  
*Vicarages*, &c.
2. *Without Cure*; as,  
*Prebends*,  
*Ecclesiastical Hospitals*, &c.

And here the Learning touching those Matters, and also touching *Vacancy* by *Pluralities*.

Also of *Appropriations*, *Common Dispen- sations*, *Qualifications*.

And *Vacancy*, by  
*Resignation*,

*Depri-*

*Deprivation,  
Cession.*

So much touching *Ecclesiastical Benefices*  
not observable *supra*,  *Sect. 22.*

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## S E C T. XXVI.

*Of the Nature and Kinds of Properties.*

**H**itherto of the Kinds of *Things*; I come now to consider the Nature and Kinds of those *Properties* or *Interests* that Persons have, or may have in them.

The *Rights* of *Things* are distributed according to the *Nature* of the *Things* themselves; which are,

1. *Personal.*
2. *Real.*

The *Right* of *Things Personal* is called *Propriety*, and under that will come these *Considerables*, *viz.*

1. The *Kinds* of those *Rights*.
2. The *Capacities* wherein they are held.
3. The *Manner* of their being *acquir'd* or *transferr'd*.

I. The *Kinds* of those *Rights* or *Proprieties* of *Things* are Three, *viz.*

1. A *Propriety* of *Action*, which is relative to all *Things* in *Action*.
2. A *Propriety* in *Possession*.
3. A *mix'd* *Propriety*, partly in *Action*, and Partly in *Possession*.



## The Analysis of the Law.

1<sup>st</sup>, Touching the Property of Things in *Action*.

This is an *Interest* by Suit or Order of Law, to demand the *Things* themselves, or *Damages* for them.

But of this hereafter, when we come to *Wrongs* or *Injuries*.

2<sup>dly</sup>, Touching Property in Possession :  
It is either,

1. *Simple* and *Absolute*.
2. *Special* or *Particular*.
1. *Simple* or *Absolute* Property, is when a Man has it, and no other *has* or *can* have it *from* him, or *with* him, but by his own Act or Default.
2. The *Special* or *Particular* Property is of Two Kinds, *viz.*
  1. Such as *some other* has a *concurring Interest* with him therein.
  2. Such wherein, though *no other* has any *concurring Interest* with him, yet his Property is but *temporary*, and vanishes by certain Accidents or Occurrences.

The former Kind of those *Special* or *Particular* Properties are very various, *viz.*

1. The Interest that a Man has by Bailment.
2. The Interest he has in Goods pledged : Or,
3. The Interest he has in Goods conditionally granted.
4. The Interest he has in (Things distrain'd, or) a Distress.
5. The Interest of Goods demis'd for a Term.

The

The Second Kind of *Special Property*, wherein though no other has a Property, nor indeed are the Things in themselves capable of any (certain or sure) Property, yet a Man by certain Contingents or Accidents may have a *Temporary Property* in them; such are Things *Feræ Naturæ*, wherein a *Temporary Property* may be lodg'd upon these Grounds, viz.

1. *Ratione Impotentia*, as in *Young Birds* in a Nest upon my Tree.
2. *Ratione Loca*, as *Conies* and *Hares* while in my Ground.
3. *Ratione Privilegii*, as of *Birds* or *Beasts of Warren* while within my *Warren*, and *Swans* within my *Liberty*.

3dly, Touching *Mix'd Properties*; i. e. partly in Action, and partly in Possession; They are *Annuities*; wherein a Man may have a *Personal Inheritance*.

Thus far of *Property* or *Right* in *Things Personal*.

II. The Second Thing propounded, is the *Capacity* wherein a Man may have them; and that is double;

1. *In Jure proprio*.
2. *In Jure alterius*.

And this latter is of two Kinds;

1. As a *Body Politick*.
2. As *Executor* in Right of the *Testator*.

III. The Third Thing propounded is, The *Manner of the Acquest*, or Translation of

## The Analysis of the Law.

Property. And because both of these will be much of one Consideration, I shall join them in the Course of my Distributions.

*Personal Things*, either in Action or Possession, may be acquir'd or transferr'd Three Ways :

1. By Act in Law.
2. By Act of the Party.
3. By a Mix'd Act, consisting of both.

## S E C T. XXVII.

### *Of Acquisition of Property by Act in Law.*

- I. **T**HIS Acquisition by Act in Law may be many Ways, viz.
  1. By *Succession*, whereby Properties are transferr'd to the Successors of such a Corporation by Law or Custom, which has a Power to receive Personal Things in a Politick Capacity ; as,
    1. A *Sole* Corporation by Custom.
    2. An *Aggregate* Corporation, by Common Law.
  2. By *Devolution*, viz.
    - To the *Executor*.
    - To the *Ordinary*.
    - To the *Administrator*.
    - To the *Husband* by the *Intermarriage*, i. e. As to Personal Things in Possession, but not as to Personal Things in Action.
  3. By

3. By *Prerogative*, whereby they are given to the *King*, or to such as have the *King's Title*, by *Grant* or *Prescription*; as, *Waif, Stray, Wreck, Treasure Trove*.
4. By *Custom*, as in the Case of *Heriot Custom*, and *Heriot Service, Mortuaries, Heir Looms, Foreign Attachment, Assignment of Bills of Exchange*.
5. By *Judgment*, and *Execution* thereupon, which in the Case of the *King* extends as well to *Things in Action* that have a *Certainty* in them (*as Debts*), as to *Things in Possession*. But in the Case of a *Common Person*, only as to *Things in Possession*.

And this by,

1. *Fieri Facias*: Or,
2. *Elegit*.

6. By *Sale in Market-Overt*.

Devant  
16.

## S E C T. XXVIII.

*Acquisition of Property by Act of the Party,  
and Mix'd Act.*

II. **A** *quisition of Property by Act of the Party*, may be Three Ways, viz.

1. By *Grant*.
2. By *Contract*.
3. By *Assignment*.

And herein is considerable,

1. That in the *King's Case* it extends as well to *Things in Action* as in *Possession*;

F 4

## The Analysis of the Law.

*session*; for *Debts* may be assign'd to him, or by him.

2. In the Case of other Persons, only Things in Possession are assignable.

III. Acquisition thereof by a *Mix'd Act*, partly by *Act of Law*, and partly of the Party.

And thus Things in Action, as well as in Possession, are transferrable Two Ways.

1. By *Act of the Party*, with *Custom co-operating*.

Thus a Bill of *Exchange* is assignable.

2. By *Operation of the Law*, concurring with the *Act or Default of the Party*; as, *Forfeitures* of several Kinds, viz.

1. By *Outlawry* in a *Personal Action*.
2. By being put in *Exigend* in the Case of *Felony*.
3. By *Attainder of Treason or Felony*.
4. By *Motion* to the *Death* of any Person; as *Deodand*.

And thus far concerning the *Rights of Things Personal*.

## S E C T. XXIX.

### *Concerning the Rights of Things Real.*

**I** Now come to the *Rights of Things Real*: And herein I shall hold this Method.

I shall consider the *Rights* of the Things themselves, or the *various Interests and Estates* in *Things Real*, viz.

- I. The

1. The different *Nature* of Estates or Interests in Things Real, in relation to,
  1. Their *Nature* and *Extent*.
  2. Their *Limitation* or *Qualification*.
2. The different *Relation* of those Estates, with respect to the *Possession*.
3. The different *Qualities* thereof in re- *Vide Sup.*  
spect of the *Persons* having the same. 32.

*First*, As to the Difference of Estates, with relation to their *Nature* and *Extent*, they will be divided into.

1. Estates by the Course of the *Common Law*.
  2. Estates by *Custom* or *Copyholds*.
- Estates by (Course of) the *Common Law* *Pref.*  
are divided into, *Co. Lit.*
1. Estates of *Inheritance*.
  2. Estates *less than Inheritance*.
- Estates of *Inheritance* are,
1. *Fee-Simple*.
  2. *Fee-Tail*.

## S E C T. XXX.

### Of Estates in *Fee-Simple* and *Fee-Tail*.

*First*, **O**F an Estate in *Fee-Simple*; where-  
in is considerable,

1. The *Extent* and *Nature* of the Estate.
  2. The *Quality* incident thereunto.
1. As to the *Extent* and *Nature* of the Estate:  
It is an Estate to a Man and his Heirs for  
ever. And a *Fee-Simple* is either,
1. *Absolute*

Co. Lit. 18.

1. *Absolute.*2. *Limited or Qualified.*

An *Absolute Fee-Simple* is such as has no Bounds or Limits annex'd to it, and is an Estate to a Man and his Heirs absolutely for ever.

A *Limited or Qualified Fee-Simple* is such as has some Collateral Matter annex'd to it, whereby it is made by some Means determinable, viz.

By *Limitation* ; or,

By *Condition.*

2. The *Quality* of an Estate in *Fee-Simple* is, That it is transmissible in the very Nature of the Estate :

1. To the *Successor* in *Bodies Corporate* by a *Right of Succession.*

2. To the *Heir* in the Case of *Persons natural* by *Descent.*

3. To any other *Person* by *Alienation.*

As to the former of these,

The *Nature* of the Corporation directs the *Rule* of *Succession.*

As to the Second,

The *Rules* of *Descents* are directed,

1. By *Custom.*

2. By *Common Law.*

1. By *Custom* ; as,

To all the *Sons* in *Gavelkind.*

To the *Youngest* in *Burrow English.*

2. By the *Common Law*, wherein the *Rules* of the *Common Law* give the *Direction.*

But of this more at large in *Seet. 33.*

The *Second Estate* of *Inheritance* is *Fee-Tail.*

And

*Infra Sect.*

33.

*Bacon Hist.*

1 Part,

p. 106.

And herein are likewise observable.

1. The *Nature* and *Extent* of the Estate.
  2. The *Incidental Qualities* thereof.
1. As to the First of these,

The *Manner of its Limitation* is that which defines and circumscribes it: And that is either,

1. *General*; when an Estate is given *Co. Lit.* to one, and the Heirs of his Body; *See. 13.* the Heirs Male of his Body, or the Heirs *Female* of his Body.

2. *Special*; as when it is limited to a Man, and the Heirs of his Body by such a Woman; or *e converso*.

And here falls in a Consequent of such a *Limitation*; namely,

An *Estate Tail after Possibility* of *See. 31.* Issue extinct.

2. As to the *Incidental Qualities*, or *Qualities* incident to such an Estate, they are,

1. In relation to the *Hereditary Transmission* thereof.

2. In relation to the *Alienation* thereof.

1. In relation to the *Hereditary Transmission* thereof. *Infra See. 33.* The Rules of Descent direct the Manner of it.

2. In relation to the *Alienation* thereof. Regularly by the Stat. *De Donis Conditionalibus* they have no Power of aliening, so as to bar the *Issue*, *Reversion*, or *Remainder*.

And



## The Analysis of the Law.

And therein are considerable,

1. What Alienations are void by his Death, either,

1. By the Stat. *De Donis Conditionabilibus*.

2. By the Stat. *11 H. 7. of Jointresses*.

2. What Alienations are voidable only, viz.

By Entry.

By Action.

By Suit.

And therein of *Discontinuances*.

3. What Alienations bind the Issue in Tail, but not the Reversioner, viz.

*Co. Lit.*

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1. A Fine with Proclamations, by Stat. 4 Hen. 7.

2. A Lease for Three Lives, &c. and accustomable Rent, by Stat. 32 H. 8.

3. Attainder of Treason, by Stat. 33 H. 8.

*Co. Lit.*

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4. A Warranty Collateral, Lineal, with Assets.

4. What Alienations bind both the Issue and the Reversion, viz.

A Common Recovery pursuant to Law.

And here of Common Recoveries:

*Co. Lit.*

372. b.

Their Kinds;

Their Effects.

S E C T.

S E C T. XXXI.

Of Estates at Common Law, less than Inheritance.

THE said Estates are considerable like-wise:

1. In their *Nature and Kinds.*
2. In their *Incidents.*

I. In their *Nature and Kinds*, they are either,

1. Estates of *Freehold.*
2. Estates *less than Freehold.*

1. Estates of *Freehold* are again divided into,

1. Such as arise by Act of Law.
2. Such as arise by Act of the Party.

*Freehold* Estates arising by *Act of Law* are,

1. Tenant by the Curtesy of *England.*
2. Tenant in Dower.

See. 14.

And here of the Learning of both these. *Freehold* Estates arising by *Act of the Party* are,

1. Tenant for his *own Life*: Which is either,

1. *Simply* so; Or,
2. With a *Privilege* annex'd; as, Tenant *after Possibility*, *De quo supra*, p. 75.

2. Tenant *Pur autre vie.*

And herein of Occupancy,

Gr-

# The Analysis of the Law.

*General.*

*Special.*

As also of *Estates* limited to one and his Heirs, *Pur auter vie.*

2. *Estates less than Feehold* are of Two Kinds:

1. *Certain.*

2. *Incertain.*

1. *Estates less than Freehold certain* are Leases for Years.

And here also of Leases by *Stat. Merchant, Stat. Staple, and Elegit.*

And likewise the Learning of *Ex-tents, Re-extents, Audita Querelas, &c.*

2. *Incertain Estates less than Freehold* are,

*Tenants at Will.*

These are determinable at the *Will* of either Party.

II. The *Incidents* to all these particular Estates, except *Tenancy at Will*, are these, *viz.*

1. They are transferrable from one to another, unless particularly restrain'd, By Condition; or, By Limitation.

They are forfeitable.

And here of the various Forfeitures of particular Estates; as,

1. Such as give a *Right* or Title of *Entry* to him in Reversion.

2. Such as give a *Remedy* by *Action*, as, *Wast.*

And here of the Title *Wast.*

S E C T.

*Infra Sect.*

42.

S E C T. XXXII.

*Of the Distinction of Rights of Estates,  
with Relation to the Possession.*

**H**AVING gone through the several Kinds *Vide Sect. 29.*  
and Natures of *Estates* both at Com-  
mon Law and by Custom, I come now in  
the second Place to the *various Relations* that  
these *Estates* have to the *Possession*; which  
gives several other Determinations unto the  
*Rights* that Persons have to them.

These *Estates* before mentioned, and the  
*Rights* thereupon, are either,

1. Such as are in Possession.
2. Such as are not in Possession.
1. The *Right of Estates in Possession*, is  
where there does interpose no *Estate*  
or Interest between the *Right* and the  
*Possession* of the Thing; as,  
Tenant for *Life* in Possession.  
Tenant in *Fee* in Possession, &c.
2. The *Rights* that are not immediately  
in *Possession*, are either,
  1. Where the Time of their Enjoy-  
ment expects the Accomplishment  
of something else that must ante-  
cede it.
  2. Where the *Right* or *Estate* per-  
chance is immediately in the  
Party; but the *Possession* thereof  
is removed or detain'd by another.

I. As

## The Analysis of the Last.

I. As to the former of these, they are of several Kinds, *viz.*

1. *Reversions*; which though a present Interest, yet stands in a Degree remov'd from the Possession till the particular Estate be determined.
2. *Remainders.*
3. *Future Interests* of Terms for Years.
4. *Contingent Interests*; or Interests or Estates limited to take Place upon a precedent Condition.

This is frequent in Cases.

1. Of *Accrewers.*
2. Of *Contingent Uses.*
5. *Estates* subject to a Condition of *Re-entry*, wherein he that has the Benefit of the Condition, tho' he has an Estate in the Condition, yet he has not the Land till the Condition broken, and a Re-entry.

II. As to the latter of these, *viz.* Where the *Estate* is *divested*, or *removed*, or *detained*, by *another*.

This gives Two new and additional Denominations, *viz.*

1. A *Title* of an *Estate*.
2. A *Right* of an *Estate*.
1. A *Title* of an *Estate*, is where a Man has not yet the Possession, but has a Title to have it, by reason,
  1. Of a Condition broken.
  2. Of a Title of Entry given by Forfeiture.
  3. Of a Title of Entry by reason of Acts of Parliament.

3 *Eliz.*  
c. 20.

As

## The Analysis of the Law.

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As Title of Entry for *Mortmain*.

For Assent to a Ravisher, &c.

2. *A Right of an Estate*, is where a Man is put out of his Estate by the Wrong of another.

Hereby, though he has still the Right to have the Estate he had before, yet he has not the Estate itself in Possession.

And those Rights are of two Kinds,

1. *Remediable*. And,

2. *Remediless*.

1. *Remediable Rights* are of two Kinds:

viz. They are remediable, either,

1. *By Entry*, which is called a *Right of Entry*.

2. *By Action*, which is called a *Right of Action*. And these are,

1. In Case of *Usurpation* of Advowson.

2. In Case of a *Discontinuance* by Tenant in Tail, &c.

3. In Case of a *Disseisin* or *Abatement*, and a dying seiz'd by such Disseisor or Abator, and a Descent to his Heir.

And here all the Learning of

*Entries Congeable* ;

*Discents que Toll Entry* ;

*Continual Claim* ;

*Infants*, when bound, &c.

2. *Remediless Rights* are where the *Remedy* is taken away, though the *Right* remains ;

Which may be either,

1. *By Warranty*, *Collateral* or *Lineal*, <sup>*Supra,*</sup> *pag. 76.*  
with Affets.

G

And

## The Analysis of the Law.

And here comes in the Learning of  
*Bars and Rebutters by Warranty.*

2. By *Nonclaim* upon a Fine.
3. By *Limitation of Time*. By the old,  
or the later Statutes, introduced in  
such Cases, viz. 32 H. 8. 21 Jac. 1.

*Vide*  
*Seet. 29.*

III. The *Third* Thing I propounded, was  
the different Qualities and Relations in Re-  
gard of the Persons having the Estate.

And these are,

1. *Sole Tenants.*
2. *Jointenants.*
3. *Tenants in Common.*

And here comes in the Learning of each  
of these.

## S E C T. XXXIII.

*Touching Acquisition and Translation of  
Estates in Things Real. First, By Act  
in Law.*

**T**HUS far have I gone in a Description  
of the various Natures, Relations,  
and Kinds of Estates; and now I come to  
the Manner or Means of their Acquest or  
Translation.

And an Estate or Interest is thus transla-  
ted, viz.

1. By *Act of Law*.
2. By *Means of the Party*. *Vide prox' Seet.*
1. By *Act of Law*, there is a various Ac-  
quisition of Things, according to their  
several Natures, viz.

1. Of

1. Of Things *Real* that are *Chattels*.
2. Of Things *Real* that are *Freeholds*.
3. Of Thing *Real* that are *Inheritance*.
1. As to the Acquest of *Chattels* by Act of Law ; though they are *Real*, they are of the same Kinds as *Things Personal*, Therefore *vide ante Sect. 27*.

☞ Only with this additional Exception, That *Chattels Real* go not to the Husband immediately by the Marriage, unless he survives the Wife.

2. As to the Acquest of Estates of *Freehold* by Act in Law, there is only the Title *Occupancy* which here comes in.

And that is either { 1. General.  
                                  2. Special.

3. As to Matters of *Inheritance*, the Titles of Acquests therein by Law seem to be of two Kinds, *viz.*

1. Such as is applicable to *all Estates of Inheritance, viz. Descent*.
2. Such as is applicable only to the Acquest of Estates in *Fee-Simple*.

I. The Act in Law applicable to the Acquest of all Estates of *Inheritance, Descent*, or Hereditary Succession.

And this is either,

1. Of an *Estate Tail*.
2. Of an *Estate in Fee-Simple*.

Touching the Descent of *Estates Tail* ; the Manner of the *Limitation* directs the Descent as aforesaid.

Touching the Descent of *Fee-Simple*, Two Things are considerable, *viz.*



## The Analysis of the Law.

1. The *Rules* of the Descent itself.
2. The *Burden* or *Charges* that lie upon the Heir that *takes* by Descent.
1. The *Rules* of Descents of *Fee-Simple* are directed, either,
  1. By Custom; or,
  2. By Common Law.

The *Direction* of Descents by *Custom* is various; as,

Sometimes to all the Sons, as *Gavelkind*.

Sometimes to the youngest Son, as *Burrow English*.

Sometimes to the eldest Daughter, or youngest, &c. as some Customary Lands.

*See* 18.

The *Direction* of Descents by the *Common Law*, and the *Rules* thereof, are divers, *viz.*

1. Relating to the Quality of the Persons in the Line,

*Ascending,*

*Descending,*

*And Transversal.*

2. In relation to the Number of Persons inheriting, *viz.*

*One*, if it be a Male, is Heir.

*All*, if they are Females.

And here the Learning of *Partners* and *Partition*.

3. In relation to the *Impediments* of the Descent; as,

*Illegitimation,*

*Half-blood,*

*Attainder,*

*Attainder,  
Or Corruption of Blood.*

2. The *Burden* upon the Heir: *How* and *where* chargeable.

1. With the Debt or Covenant of the Ancestor.
2. With the Warranty of the Ancestor.

II. The Second Kind of Means of Acquisition by Act in Law, refers only to *Estates in Fee-Simple*; as,

*First*, by *Prescription* or *Custom*; which is,

1. Of Things in *Gross* and *Substantive*:  
And thus a Right of an *Incorporeal Inheritance* is gainable.
2. Of Things incident and appurtenant,  
And here of *Prescription* or *Custom*;  
the Nature, Kinds, and Effects thereof.

*Secondly*, By *Escheat*; which is either, *Ante, p. 49.*

1. For Default of Heir.
2. For Attainder of the Tenant, *viz.*  
For *Felony*, to the Lord.  
For *Treason*, to the King.

## S E C T. XXXIV.

*Concerning Acquests by the Means of the Party. And First, By Record.*

**A** *cquests of Estates*, by the Means of the Party himself, may be of Two Kinds,

G 3

1. By

## The Analysis of the Law.

1. By *Wrong*.
2. By *Right* or *Title*.

*Acquisitions by Wrong* are also of Two Kinds, viz.

1. By *Wrong* to a Chattel; as,  
*Ejectment of Farm.*  
*Ejectment of Gard.*
2. By *Wrong* to a Freehold; as,  
*Abatement;*  
*Disseisin;*  
*Intrusion;*  
*Usurpation.*

*Acquisition by Right or Title*, is likewise of Two Kinds:

1. By *Conveyance*.
2. By *Forfeiture*.

*Acquisition by Conveyance*. Here may be brought in all the Methods and Courses of *Assurances* and *Conveyances of Lands*, which lets in the most ample and considerable Part of the Law.

*Conveyances* therefore are of Two Kinds:

1. By *Matter of Record*.
  2. By *Matter in Pais*.
1. By *Matter of Record*, they are either,
    1. By *Fine*.
    2. By *Common Recovery*.
    3. By *Deed enroll'd*.
  1. By *Fine*; where comes in all that Learning, viz.
    1. Their Kinds.
    2. Their Effects.

Their Kinds are in General Two,  
 viz.

1. *Fines* at Common Law.

2. *Fines*

2. *Fines* with Proclamations.  
And here of their Kinds in *special*.  
Their Effects ;
  1. In relation to bar *Privies*, or *Conveyance of Estates*.
  2. In relation to Strangers, *Non-Claim*.
2. As to *Common Recoveries*, therein are considerable.
  1. Their Kinds, with treble, double, or single Voucher.
  2. Their Effects ;
    1. In relation to *transferring* or *barring* Estates in Fee-Simple.
    2. In relation to *barring* Estates Tail, Remainders, Reversions, &c.
3. As to *Deeds enroll'd*, they are of Three Kinds, *viz.*
  1. Deeds enroll'd by *special Custom*, as in *London*.
  2. Deeds enroll'd at *Common Law*.
  3. Deeds enroll'd in Pursuance of the Stat. 27 H. 8. or *Bargain* and *Sales* enroll'd :

Whereof hereafter, p. 93.

## S E C T. XXXV,

*Concerning Conveyances by Matter in Pais,  
And First, Of Deeds.*

**C**onveyances by Matter in Pais are of Two Kinds, viz.

1. *Conveyances without Deed.*
2. *Conveyances by or with Deed.*

I. *Conveyances in Pais without Deed*, are either,

1. *Of Chattels*; or,
2. *Of Freeholds.*
1. *Of Chattels*; as Leases, or Extents of Land, and may be either,  
By Grant or Assignment;  
By Parol;  
By Exchange; *Quere.*
2. *Of Freehold of Lands by Livery*. Of this hereafter.

II. *Conveyances in Pais with or by Deed.*  
Here we may consider,

1. *Of the Nature of Deeds themselves.*
2. *Of their Effect or Efficacy in relation to,*

Acquiring } Estates.  
Transferring }

Concerning the Nature of Deeds, they are considerable:

1. *Simply in themselves:*

And here the whole Learning of Deeds,  
viz,

Of

Of the *Parties* thereto, and their  
*Names*.

Of the Kinds of Deeds, *viz.* *Indented* and *Poll*.

Of the *Parts* constituting Deeds:  
*Sealing* and *Delivery*, &c.

2. With relation to the Passing of Estates;  
and so they are call'd,

*Charters*,

*Grants*,

*Feoffments*.

1. Deeds *simply* consider'd ;

1. Their Constituent Parts, *Sealing*  
and *Delivery*,

2. The Parties to them ; *Grantor* and  
*Grantee*, &c. their Names, &c.

3. Their Kinds, *Indented*, and *Poll* ;  
and the *Effects* resulting from both  
or either ;

Particularly of *Estoppel*.

2. Deeds considered with relation to  
their *Use*, especially in Grants, Feoff-  
ments, and other Conveyances.

And herein we consider,

1. Their Kinds.

2. Their several Parts.

As to the *Kinds* of Deeds, they are either,

1. Such as have their *Efficacy* without  
the Adjunct of some other Cere-  
mony.

2. Such as to their *Effects* require ano-  
ther Ceremony to be joined with  
them.

I. As to the former of these, they are of  
Three Kinds ;

*Grants* ;

## The Analysis of the Law.

*Grants ;  
Releases ;  
Confirmations.*

1. As to *Grants*: There are many Things that are of an *Incorporeal Nature* ; as, [*Advowsons, Tithes, Liberties, Commons, &c.*] that,

1. Cannot pass from one to another by Act of the Party without Deed. Yet,

2 Co. 23. b.

2. Pass by Deed without any other Ceremony requisite.

2. As to *Releases*, they are of several Kinds; *viz.*

1. *Releases*, whereby the Thing released is *extinguish'd* in the Possession of the Releasee; as, Rights, Common, Seigniories, Rents, &c. and other Profits issuing out of Lands by *Release* to the Tenant.

2. *Releases* whereby an Estate is transferr'd, which is either,

1. By *Mittre le Estate*, as of one Jointenant to another.

2. By *Encrease* or *Enlargement* of the Estate, being made by the Reversioner to the Lessee in Privity, with apt enlarging Words.

3. As to *Confirmations*, they are of Two Sorts, *viz.*

1. *Corroborating* the Estate of which it is made; as, *Dean and Chapter's* confirming the Grant of the Bishop; Patron and Ordinary confirming

firming the Grant of the Parson;  
or the Disfeisee that of the Dis-  
feisor.

2. *Enlarging* the Estate with apt Words; as, in case of *Release*.

II. As to the other Sort of Deeds that require a Ceremony concomitant with them, to make them *effectual*, viz.

1. A *Livery of Seisin* in the Case of a Feoffment, though by Deed.

And here comes in all the Learning of *Livery*, *Letters of Attorney* to make or receive it, &c.

2. *Attornment* requisite in Cases of Grants, of Reversions, Remainders, Rents, Seigniories,

And here of *Attornments*; how, by whom, and when to be made.

And the several Effects thereof, viz.

1. To create a *Privy of Distress*, or *Action*, as in the Case of *Fines*, *Quid Juris clamat, Quem redditum reddit, Per que Servitia*.
2. To pass the *Interest*, as in Case of *Grants*, singly by *Deed*.

Thus far of the Nature of Deeds in reference to the Acquest of Lands.

But there are besides this, in relation to *Deeds passing Lands*, several *Parts* that usually occur in Deeds, and which take up large Titles, viz.

1. The *Parties*, and therein their Names, and Names of Purchase; as *Grantor*, *Grantee*, *Feoffor*, *Feoffee*.
2. The *Premises* of the Deed; contain-  
ing,

1. *Effect*



## The Analysis of the Law.

1. Effectual Words to pass the Interest, as *Grant, Enfeoff, &c.*
2. The Thing granted, which takes in the whole Title of *Comprize*, and *Nient Comprize*, viz.
  1. By what Names Things pass:
  2. What Things are compriz'd within the Grant, viz.
    1. Things in *Gross*.
    2. Things *parcel*.
    3. Things *incident, appendant, appurtenant, &c.*
3. The *Habendum* of the Deed, which limits the Estate; and what Words are apt for this.
4. The *Reservation* or *Reddendum*; and what shall be said a good *Reservation*.
5. The *Covenants*; which are of Two Kinds:
  - 1<sup>st</sup>, *Covenants personal*, and their Exposition.

And here of *Covenants*; as,

1. What shall pass with the Land, and what not.
  2. Their Exposition.
- 2<sup>dly</sup>, *Covenants real*, which is Warranty.

And here of that Learning; as,

1. What their *Kinds*;
  - General,*
  - Special,*
  - Lineal,*
  - Collateral.*

2. What their *Effects*:

1. By

1. By Way of *Action, Voucher, Warrantia Charta.*
2. By Way of *Bar, or Rebutter.*
6. The *Condition or Defeasance.*

And here all the Learning of *Conditions and Limitations*: And incident to this, Learning of *Deeds* falls in those Two great Titles, *viz.*

1. *Monstrance de Faits*, or where Deeds are necessary to be pleaded or shewn.
2. *Exposition de Faits*; which is full of infinite Variety, according to the Texture of Deeds, and their several Clauses.

## S E C T. XXXVI.

### *Of Conveyances by Force of Statutes.*

AND thus far of *Conveyances* according to the Course of the Common Law; and now I proceed to *Conveyances*, according unto, or by Force or Power of Acts of Parliament.

*Conveyances* according to, or by Virtue of Acts of Parliament, are of Two Kinds,

1. By Way of *Bargain and Sale*, according to the Stat. 27 H. 8.
2. By Way of *Use*.

And this latter is either,

1

1. With

## The Analysis of the Law.

1. With Transmutation of Possession; as,  
By Feoffment or Fine.
2. Without Transmutation of Possession;  
By Covenant to stand seized.  
And this is a large Field, for all the Learning of *Uses* come in here; as,  
Of *Considerations* sufficient to raise it.  
*Contingent Uses, &c.*  
How destroy'd;  
How revived.
3. By Way of *Devise*.  
And here all that voluminous Title of *Devises*, and the Incidents thereto, may be introduc'd.

## S E C T. XXXVII.

### *Concerning Customary Estates.*

**T**HUS far of *Estates at Common Law*; we come now to *Customary Estates*, viz. Tenant by *Virge*, or by Copy of Court-Roll.

And because this is a special Kind of *Customary Estate*, and I shall not have again to do with it, I shall shortly consider these Two Things, viz.

1. The *Nature* or *Kinds* of *Estates* grantable thereof.
  2. The *Incidents* relative thereunto.
1. Touch-

1. Touching the *Nature* of Estates grantable, the *Custom* directs it.

For by *Custom* it is grantable,

1. *In Fee-Simple.*

2. *In Fee-Tail*: And here of the *Entailing Copyholds*, where it may be, and how barred.

3. *For Life or Lives.*

2. Touching the *Incidents* relative to Copyholds, they consist either in,

- [1. *Modes of Acquiring*: Or,

2. *Manner of Transferring*.]

Touching the *Transferring* the Interest of the Copyholder, it is done,

1. *By Hereditary Descent*: And here of what Effect or Use the Heir's Admission is.

2. *By Surrender*; which is either,

1. *In Court.*

2. *Out of Court*, into the Hands of the Lord, the Steward, Customary Tenants when warranted by the Custom.

And the *Effect* of such *Surrender*; where, when, and how it must be presented.

The Learning concerning *Copyholds* is grown very large, and takes in very many Particulars: For Instance;

1. Who is *Lord* to make a *Grant* or *Admittance*: What a *Dominus pro Tempore*, or a *Disseisor*, may do therein.

2. Who is a *Steward* to perform that Office, and his Power therein.

I

3. What

## The Analysis of the Law.

3. What shall be said a *Copyhold Manor*, or a *Copyhold Court*, to enable such Grants.

4. What shall be said a *Forfeiture* of a *Copyhold Estate*:

By *Wast*,

By *Alienation*,

By *Refusal to perform Services*.

Who shall be bound by such *Forfeiture*.

Who shall take Advantage of it.

What shall be a Dispensation with it.

Besides which, there are very many more Considerables will fall under the Title of *Customary Estates*, or *Copyholds*.

## S E C T. XXXVIII.

### *Of Translation of Property by Forfeiture.*

**I** Now come to those *Translations of Estates* which happen by Default of the Tenant in *Fee-Simple*, viz. Such as are *Forfeitures* of his Estate.

And these are of several Kinds:

1. *Forfeiture by Attainder*; either,
  - 1<sup>st</sup>, Of *Treason*, which gives the Land to the King by the Common Law. (And this lets in all the Learning touching *Offices*, *Petitions*, &c.) Or,
  - 2<sup>dly</sup>, Of *Felony*; whereby it escheats to the Lord; whereof before, p. 85.
2. *Forfeiture by Purchase in Mortmain* without Licence, whereby it goes to the Lord.

3. For-

3. Forfeiture *by Cessing* from doing his Services *per Biennium*. (And here comes in the Learning of *Cessions*.)
  4. Forfeiture *by Alienation contra Formam Collationis*.
- 

## S E C T. XXXIX.

*Of Wrongs or Injuries. And First, Of Wrongs to Persons.*

**I** Come now from the Consideration of *Rights* or *Jura*, to consider of *Wrongs* or *Injuries*; wherein I shall take this Order, *viz.*

*First*, I shall pursue the several *Natures of Injuries*, as they are severally applicable to those Things which are the Subjects where-to the several Rights aforesaid are adherent.

*Secondly*, Because it will be a shorter and plainer Way to mention the several *Natures of the Remedies* applicable to the several Kinds of *Injuries*, or *Wrongs*, I shall mention those Actions that are applicable to the several *Injuries*, together with the *Injuries* themselves; leaving the farther Explication of the Manner of Application of those *Remedies* unto the Third and Proper Head, concerning *Reliefs* or *Remedies*.

As to *Injuries*, or *Wrongs*, they are of Two Kinds, *viz.*

H

I. Such

## The Analysis of the Law.

1. Such as are of *Ecclesiastical Conuizance*.
  2. Such as are of *Temporal Conuizance*.
- Such as are of *Ecclesiastical Conuizance*, are either,
1. *Criminal*.
  2. *Civil*.
1. The Wrongs Criminal of *Ecclesiastical Conuizance*, are such as are *Publick Scandals* and *Offences*, wherein the Judge Ecclesiastical proceeds, either,
    1. At the Prosecution of some Person: Or,
    2. *Ex Officio*, & *pro salute animæ*; as, In Cases of *Adultery*, *Fornication*, *Incest*, *Prophanation* of Sacred Things or Times, (or Places,) *Blasphemy*, *Heresy*, and divers others.
  2. Wrongs Civil of *Ecclesiastical Conuizance*, are of these Kinds, viz.
    1. *Defamation* in some Particulars.
    2. *Tithes*, their Right, Substraction, &c. as also *Oblations*, *Mortuaries*, *Pensions*.
    3. Causes of *Spoliation* in relation to *Benefices Ecclesiastical*.
    4. Matters of *Matrimony* and *Divorce*.
    5. *Wills* or *Testaments*, and *Administrations*.

Those *Wrongs* that are of *Temporal Conuizance*, are of Three Kinds:

1. Such as are of the *Conuizance* of the *Admiral's Court*; as *Piracy*, *Depredations*, and *Wrongs* on the *High Sea*.

2. Such

2. Such as are of the *Constable* and *Marshal's Court*; as, *Usurpation of Coats of Arms, Matters of Precedence, &c.*
3. Such as are of the *Conuzance* of the *Common Law Courts*.

This latter Head is very large and extensive; but in general, may be divided into Two Kinds:

1. Such as are *Criminal* or *Publick*, wherein the Wrong-doer is proceeded against *Criminally*. And these are to be distributed under the Titles of *Pleas of the Crown*,
2. Such as are *Civil* or *Private*; wherein at the Suit or Prosecution of the Party injur'd, he has *Reparation* or *Right* done.

Touching *Injuries* to *Civil Rights* or *Interests*, they must be distributed according to the several Natures and Kinds of those *Rights* which by those *Wrongs* are injur'd: And since we have already before consider'd of Two Sorts of *Rights*, viz. *Rights of Persons*, and *Rights of Things*, I shall begin with those *Wrongs* that relate to the *Rights of Persons*.

And since in the Distribution we have made of the *Rights of Persons*, we have observed, That the *Rights of Persons* have a double Consideration, viz.

1. One *Absolute*, in reference to the Person himself. And,
2. Another *Relative*, with respect to the Persons related to him.



## The Analysis of the Law.

We shall distinguish *Wrongs* accordingly.

*Wrongs* therefore of *Common Law Conu-  
zance*, which are *Private* or *Civil*, are such  
as are done either,

1. By *Particular Persons*; or,
2. By *Countenance* of *Legal Proceedings*.

And the former Part of these *Wrongs*, are  
done either,

- 1<sup>st</sup>, To the *Rights of Persons*; or,
- 2<sup>dly</sup>, To the *Rights of Things* annex'd to  
Persons in Point of *Property* or *Estate*.

As to *Wrongs* that are done to *Persons*, or  
in relation to the *Rights of Persons*, they are  
of Two Kinds:

1. Such as relate to the Person consider'd  
absolutely and in himself.
2. Such as relate to him, as he stands in  
some Kind of Relation to another Per-  
son.

As to such *Wrongs* as relate to the Person  
himself, they are of Three Kinds. Every  
Man has a Right to his own Person; and  
a Wrong done to that, is nearest to him,  
because a Man has the greatest Propriety  
in his own Person.

And the *Wrongs* thereunto are also of  
Two Kinds, *viz.*

1. *Wrongs to his Body*.
2. *Wrongs to his Name or Reputation*: For  
I reckon this amongst those *Wrongs*  
that are done to his Person.

I. The *Wrongs* to his *Body* are of Two  
Kinds, *viz.*

1. *Affaults*; as, *Beating*, *Maiming*, *Wound-  
ing* of a Man:

Wherein

Wherein the Law gives a double Remedy, viz.

1. *Preventional*, by Security of the Peace.
2. *Remedial*, by Action, either of *Trespass*,  
*Affault*,  
*Battery*,  
*Wounding*,  
*Appeal of Mayhem*.
2. *Imprisonment*, without lawful or just Cause: 2 *Inst.*  
p. 55.

Wherein the Law also gives him a double Remedy, viz.

1. To remove or avoid the Imprisonment, as by *Habeas Corpus* into the King's Bench or Common Pleas, Writs of *Mainprise*, *De Odio & Atio*, *De Homine Replegiando*, &c.
2. To recover Damages by Way of Compensation for it, by Action of *False Imprisonment*; or if the Imprisonment be lawful, but the Party bailable, and his Bail refused, in some Cases a special Action of the Case upon the Stat. 23 H. 6.

II. As to Wrongs done to his Name, they are of Two Kinds, viz.

1. *Scandal* by Words spoken, Libels, Pictures, &c. wherein the Remedy is to have Compensation in Damages by Action of the Case.

And here comes in all that large Title of *Actions of Slander*, and what Words are scandalous.

## The Analysis of the Law.

2. Under *Pretence* of a *Legal Prosecution*, but *false* and *malicious*; as, for a false and malicious imposing some great Crime by Complaint to a Justice of Peace, or by preferring a Bill of Indictment falsely and maliciously.

The *Remedy* the Law gives, is,

1. Sometimes by an *Action of Conspiracy*.
  2. Sometimes, and more ordinarily, by *Action upon the Case*.
- 

## S E C T. XL.

### *Of Wrongs to Persons under Relation.*

**T**HE Wrongs that are done to a Person under some Kind of Relation, principally take in the Three *Oeconomical Relations* before mentioned; as,

1. *Husband and Wife,*
2. *Parent and Child.*
3. *Master and Servant.*

And some of the *Civil*; as,

1. *Guardian and Pupil.*
2. *Lord and Tenant, &c.*

1. *First,*

## The Analysis of the Law.

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1. *First, For Husband and Wife*; as where the Wife is taken away from the Husband, the Law has provided a Remedy for him by Action of Trespass *Dē Uxorē Abducta*. So if she be beaten, a special Action of Trespass (on the Case) for beating his Wife, *per quod Consortium amisit*.

2. As to *Parent and Child*: Wrongs of this Kind are either,

1. By taking away the Child under Age out of the Custody of the Parent, where the Remedy is Action of Trespass.

2. By taking away, and marrying the Heir within Age: The Remedy is, *Trespass* or *Ratiffement*, to recover Damages, and the Value of the Marriage.

3. As to *Master and Servant*:

1. If a Servant be retained by another before his Time is expired; Remedy is, Action on the Case.

2. If a Servant be beaten, whereby he is disabled to work; the Remedy is, Action of Trespass or Case, *per quod Servitium amisit*.

We come now to *Interests of Civil Relations*, and the Wrongs therein respect,

1. *Guardian and Pupil*.

2. *Lord and Tenant*.

3. *Lord and Villein*.

## The Analysis of the Law.

1. As to the first of these : The *Guardian* has an Interest in the *Pupil* in these Two Kinds of *Guardians* :

1. Guardian in *Knights-Service*.
2. Guardian in *Socage*.

If the Ward be taken away, or taken away and married, it is a Wrong to the Guardian, and remediable ;

1. By *Trespass*.
2. By *Writ of Ravishment of Ward*.
3. By *Writ of Right of Ward*.

2. As to that of *Lord* and *Tenant* : If they be *Tenants at Will*, and either by *Menaces*, or by unlawful *Distresses*, they are driven away from their *Tenancies*, it is a Wrong which the *Lord* may repair himself in by special *Action* of the Case.

3. So if a *Villein* be forced from his *Service*, or beaten or maimed so that he is disabled to perform such *Service*, an *Action* of *Trespass* lies, *per quod Servitium amisit*.

S E C T. XLI.

*Of Wrongs in relation to Rights of Things.  
And First, of Things Personal.*

**H**itherto of *Wrongs* as they relate to Persons, either absolutely, or under Relations *Oeconomical* or *Civil*; I come now to such Wrongs as relate to *Things*, and those are either,

1. To *Things Personal*,
2. To *Things Real*.

Wrongs relating to *Things Personal* are of these Kinds, viz. According to the Nature of the Things :

1. *Personal Things* in Possession,
2. *Personal Things* in Action.

I. As to *Personal Things* in Possession, viz. *Goods, Cattle, Money, &c.* the Wrongs there- to are of Two Kinds :

1. An Unjust Taking, or a Taking and Detaining of them, which is an Injury, and for which the Party grieved has his Remedy, viz. either,

1. To have the Things themselves, if detained by *Replevin*.
2. To have Reparation in Point of Damages by Action, either of *Trespass Vi & Armis*, or of *Trover* and *Conversion*.

2. An

## The Analysis of the Law.

2. An unjust Detaining, without an unjust Taking.

The Remedy :

1. The Things in Specie, by *Replevin*, if taken for *Damages* only ;  
or,
2. *Trover* and *Conversion* for the Thing, or if it can't be had, for *Damages* by *Detinue*.

And although *Charters* concerning Land be in the Realty in respect of their Relation to the Land, yet they are not in themselves any more than Paper, or Parchment, and Wax ; and therefore are within the afore-said Rules, in respect of taking or detaining them.

II. *Personal Things in Action* are likewise of Two Kinds :

1. Such Things in Action as arise by express Contract or Agreement.
  2. Such Things in Action as arise by implied Contract, or *Quasi ex Contractu*.
1. The former Kind are of Two Sorts :
1. By *Deed* or *Specialty*.
  2. Without *Deed* or *Specialty*.
1. Those that are *with* or *by Specialty* are also of Two Kinds, *viz.*
1. *Debts* :

And the *Wrong* that relates to them is *Non-payment* according to the Deed.

The Remedy is Action of Debt, to recover the Debt itself, and Damages for *Non-payment*.

2. Co-

## 2. *Covenants* :

The *Wrong* herein is Breach of *Covenant*.

The *Remedy*, *Action of Covenant* :  
And here comes in the Learning  
of *Covenants*.

What Words make a *Covenant*.

What *Covenants* pass to the As-  
signees, &c.

## 2. Those that are without *Specialty*.

### 1. *Debts* :

The *Wrong* and *Remedy* the same as  
before, in Cases of Debts by *Spe-  
cialty*.

And hither also may be referr'd  
those Things, which though they  
favour of the *Realty*, are yet re-  
coverable by *Action of Debt* ;  
as Rents reserv'd on Leases for  
Years, Relief, &c.

### 2. *Promises* ; for a good Consideration, whether they be *Promises* that arise by Law, or such as are *collateral*.

*Remedy* in all such Cases, is to recover  
*Damages* by *Action* on the Case.

And here comes in, *Warranty* of Chat-  
tels upon Sale.

### 2. Such *Things in Action* as arise by an *implied Contract* are many : For Instance ;

#### 1. In *Contracts for Things*, it is generally intended, That none sell any Thing that he knows not to be his own ; if he does, an *Action* on the Case lies in Nature of *Disceit*,

#### 2. In



## The Analysis of the Law.

2. In *Contracts for Viſuals*, is implied, *That they are not unwholſome*; if they be, an Action of the Caſe lies.
3. In *Persons that undertake a Common Truſt*, it is imply'd, *That they perform it*; otherwiſe an Action on the Caſe lies.

As for Inſtance :

In the Caſe of,

1. A *Common Hoſt*, is to ſecure Goods in his Inn.
  2. A *Common Carrier*, or *Bargeman*, to ſecure the Goods he carries.
  3. A *Common Farrier*, that he perform his Work well, without hurting the Horſe.
  4. A *Common Taylor*, that he does his Work well; and ſo of other Tradeſmen, &c.
- 

S E C T.

S E C T. XLII.

*Touching Wrongs to Things Real, without dispossessing the Party; and their Remedies.*

**I** Come now to those *Wrongs* or *Injuries* which are done to *Things Real*, and the *Rights* of them.

And these may be divided in these Two Kinds, viz.

1. Such as are without a *Removing* the Owner or Proprietor out of Possession.
2. Such as are with a *Remover* of him out of his Possession.

Those which are without a *Remover* out of Possession, are of several Kinds: I shall reduce 'em to these following, viz.

1. *Trespasses* by breaking any Man's Ground, Hedges, &c. by the Party (*Trespassor*) himself, or by his Command, or by his Cattle, &c.

*Remedy*, to repair the Party in Damages, by Action of *Trespass, Quare Clausum fregit*.

2. *Nuisances*, or *Annoyances*, either,
  1. To *Interests* in Things *Corporal*, as Houses, &c. by stopping Lights, erecting Lime-Kilns, or Things annoying another's Dwelling, or withdrawing Water from a Mill, &c.

2. Or,

## The Analysis of the Law.

2. Or, To Things *Incorpeal* ; as,
  1. To *Chemins* or Ways, by obstructing them, &c.
  2. To *Markets*, by erecting another Market too near them.
  3. So of *Ferries*, by erecting another too near.

And infinite more Instances may be given, the Title of *Nusances* being very large.

The Remedies in all these Cases are either,

1. *Without Suit* ; to abate, or to remove them, if done to *Inheritances Corporeal* or *Chemins*.
2. *By Suit* ; as,
  1. *Quod permittat, Assize of Nuisance*, to remove the Thing, and recover Damages.
  2. *Action on the Case* to recover Damages. *Vide Sect. 46. & 47.*
3. *Disturbances* : And this principally concerns such *Real Things* as are *Incorporeal* : For Instance ;
  1. *Disturbance to present to a Church presentable* : And this concerns *Advowsons*, and *Right of Patronage*.

And the Remedies relating thereunto are,

*Quare Impedit* ;  
*Assize de Darrein Presentment* ;  
*Quare Incumbavit* ;  
*Ne Admittas* ;  
*Breve Episcopo ad admittend' Clericum.*  
And

And this is a vast and a curious Piece of Learning.

2. *Disturbance of a Person to enjoy his Franchises*; as,

Disturbing such as come to my Market, or to my Leet ;

Forcing them to come to another Court ;

Not permitting a Person to hold his Court, or take his Toll.

And many more of the like.

The common *Remedy* herein is by Action on the Case.

3. *Disturbance of Commoners* to enjoy their Common ; surcharging the Common by one that has Common ; or by putting in Cattle by one that has not Common ; by erecting a Warren to the Prejudice of the Commoners.

Here the *Remedy* in some Cases may be by *Admeasurement*, *Assize*, *Quod Permittat* :

But in most, and indeed in all Cases of this Nature, it is usual by Action on the Case.

4. *Disturbances of Ways*.

The like *Wrongs*,

And the like *Remedy*.

4. The Fourth Sort of *Injuries* are, *Subtractions of Customs, Duties, or Services Real*; as,

Suit to Court ;

Suit to Mill ;

Homage ;

## The Analysis of the Law.

Fealty ;  
Rents, &c.

The *Remedies* here are various:

For, 1<sup>st</sup>, If the *Services* are accompanied with a *Tenure*, the ordinary *Remedy* is either,

1. *Without Suit*, by *Distress*.

And here of *Distresses*, *Avowries*, &c.

2. *With Suit* ; and then,

1. If they are Rents reserved on Leases for Years, the *Remedy* is *Action of Debt*.

2. If they are Rents of Freehold, *Remedies* are by *Assize* in case of *Seisin* and *Disseisin*.

2<sup>dly</sup>, If those *Services* are without *Tenure*, as *Suit to Mill* by Custom, &c. the *Remedies* are *Scita ad Molendium*, *Action on the Case*.

5. The Fifth Sort of *Injuries* is *Waste*, or *Detraction*.

And this *Injury* is of Two Kinds, according to these Relations, *viz.*

1. In relation between the Owner of the Soil, and he that has a Profit appendre out of it ; as, *Ebbers*, *Pawnage*, &c.

If the Owner of the Soil destroys the Wood, the *Remedy* lies by *Assize*.

*Action on the Case* to recover Damages.

2. In

2. In relation between the particular Tenant and he that has the Reversion or Remainder of Inheritance; as *Wast* in Houses, Woods, Lands, &c. is a Disinheritance to the *Reversioner*, who has *Remedy* either,

1. *Preventive* by *Estrepement*, prohibiting *Wast*, which also lies against a Tenant, where the Land is in Suit: Or,

2. *Remedial*, by Action of *Wast*;  
In the *Tenet*;  
In the *Tenuit*.

And here comes in a great Flood of Learning:

What shall be said *Wast*; *Supra.*  
When, and against whom it lies, *p. 78.*  
&c.

And although under this Title of *Wrongs*, without Removal of Possession, I have brought in Remedies by *Assize*, &c. which always supposes a Dispossession, yet really it is no Dispossession in those Cases before instanced, because they concern *Things Incorporal*; wherein, though the Party may admit himself disseised, it is but a Disseisin at Election, and rather made a Disseisin by his bringing an Assize, which the Wrong-Doer shall not dispute, than truly so. And now:

## S E C T. XLIII.

*Concerning Wrongs which carry with them  
an Amotion of Possession.*

**T**HE Wrongs which carry with them an Amotion of Possession are of Two Kinds, and concern,

1. The Rights of Chattels.
2. The Rights of Freeholds.

I. As to the Rights of Chattels, whereof the Party is dispossessed by a Wrong-Doer, they are these, viz.

1. Leases for Years.

The Remedy is by *Ejectione firme*; or if by the Reversioner, *Quare ejecit infra Terminum*.

In both which, at this Day, he recovers Damages, and the Possession of his Term.

2. Wardships and Holding over for single or double Value.

The Remedy is, *Quare intravit Maritagio non Satisfacto, Ejectione Custodie*; and against a Stranger, a Writ of Right of Ward.

3. Tenants by Stat. Merchant, Stat. Staple, and Elegit: Though they have but Chattels, yet the Statute gives them Remedy for their Possession by *Assize*.

II. I come to the Rights of Freeholds, and the Wrongs done to them, together with an

## The Analysis of the Law.

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*Amotion of the Possession*: And those *Rights* are of two Kinds, viz.

1. Some only compatible to them that claim not only a Freehold, but any Inheritance.

2. Some that are common to any that have a Freehold only.

And accordingly, their Remedies will be severally diversify'd.

These Wrongs are of several Kinds, viz.

*Abatement*;

*Intrusion*;

*Disseisin*;

*Usurpation*;

*Discontinuance*;

*Deformement*.

1<sup>st</sup>, *Abatement* is where one enters after the Death of the Ancestor, before the Heir enters.

The Remedy is according to the Nature of the Descent from his Ancestor,

By *Assize of Mortd'ancestor*;

*Writs of Aile, Bekail, Cofinage*.

2<sup>dly</sup>, *Intrusion* is an Entering or Continuing in Possession after an Estate for Life determined.

The Remedy: He in the Reversion or Remainder may enter; or if his Entry be taken away, has his Writ of *Intrusion*.

3<sup>dly</sup>, *Disseisin* is a large Title, and is an unlawful Entry and Ouster of him that has an actual Seisin and Freehold.



## The Analysis of the Law.

And it is either,

1. *With Force*: In which Case the Party disseised has his Remedy, either,

1. By Writ of *Forcible Entry* upon the Stat. 8 H. 6. to recover the Possession, and Damages.

2. By Assize of *Novel Disseisin* to recover his Possession, and Damages, and the Party to be fined and imprison'd for his Force.

3. By Writ of *Entry in-Nature* of an Assize, to recover his *Seisin* and Damages.

2. *Without Force*: And for this he has Remedy by *Assize*, or *Writ of Entry*, *ut supra*.

Now both these *Disseisins* are either of *Things Incorporeal*, or *Things Corporeal*.

1. Of *Disseisins Incorporeal*: This is not always a *Disseisin* at the Election of the Freeholder.

And *Disseisins of Inheritances Incorporeal* are various, according to the various Kinds of *Incorporeal Inheritances*; as,

*Commons*;

*Profits appendre* in another's Soil;

*Offices*;

*Tithes*;

*Rents by Rescue*;

*Replevin*;

*Enclosure*;

*Enclosure ;  
Denial.*

2. *Disseisin of Corporeal Inheritances* are of Two Kinds :

1. With an *Actual Ouster*, as is requisite between

*Jointenants,  
Parceners,  
Tenants in Common.*

2. Without an *Actual Ouster*, even by the *Disseisee's* waving of Possession upon an Entry made.

And all these Kinds of *Disseisins* are done either to the Party himself, or to his Predecessor or Ancestor.

And the Remedy is,

By *Writ of Entry sur Disseisin*.

And these Writs of *Entry sur Disseisin* are either,

1. In Nature of an Assize against the first Disseisor ; or in the Degrees, as in the *Per*, or *Per & Cui*, against the *Feoffee* of the *Disseisor* or his *Feoffee* : Or,

2. They are in the *Post* when the Degrees are spent, or when the Tenant comes in under the Disseisor in the *Post* ;

As the *Lord by Escheat, &c.*

And this Learning of *Disseisins*, of *Assizes*, and of *Entry sur Disseisin*, are large and comprehensive Titles, and of great Variety and Extent.

## The Analysis of the Law.

4thly, *Usurpation*: This Title refers only to *Advowsons*; where one that has no Right to present, presents to a Church, and his Clerk is admitted and instituted, and continues in by Six Months.

The *Remedy* is by *Writ of Right of Advowson* for the Patron in Fee-Simple.

And this also takes in all the Learning of *Advowsons*, and the Provisions made by the Stat. *West. 2.* to save the Right of *Possessory Actions* against Usurpation:

1. Where it is upon the Predecessor.
2. Where it is upon the Ancestor in Tail.
3. Where upon Tenant for Life, Guardian in Chivalry, &c.

5thly, *Discontinuance*: This is where he that aliens has not the full Right, yet it puts the Party injur'd thereby to his real Action; as in these Instances, viz.

*Co. Lit.*  
326. b.

1. When the *Alienation* is by *Tenant in Tail*, the *Remedy* is, for the Heir in Tail, by *Formedon in Descender*; for the Reversioner, by *Formedon in Reverter*; and for the Remainder Man, by *Formedon in Remainder*.
2. When the *Alienation* was by the Husband seized in Right of the Wife; at Common Law the Wife was driven

ven to her *Cui in Vita*, in or out of the Degrees, as the Case fell out.

But now she may enter (unless a Descent be cast) after her Husband's Death, by the Statute

11 H. 7.

3. When it was by a Bishop, &c. aliening without the Assent of the Dean and Chapter at Common Law, his Successor was driven to his Writ of Entry *Sine Assensu Capituli*. But this is remedied by Stat. 1 & 13 Eliz.

The Learning of *Discontinuances* is also very curious; as,

Who may discontinue; who not.

What shall be a *Discontinuance*; and what not.

And as the Learning thereof is ample, so is that of the Remedies thereof, by *Formedon*, &c.

6tly, *Deforcement*: And this is a larger, and a more comprehensive Expression than any of the former; for a *Disseisor*, *Abator*, *Intruder*, *Discontinuer*, *Usurper*, and those that claim under them by *Feoffment* or *Alienation*, are all *Deforceors*. But the proper Application of the Word is to such a Person, who, tho' he has not a just Right, has yet recover'd against, or barred him that has the true Right, either,

## The Analysis of the Law.

1. *By Default.* And then the Remedy for the Party so deforced is,

If he had only a particular *Interest*, by *Per quod ei Deforceat.*

If he were Issue in Tail of him that so lost, by *Formedon.*

If Tenant in Fee-Simple, or his Heir, by *Writ of Right.*

2. Or in a *Real Action* of an Inferior Nature; as *Writ of Entry*, &c. And then,

1. Of the Issue in Tail of him that so lost, or is barred. The *Remedy* is, by *Formedon in Descender.*

2. Of the Tenant in Fee-Simple that so lost, or is barred. The *Remedy* is, by *Writ of Right.*

## S E C T. XLIV.

*Of Wrongs that have the Countenance of Legal Proceedings of Courts.*

**H**itherto I have proceeded in examining *Wrongs* done by Parties themselves; I now come to consider of *Wrongs* done

done by Courts or their Officers, in relation to Legal Proceedings.

And they are of Two Kinds, *viz.*

1. When the Court proceeds in a Cause whereof they have no Jurisdiction.
  2. When they proceed in Causes whereof they have Jurisdiction, but proceed erroneously.
1. The former of these is a Wrong, and the Party has his Remedy or Relief therein.
    1. By not submitting to the Sentence or Judgment, and bringing his Action against them that execute it.
    2. By Prohibition from a superior Court; as when an Ecclesiastical Court proceeds in a Cause of Temporal Conuzance; or an Interior Court, that has a limited Jurisdiction, holds Plea of a Thing done out of its Jurisdiction.
  2. The latter is when they proceed erroneously, or by committing some Mistake in a Matter within their Jurisdiction.

This I call a Wrong: Not that the Party that supposes himself injured has any Remedy against the Court, or the Judge that thus proceeds; for if Men should suffer barely for Error in Judgment, when there is no Corruption, no Person would be Judge in any Case. But I call it a Wrong, because, in Truth, the Party has a Right to be *relieved* against such a Judgment: And,

1. In

## The Analysis of the Law.

1. In *Causēs Ecclesiastical* or *Maritime*, the Law has provided a Relief against an erroneous Judgment,

*By Appeal to other Judges.*

2. In *Causēs of Common Law Cognizance*, Errors or Mistakes in Judgment are revers'd.

1. In *Courts not of Record*, as County Courts, and Courts Baron,

*By Writ of false Judgment.*

2. In *Courts of Record*, wherein Error may happen divers Ways,  
*viz.*

1. By *Error of the Jury* in giving a *False Verdict*:

The Remedy is by *Attaint*.

2. By *Error or Disceit*; if the Sheriff returns a Party as summoned when he was not, whereby Judgment is against him by Default.

The Remedy is, by *Writ of Disceit*.

3. By *Error of the Court*. And then

The Remedy is,

*Writ of Error* in a superior Court.

*Audita Querela*.

And here may come in the Learning of  
*Writs of Error*, and *Audita Querela's*.

S E C T.

S E C T. XLV.

*Concerning Remedies, and the Method of obtaining them.*

**I**N the former *Sections* I have consider'd of the various Kinds of *Wrongs* or *Injuries*, and under those Distributions have mentioned their ordinary Remedies, and thereby have much contracted this Title; wherein I shall only give some general Rules relating to the Manner of the Application of those Remedies, leaving every particular *Remedial Writ*, together with the Process belonging to it, to be consider'd and digested under their several Titles in the former *Sections*.

Remedies for *Wrongs* are according to the Nature of those *Wrongs*, viz.

1. *Ecclesiastical*.
2. *Civil*.
1. *Ecclesiastical Remedies* are such as are applicable to Wrongs of *Ecclesiastical Conuzance*, and take in or include these Two Generals, viz.
  1. The *Courts* or *Places* where the said *Remedies* are to be had.
  2. The *Process* preceding Judgment and Execution relating thereto.
2. *Civil* or *Temporal Remedies* are such as concern either,
  1. *Maritime Injuries*.
  2. *Military Injuries*.
  3. *Civil* or *Common Law Injuries*.

1. In



## The Analysis of the Law.

1. In Reliefs or Remedies for *Maritime Injuries*, are considerable,
    1. The Court of *Relief*: The *Admiral Court*.
    2. The Process preceding Sentence, &c.
  2. In Remedies for *Military Affairs*, or Matters of *Arms* and *Honours*,
    1. The Court is the Court of *Honour*, or *Military Court*.
    2. The Process, Sentence, and Judgment.

(Now of little Use.)
- 

## S E C T. XLVI.

### *Remedies at Common Law: And First Of those without Suit.*

THE Law in many Cases provides a Remedy *without Suit*, which in general is either,

1. By *Act of the Party*.
2. By *Act in Law*.

Remedies allowed by the Party's own Act, are in reference,

1. To *Things Personal*.
2. To *Things Real*.

1. In reference to *Things Personal*:

1. If another does wrongfully take or detain my Goods, my Wife, my Child,
- or

or my Servant, I may lawfully re-take them again, if I can, so I do it not riotously.

2. So I may defend myself (or them) by Force, if assaulted.

2. In reference to *Things Real*.

In these and some other Cases, the Law allows a Man a Remedy without being driven to it, *viz.*

1. In Cases of Nuisance done to my Freehold, I may remove them, if I can, without Riot; as,

1. To remove an Obstruction out of my Way.

2. Or the Over-hanging of another Man's House over mine.

3. Or the Obstruction of Water running to my Mill.

2. In Cases of *Rents*, I may distrain the Goods or Cattle that are Levant and Couchant upon the Tenement charged therewith.

3. And so in Cases of Cattle doing Damage upon my Ground, I may distrain upon my Ground Damage Feasant. And so I may distrain Cattle that are sold for my Toll.

3. In reference to *Lands*.

1. I may distrain, and maintain my own Possession against any Person that would eject or disseise me.

2. Where I have a Right or Title unto Lands, and my Entry not taken away, I may gain the Possession by my Entry.

And

## The Analysis of the Law.

And this necessarily draws into Examination these Two Things, *viz.*

1. *Titles of Entry*; which are either by Breach of a Condition in Fact, or in Law annex'd to an Estate that I have parted with, or my Ancestor.

And here comes in, *Of Conditions*; what are good, and what not; when and to whom it gives an Entry; and how *destroy'd* or *suspended*.

2. *Rights of Entry*: And this lets in all those Considerations that concern the *Titles of Entry* *Conceivable*, of *Descents* *that Toll Entry*, or *Continual Claim*, of *Avoiding Descents by Infancy*, by Stat. 34 H. 8.

But regularly;

1. In *Personal Things* in Action, as for *Debts*, or *Covenants*, or *Promises*: Or,
2. As to *Rights of Real Things*, where the Entry is by Law taken away, the Party cannot be his own Judge, but must have Recourse to the Courts of Common Justice, except in the Cases following, *viz.*

By *Act in Law*, in some Cases without Suit, the Party shall have Remedy, where by *his own Act* he cannot; as,

1. In *Things Personal*; as if the Debtor makes the Debtee Executor, he may pay himself.
2. In *Things Real*; as where a Man's Entry is taken away; as by *Descent*, or by *Discontinuance*;

*nuance*; yet if he come to the Possession without *Folly* or *Co-vin*, he shall be *remitted*.  
And here all the curious Learning of *Remitters* comes in.

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## S E C T. XLVII.

### Concerning Remedies at Common Law by Suit.

**H**itherto concerning *Wrongs* and *Injuries* in relation to *Things* both *Real* and *Personal*, and Remedies for the same *without Suit*; I now come to consider of Remedies *by Suit*, and the Means or Method of their Application.

*Remedies by Suit* seem to be of Two Kinds :

1. Such as the Parties provide for themselves by mutual Consent.
2. Such Remedies as the Law provides for them.

I. Remedies that Parties provide for themselves are of Two Kinds :

1. By their own immediate Accord.
2. By transferring the Decision of it to others.

1. The former of these, *viz.* The immediate Consent of the Parties, is that which in Law is called an *Accord*, which, with Satisfaction accordingly made, is in some

## The Analysis of the Law.

Some Cases of *Personal Injuries* a Bar to any other Remedy.

6 Co. p. 44.

And this lets in the Learning of *Accords* and *Concords*; what are good, and what not; where they are a Bar, and where not.

2. The latter of those, *viz.* The transferring the Decision to others; which,
  1. If to Two, or more, is called an *Arbitrament*.
  2. If to one, an *Umpirage*.

And here the large Learning of *Arbitraments* and *Awards*; what a good Submission; what a good Award, or not; what Remedy upon it, when and where it is a Bar in *Personal Actions*, &c.

II. *Secondly*, Such Remedies as the Law provides are also of Two Kinds, *viz.*

1. Such Remedies as the Law provides *without Suit*; whereof before.
2. Such Remedies as the Law provides in the Courts of Justice, settled by Law, and according to those Constitutions touching *Actions* and *Suits*, that the Law has provided and instituted.

And this takes in these Considerations, *viz.*

1. The Courts of *Judicatories*, establish'd by Law, for recovering of Rights, and redressing of Wrongs.
2. The *Remedies* themselves by certain Writs instituted by Law, and applicable to those several Wrongs.
3. The *Prosecution* or *Pursuit* of those *Remedies* in the said Courts.

I

1. The

1. The First of these concerns the large Learning of the *Jurisdiction of Courts*: And forasmuch as there are several entire Tracts written thereon, and I have before touched upon them, I shall here forbear to say any Thing further herein; only that that Learning may with Reason enough be transferr'd hither, at least some Particulars thereof.
2. The Second, touching the Natures and Applications of those Remedies, I have in the former *Sections*, under every several Kind of *Wrong* or *Injury*, mention'd the respective *Remedy*, and therefore shall not again repeat it here.
3. The Third, which is the Prosecution, or *Pursuit*, of those Remedies, is the Business of this *Division*.

But before I enter upon that Matter, I shall premise these Two Things, *viz.*

*First*, That the best Way to meet with all the Titles of the Law in this Business, will be to pursue the same in the Order and Method of the Proceedings themselves, without any other Distribution.

*Secondly*, That there are some Things wherein the Pursuit of a *Real Suit* and *Personal* do differ; as in the *Process*, the *Judgment*, and the *Execution*: But in most other Things they do agree, or, at least, the Pursuit of a *Real Action* contains all the general Learning of a *Personal Action*, and much more.

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Where

## The Analysis of the Law.

Where therefore there is a signal Difference, I shall observe it by the Way, without running through the whole Procedure of a *Real* and *Personal Action* distinctly; and shall only here observe, that the general Parts of a Suit are these :

1. The *Process*.
2. The *Pleading*.
3. The *Issue*.
4. The *Trial*.
5. The *Judgment*.
6. The *Execution*.
7. The *Appeal*.

## S E C T. XLVIII.

### *Of Process and Appearing.*

I. **F**IRST, Where a *Wrong* is done, or a *Right* detain'd, the Party injured is to make his Application or Suit for that *Remedy* which the Law ordains; and in order thereto, to take out such (*Writ* or) *Process* as the Law (on the Circumstance of his Case) requires.

The (*Common, Usual,*) *Ordinary Process* are as follow :

1. In *Personal Actions*,  
*Summons, Attachment, Distress, Capias, Alias, Pluries & Exigent*, and in some it begins with *Attachment*.

2. In

2. In *Real Actions*,

'Tis *Summons*, *Grand Cape*, and *Judgment*, or after Appearance, *Petit Cape*, and *Judgment*.

3. In *Mix'd Actions*, -

In *Assizes*, *Attachment*, and upon *Default*, the *Inquest* taken by *Default*.

In *Wast*, *Attachment* and *Grand Distress*, and an *Inquiry* of the *Wast*, &c.

Every *Process* gives the Defendant a Day in Court; and this lets in these several Things, viz.

*Four* in Court, and the *Variety* of it.

And incident to this, is,

*Adjournment*; and,

*Discontinuance*.

And at that Day or *Four* in Court, the Defendant or Tenant either appears, or not appears.

Here of *Appearance*, and its Diversity:

1. By *Guardian*, (or *Prochien Amy*.)

2. By *Attorney*.

3. In *Person*.

If there be not an *Appearance*,

1. Either a *Default* is made:

And here of the *Process* upon *Default*,

1. In *Personal Actions*.

2. In *Real Actions*.

2. Or there is an *Excuse* of *Appearance*.

And therein *safer Default*;

1. By *Protection*.

2. By *Essoin* prayed.

And here all the Learning of *Essoins*;

Their *Nature*,

Their *Diversity*; as,

K 2

*Mirror*,  
c. 5. § 1.

*Common*



## The Analysis of the Law.

*Common Essoins,  
Service le Roy, &c.*

On the other Side, as to the *Plaintiff*:

1. The *Plaintiff* either *appears*; or,
2. *Makes Default*, and thereupon a *Non-prosecution*.

And here of the *Nature* and *Variety* of  
*Nonuits*;  
*Retraxits*, &c.

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## S E C T. XLIX.

### Of Pleading.

II. **S***Secondly*, I come to *Pleading*.

If both Parties appear, the *Plaintiff declares or counts*.

And here of,

1. *Counts*.
2. *Declarations*.

And the Defendant or Tenant's Part is  
after *Imparlance to plead*.

And such Plea is either,

1. *Dilatory*; or,
2. To the *Matter or Right* of the Complaint.

*Ist*, *Dilatory Pleas* are of several Sorts:

1. To the *Jurisdiction* of the Court:
  1. From the Place where the Suit arises.
  2. From the Thing in Controversy,  
as, *Ancient Demesne*:

2. To the *Impotency*, or *Non-ability* of the *Plaintiff*, which is very various; as,
  1. *Alien* { *Amy.*  
              *Enemy.*
  2. *Outlawry* { *In Personal Actions.*  
                  *For Felony.*
  3. *Excommungement.*
  4. And formerly *Villinage.* And,
  5. *Profess'd.*
3. In *Abatement.*  
And this either,
  1. Of the Count.
  2. Of the Writ.
4. *View demanded.*  
And this is a large Title.
5. *Aid prayed:*
  1. Of the *King.*  
And here of *Rege Inconsulto, Procedendo.*
  2. Of a *Common Person.*  
And here of *Aid.*  
The different *Kinds* of *Aid*; as,
    1. Of the *Reversioner* or *Remainder-Man.*
    2. Of the *Patron* and *Ordinary.*
6. *Voucher:* Which is a very large Title.  
And here of *Voucher;*  
In what Action;  
Of what Person.  
*Counter-Plea* of *Voucher:*  
*Process* against *Vouchee.*  
*Pleading* of *Vouchee.*  
*Recovery* in *Value.*

## The Analysis of the Law.

### 7. *Age Prier* :

1. For *Minority* of the Demandant.
  2. For *Nonage* of the Tenant.
- And here of *Prier in Aid of Vouchet*,  
*&c.*

And all the Learning of *Age*.

And herein comes also, *What*  
*and when Pleas Dilatory are Per-*  
*emptory,*

*After Demurrer ;*

*After Trial.*

And of *Pleas in Abatement* after  
the last Continuance.

2dly, *Pleas* that go to the *Right* or *Merit*  
of the Complaint, are of Two Sorts :

1. *Pleas to the Action*, which denies the  
Substance of the Complaint :

And commonly make either,

1. A *General Issue* ; as,  
In *Tresspass*, *Not Guilty*.  
In *Debt* upon a Contract, *Nil Debet*.  
In *Assumpsit*, *Non assumpsit*.  
In *Assize*, *Nul Tort*, *Nul Disseisin*.  
In *Dower*, *Nunque de seize de Dower*.  
In a *Writ of Right*, That the Te-  
nant has more Right to hold,  
than the Demandant has to de-  
mand,
2. Or a *Common Issue* ; as,  
In *Debt on Bond*, or *Action of Co-*  
*venant*, *Non est Factum*.  
In an *Assize of Mortdancestor*, *Aile*,  
*Besale*, *&c.* That the *Ancestor*  
was never seized.

### 2. *Pleas*

2. *Pleas in Bar*: These are very various and different, according to the several Kinds of the *Tenants* or *Defendants* Case. And lets in all the Learning of *Bars*, &c. as,

*Bars* are either such as are,

1. *Proper*.
2. *Common*.

*Pleas in Bar* therefore considerable,

1. In their (*Nature* or) *Matter*.
2. In their *Qualities* or *Manner of Pleading*.

I. *Bars* according to the *Nature* of the *Action*, and *Case* of the *Parties*, are very various and different (and therefore here all the Learning of such *Bars* comes in,) yet somewhat concerning them follows:

1. *Proper Bars* are,
  1. Such as are applicable only to *Real* or *Mix'd Actions*; as,
    - Fine*;
    - Feoffment*;
    - Release of Right*;
    - Warranty*, &c.
    - Of the *Plaintiff*;
    - Or his *Ancestor*.
  2. Such as are proper to *Personal Actions* only; as,
    - Accord with Satisfaction*;
    - Arbitrament*;
    - Performance*,
    - 1. Of the *Condition*.
    - 2. Of the *Bond*.

## The Analysis of the Law.

2. Such *Bars* as are common to both, yet diversify'd oftentimes with such *Diversifications* as are *applicable to the Nature of the Action*; as,

1. *Release of Action.*
2. *Limitation of Time* by Act of Parliament elaps'd.
3. *Estoppels*:

And here of the several Kinds of *Estoppels*:

1. *By Matter of Record.*
2. *By Matter in Pais*; as,  
*Deeds Intended or Poll.*

And here of the whole Learning of *Estoppels*.

✂ For note, *Estoppels* are not only the Matter of *Bars*, but of *Replications*, *Rejoinders*, and all other *Pleadings*.

II. Concerning *Bars* as to their *Qualities* or *Manner of Pleading*, the same common Rules of *Pleading* for the most part concerns all Kinds of *Pleading*.

And therefore I shall here shortly insert them once for all, *viz.*

1. That the *Plea* be *single*, and nor *double*.  
And here of *Double Pleas*.
2. That it have convenient *Certainty of Time, Place, and Persons*.
3. That it answer the *Demandant's* or *Plaintiff's Count* or *Plaint*.
4. That it be so pleaded, that it may be *try'd*.

When the Defendant has pleaded, what next follows is, The Plaintiff or Demandant answers

answers the Defendant's *Plea*; and this is called a *Replication*.

(And here of the general Rules, &c. of *Replications*;) viz.

That it be,

1. *Certain*.

2. *Single*.

3. *Answering the Bar, &c.*

And this *Replication* either,

1. *Denies* or *Traverses* the *Bar* or *Plea* of the Defendant; and then an *Issue* is tender'd, which regularly must be joined in by the other Party, and then the Parties are at *Issue*.

And here all the Learning of *Traverse*; what is traversable, or not; how it must be made, either *simply* without an *Inducement*, or with an *Inducement*; and concluding *Absque hoc* to the Matter alledged by the Defendant.

2. Or *Confesses* and *Avoids*.

And here all the Learning of *Confess* and *Avoid*; and then there is no *Issue* made by the *Replication*: But possibly the Pleadings run on to *Rejoinder*, *Surrejoinder*, *Rebutter*, or *Surrebutter*.

For if the Plaintiff replies so as no *Issue* be offer'd, this gives Occasion to the Defendant to *rejoin*.

And here of *Rejoinders*, and how he must maintain his *Bar*, and not depart from his *Plea*.

And here of *Departure in Pleading*.

S E C T.

## S E C T. L.

*Of Issues.*

III. **T**HUS far of *Pleading*: Now by this Time either by the *Plea*, *Replication*, *Rejoinder*, &c. the Parties are descended to an *Issue*, viz. To something affirm'd by the one Party and denied by the other, which *Affirmation* and *Denial* is called an *Issue*; for now the Parties have no more to do, unless a Matter happen to emerge after *Issues* join'd, and the last Continuance.

This, if it be pleaded, is called a *Plea puis le Darrein Continuance*.

So that their Business being at *Issue*, they have no more to do but to expect the *Trial* and *Determination* of that *Issue*.

Now *Issues* are of these Kinds, viz.

1. An *Issue* join'd upon a Matter of *Law*, which is to be determin'd by the Court.

And this *Issue* is called a *Demurrer*.

2. An *Issue* of *Fact*, which is of Two Kinds;

1. An *Issue* join'd touching a Matter of *Record*, on *Nul tiel Record* pleaded, &c.

2. An *Issue* joined touching a Matter in *Pais*; as,

Whether such a Deed were made.  
Whether such a Feoffment were executed, &c.

## S E C T.

S E C T. LI.

Of Trials.

IV. **A**ND now *Issue* being join'd be- *Vide Co. 9.*  
tween the Parties, they have no *fol. 30.*  
more to do but to expect the *Trial* of that  
*Issue*; and for that End they have *Days* of  
*Continuance* given.

Here of *Continuances*, &c.

*Trials* are of several Kinds, according to  
the Nature of *Issues*, and the several Ap-  
pointments and Directions of the Law  
touching the same, *viz.*

1. *Trials by Record*; as,  
When *Issue* is join'd, whether there be  
any such Record or no.
2. *Trials by Inspection*; as,  
Upon *Error* to reverse a Fine levy'd by  
an *Infant*, or in *Audita Querela* to a-  
void a Recognizance acknowledged  
during his *Minority*.
3. *Trials by Proofs*; as,  
Where *Issue* in *Dower* is, whether the  
Husband be living or not.
4. *Trials by Examination*; as,  
Where an Action of Debt upon Ac-  
count is brought for Things not ly-  
ing in Account.
5. *Trials by Certificate*:  
1. Of the *Constable* and *Marshal*, whe-  
ther the Party be in Service.

2. Of



## The Analysis of the Law.

2. Of the *Bishop*, by *Mandate* from the Secular Court, as in case of *General Bastardy*.

So of *Issues* upon the *Right of Marriage* between the Parties to the *Suit*.

So of *Plenary* by *Institution* into Churches.

### 6. *Trials by Battel* :

1. In *Appeals*.
2. In a *Writ of Right*.

### 8. *Trials by Jury*.

(And this takes in a large Field of Learning.)

*Trials by Jury* are,

1. *Extraordinary*.
2. *Ordinary*.

*Medietatem Linguae.*

1. *Extraordinary*: In *Writ of Right*, In *Attaint*. *Quere Appeals*.

2. *Ordinary*: By *Twelve Men*.

Wherein consider ;

1. The *Process* to bring in the *Jury*, In *C. B.* by *Venire Facias* & *Habeas Corpus*.

In *B. R.* by *Venire Fac' & Distringas Juratorum*.

2. The *Tales* for want of a full *Jury* appearing.

3. *Challenges* of all Sorts :

1. To the *Array*.
2. To the *Polls*.

4. The *Oath* of the *Jury*.

5. The

5. The *Evidence* to be given to the Jury :  
What allowable to be given ;  
And when.
6. *Verdict* of the Jurors :  
1. General Verdict.  
2. Special Verdict.
7. What Defaults or Miscarriages impeach the Verdict.
8. The *Postea*, or Return of the Verdict by the Judges of *Nisi prius*.

Co. Lit. p.  
227. b.

## S E C T. II.

### Of Judgment.

V. **T**HE *Fifth* Act in this Business of *Prosecution* or *Suit*, is *Judgment*.

(And here the whole Learning of *Judgment*, comes in) *viz.*

I. What shall be sufficient to stay *Judgment*.

And herein,

1. Of arresting *Judgments*.

2. Of reversing *Judgments*.

II. Upon what it is given ; which for the most part is upon these Premises (or Precedents.)

1. Upon *Default* after *Default* ; as in Real Actions after the Grand Distress in,

*Wast* ;

*Quare Impedit*.

2. Upon

## The Analysis of the Law.

2. Upon *Confession*,  
*Nibil Dicit*;  
*Non sum Informatus*.
3. Upon *Demurrer*.
4. Upon *Trial of the Issue*, according to the various Methods of Trial above mention'd.

### III. The several Kinds of *Judgments*.

1. In *Suits Real*.
2. In *Suit Personal*.
  1. *Interlocutory*, and *not final*; as,  
Awards upon the Writ affirm'd, or other *dilatory Pleas*, where the *Judgment* in many Cases only is,  
*Respondeat ouster*.
  2. *Final*, but not *compleat*:  
And that either,
    1. *Incompleat* in Part, but *compleat* in the Residue; as,  
Where the Judgment is given for the Thing demanded, but the Damages not yet inquired of.
    2. *Incompleat* in the Whole; as,  
Where a Judgment is given for the Party to recover his Damages, where the Damages are the Principal, wherein,  
The *Compleat Judgment* is not given till the Writ of Inquiry return'd.
  3. *Final* and *Compleat*, with respect to the Action upon which it is given.

4. *Final*,

4. *Final*, not only as to the Action upon which it is given, but to all other Actions (touching that Thing;)

as,

*Judgment final*, in a Writ of Right after the Issue joined, &c.

IV. The Forms of Entry of Judgments.

S E C T. LIII.

*Of Execution.*

VI. **T**HE Sixth Act in this Business of *Suit*, is *Execution*.

This is a great Field of Learning.

*Executions* seem to be of Two Kinds :

1. Within the Year.
2. After the Year.

I. The former of these is also of Two Kinds :

1. In reference to Lands recover'd.
2. In reference to Debts or Damages recover'd.

*First*, In relation to *Lands recover'd*, Two Things are considerable :

1. The Writ or Mandate of *Execution*.
2. The *Execution* of the said Writ.

1. Touching the former ;

The *Writ* or *Mandate* itself is of Two Kinds, in relation to the *Estate recover'd* :

1. If

## The Analysis of the Law.

1. If a Freehold, *Hab' Fac' Sciffrnam.*
2. If a Chattel, *Hab' Fac' Possessionem.*

I do not here meddle with the *Executions* of other Kinds of Writs, as *Quod Permittat, Replevin, &c.* because they may come in in the former *Section*, where the Writs themselves are mentioned, and they are various.

2. Touching the latter;  
In the *Execution* of the Writ is considerable:

1. The Officer that is to make it.  
And here of the Office of Sheriff;  
The Manner of his Making;  
His Power;  
His Duty in making Returns, &c.

2. The Manner of doing it.  
And here of the *Posse Comitatus*.  
*Sed vide ante*, Of Sheriffs.

*Secondly*, In reference to *Debts* or *Damages recover'd*, there are also considerable;

1. The *Nature* of the *Process*.
2. The *Manner* of its *Execution*.

The *Process* itself is of the following Kinds:

And so are the Methods or Manner of the *Execution*.

(*N. B.* They are herein join'd together.)

1. The

1. *The Body only*, by *Capias ad Satisfaciend'*.  
 And here of *Capias's*:  
 (Where it lies;)
  - How executed;
  - When with, and when without,  
 breaking open Doors.
  - What Kind of *Execution* it is;
  - Whether without Satisfaction.
 And here of *Non omittas*:  
 As also of *Escapes*.
2. *Goods only*, by *Fieri Facias*.  
 And here of that Learning:
  - How, upon what, and by whom,  
 it is *executed*.
  - And whether a Return be necessary.
3. *Profits of Lands only*, by *Levari Facias*.  
 And here of that:
  - What *Profits* shall be levied;
  - And whereupon.
4. *Part of the Lands*, and *all the Goods*, by *Elegit*.  
 Here of *Elegit*:
  - Where it lies;
  - What Lands extendible;
  - How the Extent shall be made;
  - How return'd;
  - And where a *Re-extent*.
5. *Body, Lands*, and *Goods*, by *Extent* upon a *Stat. Merchant*, or *Stat. Staple*, or a *Recognizance* in Nature of a *Stat. Staple*.  
 And here of these *Executions*.
 

L
What

## The Analysis of the Law.

What they are;  
The Manner of *executing* the  
same, &c.

II. *Secondly*, Touching *Executions* after  
the Year past;

When the Proceeding is,

1. To revive the Judgment. And,
2. Obtain *Execution* thereof;

By *Scire Facias*.

And here all the Learning of  
*Scire Facias's*.

## S E C T. LIV.

*Of Redress of Injuries, by Error, &c.*

VII. **L** *Astly*, I come to *Remedies* that Per-  
sons have, to be reliev'd against  
those Proceedings (aforesaid,) in case they  
have just Cause so to be.

And they are these, *viz.*

1. *By Writ of Error*; to remove the Re-  
cord into a superior Court, to examine  
the Errors, in case the Inferior Court  
has erred in Point of *Proceeding*, *Judg-*  
*ment*, or *Execution* awarded.

And here comes in that great Title *Error*,  
with its *Adjuncts* and *Appendixes*, *viz.*

1. Where it lies.
2. When it lies.
3. In what Court.
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6. The *Process* to bring in the Party that recover'd.
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2. By *Writ of Attaint*, where the Jurors give a false Verdict.  
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3. By *Writ of Disceit*, where the Judgment is by Default, and the Party never duly summon'd.
4. Where the Party has lost by Default in a *Real Action*, yet has good Right, when yet by reason of his Default, he did not shew it; viz.
  1. By *Writ of Right* for him that lost by Default, or his Heir, having a *Fee-Simple*.
  2. By *Writ of Quod ei Deforcat*, if he had only an Estate for *Life*, or in *Tail*.
  3. By *Formedon in Descender, Reverter, Remainder*. *Vide ante*.
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5. Where the Party is put out by *Execution*, wherein he had no Day to plead or answer, as in *Executions* by *Capias*, *Elegit*, *Statute Merchant*, &c.

By *Andina Querela*.

L 2

And



## The Analysis of the Law.

And here of the whole Learning of  
*Audita Querela's.*

And thus far of the *Partitions* of the *Titles* of the *Law of England*, and the *Analysis* thereof, in relation to *Rights*, &c. of a *Civil Nature*.

As to *Pleas of the Crown*, and *Matters Criminal*, that should here ensue, they are already drawn up, or perfected, by me in a short Tract, *Of Pleas of the Crown*, which I shall add to this in due Time.

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**F I N I S.**

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