AN

ESSAY

TOWARDS A

GENERAL HISTORY

OF

Feudal Property

IN

GREAT BRITAIN,

Under the following Heads,

I. Hiſtory of the Introduction of the Feudal Syſtem into great Britain.
II. Hiſtory of Tenures.
III. Hiſtory of the Alienation of Land Property.
IV. Hiſtory of Entails.
V. Hiſtory of the Laws of Succeſſion or Deſcent.
VI. Hiſtory of the Forms of Conveyance.
VII. Hiſtory of Juriſdictions, and of the Forms of Procedure in Courts.
VIII. Hiſtory of the Conſtitution of Parliament.

The Fourth Edition corrected and enlarged,

By JOHN DALRYMPLE, Eſq;

C'eſt un beau ſpectacle que celuy des Loix Feodales. Un chene antique s'eleve——
——Quantum vertice ad auras
Ætherias, tantum radice in Tartara tendit.
MONTESQUIEU.

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MDCCLIX.

To the HONOURABLE

HENRY HOME,

Of KAIMS, Esquire;

One of the Lords of Council and Session.

MY LORD,

I Do myself the honour of dedicating these papers to your lordship, as to the person, who not only led me into the general train of enquiry contained in them, but to whom any merit that may be found in the conduct of the particulars of that enquiry, justly belongs.

I know not whether this confession should excite in me most shame or most vanity; but I feel so much of the latter, that I am perfectly indifferent as to the other.

As the following thoughts were directed by your lordſhip, and were many of them reviſed by the greateſt genius * of our age, I have ventured to publiſh them to the world: I flatter myſelf they may prompt others, who have had advantages in any degree ſimilar to thoſe I have had, to trace the laws of their country with more ſucceſs, than it has been in my power to do.

When the publick is informed, that many papers which were open to me, have been wrote by your lordſhip, upon ſimilar ſubjects, the higheſt impatience will ariſe, for the communication of ideas, in which none of the deficiencies or

* Preſident Monteſquieu.

errors

errors of the following ſheets will appear.

I have the honour to be, with the higheſt reſpect and gratitude,

Your lordſhip's obliged,

And moſt obedient

Humble ſervant,

Edinburgh, 1757. JOHN DALRYMPLE.

PREFACE.

THE following chapters contain an attempt, to trace from the earlieſt feudal times, the great out-lines of the laws which relate to land property, in England and in Scotland, ſo far as they are derived from a feudal origin; to mark their variations in different ages, and to aſſign the cauſes of thoſe variations.

The progreſs of thoſe laws, however little attended to, is in both countries uniform and regular, advances by the ſame ſteps, goes almoſt in the ſame direction, and when the laws ſeparate from each other, there is a degree of ſimilarity in the very ſeparations.

The rights affecting land property, have chiefly diſtinguiſhed the feudal from every other law. Many of thoſe rights diſtinguiſhed according to that law, now

prevail in Britain, and the remains of many more, may ſtill be ſeen and felt.

Such a progreſs is the more to be attended to, becauſe until the ſubjects of England and Scotland have a knowledge of each others laws, there never will be a perfect union of the two kingdoms.

Will a ſubject of the one country lend money in the other, when he knows not by what proceſs he is afterwards to recover it? Will he buy land in the other country, when he knows not what ſecurity he is to have in poſſeſſing it? An inhabitant of Northumberland makes no ſcruple to purchaſe an eſtate in Middleſex or Kent, who yet will not buy the next field to him on the north of the Tweed; and people on this ſide of the border, make as little ſcruple to lend their money on eſtates, at the moſt northern extremities of Scotland, who yet will not truſt a ſhilling, on a Northumland ſecurity, at their doors.

At the ſame time I am far from thinking our old laws in Scotland, ſhould upon

upon every occaſion be overturned, to make way for an union with the laws of England. The following papers will ſhow, that the former approach to the latter of their own accord, and that the legiſlature needs only permit them to decay by degrees, inſtead of deſtroying them at once.

The following papers were, however, undertaken with another, and a more extenſive deſign.

The Spirit of laws firſt ſuggeſted in France, and the Conſiderations upon forfeiture firſt ſuggeſted in England, that it was poſſible to unite philoſophy and hiſtory with juriſprudence, and to write even upon a ſubject of law like a ſcholar and a gentleman.

That diſcovery being made, it appeared, that a ſyſtem of law, once ſo univerſal, and ſtill ſo much revered; during the progreſs of which, men arrived from the moſt rude to the moſt poliſhed ſtate of ſociety; a ſyſtem which has been the cauſe of the greateſt revolutions both ci-

vil and military; a ſyſtem connected equally with the manners and with the governments of modern Europe; deſerved an enquiry in the republick of letters, independant of the preſent particular uſe of that enquiry, in any particular nation.

ADVERTISEMENT.

IN the courſe of the following papers, ſome modern writers are ſometimes quoted, who may perhaps not be quoted as authorities in courts of law: when the author does this, he does it to avoid the parade and embarraſſment of too great a number of citations; but means at the ſame time to refer the reader to the authorities to which theſe writers refer, and on which they ſupport their propoſitions. Where theſe ſupports are wanting, he quotes no modern author, however worthy of credit, except to prove the modern law.

CHAP. I.

Hiſtory of the Introduction of the Feudal Syſtem into Great Britain.

IT is now generally agreed, that the Feudal Laws derived their origin from the ancient Germans; under which denomination were comprehended all the northern nations on the continent, who, in vaſt bodies, iſſuing from their native marſhes and foreſts, overrun the Roman empire, and ſettled in the territories which they conquered. Germans.

Yet in hiſtorical relations of thoſe nations, while they were in their own country, we are not to expect relations of the Feudal Law; for during that period it exiſted not among them: A ſpecies rather than a peculiarity of manners and inſtitutions, may however be obſerved while they were at home, which, added to a very peculiar ſituation when they ſettled in the conquered countries, was the cauſe of a ſyſtem of laws and politicks, the moſt particular that ever appeared in the hiſtory of mankind; a ſyſtem eſtabliſhed by every one of thoſe nations, however different in their dialects, ſeparated by ſeas and mountains, unconnected by alliances, and often at enmity with each other.

The thought of diſtributing among a conquering people the lands they have conquered, and

and of annexing to the gift, a condition of military ſervice, is in itſelf an exceeding ſimple one; accordingly we learn from hiſtory, it has been often reduced into practice, as among ſome of the Roman colonies on the confines of the Roman empire, among the Timarriots in the Turkiſh empire, and among other nations: But there were particular circumſtances, attending the conqueſts of the German nations, which never attended thoſe of any other conquering people; and without a peculiarity of cauſe, there never will be a peculiarity of effect.

The Greek and Tyrian colonies came from republicks; if they did not preſerve a dependance on their native country, they at leaſt preſerved a great connection with it: They went out in ſmall bodies, and as ſuch they formed themſelves into republicks. Equality among the citizens had been a rooted and political principle with them at home; it became now, from their ſituation, ſtill more the natural and conſiſtent principle of their union.

The various conqueſts of Aſia by Aſiaticks, have been made for one man, and not for a people, and therefore ſtanding armies have always been kept up to ſecure them.

Alexander and his army fought not for habitations, but for glory and dominion: That dominion was maintained by armies and cities; he and his ſucceſſors reſerved to themſelves the ancient revenues of the prince, together with the

mili-

military and political adminiſtration of the ſtate: The armies found a refuge in the cities for themſelves and their plunder, but the ancient inhabitants preſerved their land property and their laws.

The Hebrews in Canaan followed different principles of conqueſt; they extirpated for neceſſary reaſons the ancient inhabitants, inſtead of aſſociating with them.

The modern European colonies are kept in ſubjection, not only to their native country, but even ſometimes to particular companies of merchants in it. They are conſidered merely as inſtruments of commerce, and are therefore generally allowed to be regulated by the laws and police which happen to prevail in the different countries from whence they came: Their principles of ſettlement are not determined by the natural circumſtances attending a ſettlement, but by the particular views with which they are ſettled.

The Romans, who extended their empire further than all other nations, preſerved their conqueſts too by colonies; but as the members of them were for a long time taken from the dregs of the people, they went out without any extenſive ſubordination; afterwards when the ſoldiers conſtituted the colonies, and paid military ſervice in return for their lands, they had indeed a regular ſubordination; but then their connection with their native country was not broken, and beſides they were in continual danger from the

incur-

incurſions of the enemy: In theſe circumſtances, it was not natural that the poſſeſſions ſhould be hereditary; for in the ſucceſſion to a vacant poſſeſſion, valour, where valour was ſo neceſſary, would be preferred to conſanguinity; nor would the preference be complained of by men having connections with the mother country, and ſtill conſidering Rome as the ſeat of their fortunes. Accordingly none of the lands given under the condition of military ſervice, to the members of theſe colonies, went in deſcent; a few given by the emperor Severus excepted, and theſe rather were ordered to deſcend, than in reality ever deſcended to heirs.

In almoſt all thoſe various tranſmigrations, it is obſervable, that the conquerors either conformed to the civil laws of the conquered people, if they left a people at all; reſerving to themſelves the political and military adminiſtration; or they retained their own laws among themſelves, leaving to the conquered people the enjoyment of theirs. The reaſon was, a contrary regulation would have been either impoſſible for them to compaſs, or uſeleſs when compaſſed.

On the other hand, in every one of thoſe various circumſtances, the ſituation of the Germans was different: As there was no general ſyſtem of government in their own country, they had been ſubjected in their various diſtricts, to that chieftain, who could do them moſt good or moſt hurt: When therefore they iſſued abroad, they went

went rather as a band of independant clans, than of independant members; with a ſpirit of oligarchy, and not of equality.——Simple both in their manners and in their views, they could have no conception of a ſtanding army, with the expence, and diſcipline, and reſources neceſſary to ſupport it.——On the contrary, having quitted their own countries in vaſt bodies from neceſſity, being in queſt merely of a habitation, and purſuing neither glory nor dominion, but with a view to attain that habitation, they took up with the ſimple thought, of ſpreading themſelves all over the country, among the ancient inhabitants.——As the nations they conquered were more numerous, ſo were they likewiſe more poliſhed, and expert in arts than themſelves; they durſt not therefore put ſuch nations to the ſword.——Unacquainted even with commerce itſelf, they were ſtill more unacquainted with the refinement of being made the inſtruments of it to others.——As long as the moſt diſtant views to their native country remained, and as long as continual danger obliged them to be ready for continual defence, the poſſeſſions, it is true, upon the death of the tenants, could not regularly deſcend to their heirs, who perhaps were not able to defend them, but were given to thoſe in general, who appeared the moſt likely to be able to do ſo; yet when in courſe of time that ſituation was changed, and this valour was not ſo continually neceſſary, then the poſ-

ſeſſions

ſeſſions we are ſpeaking of, in contradiſtinction to all others in the hiſtory of the world, which have any reſemblance to feudal ones, became hereditary.

When ſuch were the circumſtances attending the conqueſts of the German nations, it followed in the courſe of things, that being an army, theſe conquerors would fall into a ſubordination in their ſettlement: It followed in the ſame courſe that being very valiant, their genius as well as ſituation would lead them to inſtitutions, which made it an obligation upon almoſt the whole body, to be ready at a military call; and this ſettlement, ſubordination, and obligation to military ſervice carried in themſelves, without the plan of a legiſlator, a ſyſtem of laws, which, however the laws of the conquered people might for ſome time ſubſiſt, could not fail in the end to ſwallow up all the laws of all the countries where it came.

Naturally fond of the inſtitutions of our anceſtors, we are apt to make this ſyſtem the reſult of the moſt conſummate political prudence and refinement: But regular and extenſive as the fabrick became, it was no more originally than the very natural conſequence of very natural cauſes: In inventing other cauſes, we only deceive ourſelves, by transferring the refined ideas of our own age, to ages too ſimple to be capable of forming them.

It has been long diſputed among Antiquaries, at what time the feudal ſyſtem was firſt introduced into England. While ſome have been poſitive, that it was eſtabliſhed among the Saxons; others have been as poſitive, that it was firſt introduced by the Norman conqueſt. Saxons.

Theſe opinions, by certain conceſſions, on both ſides, may perhaps be reconciled.

The Saxons in their own country, had, like all the other German nations, their princes and chieftains; they had likewiſe their ſlaves, who ſerved them not as domeſticks, but as labourers of the land, in return for which, they paid a certain quantity of cloaths, and corn, and cattle. When ſuch a people ſettled in a foreign country, it is naturally to be expected, that certain portions of the land would be reſerved for the prince, and the reſt parcelled out among the chieftains; that in order to prevent diſputes about the boundaries of eſtates, and to make the deed more formal, theſe laſt would have their lands pointed out to them by the prince, in preſence of the other chieftains, and when writing came into uſe, pointed out to them by a charter; and that both the prince and chieftains would again ſettle upon their lands, their followers of an inferior degree, and their ſlaves.

At the ſame time we are not to imagine that the whole land of the country was ſo diſtributed, or ſo holden. The * Germans in none of their

* L'Eſprit des loix, Lib. 30, cap. 8.

con-

conqueſts aſſumed the property of the whole lands to themſelves, the ſuperfluity would have been burdenſome; ſuch of the ancient inhabitants then, as were allowed to live in the country, kept their lands on the ancient footing; ſuch of the intruders too, as were not attached to any chieftain, taking poſſeſſion of any vacant land that they found, enjoyed it on the ſame footing; both of them held their poſſeſſions at firſt without grant from the prince, and when writing came in, likewiſe without writing.

But then, as it was neceſſary to reduce to ſubjection, under government, in a political, thoſe, who were not ſubjected in a feudal capacity, the king ſent his own officers to judge, and to lead to war the poſſeſſors of theſe laſt lands in the ſame manner as the chieftain judged, and led to war the people dwelling upon the lands, which had been granted in a feudal form, to him.

The diſtinction between lands held on the ancient, and thoſe held on the new and feudal footing, is obvious, and marked with preciſion in the earlier French * law. Marculfus † preſerves the very form of converting an allodial into a feudal eſtate. Lands of the former kind were called *Alleux*, the officer ſent to command in them was called *Count*, thoſe living under his juriſdiction, and poſſeſſing ſuch lands, were called Libres, or in Latin *Liberi*, and often *Milites*,

* L'Eſprit des loix, lib. 30. cap. 17, 18, 20. † Marculf. Lib. 1. Form. 13.

and

and were defined to be; * *Celles qui ne recognoiſſent ſuperieure in feodalité, et ne ſont ſujets a faire, ou a payer aucuns droits ſeigneuriaux.* Such lands were claſſed into counties, theſe again into vills, and theſe laſt into hundreds; over the vills *Vicarii*, and over the hundreds *Centenarii* were placed, the latter to act under the former, and both to act under the Count. Lands on the other hand held on the new and feudal footing were called *Feodaux*, thoſe holding them were called *Leuds*, i. e. Lords; the *Leuds* judged their own people, and led them to war; their lands were not contained in the diviſions and ſubdiviſions of the counties, nor were their people ſubject to the officers of them. † At a much later period of the feudal ſyſtem in Italy, the *Allodia* and *Allodiarii* make no inconſiderable figure in the books of the Fiefs. And in the earlier feudal hiſtory of all Europe, the diſtinction betwixt the *Allodia* and *Beneficia*, the lords and the counts, the freemen and vaſſals, is without difficulty to be ſeen.

When this diſtinction was ſo univerſal among other feudal nations, during the Saxon times, is it to be believed, that it did not ſubſiſt among the Saxons? It did ſubſiſt, and is to be found in the celebrated, though hitherto ill underſtood diſtinction, betwixt Thain Land or Boc Land, and Reve or Folk Land.

* Reform. cuſtom. Art. 102.

† L'Eſprit des loix, Lib. 31. Cap. 8. & 14.

Land

Land granted to the *Thains* or Lords was called *Thain Land*; Allodial Land, over which the king's officer, called in the Saxon language, *Reve*, and afterwards ſherriff, had juriſdiction, was called *Reveland*. Again, land of the one kind being held by a charter, was at other times called *Bockland*, that is, book land; land of the other kind being held without writing, and in the ancient manner, and moſtly by the ancient inhabitants, was at other times called *Folkland*. In many of the Saxon * laws, theſe two ſpecies of lands are continually ſet in oppoſition to each other.

This produced the diſtinction between the proprietors of Bocland, called Thegen, that is, lords, with the Theoden, who were thoſe under them; and the ſuperintendants of Folkland, called Coples, that is, counts or earls, with the Ceorles, who were thoſe under them. A † law of Æthelſtan, in enumerating the orders of the ſtate, ſays, *Et ibi erant quilibet, pro ſua ratione, Cople et Ceorle, Thegen et Theoden*; which firſt Lambard juſtly tranſlates by the word *Comes*; and a law of king ‡ Ina, ſo far back as the 688, makes mention of counts or earls, and of their counties.

The poſſeſſors of allodial lands are, in the language of thoſe times, to be likewiſe under-

* Leg. Alfrid. Cap. 37. Leg. Eadward L. 2. † Lex de gentis, et legis honoribus in Judic. Civitat. Lund. ‡ Lex. Ina 56.

ſtood, by the general word made uſe of in the French law, *Liberi*, ſet in oppoſition to the ſlaves, and to the tenants under the dominion of the Thains. As in the French law too, the *Liberi* were defined to be, *Celles qui ne recognoiſſent ſuperieure en Feidalitè*, ſo in Dooms-day, the *Liberi* are expreſſed to be, thoſe *qui ire poterant quo volebant*, men, in ſhort, attached to no lord in a ſeignoral, but to the king alone in a political capacity; though from the ſame book it appears, that they often, for their greater ſecurity, put themſelves under the protection of ſome lord.

The Folkland was divided and ſubdivided into Counties, Tythings, called ſince by corruption Rideings, and Hundreds, and over theſe diviſions the king's officers, in the ſame manner as in the French law, were placed in their orders. Many Saxon laws deſcribe theſe diviſions, and the 35th law of Edward the confeſſor, near the end, enumerates the officers ſet over them to be, *Vice comites, et Aldermani, et Prepoſiti Hundredorum*, correſponding to the *Comites*, *Vicarii*, and *Centinarii* of the French, and ſet in oppoſition to the lords, who immediately follow them in the enactment of the law: *Barones vero qui ſuas conſuetudines habent, et qui ſuam habent curiam, de ſuis hominibus videant, et ſic de iis agant, et omnia rite faciant.*

As the judge of the Thain land was the Thain himſelf, ſo the judge ordinary of the Reve land

or

or Folkland was the * Reve or Shirrive, and the court in which this laſt judged the freemen, ſeparate from that court in which the Thaine judged his people, was ſometimes called the Revemote † or Scyremote, and at other times by it is to be underſtood even the Folkmote.

As in France the form of converting allodial into feudal eſtates is to be traced, ſo in England great part of the book of Dooms-day is taken up with an account of the converſion of the former into the latter. From the ſame book it appears, that feudal often returned to be allodial eſtates, and returned to the ſubjection of the king; though he was ſometimes cheated of the cenſus laid upon them: ‡ *Hæc terra fuit tempore Edwardi Thain land, ſed poſtea converſum eſt in Reve land, et idem dicunt legati regis quod ipſa terra et cenſus qui inde exit furtim aufertur regi*, is a return often to be found in that book.

I am ſenſible, this account of the diſtinction betwixt Folkland and Bocland, is different from the various accounts given of it by modern hiſtorians, and lawyers, and antiquaries; but I appeal to the nature of the German conqueſts, to the analogy of law in neighbouring nations at the time, and to a general view of the ſureſt guides in this queſtion, the Saxon laws themſelves.

Among the Saxons then, though a great part

* L. Eadweardi 11. † L. Eadgar 5. L. Canut. 17.
‡ Dooms-day, Tit. Hereford.

of

of the lands of England were held by a feudal tenure, yet many of them continued ſtill to be allodial.

And even in thoſe which were held by a feudal tenure, the feudal relations were far from running in that regular ſubordination, which, with after-ages, made the feudal connections and dependancies ſo compleat, in the eſtabliſhment, and extenſion of the rights of the rear vaſſals, that is, of the ſub-vaſſals, who held their lands under the crown-vaſſals, in the ſame manner, that theſe laſt held their lands under the crown.

Two things were great bars to the progreſs of the rear vaſſalage. In the firſt place, when the lands given immediately by the king, reverted to him, as they frequently did, either by the crime of the vaſſal, or from the limited deſtination of heirs; if the right of the ſub-vaſſal had not fallen with that of the principal one, the king would then have loſt the profits of the reverſion. In the next place, the lords were too ſenſible of that independancy, which aroſe to them, from the hereditary enjoyment of their eſtates, to beſtow the ſame power of independancy on thoſe below themſelves. Both the king and the lords then found their advantage, in limiting the intereſts of the rear vaſſals.

Accordingly, it was late * in the French law,

* L'Eſprit des Loix, Lib. 31. Cap. 25.

before the rear Fiefs were made descendible to heirs. In * Italy, at the time the books of the Fiefs were wrote, the crown vassals could give in fee; but then those to whom they gave, could not give again under themselves. Among the Saxons, there is not the least reason to believe, that the grants under the lords were at all hereditary: For though we see by † charters in the later Saxon times, that some of the book lands were granted by the proprietors, to people under them, for many different services, in the form of a charter, and for one, two, or three lives; yet it is obvious that these grants were of the nature of leases, not of Fiefs, and the possessors of them were tenants, not rear vassals. Even the law of forfeiture of king Canute, and afterwards of Edward the confessor, so much talked of among lawyers, proves beyond contradiction, that the grants under the lords were not hereditary: "Qui fugiet a domino suo vel socio, pro timiditate, in expedi-"tione navali vel terrestri, perdat omne quod "suum est, et suam ipsius vitam; et manus "mittat *Dominus ad terram quam ei dederat*; *et* "*si terram hereditariam* habeat, ipsa in manum "regis transeat." An opposition is put betwixt land falling to the lord, and land falling to the king upon forfeiture: The last is called *terra hereditaria*, as set in opposition to the other, for

* Lib. Feud. 1. Cap. 1. † Spell. tenures, Cap. 16.

a very

a very good reaſon, becauſe the poſſeſſion of land under a lord was not hereditary at all.

Again, in the connections even between the king and his immediate vaſſals, or the lords, the tye was but ſlight among the Saxons. In the hereditary poſſeſſion of the grant made ſecure to the crown-vaſſals; in the feudal form of the grant through a charter; in certain heriots and profits paid on change of heirs; and in the obligation to certain military duties; the outlines of the feudal ſyſtem may be ſeen: But that infinite variety of rights, ariſing from the cloſer union, betwixt the king and his vaſſals, and from the ſubordination of that union deſcending through the various ranks of the nation, was as yet not known.

Nor is this backward ſtate of the feudal inſtitutions among the Saxons to be wondered at: The feudal ſyſtem was not eſtabliſhed at once, in any one kingdom of Europe; the Saxons beſides were a cruel and extirpating race; inſtead of ſettling themſelves, and ſpreading peaceably among the Britons, thoſe laws, which that ſettlement would have neceſſarily involved in it; they put many of them wantonly to the ſword, and drove many more into France and Wales. Thus more land being vacant than the Saxons could poſſeſs, their chieftains would not for a grant of land, ſubmit to the ſevere feudal regulations; add to this, that the princes who came over, being rather plunderers than princes, their

attendants were, and continued to be, rather their associates, than subjected to them; and from thence arose that degree of equality of princes and chieftains, which is so contrary to the feudal system, and to the rights of the superior lord.

Normans.

William the Conqueror came from a country where the greater power of the prince had sooner riveted the feudal duties upon the crown-vassals, and where a longer duration and smaller interruption of the feudal principles had given time and room for the rights of the rear-vassalage to ripen. He introduced many of the laws of his own country into his new dominions: By the number and variety of these laws; the infinite number of grants made by him and his followers; the language of the feudal books which he made to supplant that of the Saxons; and many new forms and terms in which it was made necessary to manage all disputes in law, at a time when every judge was a Norman, and almost every dispute in some degree a feudal one; occasion has been given, for the opinion, that this prince was the first who brought the Primordia of the Fiefs into England.

Three general alterations were made by William, which, by their important effects, have imposed upon Antiquaries, and led them into that opinion.

In the first place, he altered the nature of a good deal of the land in the kingdom, by abolishing

liſhing the diſtinction betwixt allodial and charter land. A great part of Dooms-day is taken up with an account of the converſion of the one into the other; and moſt of thoſe lands, as well as of all the other lands in the kingdom, he made to be held by military tenures or knight-ſervice. This he carried ſo far, as to ſubject the church-lands to the ſame ſervice, and * fixed the number of ſoldiers which every biſhoprick and abbey ſhould equip for the war.

Again, the diſtinction between allodial and feudal land being deſtroyed, the great offices which were founded on that diſtinction, ſhould have fallen too: But William prevented this: From the greater progreſs of the feudal ſyſtem in his country, the earldoms were become hereditary, and were held of the ſovereign by a feudal tenure: The Counts, that is the earls, had again ſpread the ſame ſyſtem under themſelves, and made the freemen hold of them by the ſame tenure. Now William, in imitation of theſe great ſeignories in his own country, † attached large territories to the title of Earl, in England, and carrying the imitation of the ſame ſeignories ſtill further, made the earldoms hereditary; by this alteration, thoſe honours, which among the Saxons were only official, and during pleaſure, became now ſeignoral and perpetual.

But the great alteration which happened in

* Spell. Cod. leg. vet. † Ibid.

the time of William, or in that of one or two of his ſucceſſors, was: That not only theſe great offices were made hereditary, but that the whole Fiefs of the nation, as well thoſe holding of the great officers, as thoſe holding of the lords, became ſuch; in ſhort, the rights of the rear-vaſſals advanced to the ſame degree of firmneſs, with that of the more immediate vaſſals of the crown.

The greater progreſs of the feudal ſyſtem had eſtabliſhed theſe rights in Normandy, and they were by the conquerors tranſplanted into England. In conſequence of this, all the effects which neceſſarily muſt follow a general extenſion of this kind, do immediately ſtart up in this reign, or in a reign or two after. Thus the term * vavaſſour or rear-vaſſal we find immediately in the laws of the Norman princes.——— Thus homage, if not introduced by William, had at leaſt, all its ceremonies aſſigned it by him; † which ceremonies became neceſſary to preſerve the memory of the tenure, at a time, when not the heirs of a few great thanes holding of the king, as in the Saxon times, but the heirs of many thouſand vaſſals holding both of the king and of ſubjects, were claiming poſſeſſion, and could no longer even by the laſt be refuſed it.———Thus the right of eſcheat to the

* V. leg. Gul. lex 24. & leg. Hen. 1. lex 7. & 27.

† Comparé L'Eſprit des loix, Lib. 31. Cap. 32.

lord

lord was ſoon after eſtabliſhed, over the rear-vaſſals, whoſe holdings were become by that time hereditary:——Thus the ward and marriage of the heir, of which, as Sir Henry Spellman * proves, there are no veſtiges in the Saxon law, and to which indeed, the independancy of the Saxon thanes would never have ſubmitted; we find quickly taking place among the Normans, in favour both of the king as ſuperior lord, and of the ſubject as ſuperior lord: In favour of the king, who had power to inforce them, and in favour of the ſubject, who when he granted his land hereditarily under himſelf, had been accuſtomed in his own country to demand, and thought he had a right to demand, the ſame incidents from his vaſſals, in return. The ward of the heir, we find from Glandville, fully eſtabliſhed, in the reign of Henry II. and the marriage of the heir, which in its eſtabliſhment could only come after the ward, is referred to, in the laws of Henry I. as a law ſubſiſting in the time of William Rufus. The law of Henry I. it is likewiſe obſervable, ordains, that all ſubject ſuperiors ſhall obſerve the ſame regulations with reſpect to their wards, which that prince there preſcribes to himſelf, with reſpect to his own. † *Et præcipio ut Barones mei ſimiliter ſe contineant erga filios et filias hominum ſuorum.*

The queſtion at what time the feudal Syſtem

* Spell. tenures, cap. 14. & 15. † Leg. Hen. I. L. 1.

Scotch. was first introduced into Scotland, and by what steps it advanced, is much more difficult to be solved. The English have the laws of their Saxon kings, they have charters too as far back as the year 694; but the Scotch have no system of their law before that of David I. who began his reign *anno* 1124; nor charters before the time of Malcolm III. who began his *anno* 1057.

In consequence of these defects, it is still a dispute in Scotland, whether the feudal law was established there, as early as the reign of Malcolm II.

Perhaps by certain concessions, the differing opinions concerning the origin of the System, in this part of the island, may be likewise reconciled.

The Feudal System, we have seen, was not established at once in England, but by degrees; the same was its progress in every other country in Europe. Further, the principles of the fiefs were settled by a conquest in every country where they came, and in proportion as that conquest was perfect or imperfect, they acquired a firmer or less firm footing. Lastly, it is plain not only from facts handed down by historians *, but likewise from the famous account of the laws of Malcolm, prefixed to the *Regiam Majestatem*, and the terms made use of in that account, that

* Craig, lib. 1. dieg. 8. n. 2. & 3. & notæ.

before

before his reign, ſome of the feudal characteriſticks were known in Scotland.

It is probable then, that before the reign of that prince the Primordia of the fiefs were advanced in much the ſame degree in Scotland, as before the time of William the Conqueror they were advanced in England. They muſt have taken their riſe from ſome conqueſt, made by nations of German origin, in the lower parts of Scotland; and from thence been extended to the more mountainous: For thoſe nations, wherever they went, by their ſubordination of ranks in conquering, and their diviſion of the conqueſt when made, laid continually a foundation for the feudal ſtructure to rear itſelf upon.

This ſituation of his country gave to Malcolm an opportunity to put the laſt hand to, and compleat the feudal ſtructure: That politick prince brought the ſyſtem to completion by art *; by the converſion of the allodial into feudal lands, expreſſed by Fordun †, and the laws of Malcolm ‡, as an alienation made by the king of all that land not yet diſpoſed of, which, in right of the crown, was deemed to belong to the king; by the prudent diſtribution of the land thus converted §, and of the real ‖ crown-lands, among his nobles; by titles of honour attached to feudal grants; by making all donations of forfeitures in the feu-

* Eſſays on Brit. Antiq. cap. 1. † Ford. lib. 4. cap. 43.
‡ Leg. Malc. cap. 1. § Ford. loc. cit. ‖ Leg. Malc. cap. 1.

dal form; a cuſtom which all his ſucceſſors too followed; by the far greater privileges of the king's vaſſal, than of the Allodiarius, one of which was in moſt nations of German origin *, that a greater compoſition was exacted, and paid, for taking away the life of the former than of the latter; by that ſecurity of poſſeſſion which the introduction of charters conferred, and which all were fond of acquiring; and laſtly, by that influence, which the example of almoſt all neighbouring nations could not fail to have upon his people.

The words of Fordun deſcribing the ſtate of the kingdom, prior to the time of Malcolm in Scotland, and the alterations made by that prince, contain the outlines of the ſtate of the Feudal Syſtem among the Saxons, and of the alterations made upon it by William in England: † "Antiquitus vero conſueverant reges, ſuis "dare militibus, plus aut minus de terris ſuis, "in Feodifirmam, *alicujus provinciæ portionem* "*vel Thanagium. Nam eo tempore, totum pene* "*regnum dividebatur in Thanagiis:* De qui- "bus, cuique dedit, pro ut placuit, vel ſingu- "lis annis ad firmam, ut agricolis; vel ad de- "cem annorum, ſeu viginti, ſeu vitæ terminum, "cum uno ſaltem, aut duobus hæredibus, ut "liberis et generoſis; quibuſdam itaque, ſed "paucis, in perpetuum, ut militibus, Thanis,

* L'Eſprit des loix, lib. 31. cap. 8. † Ford. lib. 4. cap. 43.

"prin-

" principibus. Malcolmum autem in donis ita larg-
" um fuiſſe, ut cum omnis totius regni, certas
" regiones et provincias, ritu priſcorum, in pro-
" pria poſſeſſione tenuerat; nihil inde poſſidendum
" ſibi retinuit."

From this relation it appears, that the kings of Scotland had originally aſſigned to their officers certain portions of land, which were erected into Thaindomes; that however the whole land of the kingdom was not portioned out in this manner; that on the contrary part of it was under ſubjection of the prince; but that Malcolm diſtributed this remaining part of the country among his nobility; or in other words converted all the allodial land of his kingdom into feudal.

In return for the favours conferred by this prince, and in conſequence of the foundations laid by him, the ceremonies of homage were eſtabliſhed, the incidents * of ward and marriage were conferred; and in a ſtate of the Scotch nation ripe for the reception of the Feudal Syſtem, the natural courſe of things, and the prudence of the Scotch monarch, brought about in one part of the iſland, what in a ſtate of the Engliſh nation, equally ripe for the ſame reception, the violence of the Engliſh monarch inforced in the other.

* Ford. lcc. cit. Leg. Malc. lcc. cit.

CHAP. II.

History of TENURES.

SECT. I.

Species of tenures.

Military tenure.

AS the principles of the Feudal Syſtem were founded in conqueſt, as all its relations tended to preſerve and defend that conqueſt; ſo moſt Fiefs were originally held by a condition of military ſervice.

This connection betwixt the nature of a fief and the military ſervice, was underſtood to be ſo neceſſary, that it laſted even till the lateſt times in the law. * In England, before the twelfth of Charles II. if the king had granted lands without reſerving any particular ſervice or tenure, the law creating a tenure for him, would have made the grantee hold by knights ſervice; and in Scotland, before the 20th of George II. all lands were preſumed to be holden ward, that is, by knight-ſervice, unleſs another holding was expreſſed.

Soccage tenure.

In all the German ſettlements, after the diviſion of the conqueſt, both the princes and the chieftains divided the poſſeſſion

* Viner voce tenure (K)

of

of the lands which they obtained, partly among the braveſt of their followers, who in return were to attend them in war; partly among ſuch as inclined to be huſbandmen, called in the compilement of the confeſſor's laws, Sokmen, from whom they received in return certain quantities of corn and cattle, and cloaths; and partly among their ſlaves, called in the ſame compilement villains, who laboured the ground for behoof of their maſters who had ſettled them upon it.

The contempt which in thoſe martial ages, was entertained for every man who was not a ſoldier, * brought the Sokmen in eſtimation very much upon the ſame footing with the villains. A law of Edward the confeſſor † puts an equal valuation on the life of a Sokman and of a Villain, *Manbote in Danelaga de Villano et Sockmanno* 12 *oras.*

Hence, during a long time in the feudal ſettlements the poſſeſſions of the huſbandmen were rather leaſes than feuds, and the poſſeſſors of them rather tenants than vaſſals. They were deſpiſed in the commonwealth; in every different nation they had a different name of baſeneſs, as in France that of Roturiers, and in Britain that of Sokomen; they were ſubjected to the meaneſt ſervices, and, as appears from the book of Doomſday, were inconſiderable in num-

* Vid. Spellm. gloſſ. voce Sceomannus. † Leg. Ed. L. 12.

bers;

bers; they bore no part in the councils of the nation; thoſe who held of the king in capite, by knights ſervice, being the only vaſſals who were originally admitted into theſe councils; even the price of their lives was eſtimated very low in the law; and at a period when the poſſeſſions of the military vaſſals were become hereditary, thoſe of the huſbandmen, as appears from all the Saxon charters *, to ſuch people, were either during pleaſure, or at moſt for life or lives.

But in proceſs of time, theſe huſbandmen having continued long in poſſeſſion of the land, and during a more ſettled ſtate of affairs, and being grown into eſtimation in the commonwealth, began to claim, and with little oppoſition, an inheritance in the land: This claim, when made good, cauſed Soccage to be conſidered as a regular tenure, and gave firmneſs to it as ſuch.

As the times too grew more peaceable, and the new conquerors were more ſafe in their conqueſts, ſuperiors ran very much into the practice of exchanging that military ſervice, which was no longer of the ſame uſe as formerly, for the ſervices of agriculture.

Further, the ſame peaceable manners, made the minds of men be ſhock'd with the bondage of their fellow-creatures; † Villains were infranchiſed, the ſlaviſh tenure of villenage, which

* Vid. Spellman of tenures. † Lyttlet. ſect. 204. et ſeq. Mad. form. anglic. tit. Manumiſſion of villains.

had

had taken its name from the objects of it, was deemed to be too ſevere, and by degrees was converted into Soccage, a tenure better accommodated to the more civilized diſpoſitions of mankind.

Thus the tenure by knights ſervice, and the tenure by villenage, the one ſinking, and the other riſing in dignity, falling both gradually into the ballance of Soccage tenure, this laſt extended itſelf daily in Great Britain over land-property.

The extenſion of Soccage, was a deviation from the original feudal relations; the alterations in the rents of Soccage were the effect of an equal deviation from feudal manners.

Lyttleton obſerves *, that vaſſals by Soccage, paid originally the actual ſervice of the plow, in lieu of any other rent, and that from thence they got the name of Soccomen.

But afterwards, it appears, that they came to pay a certain rent in corn and cattle. According to Sir Henry Spellman †, the word Farm or Feorme, which in his time was ſometimes uſed to ſignify rent, ſignified antiently corn and cattle; and Gervas ‡ of Tilbury relates, that he has ſeen in the reign of Henry I. ſeveral of the king's vaſſals, driving their rent of corn and cattle to the king's court, but that the ſame prince

* Lytt. ſect. 119. † Spellm. tenures, cap. 7. ‡ Selden, vol. 1. p. 1003.

going abroad, and having occaſion for money, ſent people through the kingdom to value the rents, and that in each earldom a vicarius was placed, to bring thoſe rents, converted into money, into the exchequer.

The alteration made by this prince, was made by a great many other ſuperiors, who not reſiding on their eſtates, as ſuperiors had done in the ſevere ages of the Feudal Syſtem, were glad to exchange the original duty of military ſervice, for the ſervice of agriculture; and that afterwards for the payment of corn and cattle; and that at laſt for the payment of a certain ſtated ſum of money *.

Burgage.

Thus in the original feudal eſtabliſhment, it appears, that almoſt the whole commonwealth would be divided into two claſſes of men; the ſoldiers and the huſbandmen: The firſt of which, by their tenures, were bound to confront danger, and the other from inteſtine broils or foreign invaſions, were continually expoſed to it. The moſt martial nation however, muſt have ſome artificers attending them; but theſe, unable to brave the dangers to which the other two bodies of the nation were accuſtomed, and ſeeing no ſecurity for themſelves in the country, either retired into the antient Roman towns, or built new towns for themſelves, near the caſtles of their reſpective lords.

* Lyttlet. ſect. 119, 120.

At firſt deſpiſed among a nation of warriors, they were in the meaneſt condition: From a view of the ſituation of the towns of England in the book of Doomſday, it appears, that the inhabitants of them were anciently a mixture of people, either in the demeſne of the king, and conſequently tenants at will; or in the dominion of a variety of lords; or *Liberi*, who had found they could not live without putting themſelves under the more immediate protection of the king, or of ſome lord; and that all of them were under the juriſdiction, either of the king in his burghmote, or of ſome lord in his court, and payed a cenſus and taxes to the bailiffs, called Portreves, of the one or the other reſpectively. The famous charter of William I. to the city of London *, is no other than a mere inſtrument of protection; the mighty privilege he confers upon the citizens is, that they ſhall be law worthy, and that they ſhall be capable of inheritance.

Even in the earlieſt times of the Feudal Syſtem in Britain, however, it appears, that both the princes and the lords were beginning to encourage theſe ſettlements. The Saxon princes and lords had allowed the towns to form themſelves into † communities and gilds; had, under colour of protecting them, walled them round, and ſometimes put garriſons of their own men

* Hollingſhead, vol. 3. fol. 15. † Doomſday.

into

into them; had beſtowed ſmall territories for ſupport of the community; and in return for all theſe favours, exacted ſmall rents * in proviſions and horſe-carriages. And William † the Conqueror ordered many ſuch ſettlements to be erected through the land.

In after times the benefit of theſe towns was ſtill further obſerved; they were freed of their Portreves, and of foreign juriſdictions; their taxes and lands were fee'd out to them in feofarm; they were allowed to enjoy their own magiſtracies; enfranchiſements were granted them; charters and privileges were conferred; and a new, feudal, free tenure was brought into the law, called tenure by Burgage; a tenure highly advantageous to thoſe who erected it, as thereby they rendered the people who held by it dependants upon them, and the towns places of defence againſt their enemies.

Frank-allmoigne.

The ſame ſecurity which beſtowed firmneſs on the tenure of Soccage, and which the introduction of Burgage tended to beſtow on the nation, produced likewiſe the tenure of mortification; or, *Frank-allmoigne*, which laſt it was called, becauſe the lands were held as a free alms in *Libera Eleemoſina*, on the account of religion ‡.

Originally, when lands were given to the

* Vid. Doomſday. † Cart. Gul. cap. 61. Wilkins, 229. ‡ Reg. Maj. lib. 2. cap. 23. n. 2. lib. 2. cap. 18. n. 3. Glanville, lib. 7. cap. 1. in prin. et in fin.

church,

church, they were burdened with military ſervice; this ſervice the biſhop or abbot performed in ſome ages by himſelf, and in others by a delegate: But when the neceſſity for it became leſs, people in giving lands to the church exacted no other return, than prayers and ſuch religious exerciſes *.

Thus the ſeveral orders that were of value in the ſtate, the ſoldiers, huſbandmen, artizans, and clergy, became each the object of a diſtinct tenure, and the four ſimple forms of tenure, into which all the reſt may be reſolved, came, by the natural and gradual courſe of things, into the law.

As theſe three laſt ſpecies of tenure were extended by the more peaceable and humane genius of the ſucceeding times, ſo the ſame genius produced a great alteration in military tenures, both in England and in Scotland.

Originally the grants of lands were burdened with indefinite military ſervices; but in the time of the Normans, theſe ſervices came to be diſtinguiſhed one from another, and according to thoſe diſtinctions military tenures got different names: Thus ſome lands were granted on condition of guarding a caſtle, and theſe were ſaid to be held by caſtle gard; others on that of performing warlike offices about the king's perſon, as to carry his banner in the day Eſcuage.

* Lyttlet. ſect. 135. Stair, lib. 2. cap. 2. num. 59.

of

of battle, and theſe were ſaid to be held by great ſerjeanty: Others again were granted on condition of attending the king in perſon on foreign expeditions, and theſe were ſaid * to be held by Eſcuage.

Of theſe laſt conſiſted the greateſt part of the feudal property in the kingdom.

According to the books of the Fiefs †, all vaſſals were originally obliged to perform their ſervices in perſon; afterwards, as the ſeverity of the feudal law declined, and it became indifferent to ſuperiors, whether the ſervice was performed by the vaſſal or by another, the vaſſals by Eſcuage in England got into a way of not attending in perſon; inſtead of ſuch attendance, they ſent deputies in their places. To this practice long acquieſced in, a ſanction was given, by a judgment, in the reign of Edward III. ‡ But ſtill the fief, as appears from a caſe in that of Henry I. was forfeited, if the deputy was not ſent §.

In further proceſs of time, as ſuperiors became ſtill leſs exact, vaſſals became ſtill more remiſs; they did not even take the trouble of ſending their deputies, but gave a compenſation in money to the lord, according to an aſſeſſment determined by parliament; and for this compen-

* Spellm. of feuds, cap. 22. Mad. hiſt. of excheq. fol. 431.
† Lib. feud. 2. ‡ Lyttlet. ſect. 96. § Seld. notes on Hengage, 114, 115.

ſation

ſation he could only diſtrain, but not ſubject his vaſſals to forfeiture.

At the ſame time, as ſuperiors had ſtill great power over their vaſſals, they exacted, and diſtrained for exorbitant ſums, under pretence of this compenſation.

To elude theſe exactions, the vaſſals invented, what is called by Lyttleton the Eſcuage-certain; by this they became bound in the charter, to pay a certain, ſtated ſum of money, in lieu of attendance in perſon, or by deputy.

This produced the diſtinction betwixt Eſcuage certain, and Eſcuage uncertain; for where ſuch proviſion was not made by the vaſſal, or where it was provided that the compoſition ſhould be regulated by the aſſeſſment of parliament, the Eſcuage was called uncertain *.

In this laſt the ſuperiors continued their exactions, nor when they laid on and levied them, did they give the vaſſals the ancient alternative of paying in ſervice, or in money, as they pleaſed: On the contrary, Henry II. upon occaſions of war, uſed, without ſummons, or any other ceremony, to aſſeſs a ſum upon every knight's fee for the exigencies of the war †.

But what was laid on by this prince with ſome moderation, ſeems to have been laid on by ſucceeding princes without any; and the example

* Lyttlet. ſect. 120. † Madox hiſtory of exchеq. pag. 435.

of

of the ſovereign with regard to his vaſſals, was followed by the lords with regard to theirs.

Theſe aſſeſſments raiſed ſo great clamours in the whole nation, that they became, in the reign of king John, one of the chief ſources of contention betwixt that monarch and his ſubjects. Theſe laſt prevailed; John ſigned the *Magna Charta*; one clauſe of it was, *Nullum ſcutagium ponatur in regno noſtro, niſi per commune concilium regni noſtri:* And though this conceſſion concerned only the king, with regard to his vaſſals, by Eſcuage uncertain; yet it was equitably extended to all meſne lords and their vaſſals by eſcuage uncertain, theſe being obliged to pay, and thoſe to accept, Eſcuage, at the rate aſſeſſed by parliament.

The Eſcuage certain came to be deemed altogether a Soccage tenure, and therefore was only ſubject to the duties of it; but the Eſcuage uncertain, on the contrary, continued ſtill ſubject to the incidents of ward and marriage. This laſt then came to be a ſtrange mixture of military and Soccage holding; as it was ſubject to ward and marriage, it was of the former kind; as it paid money, inſtead of military ſervice, it was of the nature of the latter.

Taxtward. In Scotland the ſeverity of the military tenure came to be ſoftened after a different manner.

As our only incurſions were into England,

they

they were eaſy; we had but little money, or occupation, and being weaker than the enemy, we were obliged to keep our diſcipline ſtrict: Thus our vaſſals did not decline the military expedition; nor could they eaſily give a recompence in lieu of their attendance; nor in our dangerous ſituation, were ſuch diſpenſations to be at all allowed.

For theſe reaſons, the obligations to military ſervice continued very long in the Scotch law *, even as long as we had wars with our neighbours in England.

But then, as the burthens of ward and marriage were not ſo intimately requiſite in our military holdings, the profits ariſing from theſe incidents were eſtimated by a great many ſuperiors and vaſſals among themſelves, at a moderate rate. Theſe vaſſals paid the eſtimation agreed upon, to be freed from the incident, and Taxt-ward was brought into our charters and law books.

Taxt-ward, like the Eſcuage uncertain of the Engliſh, was a ſtrange mixture of military and Soccage tenure; performing military ſervice, it was of the nature of the one; paying a certain ſum of money, it was of the nature of the other.

Thus while, in the military tenures of England, the military ſervice was gone, and the wardſhip remained; in many of the military tenures of Scotland the wardſhip was gone, when yet the military ſervice remained.

* Craig, lib. 2. dieg. 11.

The

Blench holding.

The ſame advancement of the intereſt of the vaſſal upon that of the ſuperior, which in England created the diſtinction betwixt Eſcuage certain and uncertain, and in Scotland converted ward-holdings into Tax-ward, produced likewiſe a conſiderable alteration in many of the tenures by Soccage.

Originally, when the king and lords granted their lands to be held in Soccage, or converted thoſe before held by military into Soccage tenures, they received the full value for that grant or converſion.

But when the feudal manners began to give place to a certain degree of luxury, ſuperiors who were in want of money to ſupport it, were willing to give to their vaſſals, who had got money through it, lands, at very low rents, in conſideration of large ſums delivered at one payment.

Theſe rents complained of as low in many ſtatutes, became gradually lower, from the neceſſities of ſuperiors: In proportion too as lands were improved, or by the ſinking of intereſt roſe in their values, theſe rents, when compared with the real rent, had the appearance of being ſtill more low, than without thoſe alterations they would have appeared to be.

The author of the old tenures * reckons it Feefarm, when the third of the value of the rent is the ſum paid.

* Tit. Feefarm.

However,

However, the rent became afterwards ſtill leſs, and in the end people got into the practice of laying aſide a rent altogether, and took directly an eluſory duty, as a roſe, a pair of ſpurs, *&c.* if demanded, which produced the holding called Blench both in England and Scotland.

Moſt of the lands in Great Britain having been converted through time into this holding, the king loſt his power over the crown vaſſals, and the crown-vaſſals their power over the people.

SECT. II.

Fruits of tenures.

AFTER the foregoing general view of the progreſs of the different ſpecies of tenures, it will be proper to obſerve the more immediate fruits and perquiſites of them.

Ward of the heir.

Anciently almoſt all lands were held by military tenures; in theſe the lord was in reality proprietor, and the tenant only uſufructuary; in return for this his intereſt, the tenant gave his perſonal ſervice; but when he was no longer in a capacity of performing that ſervice, it is not to be wondered at, that the lands ſhould have returned to the lord, to be diſpoſed of as he pleaſed; accordingly in the commencements of the Feudal Syſtem, the grants were good no longer, than for the life of the vaſſal.

In conſequence of the ſame principles, when afterwards the favour borne the heir was a bar to this power of diſpoſal, and grants were extended to a man and his heirs, it ſtill remained congruous and juſt, that at leaſt while thoſe heirs from their minority were incapable of performing the ſervice, the fief ſhould return to the poſſeſſion of the lord.

Perhaps too in thoſe boiſterous ages, it was a favour to the heir and to the fief, to put them under the protection of the lord, at a time when the heir was incapable to defend either.

Theſe conſiderations produced the right of ward in the military tenures both of England and Scotland; this right went ſo far, that in both nations, not only the military eſtate, but the perſon of the heir was in ward of the lord.

This laſt cuſtom, ſtrict as it was, prevailed even to the excluſion of the uncle or grand father, almoſt invariably in Scotland, two hundred years ago, as may be ſeen from * the deciſions at that period.

Marriage. In ſuch a ſituation it ſeemed but congruous and juſt too, according to the ſame principles, that the uſufructuary or tenant ſhould not bring into the joint poſſeſſion of the fief, one who was perhaps an enemy to the lord, or of a family at enmity with him. Hence flowed

* Dict. of deciſ. vol. 2. pag. 484.

the

the right of the lord to diſpoſe of his vaſſal in marriage.

Nor was this exertion of authority eſteemed ſo great a hardſhip as it would appear at preſent. In an age when the rude manners of men cauſed them to make leſs perſonal diſtinction in the choice of their wives; when the fair ſex were reduced to a ſtate of inſignificance, which deſtroyed their value, and even their agreeableneſs in ſociety, and rendered them almoſt incapable to form a choice at all; in an age when the woman offered by the lord to his vaſſal, was not aſhamed to wait whole days in the church, till the reluctant lover had conquered his repugnance or compounded for it; it was not likely that the male vaſſal would regard much, or the female vaſſal feel at all, the weight of the lord's power of diſpoſal.

It is probable, that originally, in the very ſtrict feudal times, the lord had the marriage of both the heir female, and the heir male, and that both forfeited, if they married without his conſent.

But as there was an obvious diſtinction, in the importance to the ſuperior, betwixt an heir female bringing a male foe into the poſſeſſion of the fief, without the ſuperior's conſent; and an heir male bringing only a woman of a family at enmity with the ſuperior into it; ſo there aroſe a difference between the penalties, upon the mar-

riage of the one, and thoſe upon the marriage of the other.

Thus with regard to the heir male, it appears in Scotland, by the * *Quoniam Attachiamenta*, and in England by the ſtatute of † Merton, that if he refuſed to marry the woman whom his ſuperior offered him, he was only obliged to pay the ſingle value of his marriage; and if he married without his ſuperior's conſent, he only paid the double: Whereas, on the contrary, with regard to the heir female, it is plain from Glanville and the *Regiam Majeſtatem*, that the antient law remained, ſo that both ‡ in England and Scotland, one who gave his daughter in marriage, without conſent of the lord, forfeited his heritage: Nay, and a widow marrying *ſine conſenſu warranti*, that is, without conſent of her huſband's heir, who was bound to warrant to her her dower, and to whom her new huſband owed fidelity, forfeited her dower; *Tenetur tamen mulier cum aſſenſu warranti ſui nubere, aut dotem amittet.*

In the end however, heirs female came to be much in the ſame ſituation with the heirs male; their fiefs were not forfeited, and they paid the avails or values like the others.

Thus a ſtatute in the reign of Edward II. ‖ though it ordains, that the widow ſhall ſwear

* Quon. attach. cap. 91, & 93. † Ann. 20. Hen. 3. cap. 6 & 7. ‡ Reg. Maj. lib. 2. cap. 48. Glanville, lib. 7. cap. 12. ‖ Ann. 17. Ed. 2. cap. 4.

not

not to marry, without the consent of the king, yet does not make her dower to forfeit, if she marries without it *.

It is probable, that at a still earlier period in the two kingdoms, the distinction had worn out; for as power over their vassals came to be of less, and money to be of more consideration to superiors, they were well contented to exchange the right of dispossal, which they antiently had, with all the artifices they had used to support that right, for a sum of money in hand; and the vassals again, rather than marry women disagreeable to themselves, or run the hazard of the ancient law of forfeiture, were willing to give that sum. Bracton †, who wrote in the reign of Henry III. mentioning the penalties upon heirs, who had disregarded their superior's right of dispossal, uses the words, *sive sit masculus, sive fœmina*, indiscriminately; and makes the penalties to consist, not in the forfeiture of either, but in the payment of the values equally by both.

This progress, though a certain one, has not always been attended to; for our judges in Scotland, influenced by the universal practice of this gift, as it then stood, did once so far forget the penal origin of the incident of marriage, that in a dispute between the donatar of the earl of Ar-

* Staunf. prerog. reg. cap. 4. fol. 21. † Bract. lib. 2. cap. 31. n. 1. comp. Staunf. cap. 4. fol. 21.

gyle, and the laird of M'Naughton, they, by their firſt deciſion, found * a value due, even though the ſuperior had given his explicite and ample conſent to the marriage.

Non-entry. Relief Fine of alienation.

From the ſame principle which, in the caſe of minors, produced the right of ward, it followed in the caſe of majors, that the ſuperior lord had a title to the poſſeſſion, during the interval betwixt the death of one vaſſal, and the entry of another.

On this event originally the property returned to the ſuperior lord; Afterwards the heir was conceived to have a right to what his predeceſſor had poſſeſſed; but ſtill, as the obligation upon the ſuperior to receive the heir, was not conceived to be abſolute, and even though it had, as it was not eaſy to force him to fulfil it; heirs were contented to make a preſent to the lord † for their entries.

Anciently, this preſent was ſaid to be given in redemption of the fief, but in after times it was ſaid to be given in renovation of it; the propriety of the terms is not attended to, but they contain a ſolid diſtinction: At firſt the effects of the old principle ſo far remained, that when the fief was renewed in the perſon of the heir, it was ſuppoſed to be in conſequence of a voluntary

* Stair's deciſions, Jan. 3d, 1677. † Lib. feud. 5. tit. 1.

agree-

agreement betwixt the lord and him; but in after periods it was conceived to be in consequence of an absolute obligation upon the lord to renew.

From the return of the fief then upon the death of the vassal, into the possession of the lord, flowed the incident of Non-entry; a term not known in the law of England, though the incident itself was known: And from the right of the heir to repossess the fief, upon giving a present to the lord, flowed that of Relief: And upon the same principles, if it was just, that the heir should give a present for the renovation of his grant, it was much more just, upon the alienation of the fief, whereby a stranger was brought into it, that the superior should receive likewise a relief or fine for alienation.

The law in the books of the fiefs Non-entry. was extremely severe upon the non-entry of the heir: By that law *, if the heir did not enter within a year and day, his fief was forfeited to his lord.

The laws of Great Britain were never so severe; for so far as we can trace them back, all that the superior could do, upon the death of the vassal, was, to take possession of the fief, till it was relieved by the proper heir.

Thus Glanville †, treating of the death of a

* Lib. feud. 2. cap. 21. † Glanv. lib. 7. cap. 9.

vaſſal, whoſe heir is of full age, ſays: *Domini poſſint feudum ſuum cum hærede in manus ſuas capere:* And though he ſays, ſuch heirs may retain the poſſeſſion, yet that is only, *Dum tamen parati ſunt relevium et alia recta ſervitia inde facere:* And thus by a ſtatute of Robert III. * "It is leiſum to the "king, or inferior over lord, when the vaſſal de- "ceaſes, to ſeize in his own hands, his lands, until "it be made manifeſt by an inquiſition or aſſize, "quha is heir, and gif he be righteous, and of "perfect age."

Even this power of ſeizure in Scotland was afterwards put under reſtraints. The declarator of Non-entry, or action of declaration that the vaſſal lay out unentered was invented; an action not required in the ſtatute of Robert III. nor mentioned in the old books of the law: In conſequence of this, although the fief was ſtill ſuppoſed in law to fall into the hands of the king or the lord upon the death of the vaſſal; yet in fact neither the king nor the lord could without declarator enter to poſſeſſion, or draw the full and improved rent of the lands.

The law of England took a different courſe; for as the power of the lords over their vaſſals, ſooner decreaſed in that country, they loſt altogether the power of taking poſſeſſion.

When I ſpeak of the lords, I mean ſtrictly the

* Stat. Rob. 3. cap. 19 & 38.

lords

lords ſuperiors, and not the king ſuperior; for with regard to this laſt, he from his prerogative retained his ancient privilege.

This diſtinction was brought about in the reign of Henry III. The words * of a ſtatute in the reign of that prince are: "Si heres aliquis tempore mortis anteceſſoris ſui, plenæ ætatis fuerit, *capitalis dominus eum non ejiciat, nec aliquid ſibi capiat, vel amoveat; ſed tamen inde ſimplicem ſeizinam habeat pro recognitione dominii ſui*, ut pro domino cognoſcatur; et ſi capitalis dominus hujuſmodi heredem extra ſeizinam malitioſe teneat, propter quod breve mortis anteceſſoris vel conſanguinitatis, oporteat ipſum impetrare; tunc damna ſua recuperet, ſicut in aſſiza novæ deſſeizinæ; de heredibus autem, qui de domino rege tenent in capite, ſic obſervandum eſt, *ut dominus rex primam inde habeat ſeizinam, ſicut prius inde habere conſuevit, nec heres nec aliquis alius, in hereditatem illam ſe intrudat, priuſquam illam de manibus domini regis recipiat*, prout hujuſmodi hereditas, de manibus ipſius et anteceſſorum ſuorum, recipi conſueverit, temporibus elapſis."

An oppoſition, and an oppoſition wiſely obſerved by lord Coke †, upon this ſtatute, is put between the lord ſuperior and the king ſuperior, the new cuſtom and the old cuſtom, the ſimple

* Ann. 52. Hen. 3. cap. 16. † Coke inſt. vol. 2. p. 134.

ſaſine or relief of the lord, and the real ſaſine or poſſeſſion of the king, the mere acknowledgement of the one, and the ſolid preſervation of the ancient right of the other.

From this time we read nothing of the poſſeſſion of the lord: Bracton *, the author of Fleta † and others, treat of the right of the lord to take a relief, called by the laſt of theſe authors ‡ *Quaſi prima ſazina:* But they ſay nothing of his right of poſſeſſion, excluſive of the heir; whereas the ſtatute § *De prerogativa regis*, ratifies, and *Staunford* *, commenting upon that ſtatute, explains and proves the right of the ſovereign.

Relief. In the origin of the feudal law in Europe, the gift which the vaſſal on his entry gave to the ſuperior †, conſiſted of armour.

Therefore in the Saxon law ‡ the king had his heriots, which were a quantity of warlike accoutrements that he had a right to take from the goods of the deceaſed vaſſal, and which accoutrements, in thoſe days, were more in conſideration than money.

But ſome reigns after the conqueſt, when money came to be more in requeſt than armour, this heriot was changed into relief, or the payment of a certain ſtated ſum in money.

Heriots remaining ſtill in ſome manors in Eng-

* Bract. lib. 4. tract. 3. cap. 1. † Flet. lib. 5. cap. 1. ‡ Flet. lib. 5. cap. 1. N° 4. § Ann. 27. Ed. 2. * Staunf. cap. 3. † Lib. feud. 5. tit. 1. ‡ Leg. Canut. N° 69.

land,

land, and * heresilds having remained till very lately in some manors in Scotland, have made people consider them as fruits distinct from relief; but what the Saxon law of Canute calls heriots, the Norman law of Henry I. almost translated from it †, calls *Relevationes:* The book of Doomsday ‡ too calls the heriots in armour reliefs; *Tainus pro relevamento, dimittebat regi, omnia arma sua et equum,* &c. And though upon the change of heriots into reliefs, some lords kept up in their manors, the custom of taking the best moveable besides; yet this custom was only particular to those manors, and the heriot was far from being a general fruit, distinct in its origin from relief.

Whether the exact quantity of this gift taken in money, was fixed by law, is not very material, seeing that the law, if there was any, was not observed; on the contrary, it was customary with the first violent princes of the Norman race, to demand such exorbitant redemptions, as thro' the inability of the heirs to pay them, brought the fiefs back into the hands of the princes.

This procedure by Henry I. who had a disputed succession to defend, and who was therefore more dependant upon his subjects, is complained of, and amended, with regard both to the king superior, and to subject superiors. The words

* Bankton, lib. 2. tit. 9. N° 69. † Leg. Hen. 1. N° 14.
‡ Doomsday, tit. Walenford.

of the charter of that prince are *: "Si quis "baronum, comitum, ſive aliorum, qui de me "tenent, mortuus fuerit, heres ſuus non redimet "terram ſuam, ſicut faciebat tempore fratris mei; "ſed legitima, et certa relevatione, relevabit eum; "ſimiliter et homines baronum meorum, legitima "et certa relevatione, relevabunt terras ſuas, de "dominis ſuis."

But that advantage which the nobles had taken of the weak condition of this prince, they were obliged to depart from, in the powerful reign of Henry II. The law then was †, "De baroniis "vero nihil certum ſtatutum eſt, quia juxta vo- "luntatem et miſericordiam domini regis, ſolent "barones capitales, de releviis ſuis, domino regi "ſatisfacere."

Perhaps the nobles more eaſily ſubmitted to the uncertainty of relief, becauſe ſome of them might hope, by oppoſition or favour, to get the king to remit the relief as to them. But as theſe views did not always ſucceed, they aimed at a more ſolid ſecurity, in the diſturbed and impotent reigns of king John and Henry III. Theſe princes oppoſed them long, but they oppoſed in vain: The nobles made good their pretenſions, at the expence of their blood, and put the aſcertained quantity of relief, in a proportion according to the ranks of the vaſſals, into the

* Chart. Hen. 1. cap. 1. † Glanv. lib. 9. cap 4.

great

great charter of the nation *. 100 *l.* was made due by an earl, 100 marks by a baron, and 100 ſhillings by a knight.

The ſame progreſs, and for the ſame reaſons, is to be obſerved in the law of Scotland; for though in the time of the *Regiam Majeſtatem*, the heirs of barons were † *in miſericordia regis*, yet in following reigns, as the vaſſals became gradually leſs dependant upon the king, and the right of the heir grew ſtronger, reliefs in general came to be aſcertained in their quantity, and the heir in Scotland was rendered equally independant with the heir in England.

Reliefs were originally peculiar to military tenures, but a right ſo beneficial to the ſuperior could ſcarce fail to be quickly extended over Soccage tenants, who originally were ſtill more dependant than the military ones. It appears from ‡ Bracton, and the § *Regiam Majeſtatem*, that at common law, an additional year's rent upon the ſucceſſion of every new tenant in Soccage, was underſtood to be due; but from the ſtatute of wards ‖ of Edward I. which affirmed the common law in this reſpect, it appears, that ſuperiors had choſen rather to keep the quantity of this relief undetermined, in order to have a larger field for extortion; this ſtatute which ſeems to be made in favour of the vaſſal, after

* Mag. Chart. cap. 2. † Reg. Maj. lib. 2. cap. 71. ‡ Bract. lib. 2. fol. 85. § Reg. Maj. lib. 2. cap. 71. ‖ An. 28. Ed. I.

declar-

declaring, that a free Soccoman ſhall double his rent after the death of his anceſtor, uſes theſe words, which relate to the former abuſe, *And ſhall not be unmeaſurably grieved.* In Scotland again, we ſupplied the want of a ſtatute preventing this grievance, by a precaution in the conveyance, and put almoſt conſtantly an obligation for doubling the rent, into the Soccage contract.

The year's rent extraordinary, in Soccage tenures *, paved the way for an alteration in the manner of aſcertaining the quantity of relief due in military tenures; for when the fiefs came to be diſmembered, ſo that in the ſame order of men, ſome had very large, and others very ſmall eſtates; the abſurdity of making every man of the ſame order pay the ſame preciſe ſum, and on the other hand, the difficulty of proportioning the quantity of the relief to the extent of the reſidue of the fief remaining undiſmembered, were equally great; and therefore, in imitation of the year's rent due in Soccage, a year's rent extraordinary was likewiſe made due in military fiefs in Scotland every where, and in England † in many places.

Fine of alienation.

According to the ſtrict feudal ſyſtem, as will be more fully ſeen in the next chapter, the vaſſal originally could not alienate his fief, without the conſent of his lord; to gain this conſent, it was natural for him, or for the new vaſſal, to make a pre-

* Kaimes hiſt. notes, N° 15. † Viner voce Tenure (F. a.)

ſent

ſent to the lord; and on the cuſtom of making a preſent to get the lord's conſent, was erected a right of exacting it, in after times, when his conſent could not be refuſed: Hence the origin and the duration of the fine of a year's rent upon alienation.

In order to avoid this fine, the vaſſals got into a way of alienating, but ſo as to make the new vaſſals hold of them, and not of the ſuperior; by which the ſuperior loſt many of the incidents and fruits of his ſuperiority.

To correct this practice, the ſtatute *Quia Emptores* was paſſed both in * England and † Scotland; by which vaſſals were allowed a full liberty of alienating, and the alienees were made to hold not of the vaſſal, but of the ſuperior: by the laſt part of this ſtatute, ſuperiors recovered their incidents and fruits, which was full retribution to them for the liberty of alienation given to their vaſſals, in the former part of it; and therefore by theſe ſtatutes it was intended, that the fines of alienation ſhould ceaſe.

But on the interpretation of the ſtatute *Quia Emptores* in England, it had been found ‡, that the immediate vaſſals of the crown in capite, were not comprehended under the ſtatute, and that they could not alienate without licence of the crown; in conſequence of this, the fines of alienation continued in the law § over theſe

* An. 18. Ed. 1. cap. 1. † Stat. 2. Rob. 1. cap. 25.
‡ Staunf. prer. reg. cap. 7. § An. 1. Ed. 3. cap. 12.

par-

particular vaſſals as long as the tenure by knights ſervice ſubſiſted. In Scotland again, the ſtatute itſelf went into diſuſe, and in conſequence of that, the fine of alienation returned into the law, over all vaſſals whatever.

Aids. The extreme dependance of the vaſſals upon their ſuperiors at firſt, and the great cordiality betwixt both afterwards, produced another incident, to wit, that of aid.

Aids were at firſt benevolencies of the vaſſals, and were given during the great feſtivity, or the great neceſſity of the lord, upon three occaſions, to wit, when his ſon was to be knighted, when his daughter was to be married, and when his perſon was to be ranſomed.

But * what flowed originally from regard, ſuperiors ſoon changed into a matter of duty, and on a gratuity erected a right; they pretended to exact what they ſhould only have received; and not contented with this, they extended the occaſions of theſe aids, and under colour of them, endeavoured to tax their vaſſals as they pleaſed.

The variations in the progreſs of aids, were much like thoſe of reliefs, the occaſions of them were limited or extended, and the *quantum* diminiſhed or encreaſed, according to the characters of princes, the exigencies of the times, and the ſtate of the vaſſals.

Thus in the reigns of Henry II. and David I. the law was †: "Nihil certum ſtatutum eſt, de

* Reg. Maj. lib. 2. cap. 73. Glanville, lib. 9. cap. 8.

† Vid. loc. cit.

"hujuſ-

" hujuſmodi auxiliis dandis vel exigendis;" and the only limitation upon this uncertainty, was, in the general words immediately after, " Ita tamen " moderate, ſecundum quantitatem feudorum " ſuorum, et ſecundum facultates, ne nimis gravari " inde videantur, vel ſuum contenementum amit- " tere."

But in the reigns of * Edward I. and † Edward III. in England, and of ‡ Robert I. in Scotland, the occaſions of exacting aids, and the quantities of the aids were not only aſcertained, but when aſcertained, were obſerved.

Aids were at firſt peculiar to fiefs held by military tenures; but they had quickly been extended from military fiefs, into other ſpecies of holdings; they were levied under the names of § Hidage, Carucage, *&c.* and too often at the arbitrary will of the king.

Taxes on lands were originally no part of the Gothick conſtitution; the king's court was ſupported by the rents of his demeſne lands, and by the fruits and incidents of the feudal tenures, to which the other lands of the kingdom were ſubjected; and therefore it is not to be wondered at, that the ſubjects bore theſe approaches to a land-tax with impatience; to ſmooth over prejudices a little, the kings, at the very time they were levying theſe taxes with violence, pretended to receive them as voluntary contributions: a

* An. 3. Ed. 1. cap. 36. † An. 25. Ed. 3. cap. 11.
‡ 2d Stat. Rob. 1. cap. 18. § Vid. Maddox & Spellman.

ſtatute

ſtatute of Edward I. * proceeds on the king's narrative, "That foraſmuch as divers people of "our realm, are in fear, that the aids and taſks "which they have given to us, before time, to-"wards our wars, and other buſineſs, of their "own grant and good-will, howſoever they were "made, may turn to a bondage to them and their "heirs, becauſe they might be at another time "found in the rolls:" And there are a variety of old deeds † in Scotland, in which the king is made to declare, that the tax which he then levies by voluntary contribution, ſhall not be a precedent for the future.

Things could not ſtand long on this footing: on the one hand through the decline of the ſtrict feudal ſyſtem, the king's feudal emoluments were become leſs, yet the exigencies of his government were not decreaſed; and therefore it was obvious, that a land-tax was needed: on the other hand it was equally dangerous to allow the king to lay it on, when, or to what extent he thought proper; and therefore in the reign of the ſame prince, in England, who had firſt limited the occaſions, and the quantities of aids in military tenures, it was ſettled ‡, that neither he, nor his ſucceſſors, ſhould lay on any new aid whatſoever, without conſent of parliament.

It does not appear, that in Scotland, any reſtraint ſimilar to this was laid upon the king by

* An. 25. Ed. 1. cap. 5. † Anderſon's appendix N° 21.
‡ An. 25. Ed. 1. cap. 5 & 6. An. 34. Ed. 1. cap. 1.

ſtatute;

ſtatute; nor indeed was it neceſſary: In Scotland the feudal ſyſtem took a deep root, and remained long; that ſyſtem was produced by, and produced again an oligarchy; would we know the ſpirit of the ancient nobility of Scotland with reſpect to their ſovereigns, it is to be found in their letter to the Pope, in defence of Robert Bruce; whom, ſay they *, "with due aſſent and conſent of us all, "we have made our prince and king. To him, "as the deliverer of the people, by preſerving our "liberties, we are bound to adhere, as well on "account of his right as on account of his merit: "Yet even him, if he deſiſt from what he has "begun, and ſhew any inclination to ſubject us "or our kingdom to England or the Engliſh, "we will endeavour to expel as our enemy, as "the ſubverter of his and of our right; and we "will make to ourſelves another king who will "dare to defend us." In ſuch a country it was needleſs to reſtrain the king by ſtatutes, from laying taxes on lands, he was ſufficiently reſtrained by his own impotency, and the power of his nobility.

The riſe of the great families upon the power of the crown, firſt ſtripped the king of the power of laying on a land-tax; but in the end, the riſe of the commons upon both the great families and the king, ſtripped both, of this power in England; and now in Britain the laying on taxes, not only on land, but on any other ſub-

* And. append. N° 11.

ject

jeƈt of property, from a conſuetude much ſtronger than any ſtatute, belongs not ſo properly to parliament, as to the houſe of commons alone. This power, taken thus from the king, and given to the ſubjeƈts, was the foundation-ſtone of the Engliſh liberty, and now diſtinguiſhes the Britiſh conſtitution, from almoſt all the hereditary ſovereignties in Europe.

Eſcheat. Among many other effeƈts, which the original ſituation of ſuperior and vaſſal produced, and which remained in the law long after the principle itſelf was forgot, was the incident of eſcheat.

This incident branched itſelf into two heads; for, in the firſt place, if the vaſſal committed a delinquency, which made him unworthy of the *feud*, the *feud* eſcheated to the lord. In the next place, if the vaſſal died without leaving an heir to perform the ſervice, the feud eſcheated to the lord.

Both incidents flowed from this principle, that there was no more than an uſufruƈt, or pernancy of the profits in the vaſſal, which he being unworthy to enjoy, or having no heir capable to enjoy, reverted to the ſuperior, and reunited itſelf to the property.

In the ancient laws not only of England and of Scotland, but of all feudal nations, the cauſes of making the fief to eſcheat, for offences againſt the honour or the intereſt of the lord, are without number.

In

In England, as the connection betwixt lord and tenant ceased sooner, so these penalties disappeared sooner than they did in Scotland. In the latter country, they may be traced through the reigns of most of the James's; and if we may credit the enumeration of Craig *, great numbers of them subsisted in his day.

In the end however, when land come to be a common subject of commerce, people who had paid value for it in money, refused to submit to such forfeitures, and scarce any injury done by the vassal to the lord, made the fief liable to escheat.

Yet still the escheat of lands for crimes against the publick, or against the lord through the publick, remained in both countries.

But on one crime, to wit, that of felony, this escheat had different effects in England and in Scotland.

In the first of these countries, felony was attended with corruption of blood; in the other it was not: the consequence was clear, that in the one country, the felon having no inheritable blood, his issue could not take upon his death; whereas, in the other country, the defect being only that of a tenant, as soon as the obstruction was taken away, that is, as soon as the felon died, a new tenant, that is, the heir started up.

This produced the distinction betwixt the †

* Craig, lib. 3. dieg. 3. † Bacon voce Forfeiture.

total

total eſcheat in England for felony, and the partial * life-rent eſcheat in Scotland for it.

The too great ſeverity of this penalty among the Engliſh, obliged them, in many of their ſtatutes againſt felony, to ſave againſt corruption of blood; in theſe the eſcheat became thereby the ſame with that for a civil debt in Scotland, and the offender forfeited for no more than his own life.

In both the Engliſh and Scotch eſcheats † it is remarkable, that land eſcheated for a crime, went to the king for a year and a day, before it fell to the lord.

This preference of the king deſerves to be accounted for.

As the land of the vaſſal originally belonged to the lord, when the vaſſal became unworthy to enjoy it, it reverted to the original proprietor; but the moveables of the vaſſal having been acquired by his own induſtry, were deemed to be his own; and for his debt contracted by his crime to the publick, were forfeited to it. But it was neceſſary, that the publick magiſtrate, the king, ſhould have ſome time to gather in theſe moveables, as well as the poſſeſſion of the land, in order to do ſo. The uſe which he made of this time and this poſſeſſion, and which in thoſe days he was conceived to have a right to make, was, to carry off every thing that could

* Quon. attach. cap. 48. N° 16. † Mag. Chart. cap. 22. Quon. attach. cap. 18.

poſſibly be moved; and for the ſake of encreaſing the penalty, to deſtroy what he could not carry off. In conſequence of theſe notions, it was his general practice, to fell the trees, pull down the houſes, and as either the ſpirit of gain or of wantonneſs prompted, to waſte the land. An inſtitution of this kind could not laſt long: the lords had too much intereſt to prevent, and the king too little intereſt to ſupport ſuch national deſtruction; therefore the lord came into the practice of giving a whole year's rent for the king's right of waſte, and got the lands ſafe and unwaſted to himſelf.

In England this right of the king to the land for a year and a day, and the ſubſequent eſcheat to the lord, was confined to real offences; for on outlawry in a civil action, there was no eſcheat * to the lord, and the king had only the pernancy of the profits of the lands, till the reverſal of the outlawry, or the death of the perſon outlawed.

But in Scotland we made a much wider ſtretch; upon the denunciation of a man for a civil debt, we uſed a fiction of law: On account of the debtor's diſobedience to the king's writ, in not appearing to pay the debt, he was ſuppoſed to be a rebel. If within the year † the debtor had been releaſed, or in the language of the law of Scotland, relaxed by the king, he was deemed to be again a true ſubject; for during the

* Bacon voce Outlawry (D.) † Quon. attach. cap. 18.

king's

king's year, the lord could not enter upon the land, and the debtor's rebellion, which had been created by one ſuppoſition, was undone by another: But if he remained a year and a day at the horn, that is, without appearing to pay the debt, the lord entered upon the land, and being once entered, his right could not, by the king, or the king's pardon, be afterwards annulled.

The want of obedience to the laws, and of right police in the country, made the ſeverity of this fiction of rebellion neceſſary. It was invented at a period * when the power of the crown being increaſed, one would have expected, that for rebellion againſt the king, the law of forfeiture, rather than that of eſcheat, ſhould have taken place. Notwithſtanding which the old law of eſcheat, with perhaps the hope of enticing the lords, for the ſake of their own intereſt, to puniſh thoſe who diſobeyed the law, occaſioned the fruits of the fiction to be given to the lord.

From the principle of eſcheat, it followed likewiſe in a very early age, that on the treaſon of the vaſſal, his lands were eſcheated to his ſuperior, to wit, the king; for during that period, the king was the only perſon who had real vaſſals; the poſſeſſors of lands under his vaſſals, not holding their lands in deſcent, were rather tenants at pleaſure, or for lives, than vaſſals.

* Reg. James 6.

When

When afterwards the rear-vaſſalage came to be eſtabliſhed, it may perhaps be found true, notwithſtanding the authority of lord Coke * to the contrary, that on the treaſon of the rear-vaſſal, his land eſcheated, to the lord, and that the law remained ſo, till it was altered by the famous ſtatute of Edward III. † which made the lands holden of others to forfeit to the king upon treaſon.

But whatever be in this conjecture, this is the ſingle inſtance, in which, on account of the publick nature of the crime, and of its dreadful conſequences, the law of eſcheat was made, at one period or other, to give place to the law of forfeiture; ſo that on treaſon the lands fall to the king, and not to the lord; to the publick magiſtrate, and not to the private ſuperior.

Yet in many of the laws of forfeiture for treaſon, the original law of eſcheat may be traced; of which the following are examples.

Originally on a vaſſal's delinquency the lands returned into the ſuperior's hands, in the ſame condition in which they had gone from him; in conſequence of this, he was conceived to have a right to reſume the lands, without being ſubject to the incumbrances charged upon them by the vaſſal: This notion prevailed long in Scotland, and ſo late as the reign of James VI. the legiſlature were obliged to provide by ſtatute ‡ for the payment of the debt on which execution had paſſed by the donatar of eſcheat, that is, by him to whom the

* Coke 3. inſt. 19. † An. 25. Ed. 3. cap. 2. ‡ An. 1592. Act. 145, & 147.

crown gifted the profits of the eſcheat; and the treaſury was afterwards obliged to add further force to this proviſion, by taking ſecurity continually from donatars, for the payment of the debt: Now the inſtance which I fix upon, in which the principle of eſcheat transferred itſelf into the law of forfeiture, is, that it came to be a doubt in law, whether the king was bound by the onerous deeds of the forfeited perſon.

In Scotland, ſo late as the year 1688, it is certain *, the forfeited eſtate was not ſubject to any deeds or debts of the traitor, which had not received confirmation of the king; and one of the articles of grievances, preſented to king William, by the convention of eſtates, was, *The forfeiture to the prejudice of creditors*; nor were theſe things remedied till the year 1690, when by ſtatute it was enacted †, *That eſtates forfeited, ſhould be ſubject to all real actions, and claims againſt the ſame.*

In England, even to this day, the old rule of eſcheat, that lands ſhould revert free of burdens, ſo far prevails in forfeiture, that the lands revert to the king ‡, diſburdened from the dower of the wife; and further, though the king upon forfeiture for civil debt ſatisfies the creditor, at whoſe ſuit the outlawry is proſecuted, yet, according to lord Coke, he is ſaid to do ſo *de gratia*, and not *de jure*.

The law of eſcheat is ſtill further ſeen in the

* Bankton, lib. 3. tit. 3. N° 57. † An. 1690. cap. 33.
‡ An. 5 & 6. Ed. 6. cap. 11.

law

law of forfeiture, from this, that by the law of England, according to lord Coke *, if an eſtate devolved *jure ſanguinis* upon a traitor, it eſcheated to the lord, and did not become forfeited to the king; by the proper law of Scotland, in the ſame manner, it would have † eſcheated to the king for defect of inheritable blood. I ſay, *by the proper law of Scotland*; for I ſpeak not of the Engliſh law of treaſon, now extended to Scotland: I ſay, *in the ſame manner*; for though in England the lands fell to the lord, and in Scotland to the king, yet in both countries they fell by the ſame principle ‡: In England the lord was *ultimus heres*, in Scotland the king is *ultimus heres*, and therefore what the lord in the one country took by eſcheat, on defect of inheritable blood, the king in the other country took by eſcheat, and not by forfeiture.

Perhaps too even in our own times, we might have traced the law of eſcheat in the ſtatute of George I. known commonly by the name of the Clan Act, amidſt all the political views with which it was made §. By that ſtatute, on the treaſon of the vaſſal in Scotland, the lands were, on certain conditions relative to the ſuperior, to eſcheat to him, and not to become forfeited to the king.

Eſcheat of ultimus heres.

Again, with reſpect to the eſcheat ariſing from the defect of the exiſtence of an heir; it happen'd, either when the deceaſed had no natural heir of blood, or when having

* Coke upon Lyt. ſect. 4 (Y) † Dirleton voce Forfeiture, & ibid. Stewart. ‡ Bankton, lib. 3. tit. 3. N° 109. & obſerv. N° 23. § An. 1. Geo. 1. cap. 20.

been himſelf a baſtard, he was not in law allowed to have an heir failing iſſue of his own body: In the firſt of theſe caſes, it is certain, by the old law-books, both of England and Scotland *, that the lord, and not the king, ſucceeded as *ultimus heres*.

But in the other caſe, where the defect aroſe from the want of a civil heir, through the baſtardy of the deceaſed, and the failure of his iſſue, ſome little difficulty occurs: According to the authority of the *regiam maj. ſtatem*, indeed the lord was in that caſe heir to the baſtard.

But if we may believe Glanville †, the ſuperior was not *ultimus heres* to a baſtard, dying without iſſue, in England, about the ſame period: And if we may believe Craig ‡, and Sir John Skeen §, the king in the ſame manner, and not the lord, was in their time laſt heir to a baſtard in Scotland. Perhaps we ought not to truſt intirely the aſſertions of theſe authors. Not Glanville's, becauſe in the very next reign, the lord was *ultimus heres* to a baſtard, as is obvious from the authority of Bracton ‖ and others. Not Craig's, becauſe in another paſſage he directly contradicts himſelf; his words ** in that other paſſage are: "Illud tamen intereſt, quod baſtardo moriente "ſine liberis, ſive ſit eccleſiaſticus, ſive laicus, "omnia ejus mobilia fiſco jure coronæ fiunt ca"duca, ſi teſtamentum non fecerit; nam baſtar"diæ inter regalia numerantur: at feuda ad do-

* Reg. Maj. lib. 2. cap. 55. Glanville, lib. 7. cap. 17.
† Glanv. lib. 7. cap. 16. ‡ Craig, lib. 2. dieg. 17. N° 12.
§ Skeen, not. ad. Reg. Maj. lib. 2. cap. 52. ‖ Bracton, lib. 2. cap. 7. ** Craig, lib. 2. dieg. 18. N° 15.

"mi-

" minum ſuum de quo tenebantur redeunt. Ra-
" tio eſt, quod ea dominorum ab initio voluntas
" fuiſſe præſumitur, ut ſoli vaſſalo providerunt et
" ejus filiis legitimis, qui ſi defecerint, ad domi-
" num debeat feudum reverti." Not Skeen's, becauſe Sir James Balfour * not only gives his opinion to the contrary, but cites a judgment to the contrary, which had been given about that time, to wit, on the 12th of December 1542; and ſtill more, becauſe the preference of the king was contrary to the analogy of the feudal plan, and of the feudal principles at the time.

At the ſame time, if the law ſtood as theſe authors aſſert, the exception may be accounted for †. Baſtards ſeem in many reſpects to have been deemed a kind of criminals in the eye of law; they were not allowed to make teſtaments, they could not have an heir failing their iſſue; when then the ſucceſſion fell, it ſeemed to fall as if for a crime, and therefore the publick-magiſtrate, rather than the private ſuperior, ſeemed to have an intereſt in it.

But whatever be in this, it is certain, that after the diſtant period, at which Glanville wrote, the lord remained *ultimus heres* in England, as long as, the feudal ſubordination remaining, there could be room for the diſpute betwixt him and the king; and in copy holds he remains *ultimus heres* at this day.

In Scotland the lord remained likewiſe very long *ultimus heres*. In the record ‡ of charters of the year 1506, there are on the 18th of February two

* Balfour tit. anent baſtards. Craig, lib. 2. dieg. 17. N° 12.

† Dirl. doubt. tit. baſtards,

‡ Book 14. N° 329. & 333.

very ſtriking inſtances of this: the king in theſe as earl of Marr, and not as king, grants to Alexander Couts and his ſpouſe, and to John Skeen and his ſpouſe, certain lands, which he expreſſes had fallen by the right of *ultimus heres* to him as ſuperior and earl of Marr, and not as king. Sir James Balfour *, who wrote before Craig, declares, that the lord was *ultimus heres*, when he wrote, and the words of Craig † are expreſs: "Ad dominum "ratione feudi ſi nullus heres appareat, ex eorum "numero, qui diſpoſitione continentur, feudum "redit domino, etiamſi non ſit expreſſum, ut in eo "caſu caderet."

In the reign of Charles II. ‡ it was fixed law, that the king was *ultimus heres* to a baſtard. If we may believe Sir Thomas Hope §, the lord was about the ſame time no longer *ultimus heres*, even to other perſons. But perhaps the truth of this laſt authority may be called in queſtion; for one of the doubts in the law of Scotland, ſtated ‖ by Sir John Niſbet, who wrote after Sir Thomas Hope, is: "If a "right be granted to a perſon, and the heirs of "his body, without any further proviſion or men-"tion of return, whether will the king have right "as *ultimus heres* or the ſuperior?"

Afterwards it appears, from a circumſtance in a judgment reported by lord Fountainhall *, that even ſuperiors were taking gifts of the eſcheat of their own vaſſals from the crown, as laſt heir; for in that report one of the competitors is a ſu-

* Balfour tit. heirs and ſucceſſors. † Craig, lib. 2. dieg. 17. No 12. ‡ Dirleton tit. baſt. § Min. practt. p. 276. ‖ Dirleton tit. limit. of fees. * Dec. 9. 1677. Somervel againſt Tennent

perior,

perior, who has taken a gift of his vaſſals eſcheat upon the failure of heirs.

But lord Stair put totally an end to the doubt, who was *ultimus heres* in our law. He declared *, that on the failure of heirs "the king by his pre-"rogative royal excluded all other ſuperiors, who "are preſumed to retain no right nor expectation "of ſucceſſion, unleſs by expreſs proviſion in the "inveſtiture the fee be provided to return to the "ſuperior, in which caſe he is proper heir of pro-"viſion:" And the reaſon he gives for it amounts to this, and is a wiſe one; that fiefs being now no longer gifts from the lord, but ſold for their value in money, his ancient intereſt is loſt. Ever ſince the time of that great author, the conſtant cuſtom of iſſuing gifts from the exchequer, the acquieſcence of ſuperiors in not conteſting thoſe gifts, the opinions † of our lawyers, and the deciſions of the judges, have run in the ſame channel, and have confirmed the right of the king, to the excluſion of that of the lord.

Nay, this law of eſcheat the judges have carried ſo far, in favour of the crown. that in the caſe of the eſtate of Maſondieu, they lately found ‡, the king, as *ultimus heres*, could defeat a death-bed diſpoſition; although the favour due to a teſtator, more eſpecially to prevent his inheritance from being caduciary, be very great; and altho' the privilege of impugning a death-bed diſpoſition, may appear to have been introduced only in behalf of the heir of blood, whoſe rights and ex-

* Stair, lib. 3. tit. 3. N°47. † Bankton, lib. 3. tit. 3. N° 106.
‡ 4 Coll. July 31. 1753.

pectations are diſappointed; but not in behalf of the crown, which takes not as heir, but as proprietor of *bona vacantia*, and the expectations of which, therefore, cannot be diſappointed at all.

This transfer of the right of the lord, as *ultimus heres*, into the hands of the king, without ſtatute, without even a ſingle deciſion in point on the conteſt, is a very ſingular inſtance of the decay of the feudal law, how it melts away of its own accord, how the rights of ſuperiors paſs from them, as their intereſt waxes weaker in the fief, and how the minds of men yield without force, when the variation of circumſtances leads them into yielding.

SECT. III.

Preſent ſtate of Tenures, and their fruits.

AFTER tracing the progreſs of the eſtabliſhment of tenures, and of their original fruits, it may not be improper to take a general view of the fates of both.

The extent of enumeration in the different ſections of this chapter, may appear tedious, but it is chiefly from this enumeration, that the baſis of the feudal ſyſtem, the connexion betwixt lord and vaſſal, can be known, and it was in the declenſion of this connexion, that the ruin of the ſyſtem itſelf was involved.

Frankalmoigne.

Tenures by *frankalmoigne* preſerving too little connection betwixt lord and vaſſal, at a time when a great deal was required, were very

very early reſtrained in both kingdoms, by the ſtatutes * of Mortmain; after theſe the famous ſtatute *Quia Emptores* †, of Edward I. barred the ſubjects effectually from making grants in *frankalmoigne* for the future, and the abolition of the Popiſh ſuperſtition, had the ſame effect in Scotland; for the lands held in *frankalmoigne*, were at the reformation annexed to the crown, which diſpoſed of them upon different tenures; and now ‡ the only remains of *frankalmoinge* in this laſt country, are the manſes and glebes of miniſters.

Military tenures preſerving too much connection between lord and vaſſal, down to times when very little was required, ſhared the ſame fate at a later period §. Military.

Tenures by ſoccage and burgage having in them a juſt moderation between theſe two extremes, have to this day a ſtable duration. In Scotland, they have the appearance of ſeparate tenures; and in England * are run into each other. Soccage. Burgage.

The perquiſites of ward and marriage being ſufferable only in a very military age, were appropriated to military holdings. In theſe they were † ſometimes diſpenſed with altogether to engage the vaſſals to attendance in hazardous expeditions: And even when they were Ward marriage.

* Mag. chart. cap. 36. An. 7. Ed. 1. cap. 1. 14. Nov. 2. Stat. R. 2. cap. 1. † An. 18. Ed. 1. cap. 1. comp. Lyttlet. ſect. 140. ‡ Stair, lib. 2. tit. 3. N° 39. & 40. § An. 12. Car. 2. An. 20. Geo. 2. * Lyttlet. ſect. 162. † An. 7. H. 7. cap. 3. Scots Acts An. 1547. cap. 2.

exacted, the exaction was made leſs rigorous, conformable to the ſofter temper of ſucceeding ages.

Thus ‖ for two hundred years paſt, our judges in Scotland have given the ward of the minor's perſon, not to the ſuperior, but to his relations; and what the judgments of courts did in Scotland, the humanity of ſuperiors did in England; ſtatutes in both countries * prohibited the lord to do waſte, and other ſtatutes obliged him to give proper maintenance to the heir.

Thus again, with reſpect to the right of marriage, the ſtatute † of *Magna Charta* ordained, that the heir ſhould be married without diſparagement. A ſubſequent ſtatute of Henry III. ‡ made the ſuperior, in caſe of diſparagement, loſe the ward. A ſtatute in the reign of Edward I. repeats this penalty, and adds §, "that if the ſu-"perior keep the heir female unmarried for co-"vetiſe of the land, ſhe ſhall have an action for "recovery of her land, without giving any thing "for her wardſhip or her marriage." Temperaments ſimilar to theſe, were introduced into the law of Scotland, and extended in both countries. Our judges in Scotland, particularly, allowed the refuſal of the marriage to be purgeable by an after conſent; they modified the value of it according to circumſtances; they excluded it altogether, where there was the leaſt appearance of fraud; as for example, where the woman offered was already engaged; they took advantage of every flaw in the order of requiſition, that is, the writ

‖ Diction. decis. voce tutor & pupil. * An. 3. Ed. 1. cap. 21. † Mag. Chart. cap. 6. ‡ An. 20. Hen. 3. cap. 6. § An. 3. Ed. 1. cap. 22.

requiring to marry; and though it was agreeable to ſtrict law, where ſeveral heirs apparent of the ſame family had died one after the other, before the age of marriage, that the value of the marriage of each ſhould nevertheleſs be paid, yet lord Durie *, who reports a deciſion to that purpoſe, ſays, ſuch a claim "was never by the court of "ſeſſion ſuſtained before." And lord Stair adds †, "That he hopes it will never be ſuſtained again." Nay, ſo far did the courts of law favour the vaſſal, that in a diſpute whether the value of the marriage was to be computed at the marriageable age of fourteen, at which time the heir had been very poor, or at the time of his marriage, when by an eſtate fallen to him, he was become very rich, lord Stair informs us ‡, "That the lords in-"clined much to eaſe the vaſſal, ſo far as law "would allow, and that ſeveral interlocutors did "paſs ſupporting his plea."

Agreeable to the ſame moderation in the judges, theſe two incidents of ward and marriage were, ever ſince the revolution, exacted with the utmoſt lenity, by the officers of the crown.

Non-entry, Relief, Compoſition.

The ſeverity of non-entry, made it laſt only a ſhort time in England, in favour of the lord; and though that ſeverity laſted longer, in favour of the king, over his vaſſals in capite, yet a ſtatute § in the reign of Edward I. barred the king from taking poſſeſſion till an office was found, that is, till he was authorized by the verdict of an inqueſt

* Durie's deciſions. French againſt Cranſton, July 11, 1622.
† Stair, lib. 2. tit. 4. N° 54. ‡ Stair, lib. 2. tit. 4. N° 55.
§ An. 3. Ed. 1, cap. 24, comp. Coke, 2d inſt. p. 206 & 689.

to

to do ſo. Many ſtatutes * were afterwards made to the ſame purpoſe; they all limited the king, and they all favoured the vaſſal.

In Scotland, not ſatisfied with taking away the ſuperior's old right, when his vaſſal died, to enter directly upon the lands, in the ſame manner that the ſuperior in England could have anciently done; and not ſatisfied with hampering the profits of non-entry with the neceſſity of a declarator, in the ſame manner, that in England the king had been hampered with the neceſſity of an inqueſt and office found; the judges went further, and in an equitable favour of the vaſſal, gave no more to the ſuperior, even after declarator of non-entry, than the retoured or ancient duties, if the vaſſal had any tolerable excuſe for ſtanding out. Upon the ſame plan taking advantage of the ancient maxim, that relief was only due in military holdings, and of the uncertainty in which ſuperiors had afterwards kept the quantity of relief in foccage holdings; the judges were ſo far from favouring the right of the lord, that they † refuſed to double the rent, upon the entry of an heir in ſocage, unleſs there had been an expreſs clauſe in the charter for doing it; and though in the entry of a ſtranger upon the ſuperior, they were obliged ‡, by ſtatutes, to make the compoſition, or fine for alienation, a year's rent of the lands, at the improved value, yet on the entry of an heir

* An. 28. Ed. 1. cap. 19. comp. Coke, 2d inſt. 572. & Staunf. cap. 3. Stat. linc. An. 29. Ed. 1. An. 2. Ed. 6. cap. 8. & Coke, 2d inſt. 688. † Dict. deciſions, tit. relief. ‡ Scots acts, an. 1469, cap. 36. comp. Stair, lib. 2. cap. 4. N° 32. an. 20. Geog. comp. Bankton, lib. 2. tit. 4. N° 33.

againſt

againſt whom declarator had not been taken, they interpreted the profits to the lord to be according * to the retoured or ancient duty only; and not according to the improved rent of the lands: With theſe temperaments, the rights of non-entry, relief, and compoſition, are ſubſiſting in Scotland; but ſuch of them as remained in England, were overwhelmed † in the fall of the court of wards and liveries in that country.

Though the right of demanding aids of the vaſſal, remained in the highlands of Scotland ſo late as the time ‡ of Craig, yet it wore away in that country by diſuſe, and in England it was put an end to by the ſame ſtatute which aboliſhed knights ſervice. The only remains of this right now, are to be ſeen in the cuſtom of parliament, to grant an aid for the dowry of the king's eldeſt daughter; for with reſpect to the land tax, it has long ago been transferred from being a feudal perquiſite, to be a national ſupply; and in this light is now to be looked upon rather as a political, than as a feudal part of the conſtitution. Aid.

The monſtrous ſeverity of the incident of eſcheat in Scotland for a civil debt, was aboliſhed by the ſame ſtatute, which took away ward-holdings; but the other effects of it on the delinquency of a vaſſal againſt the publick, are ‖ remaining, with a few variations equally in both Eſcheat.

* Balfour, tit. relief, Hope 124. Stairs, lib. 2. tit. 4. N° 28.
† An. 12. c. 2. cap. 24. ‡ Craig, lib. 2. dieg. 11. N° 22.
‖ Sup. eſcheat for delinquency.

countries;

countries; on default of an heir again, the fruit of it * is fallen to the king in Scotland, and in England reverts to the donor, ſo far as by the utmoſt ſtretch of interpretation, he can be ſuppoſed to have an intereſt reſerved in the land.

Such was the progreſs of tenures, and of the more immediate obligations attending them, and ſuch the fates of both; theſe tenures and obligations aroſe, moſt of them at a time when the intereſt of the ſuperior in the fief was extremely ſtrong, and were therefore moſt of them in their origin extremely ſevere; but it was their uniform progreſs to vary with the uniformly varying ſituations of mankind, ſo that in the end, that military ſyſtem which once was ſo univerſal and ſo ſevere, is now come to be limited in the nature of its tenures, and more ſo in the perquiſites of them. The people by their cuſtoms, and by changing many of the military into civil feuds, effected the one; the judges by their interpretation, and bending that interpretation to the genius of the times, effected the other. The ſtatute law came in aid to both. Many attempts, but in vain, had been made by parliament in England, in the reign of James I. to purchaſe from the king the abolition of wards and liveries. Cromwell † indeed made them to ceaſe during his adminiſtration, both in England and in Scotland. But it was not till at a period ripe for it in the one country, and at an after period ripe for it in the other, that whatever remained in either coun-

* Supra eſcheat of laſt heir. † Scobil's acts, an. 1654. cap. 9. ann. 1656, cap. 4.

try

try of military tenures, with the various incidents, fruits, and dependencies attending them, was laid for ever to reſt. This was done * in England during the reign of Charles II. and † in Scotland during that of his preſent majeſty, with this memorable difference betwixt the two æras, that the former prince aſked and got a conſiderable ſum, to wit, the ſettlement for perpetuity of one half of the exciſe upon the crown, to free the ſubject from bondage; whereas the other monarch made a preſent of all his ſevere feudal rights, to make his people happy.

CHAP. III.

Hiſtory of the Alienation of Land-property.

IN tracing the hiſtory of the alienation of land-property, it will be neceſſary to diſtinguiſh that voluntary alienation which takes place during the life of him who alienates, from the involuntary alienation, which takes place by attachment of law; and both of theſe again from that alienation, which, in conſequence of the proprietor's will, is to take effect after his death.

SECT. I.

THIS ſubject is curious and intereſting; in order to trace the progreſs of it, the progreſs of ſociety muſt be traced. Voluntary alienation.

* An. 12. cap. 24. Car. 2. † An. 20. Geo. 2.

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The firſt ſtate of ſociety is that of hunters and fiſhers; among ſuch a people the idea of property will be confined to a few, and but a very few moveables; and ſubjects which are immoveable, will be eſteemed to be common. In accounts given of many American tribes we read, that one or two of the tribe will wander five or ſix hundred miles from his uſual place of abode, plucking the fruit, hunting the game, and catching the fiſh throughout the fields and rivers adjoining to all the tribes which he paſſes, without any idea of ſuch a property in the members of them, as makes him guilty of infringing the rights of others, when he does ſo.

The next ſtate of ſociety begins, when the inconveniencies and dangers of ſuch a life, lead men to the diſcovery of paſturage. During this period, as ſoon as a flock have brouzed upon one ſpot of ground, their proprietors will remove them to another; and the place they have quitted will fall to the next who pleaſes to take poſſeſſion of it: For this reaſon ſuch ſhepherds will have no notion of property in immoveables, nor of right of poſſeſſion longer than the act of poſſeſſion laſts. The words of Abraham to Lot are: "Is not the whole land before "thee? ſeparate thyſelf, I pray thee, from me. "If thou wilt take the left hand, then will I go "to the right; or if thou depart to the right "hand, then will I go to the left." And we are told that the reaſon of this ſeparation, was,

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the quantity of flocks, and herds, and tents, which each of them had, and which the land was unable to ſupport; lord Stairs * wiſely obſerves, that the parts of the earth which the patriarchs enjoyed, are termed in the ſcripture, no more than their *poſſeſſions*.

A third ſtate of ſociety is produced, when men become ſo numerous, that the fleſh and milk of their cattle is inſufficient for their ſubſiſtance, and when their more extended intercourſe with each other, has made them ſtrike out new arts of life, and particularly the art of agriculture. This art leading men to beſtow thought and labour upon land, increaſes their connection with a ſingle portion of it; this connection long continued, produces an affection; and this affection long continued, together with the other, produces the notion of property in land; becauſe it makes a man naturally conclude, that there is an injuſtice in taking from another, what he has been long connected with, and juſtified in conceiving an affection for.

The right of excluding all others from a particular ſpot of ground, is one ſtep in the progreſs of the idea of property; but the right of transferring it to another is a ſecond and a wider: a man is at firſt ſufficiently happy in the enjoyment of a ſpot of ground for his own uſe, though he has not the power of transferring it to a ſtranger unconnected formerly with it; he holds his land then during his own life, and at his death his

* Stairs, lib. 2. cap. 1.

children

children or heirs being nearest connected with him, continue that right of exclusion which he had, and take up the vacant possession: nor is the connection of these children with the deceased their only title; having been connected long with the particular spot of ground, having bestowed likewise thought and labour upon it, it appears hard that they should not continue the father's right of exclusion, and that by his death they should be stripped of the enjoyment of what they had formerly enjoyed.

Hence for some time after the notion of property in land was established, we see in the histories of almost all nations incapacities either natural or civil in peoples power of alienating it.

Thus the * Romans, in the very early ages of the Roman law, could not alienate their heritage except in *calatis comitiis*, and with consent of the people; thus the *jus retractus* or right of redemption of relations took place † among the Jews, among the Greeks, and till within these few years, in the udal rights of the Orkney men; among all of whom the Feudal System was surely unknown.

When with these restraints, in this state of society the influence of feudal principles chances to concur, the bar against the power of alienation becomes double.

Hence in the origin of all feudal nations, the *jus retractus* ‡ is given to relations, and the pro-

* Hein. Antiq Roman. † Ruth, cap. 4. Jeremiah, cap. 38. ‡ Lib. feud. 5. tit. 13. Craig, lib. 3. dieg. 4.

hibitions

hibitions to alienate, are without number: penalties are even impoſed; in the books of fiefs, the right hand of him who wrote the deed of alienation, is ordered to be ſtruck off.

This prohibition ariſes partly from the original principles of reſtraint, which were in favour of the heir, and partly from the feudal principles of reſtraint, which are in favour of the ſuperior.

Inſtances of the effect of the laſt principle have been obſerved by every one; for every one ſees the hardſhip it would have been upon a ſuperior, to have allowed that land which he had given to one family, to go to another.

But inſtances of the effects of the firſt principle have not been ſo readily attended to. It will be proper then to point out ſome of them.

In the old reſtraints upon alienation, which we find in the laws of England and Scotland, no diſtinction is made *, whether the fief is held by a military, or a ſoccage tenure; but the lord's intereſt in the change of the vaſſal in the one fief is very great, and in the other very ſmall. It was then the intereſt of the heir alone, equally ſtrong in both caſes, which created an equal prohibition in both.

Again, in † the ſame old laws the reſtraint upon alienation is almoſt abſolute, where the tenant is in by deſcent; but very looſe, when he is in by purchaſe. The heirs of a perſon ſeem to have ſome right, in what has deſcended to him from his

* Glanv. lib. 7. cap. 1. Reg. Maj. lib. 4. cap. 18, 19, 20, 21.
† Leg. Alfred N° 37. lib. feud. 4. tit 45. edit. Cujac. Glanv. lib. 7. cap. 1. Reg. Maj. lib. 2. cap. 18, 20.

fore-

fore-fathers; whereas no one can pretend to have a right in what a man has acquired himſelf: it is the intereſt of the heir then, which alone created the difference betwixt the one reſtraint and the other.

But what puts it beyond diſpute, that the intereſt of the heir, and not that of the lord, was ſometimes conſidered in reſtraining the power of alienation, is, that even the conſent of the lord to the alienation of what had paſſed by inheritance, could not preclude the heir. *Alienatio feudi paterni non valet etiam domini voluntate, niſi agnatis conſentientibus*, ſays the law * of the books of the fiefs.——Lord Coke is therefore under a miſtake, when he ſays †, that though a vaſſal at common law could not alienate a part of his fee to hold of his lord, yet he could alienate the whole of it. He founds his opinion on this, that in the latter caſe the fee was not diſmembred, and the lord received the whole of his ſervices; but the miſtake ariſes from attending too much to the intereſt of the lord, and too little to that of the heir.———Is it poſſible the law could by implication allow a man in all events to alienate the whole of his fee, at the very time when it expreſſes the particular events in which he can alienate the whole, or can alienate only a part of it? When a man is a purchaſer, and has no children, he may alienate the whole; but when he is a purchaſer, and has children, he may alienate

* Lib. feud. 4. tit. 45. edit. Cujac. † Coke, inſtitut. 2. pag. 65.

only

only a part, say * the old law books of both kingdoms.

The first step of this alienation of land property in Great Britain, was the power given to a man, of alienating what he had himself acquired. Over this, and for an obvious reason, he was conceived to have a more extensive right, than over what had been only transmitted to him from his ancestors.

This power is given by implication, in † the books of the fiefs, and ‡ in the Saxon law; but in express words in the laws of Henry I. § The words are: *Acquisitiones suas det cui magis velit, si Bocland autem habeat quam ei parentes sui dederint, non mittat eam extra cognationem suam.*

At the same time this licence must only be understood to have enabled a man to disappoint his other relations, *cognationes suas*, of the whole of his conquest; but not to disappoint his son of more than a part: for so it is limited in the reign of Henry II. ‖ *Si vero quæstum tantum habuerit, is qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet, sed non totum quæstum, quia non potest filium suum hæredem exheredare.* The same was the rule in Scotland at ⸸ the same period.

The alienation of conquest, or lands taken by purchase, paved the way for the alienation of what had come by descent.

* Glanv. lib. 7. cap. 1. Reg. Maj. lib. 2. cap. 20. † Lib. feud. 4. tit. 45. edit. Cujac. ‡ Leg. Alfred. N° 37. § Leg. Hen. 1. N° 70. ‖ Glan. lib. 7. cap. 1. ⸸ Reg. Maj. lib. 2 cap 20.

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At firſt, only a part of this laſt was allowed to be alienated, and that not *cui velit*, as in purchaſes, but only on very reaſonable motives. Thus the particular inſtances, as they appear * from Glanville and the *Regiam Majeſtatem*, in which men were allowed to alienate their heritage, were, in gratitude to a vaſſal for ſervices done to the lord in war, or to the fief in peace. Secondly, in frank marriage with his own daughter, or the daughter of the feuditary, becauſe this multiplied tenants to the lord; and laſtly, in frank almoigne or free alms; the ſuperſtition of the times allowing this laſt for the good of the alienor's ſoul.

At the time that the law ſtood thus in military and ſoccage tenures, the licence of alienation made a full and ample ſtretch among burgeſſes.

Thus the law laid down by Glanville and in the *Regiam Majeſtatem*, permitted the alienation of no more than a part of a purchaſe, if there were children; but the laws † of the burroughs in Scotland, on the contrary, gave a full power to the burgeſs to alienate the whole of his purchaſe without diſtinction, whether he had children or not; and to ſell, with the obſervance of certain preferences, whatever had come to him by deſcent, if he was oppreſſed with poverty.

It is probable, though we cannot trace it, that the firſt free voluntary alienation of land in England, aroſe likewiſe among trading people; for

* Glanv. lib. 7. cap. 1. Reg. Maj. lib. 2. cap. 18. † Leg. Burg. N° 45.

the

the holding not being ſtrict in burroughs, it could not in them be of great importance by whom the ſervices were done; add to this, that the extent of the notions of mankind concerning their powers over property, increaſes with ſociety; and as people living in towns from their greater numbers, and greater intercourſe, are in a more improved ſtate of ſociety than people living in the country, it was natural that the power of alienating land ſhould ariſe ſooner among them, than among the reſt of mankind.

The free alienation of land being thus eſtabliſhed in burgage tenures; and in other tenures the alienation of purchaſes in many caſes, and that of inheritances in ſome caſes, being allowed, alienation in theſe other tenures gradually gained ground; and when * Bracton wrote his book, it ſeems to have been fully eſtabliſhed. In ſoccage tenure, the intereſt of the lord had never been great, and in all tenures the intereſt of the heir declined; ſo that in the end lands holden by ſoccage tenure, came to be freely alienated, both in England and Scotland; and as the ſtrictneſs of the feudal ſyſtem yielded to a more moderate temperament, the propenſity to alienation even in the military holdings of both nations, grew ſo great, that in the reign of Henry III. it became requiſite to reſtrain it by law.

This reſtraint was contained in † a clauſe of the *Magna Charta*, and was afterwards, in the

* Bracton, lib. 2. cap. 5. ſect. 4. lib. 2. cap. 5. ſect. 7. lib. 2. cap. 27. ſect. 1. † Mag. Chart. cap. 32.

time

time * of William the Lion, tranſplanted into the ſtatutes of Scotland. The words of it were, *Nullus liber homo det, de cætero, amplius alicui, quam ut de reſiduo terræ poſſit ſufficienter fieri dominio feudi, ſervitium ei debitum.* And this ſufficiency which was ordered to be reſerved, was by practice explained to be the one half of the feud.

One thing which very much facilitated the progreſs of alienation, was the practice of ſubfeuing; for as in ſubfeus at firſt, the original vaſſal remained ſtill liable for the ſervices, and diſtreſs might be taken for them on the whole of the land, ſubinfeudation in thoſe days was ſcarce accounted an alienation.

The licence of ſubfeuing the whole fief is granted † in the books of the fiefs. *Similiter nec vaſſallus feudum ſine voluntate domini alienabit, in feudum iam non recte dabit.* But that it ſhould prevail in Great Britain, beyond the bounds which the law preſcribed to the power of alienation in the time of the Saxons, or even in that of Henry II. and David I. is incredible; for the intereſt of the heir would have been as effectually hurt by ſubfeuing as by alienating: but the intereſt of the heir, at thoſe periods, in Great Britain, as appears from Glanville, and the *Regiam Majeſtatem*, was much ſtronger than that of the heir in Italy, at the period when the books of the fiefs were compoſed.

* Leg. Will. cap. 31. † Lib. feud. 4. tit. 38.

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The power of ſubinfeudation, however, once introduced, extended itſelf greatly in the law of Great Britain; and though, in the beginning, the original vaſſal was bound to the ſervices, and diſtreſs might be made for them on the land; yet in proceſs of time, the rear-vaſſal having poſſeſſed his feud long, and held it of another, began to think he had a connection only with that other, and none with the original lord. This perſuaſion of the rear-vaſſals gained ground, and thereby the ſuperior lords came in the end to be deprived of their ſervices and emoluments.

To remedy this, and to reconcile the jarring intereſts of lords and vaſſals, while theſe were eager after a power of alienation, and thoſe complained that they were ſtript of their ancient rights, the ſtatute *Quia Emptores Terrarum* was made in England, in * the reign of Edward I. and tranſplanted, or rather tranſcribed, into the ſtatute-book of Scotland †, in that of Robert I.

In thoſe ſtatutes it is complained of, that through the practice of ſubfeuing, the ſuperior lords had been deprived of their eſcheats, wards and marriages, and it is enacted, in favour of the vaſſals, that they may alienate the whole, or part of their land, as they pleaſe; and in favour of the ſuperior lords, that the lands ſo alienated ſhall be held of them, and not of the alienor.

As the miſchiefs complained of in the ſtatutes *Quia Emptores Terrarum*, were general, ſo the

* An. 18. Ed. 1. † Stat. 2. Rob. 1. cap. 25.

remedy was general too, and was meant to extend to all vaſſals indiſcriminately, to thoſe of the king equally with thoſe of the lords. But ſome doubts having been raiſed * in England, whether the king's vaſſals were within the words of the ſtatute; the king took advantage of thoſe doubts, and aſſerted his old claim of reſtraining his own vaſſals from alienating beyond a certain extent; for this purpoſe, in the ſtatute † *de Prerogativa Regis*, of Edward II. the clauſe of *Magna Charta*, before recited, was revived againſt the king's vaſſals in capite, and in imitation of this example, the ſtatute of William the Lion was revived in Scotland ‡ by David II.

At the ſame time there was this great difference in the clauſe, as it had ſtood in thoſe ancient, and as it was revived in theſe latter ſtatutes; that by the former, no vaſſal whatever could alienate beyond a certain extent, whereas, in the revived Engliſh ſtatute by expreſs words, and in the revived Scots ſtatute by interpretation, only the vaſſals by knights ſervice and ward were reſtrained, which reſtraint in Scotland was guarded by the penalty of recognition, or the forfeiture to the lord upon alienation, beyond the extent allowed. The bent in favour of alienation was too ſtrong, for the king to be able to reſtrain it in any other ſpecies of holding, and therefore the vaſſals by ſoccage were allowed to alienate as they pleaſed.

* Standf. de prerog. regis, cap. 7. † An. 17. Ed. 2. cap. 6. ‡ Stat. Dav. 2. cap. 34.

As

As this claim of the king was the only exception to the ſtatute *Quia Emptores*, as it was founded only on a doubt upon the ſtatute, and was directly contrary to the prevailing bent of the people towards alienation, ſo the king was obliged, ſoon after, to give it up.

This was done by a ſtatute * of Edward III. whereby the king's vaſſals by knights ſervice, were allowed to alienate as they pleaſed, on paying a compoſition in chancery.

Theſe compoſitions were ſometimes diſpenſed † with, to engage the vaſſals to attendance in hazardous expeditions; but except in theſe ſingular caſes they were paid till the reign of Charles II. when tenures by knights ſervice being aboliſhed, they were aboliſhed with them.

By the fall of theſe tenures, and of the fines which attended them, the voluntary alienation of land in England, ſo far as not reſtrained by private deeds, or particular local cuſtoms, was brought to perfection.

In Scotland the conſequences of the ſtatute *Quia Emptores*, by no means kept the ſame courſe.

The neceſſary effect of the ſtatute *Quia Emptores*, if it operated at all, was to make feudal land as much the ſubject of commerce, as if it had been allodial: Now in this view the Scotch had followed too cloſe upon the Engliſh ſtatute; for in a country where the rigour of the feudal

* An. 1. Ed. 3. cap. 12. † An. 7. Hen. 7. cap. 3.

law was ſomewhat abated, where, provided the lord had a vaſſal to do ſervice, it was not of great importance to him who that vaſſal was; there it was right to allow an unlimited alienation: But in a country where the Feudal Syſtem ſtill flouriſhed, and where the lord had a very ſtrong intereſt in the fief, to give the vaſſal an unlimited power of alienating, was beſtowing upon him a power of giving away what did not belong to himſelf.

In conſequence of thoſe different circumſtances, the ſtatute *Quia Emptores* could not be put in execution in Scotland, as it was in England; on the contrary, ſuperiors, according to their intereſt or caprice, refuſed to receive thoſe who pretended to enter in virtue of it. In ſoccage fiefs the vaſſals ſubfeued their lands, as formerly, to hold of themſelves, and in military fiefs the penalties of recognition, or the forfeiture on the alienation of the half, founded on the ſtatutes of William the Lion, and David II. kept their footing in the law; ſuperiors inferred the forfeiture from alienation, in ſpite of the new ſtatute; they continued likewiſe to infer it from ſubinfeudation, as before the ſtatute they had been continually attempting to do; and in the whole train of deciſions ſince the court of ſeſſion was erected, the ſtatute *Quia Emptores* has never once been ſet up to elude the recognition of a ward feud, alienated to hold not of the alienor, but of the ſuperior lord.

The ſtatute *Quia Emptores* being thus diſregarded, the law of Scotland wavered during a long interval; for when the bar to the alienation of lands held in ward was anew erected, the arts to make this bar of no effect were revived by the vaſſals.

One art particularly, which had ſome centuries before been invented in England, and which had been provided againſt * by a ſtatute of Henry III. was revived; vaſſals infeoffing their eldeſt ſons, pretended by ſo doing to elude the penalties of recognition, and the judges ſupported this device in favour to the vaſſal.

Another art was that of the vaſſal granting infeoffments of annualrents, or rent charges, out of their lands, by which, under pretence of the granter's remaining intereſt in the eſtate, an attempt was made to elude recognition; but the judges, in favour to the lord, put a ſtop to this device, and held †, that an infeoffment of annualrent above half of the value of the land, inferred recognition.

To reconcile the jarring intereſts of lords and their ward vaſſals, while thoſe diſregarded as much as they pleaſed the ſtatute *Quia Emptores*, nor would admit the alienees to hold of them, and yet inferred recognition from ſubinfeudation; and theſe, on the other hand, with the genius of the times, were bent on alienation, the laudable

* An. 52. Hen. 3. cap. 6. † Balfour againſt Balfour, March 15, 1569.

ſtatutes of James II. * and of James IV. † were at laſt made, encouraging and allowing the kings, lords, prelates, barons, and freeholders, to ſet their ward lands in feu farm, or by ſoccage tenure, holding of themſelves, without danger of recognition, provided the lands were ſet at full value: And by interpretation of theſe ſtatutes, the ſame permiſſion was extended likewiſe to ſub-vaſſals.

Theſe acts were made and that interpretation complied with from national conſiderations, and for national intereſts; but ſome reigns after they were obliged to give way to particular conſiderations and particular intereſts: the extenſion of the permiſſion to ſubvaſſals was ‡ diſcharged in the reign of James VI. and the ſtatutes themſelves were repealed ‖ in that of Charles I. at periods when the government of Scotland was a monarchy, controuled by nothing but a moſt grievous oligarchy, when the king and the nobles, who had their lands under ward, could not bear to ſee the ſubjection, under which they thereby held their country, broke through, by the independancy of the ſoccage tenure, into which their vaſſals were continually turning their lands. Therefore by ſtatutes they forbade ward holdings to be turned into feu holdings; and ſtill further to prevent the alienation of feu holdings, they often in the charters which they granted, added prohibitions on the vaſſals to alienate any part of their

* Scots acts, an. 1457. cap. 71. † Scots acts, an. 1503. cap. 90, & 91. ‡ Scots acts, an. 1606. cap. 12. ‖ Scots acts, an. 1633. cap. 16.

lands

lands; and to theſe again they added clauſes, ſubjecting the whole to forfeiture, in caſe the prohibition was infringed.

A greater independancy of the people, and bent of that people in favour of alienation, joined to a greater moderation in the government, have concurred in our day, to deſtroy * this penalty of recognition, have removed theſe prohibitions, and brought to perfection the voluntary alienation of land property in Scotland, ſo far as it is not reſtrained by particular conveyances.

The only remaining difference betwixt the laws of England and Scotland, in point of the power of voluntary alienation, (for with regard to the forms of alienating, there are ſtill great differences) is, that men can alienate land in England upon their death-beds, in Scotland they cannot.

Perhaps it is no refinement to ſay, that this law of death-bed was in England, and now is in Scotland, the laſt remain of the ancient bar againſt alienation.

When the power of alienating had, by gradual ſteps extended itſelf in England, yet ſtill this law of death-bed kept its ground: It is probable the firſt departure from it, was by the heirs conſenting to the deed of alienation; this probability is made ſtrong from the authority of Glanville †; "Poſſit tamen hujuſmodi donatio in ultima "voluntate, alicui facta, ita tenere, ſi cum conſenſu

* An. 20. Geo. 2. † Lib. 7. cap. 1.

" hæredis hæret, et ex conſenſu hæredis confirmare-
". tur."

In the time of Bracton and the author of Fleta *, Alienation of land upon death-bed was in general allowed, provided the alienor was *ſanæ mentis et bonæ memoriæ*, although *impotens ſui et in ægritudine in lectu mortali conſtitutus.* A ſtatute † of Henry VIII. complains of the abuſe which had been made of this toleration, yet allows " all wills " made forty years before the date of it, to be " taken and accepted as good and effectual in the " law, after ſuch faſhion, manner, and form, as " they were commonly taken and uſed forty years " before the making of the act." And in the end ‡ two other ſtatutes of the ſame prince, allowing the diſpoſal of immoveables by teſtament made at any time, *etiam in articulo mortis*, rendered the original conſent of the heir unneceſſary, and gave a ſanction to all the other breaches of the law of death-bed.

In Scotland attempts have been made § to ſupport death-bed conveyances, by the conſent, and even by the oath of ratification of the heir; theſe, indeed, the judges have cut down; but they allow men on death-bed to provide their wives, and to ſell, when oppreſt by poverty, for payment of their debts: one may diſpenſe with the law of death-bed by reſerving to himſelf a faculty to do

* Bract. fol. 14. Flet. fol. 184. † 27. Hen. 8. cap. 10. ‡ 32 Hen. 8. cap. 1. 34 Hen. 8. cap. 5. § Falconer's deciſions, Feb. 27, 1683. Earl of Leven againſt Montgomery.

ſo:

ſo: when a perſon by marriage-articles makes proviſion for the children of the marriage, he may on death-bed, divide among the children the ſubject provided, in what proportions he pleaſes: and a queſtion * is at preſent in dependance before the court of ſeſſion, whether rational proviſions granted to children upon death-bed, ſhall be good to affect the land eſtate of the heir: ſo that though the law of death-bed ſtill lingers in Scotland, it may probably be loſt here in a few ages, as it was loſt formerly in England.

SECT. II.

Involuntary alienation.

WITH regard to the involuntary, or legal alienation, which ariſes from attachment for debt, the progreſs of it, natural and feudal, ſeems to be this.

Attachment of a debtor's land.

The notion of borrowing under a promiſe of paying, is in general not very natural among a rude people; their conception of obligation is but weak in any caſe, and that of their obligation to fidelity ſtill weaker. All uncivilized nations are obſerved to be cruel and treacherous; inſtead then of a promiſe to repay, or of a written document in evidence of that pro-

* Campbells contra Campbells.

miſe, the borrower gives a pledge, as a more ſolid ſecurity.

Thus the old word in the Engliſh and Scotch law books, *Namium*, which at preſent we tranſlate by the word *Diſtreſs*, ſignified anciently from the Saxon, *Pignoris Prehenſio*, the ſeizing or diſtraining of the pledge; and Wilkins *, in his gloſſary, commenting on this word, ſays, *His primis temporibus vade et pignore caveri ſolebat; hæc illi* ꝑeð ꝛ boꝛh *vocant; nos (qui aliquam ejus rei tenemus umbram) vadios et ſalvos plegios nominamus.*

From † the *Regiam Majeſtatem* and Glanville, it appears, that in conſequence of prior agreements betwixt the parties, this pledge, upon failure of payment, either remained with the creditor, or on application to the judge, was ſold by his order; and it is not improbable, that at that time, no moveables, unleſs ſo pledged, could be ſold for debt; nor even when pledged could they be ſold, till after a competent time, and delay of payment; for ſo it is laid down by ‡ Glanville and in the *Regiam Majeſtatem:* And a ſtatute of § Robert I. made at a time when even moveables not pledged could be ſold for debt, declares, that even then they could not be ſold for forty days after the attachment. Before theſe days were elapſed, they were kept rather as a ſecurity for the debt, till the debtor ſtill delaying to pay, they were employed to extinguiſh it.

* Wilk. gloſſ. voce Nyman Skeen, voce Namare. † Reg. Maj. lib. 3. cap. 3. Glanv. lib. 10. cap. 6. ‡ Loc. cit. § Rob. 1. Stat. 2. cap. 11.

The

The progreſs of the attachment of immoveables is the ſame. * In the law of the books of the fiefs they could not be attached for debt; nor could they be attached by the Saxon law; nor for ſeveral reigns after that of William the Conqueror; nor in the time of Glanville: On the contrary †, the only writs of execution at common law in England, were the *fieri facias* on the goods and chattels, and the *levari facias* to levy the debt or damages on the lands and chattels; neither is there the leaſt hint of ſuch attachment in the Scotch *Regiam Majeſtatem*, or the Scotch *Quoniam Attachiamenta:* although in this laſt the method of attaching moveables for debt ‡ is moſt exactly deſcribed, even the words of the brief, the duty of the ſheriff, the proof of the debt, the ſale, or if no body will buy, the appraiſement; yet the attachment of immoveables is not mentioned at all.

Nor at theſe periods could the law, unleſs with an exception to be afterwards mentioned, be poſſibly otherwiſe: the limited notions of power over property, added to the intereſt of the lord againſt bringing in any vaſſal who was a ſtranger to him, were inſuperable bars to any further attachment.

It is true, by the *Regiam Majeſtatem*, lib. 3. cap. 5. and Glanville, lib. 10. cap. 8. it appears, that land might be pledged for debt; and from the ſame paſſages, compared with cap. 3. of the

* Feud. lib. 2. tit. 52. † Bacon, abridgm. tit. execution.
‡ Quon. attach. cap. 49.

firſt authority, and cap. 6. of the other, it appears, that in conſequence of bargains concerning ſuch pledging of land, a practice had crept in, that the principal ſum not being paid, the land either remained with the creditor, or on application to the judge, was ſold by him. But ſome of thoſe caſes being in conſequence of agreements, were branches rather of voluntary than involuntary alienation, and they belonged more to the rules of private tranſactions, than of public law: And further, as no right of pledge was ſupported by the king's courts without poſſeſſion; *Si non ſequatur ipſius vadii traditio, curia domini regis hujuſmodi privatas conventiones tueri non ſolet, nec warrantizare*; * the poſſeſſor of the land pledged, ſeemed in this circumſtantiate ſtate to have acquired a connection with, and power over it, which facilitated the notion of his retaining it, although the attachment of land by other creditors in general, who were not already in poſſeſſion, was, it is certain, utterly unknown.

I ſay, by other creditors in general; for though in the reign of Henry III. † we ſoon after find, that the king, and the ſurety for the king's debtor purging his debt to the king, could enter upon the land for the debt, and keep it till the debt was paid, yet this was a preference ſpecial to the king; and as the ſurety had paid off the debt to the king, he ſeemed to come in his

* Glanv. lib. 10. cap. 8. Reg. Maj. lib. 3. cap. 2. † Mag. Chart. cap. 8. Coke 2. inſt. 19. Bacon, voce execution.

place,

place, and to have a right to enjoy his privileges.

But as the voluntary alienation of land was firſt freely introduced among trading people in boroughs, ſo the involuntary alienation of it was firſt freely introduced among the ſame people in the ſame places.

Thus in Scotland, in the laws of the boroughs, which were compoſed in the reign of David I. * the method of attaching and ſelling land for debt, is compleatly laid down. By thoſe laws, the creditor might enter upon the lands of his debtor, and after certain delays ſell them: The only reſtraint this attachment admitted, was a right of redemption given to the relations of the debtor †; a right derived from the moſt ancient law, and at that time not totally eradicated even in boroughs.

This attachment thus taking its riſe in the laws of the boroughs, and among trading men, was afterwards extended to all the ſubjects indiſcriminately; ſo that by a ſtatute in the reign of ‡ Alexander II. upon application of the creditor, it became the duty of the ſheriff to advertiſe the debtor to ſell his land in fifteen days, which if the debtor did not do, the ſheriff was impowered to ſell it himſelf. And that this ſtatute was put in execution, appears from § the records of chancery, prior to the alteration of the law in the year 1469, to be afterwards mentioned.

* Leg. Burg. cap. 94. & 95. † Leg. Burg. cap. 45. & 115. Kames hiſt. notes, N° 9. ‡ Stat. Alex. 2. cap. 24. § Record of charters, lib. 4. N° 49. July 22, 1450. Charta Confirmationis Gilberti Menzie.

In

In the ſame manner it was *, that the ſtatute *de mercatoribus*, introduced the benefit of the ſtatute merchant firſt into England in the 13th year of Edward I. By that ſtatute, which was tranſplanted afterwards likewiſe † into Scotland, the merchant creditor was allowed, upon failure of payment, to take poſſeſſion of the whole of his debtor's land, till he was paid off his debt: in that land too he was infeofed by the law; and upon the ſame plan of attachment with this ſtatute merchant, the ſtatute ſtaple ‡ was two reigns after invented.

It is true, that the ſame year in which the ſtatute merchant was introduced, execution upon judgments, and common recognizances §, by the writ of *elegit*, which was common to all the ſubjects, was likewiſe introduced. But the difference of execution given upon this writ, and that given upon the ſtatute merchant, proves a very wide difference in the attachment allowed among merchants, and that allowed among the other ſubjects. The ſecurity by ſtatute merchant, gave poſſeſſion of the whole of the land to the creditor; but the writ of *elegit* gave him poſſeſſion of no more than a half: Originally men could not alienate at all, afterwards they were allowed to alienate, but not beyond the half of the feud: now this principle, or rather rule, was ſtrong at the time the writ of *elegit* was invented, and the ſtatute *Quia Emptores* had not yet been

* An. 13. Ed. 1. Stat. merc. † Rob. 1. Stat. 2. cap. 19.
‡ An. 27. Ed. 3. cap. 9. § An. 13. Ed. 1. cap. 18.

intro-

introduced; therefore whatever ſtretches might be found neceſſary from the circumſtances of merchandize, yet with regard to the kingdom in general, a ſmall deviation only was made from the common law, and the *elegit* was permitted to affect no more by the operation of law, than a man was ſuppoſed capable of alienating by his own deed.

As the feudal law relaxed of its ſeverity, and the commerce of land grew more into uſe, the attachment of land by ſtatute merchant, and ſtatute ſtaple, was allowed to all the ſubjects in general. The ſtatute merchant became firſt by practice, and afterwards by a ſtatute of * Henry VIII. one of the common aſſurances of the kingdom: And though the ſame ſtatute of Henry VIII. confined the benefit of the ſtatute ſtaple within its ancient bounds, ſo as † to operate only for behoof of the merchants of the ſtaple, and only for debts on the ſale of merchandize brought to the ſtaple; yet it framed a new ſort of ſecurity, which all the ſubjects might uſe. This ſecurity is known by the name of a recognizance on 23 Henry VIII. *cap.* 6. and in it the ſame proceſs, execution, and advantage, in every reſpect, takes place, as in the ſtatute ſtaple.

But in later times, when land came to be abſolutely in commerce, this attachment was thought inſufficient; and therefore the act of the ‡ 13th of queen Elizabeth, and the ſubſequent acts con-

* An. 23. Hen. 8. cap. 6. † Bacon voce execution (B).
‡ An. 13. Eliz. cap. 7.

cerning

cerning bankrupts, eſtabliſhed a compleat attachment of ſuch lands as belonged to the perſons ſpecified in thoſe acts: Inſtead of a half, thoſe ſtatutes laid the whole of the land open to the creditor, and inſtead of a poſſeſſion, which was all he had by the *elegit*, or ſtatute merchant, or ſtatute ſtaple, they gave him the means of procuring a ſale of that whole for the payment of his debt.

On theſe ſtatutes of bankrupts, it is well worthy notice, as confirming the principles already laid open, that although the ſtatute * of Elizabeth, and that of † the firſt of James I. related only to people dealing in merchandize, yet they were extended afterwards, by degrees, to many others of the ſubjects. By the ‡ 21ſt of James I. they were extended to ſuch as were ſcriveners by trade. By the § 5th of George II. they were extended to bankers, brokers and factors. By interpretation of the judges, they were extended further ‖ to many different claſſes of tradeſmen and mechanicks; and though they do not hitherto relate to the reſt of the ſubjects, yet future generations will ſee them extended to the whole. The compleat attachment of land now eſtabliſhed among merchants, will, in the end, by a train of cauſes and effects, as abſolute in the political, as in the natural world, affect the property of all landed men whatever.

* An. 13. Eliz. cap. 7. † An. 1. Jam. 1. cap. 15.
‡ An. 21. Jam. 1. cap. 19. § An. 5. Geo. 2. cap. 30.
‖ Bacon abridgm. vece bankrupt (A).

When

When a progreſs is uniform in its movements, and conſtant in its direction, there is no very great degree of arrogance in propheſying where it will end.

In obſerving this progreſs of legal attachment in England and Scotland, it will readily occur, as a matter of ſurprize, that our anceſtors, in the execution, by the act of Alexander II. went before their neighbours in England, who from their ſituation ſhould rather have gone before them.

The following hiſtory of the variation in our legal execution, conſequent upon this act, will ſhow the effects of this haſty ſtep.

In England, thoſe who entered by the *elegit*, ſtatute merchant, *&c.* entered rather to the poſſeſſion than to the property, ſeeing the original proprietor continued for ever to have a right of reverſion: Further, the ſtatute *Quia Emptores* ſoon after had effect in that kingdom, therefore the entry of the attacher was eaſy: In Scotland, on the contrary, by the ſtatute of Alexander II. the attacher became abſolute proprietor, and yet the law was ſo improvident, as to give no ſatisfaction to the lord for admitting him: The ſtatute of *Quia Emptores* was indeed afterwards made; but that went ſoon into diſuſe; and yet the lord remained ſtill bound to receive the attacher without fee or reward: *Sine obſtaculo aut queſtione aliquali*, ſays the law of Alexander.

Upon the refuſal of the lords to enter thoſe attachers, letters of four forms were directed againſt them; but then the lord, in right of his property

property in the ground, claimed a privilege to pay off the debtor, when he was attaching the land, and to take it to himſelf.

Though this claim was ſuſtained, and even ſuſtained in the ſtatute itſelf, yet ſtill the law produced great inconveniencies to the creditor, to the debtor, to the lord.——To the creditor; for if no one bought the land which the ſheriff ſet to ſale, the creditor could not be paid.——To the debtor; for if he had not his money ready, and the land was attached for leſs than its value, the lord, by ſtepping in, and paying off the debt, might poſſeſs himſelf of the land, againſt both debtor and creditor.——To the lord; for if the land was attached for its value, or if he had not money to clear it off when attached below its value, he was forced to loſe his old vaſſal, and get one, perhaps an enemy to him and his intereſt.

To theſe three evils, three remedies were applied, by the * act of 1469. In the firſt place, by this ſtatute, if no purchaſer appeared, a certain part of the land was appriſed, and at the appriſed value given to the creditor: Next, a right of redemption was given to the debtor at any time within ſeven years: And laſtly, the ſuperior was not obliged to admit the buyer or creditor without a gift to himſelf of a whole year's rent of the lands; at the ſame time, his ancient right of pre-emption was ſecured to him; but ſubject

* 36 Act. 1469.—

ſtill,

ſtill, by interpretation of the judges, within the ſeven years, to the redemption of the debtor.

Theſe expedients indeed, cured ſome of the preſent evils; but ſtill the ſource of the evil remained: As we followed the Engliſh too cloſely, in attempting to allow the free voluntary alienation of land by the ſtatute *Quia Emptores*; ſo we made a ſtill greater miſtake in domeſtick policy, when we ran before them, and allowed the free and unlimited attachment of land, even of land held by ward, for debt, at a time, when the ſtrong notion of the ancient right to the land itſelf in the ſuperior, gave to the ſuperior a claim to intereſt himſelf in that attachment; when there was not ſuch a degree of commerce in the country, as made ſo great a fluctuation neceſſary; and when the uncertainty, and imperfection, and weakneſs of the laws, joined to the dependance of the courts upon the great men, gave an opportunity to theſe laſt, of getting almoſt all the lands in the country into their poſſeſſion, under the cover of the laws which gave attachment for debt.

The following was one of theſe ſhameful devices: Originally it was the ſheriff of the county, who, in conſequence of application made by the debtor to the king, attached and appriſed the land, in the ſame manner that the ſheriff appriſed by the *elegit* in England; but as the lands of a debtor lay ſometimes under different juriſdictions, and the ſheriff could attach only lands under his own juriſdiction, and as the trouble and expence of getting an appriſing from every particular

cular ſheriff, was complained of, it had crept into practice, on the eſtabliſhment of the court of daily council, and of the court of council and ſeſſion, (the judges of which courts came into the king's place, as the clerks to the ſignet were deemed the king's clerks) that the lords of theſe courts, inſtead of the order of the king, or the precept of the ſheriff, granted letters, or a writ of appriſing, under the ſignet, written by the clerks of it, directed not to a particular ſheriff by name, but in general to ſheriffs in that part, or *pro hac vice*, for whoſe names a blank was left in the letters. Theſe letters being directed to meſſengers, the creditor who got them, generally filled up the blank for the names of the ſheriffs, with the name of the meſſenger who was thus conſtituted ſheriff in that part, or *pro hac vice*; and as ſuch became the judge impowered to compriſe the lands. Meſſengers being in this manner made judges in affairs of ſuch importance, thoſe who were cunning in the law, did, in parts of the country where law could have force, and great men, who had always the counſel of ſuch cunning men at command, did, in parts of the country where they themſelves could give to the law force, make the following uſe of it: They either lent ſmall ſums upon great eſtates, or bought up ſmall debts upon them; they then applied to the king's courts for a writ of appriſing, which was granted without examination, and the execution of it left to meſſengers,

ſengers, ſheriffs *pro hac vice.* Theſe meſſengers being named by the compriſer, reſolved in every thing to conſult his intereſt; or though they had not been ſo reſolved, yet reſiding at Edinburgh, and not being obliged by the letters to go to the lands, they could not know the value of them; or if they did, it was only by ſuch a proof, as the compriſer himſelf thought proper to bring. In conſequence of theſe practices, large quantities of the debtor's land were given by the meſſengers to compriſers, for very ſmall debts; nay, in the end they came to give without ſcruple the whole of his land for ſuch debts: Nor had the debtor even the conſolation to hope, that the rents of theſe lands would pay off the debt; for the creditor getting poſſeſſion of the eſtate, and the circumſtances of it being by him kept ſecret, he accounted for none of his intromiſſions: he kept his fund of payment in his own hands, and yet he never was paid; for ſeven years he pretended it was a ſecurity, and after that the law made it to him a real property. From theſe legal fetches flowed national miſery; debtors grown deſperate by ſuch crying injuſtice, either oppoſed the law by force, or ſold their right to ſome great man who could do ſo. The ſuperior, if he was not tempted by the offer of a year's rent, (which however he generally was, and for that reaſon appriſings ran on the faſter) to loſe his old vaſſal, refuſed to enter the new one; the new one fell upon a contrivance to apply to the ſuperior of that ſuperior; and if he received him,

a quar-

a quarrel enſued not only between debtor and creditor, but between mediate and immediate ſuperior. Theſe things, together with other cauſes, filled the land with wars, which were rather thoſe of houſe againſt houſe than of party againſt party, and made this people a wonder to all neighbouring nations.

As there is no record of appriſings, prior to the year 1636, it is impoſſible to prove this deduction from that record; but as the deduction is agreed upon by our ancient lawyers, ſo there is ſufficient evidence of it in the record of the king's charters. By theſe it appears, that originally * the ſheriff compriſed; that about thirty years after the ſtatute of 1469, the letters † were directed to, and executed by meſſengers, who however for ſome time performed their duty, either upon the land, or at the head-burgh of the ſhire in which the lands lay, with the ſame exactneſs that the ſheriffs had done. In the year 1528, the firſt ‡ diſpenſation was given for holding the court of appriſing at Edinburgh, inſtead of holding it where the lands lay; the reaſon given in the charter is, that the lands lay in different ſhires. Soon after this, many inſtances appear §, of diſpenſations granted even where the lands of the debtor lay in one ſhire. But ſtill, notwithſtanding theſe two laſt alterations, the ap-

* Record of charters, lib. 5. N° 6. Dec. 11. 1481. chart. Thomæ Grundiſton—lib. 27. N° 191. May 22. 1530. chart. Gulielmi Hamilton. † Record of charters, lib. 12. N° 241. Nov. 8. 1491. ‡ Ibid. lib. 24. N° 219. § Ibid. lib. 25. N° 50. 1528.

priſings were for ſome time made * by proof of the value, and with the ſame ſolemnities with which the appriſings by the ſheriffs had been led. From this period, till the year 1608, there appear ſeveral † charters on appriſings, which had paſſed without ſpecifying the value of the lands; but although in theſe it may be doubtful whether the debt did not exceed the value of the land, yet, after ‡ that year, inſtances of general appriſings become numberleſs and uncontroverted, and lands are not only compriſed without valuation, but the largeſt eſtates are compriſed for the moſt inſignificant ſums.

Such appears the progreſs of appriſings from our records, and the effects of that progreſs upon the manners of our people are but too well vouched in the hiſtories of our families and of our manners.

The king, the people, the judges, ſaw thoſe effects; they ſaw too the cauſe of them, and in their ſeveral capacities endeavoured to ſoften both. The judges §, as appears by the deciſions of thoſe days, named advocates in affairs of conſequence, to be aſſeſſors to the meſſengers; they diſcharged courts of appriſing to be held any where, but in the county where the lands lay, unleſs for ſpecial cauſes ſhown to themſelves.

* Ibid. lib. 24, N° 219. † Ibid. lib. 34. N° 485. 1576. chart. ap. Adami Wauchop. lib. 36. N° 13. 1592. chart. ap. Georgii Dundas, lib. 44. N° 351. 1607. chart. ap. Alexandri Lauder. ‡ Chancery records, lib. 1. fol. 1. 1608. Feb. 9. lib. 1. fol. 2. 1607. Dec. 5. lib. 1. fol. 168. 1614. Jan. 25. lib. 1 fol. 195. 1613. Dec. 7. § Dict. deciſ. tit. adjudication & appriſing.

They

They prevented the legals from expiring, by taking advantage of every flaw in the compriſings; as on the other hand, they diſcouraged all attempts to prove flaws in the orders of redemption; and the legiſlature, enacted by the act * of 1621, that if the land compriſed yielded more than the intereſt of the ſum compriſed for, the ſurplus ſhould be reckoned in diſcharge of the principal ſum.

But ſtill theſe corrections were not ſufficient; for, under pretence of obeying this act, and of imputing the ſurplus of his annual rent, to the payment of his principal ſum, the creditor ſtill kept poſſeſſion of the whole of the eſtate; after which, it was difficult to prove the intromiſſions upon him, and, at any rate, a proof of them could only be made good by an intricate and tedious law-ſuit.

To remedy this, the act † of 1661 was made, which enacted, that it ſhould be in the power of the debtor, to offer ſecurity to the creditor, for his annual rent, inſtead of allowing him to poſſeſs any of the land; and that it ſhould be referred to the lords of ſeſſion, to determine, whether the creditor might ſafely accept the ſecurity offered, or ſhould be allowed poſſeſſion of the land to a certain extent; at the ſame time, that extent was limited, by the ſtatute, to what produced exactly the annual rent of the principal ſum. Further, by the ſame ſtatute it was enact-

* Act. 6. 1621. † Act 62. 1661.

ed,

ed, that the time of the legal, which was formerly ſeven years, ſhould now be extended to ten; all which regulations were in favour of the debtor. It is further to be obſerved, that by interpretation of this ſtatute, a charge to the ſuperior became ſufficient to eſtabliſh the right of the creditor in the eſtate; whereby the creditor, not aſking infeofment, nor paying his entry during the legal, the diſcontent of the ſuperior could not be dangerous to him, on the one hand, nor the eagerneſs of the ſuperior to admit him, tempting to him, on the other.

By theſe laſt alterations, appriſings were changed from being the inſtruments of payment of debt, to be only a ſecurity for it. This the lords of ſeſſion had been for ſome time aiming at, by doing every thing they could, to prevent the legals from expiring; the ſtatute lengthened the time of expiration, and put it in the power of the debtor to remain in the poſſeſſion of his land.

But this alteration in the nature of appriſings, bred diſcontent in many; for people had lent their money, in expectation of getting it back when they pleaſed, or at leaſt of getting poſſeſſion of land of equal value; whereas they might now be kept from both, by an offer of ſecurity for the intereſt of their money, and that too, not for ſeven years, but for ten. The clamours raiſed on this account, made the introduction of adjudications, by the act of * 1672, neceſſary, which

* Act. 19. 1672.

being judicial ſales, ſubject to redemption within five years, would, it was thought, pleaſe all parties, and ſolve all objections: And indeed, moſt of the inconveniencies of the former execution, were prevented by this one. Anciently meſſengers had been judges in the attachment, now the lords of ſeſſion were become ſuch; formerly, though the act of 1661, reſtricted the creditor to an annualrent, ſuitable to his principal ſum, during the legal, yet on the expiration of that legal, by a ſaving clauſe in the ſtatute, he might, if the debt was not paid, poſſeſs himſelf of the whole eſtate he had appriſed; now only a proportional part of the eſtate was laid open to him at all: formerly there was room for lawſuits, in accounting for intromiſſions, now the creditor was made ſubject to no count and reckoning: formerly the legal being ten years, the land was not only not improved, but was totally neglected; becauſe neither the debtor nor the creditor knew to whom it was to belong: but this uncertainty, by the preſent ſtatute, was to remain no longer than for five years. At the ſame time, as it would have been extremely hard, to have introduced ſo many things in favour of the debtor, unleſs ſome additional care had likewiſe been taken of the creditor; therefore, in conſideration that the creditor was obliged to ly ſo long as five years out of his money, and to take land in place of it in the end, a portion of land equivalent to a fifth part of his ſum, was given to him, to be kept with the reſt, in caſe his money was not repaid within the five years.

years. Further, in order to give him an abſolute ſecurity in the land which he got, the debtor was ordained to compleat this judicial ſale, by delivering to him the title deeds of the lands; and in caſe the debtor neglected or refuſed to do ſo, the creditor was allowed to appriſe as formerly; in which event all the miſchiefs of former appriſings were allowed to fall on the debtor diſobeying the law.

Theſe amendments and proviſions were thought ſufficient by the legiſlature, and lawyers of thoſe days; but all that the wiſdom and juſtice of parliaments can do, added to the foreſight and precaution of lawyers, is often, only to apply remedies which future lawyers will break through, and which future parliaments muſt again remedy. Hard fate of law, in which, from a continual fluctuation of circumſtances, the beſt laws are but remedies to bad ones; and all that poſterity can hope for, is, to amend their forefathers defects, and in doing ſo, to leave defects for others to amend!

The original error of allowing the free attachment of land for debt, at a period when the genius and circumſtances of the people were not ripe for it, was felt, when the law itſelf was forgot: for the genius of the people not complying with that free attachment, had brought in the right of redemption in favour of the debtor, and that right ran through all the future amendments of the law, to poiſon them, to flatter the debtor with falſe hopes of ſaving a ruined eſtate, and to make the

creditor uncertain what was the nature of his own fortune. If the legiſlature in the 1672, at a period when the genius and circumſtances of the people were ripe for an almoſt compleat attachment of land-property, had given a right to the creditor to ſell the land, after a competent interval; or if it could not be ſold, to take a portion to himſelf, the remedy would have been effectual: but the effects of old laws are not ſoon to be rooted out, and the act of 1672 was tainted with theſe effects; conſequently it's remedies were unavailing.

The error of this law lay here; that inſtead of it's being contrived, ſo as to make the creditor execute it, it was left to be executed by the debtor, and a penalty was inflicted upon him for non-compliance; but penalties againſt a wilful debtor, are at any rate vain, and in this ſpecial caſe the penalty was too weak: for to invite a man to conſent to the ſale of his eſtate, by taking from him a fifth part more than he owed, and by making him loſe all hopes of recovering it after five years, was ſurely no very great bribe; as on the other hand, to terrify a man who was already deſperate, by allowing him to torment his creditor with law-ſuits, on account of intromiſſions, and to preſerve his own right to the eſtate for ten years, was ſurely no very great penalty. Debtors ſaw, and felt the alternative, and acted accordingly: they almoſt univerſally neglected the act, they produced not the title deeds, they compleated not the ſale; or if a

very

very few did obey the law, they were only men, whoſe eſtates were ſo overburdened, that there was no room for the fifth part more, which the ſtatute had provided in favour of the creditor.

Theſe miſchievous effects were ſeen by the legiſlature, but their original cauſe was not ſeen; therefore they were remedied only by halves: They were ſo far remedied, that by the act * of 1681, the right of redemption of the debtor was taken away, and any one real creditor could apply to the court of ſeſſion for ſale of the bankrupt eſtate: but they were ſo far not remedied, that it was ſtill neceſſary within the legal to carry along the conſent of the debtor; a conſent, which was ſeldom obtained, and which, no legiſlature making allowances for human nature, ought in general to have expected.

Therefore came the act of † 1690, which impowered the court of ſeſſion, on the petition of any one real creditor, to ſell the bankrupt eſtate; or on failure of a purchaſer, to divide it amongſt the creditors; both of which they were impowered to do, even within the legal, and though the debtor refuſed his conſent.

Another ‡ ſtatute a few years after, together with the later § act of ſederunt intended to make that ſtatute effectual, gave, notwithſtanding the concealment of the title deeds of the lands, a total ſecurity to the purchaſer; a ſecurity made ſuch,

* Act. 17. 1681. † Act 20. 1690. ‡ Act 6. 1695.
§ Act ſederunt, 1711. Mar. 23.

by the interpretation of the judges, as perhaps, the title deeds themſelves, if produced, could not have afforded. For on the 21ſt of June 1720, in the caſe Chalmers againſt Myretoun, the lords refuſed, after decree of ſale, to hear a party plead, that the ſale had been carried on for the debts of one who was only life-renter, and by colluſion with the creditors, at a time when he, the party, being an infant, was proprietor of the eſtate.

At the ſame time, it will be remembred, that theſe two laſt ſtatutes relate only to the attachment of bankrupt eſtates, and therefore, with regard to the attachment of other eſtates, the law ſtill remains as imperfect as it did upon the ſtatute of 1672.

An obſervation occurs before this deduction can be quitted. By the ſtatute of 1469, the ſuperior was allowed to pay off the debt, and to take the land to himſelf: this was natural at a period when the ſuperior's intereſt was ſtrong in the fief. The ſtatutes of 1690 and 1695, neither reſerve to, nor take from the ſuperior, this his ancient right; but the judges in interpreting theſe ſtatutes * have found, that this right of preference is loſt: this is equally natural in an age when the ſuperior's intereſt in the fief is become, except in matters of form, little more than a name.

* Fountainhall, Dec. 17, 1695. Kennedy contra Earl Caſſilis.

Such

Such is the progreſs of the law of England and Scotland, on the attachment of land for the debt of the debtor himſelf. From that progreſs it will readily occur, that if there was ſo much difficulty in bringing in the attachment of the lands of the debtor himſelf, there muſt have been much more difficulty in bringing in the attachment of land in the perſon of the heir for the debt of his anceſtor: The heir had not contracted the debt, therefore according to the law of nature he ſeemed free; the fief was bound for the ſervices of the lord, therefore it appeared agreeable to the laws of fiefs, that the heir ſhould have the fief free of burdens, in order to enable him to do thoſe ſervices. And accordingly * it is certain, that originally at common law in Britain, the heir was not bound for the debts of his anceſtor.

Attachment for debt of anceſtor.

It has been ſeen, that the voluntary alienation of land, and the attachment of it in the debtor's hand for his own debt, took place, both of them, at firſt, among trading people: On the ſame plan of analogy, the attachment of land in the hands of the heir for the debt of his anceſtor alſo took place firſt among the ſame people. By the ſtatute merchant of † Edward the 1ſt, it was declared, that "If the debtor die, the merchant ſhall have poſſeſſion of his lands, until he hath levied his debt." In Scotland the ſame thing

* Bacon voce heir and anceſtor. (F)

† An. 13. Ed. 1.

is laid down in a ſtatute of * Robert the 1ſt, relating to merchants; and more fully in the 94th law of the boroughs.

The too great haſte of the Scots nation, in going before the Engliſh, in the attachment of land for the debt of a debtor, by the 24th act of Alexander the 2d; and for the debt of the anceſtor, by the 94th law of the boroughs, at a time when the intereſts of the lord and vaſſal ran too much into each other, to admit thoſe attachments, created very great embarraſſments in the law of Scotland, on an emergency, which in this laſt deduction has not been mentioned. The emergency I mean, is, when a debtor died, whoſe heir would not make title to his eſtate; in that caſe, it was difficult to apprehend, how the creditor, conſiſtently with the ſtrict feudal notions, could reach the eſtate: It was not in the debtor, for he was dead; it was not in the heir, for he had not entered; it was not in the lord, for he had only the ſuperiority. This difficulty could not occur in the law of England, becauſe, originally, if the heir poſſeſſed, his poſſeſſion made him a title; and if the lord poſſeſſed, he was underſtood to poſſeſs for the heir; and afterwards † the ſtatute of uſes joining conſtantly the property to the right, made the eſtate as much the property of the heir, as if he had been admitted by the ſuperior; but in the law of Scotland it is certain, that for a long time, creditors could not reach an eſtate in this ſituation at all.

* Rob. 1. Rat. 2. cap. 89. † An. 27. H. 8. cap. 10.

To

To remedy this, the act * of 1540 was paſſed, which made a charge by the creditor, to the heir, to enter, equivalent to an entry. After that, the eſtate was deemed to be in the heir, and was attached as ſo veſted.

But to elude this, heirs gave into court formal renounciations of all connexion with the inheritance; after which, the eſtate could not be attached as belonging to the heir; neither could it be attached in the hands of the ſuperior who had not contracted the debt, and to whom, by † the renounciation of the heir, added to his own radical right, it fell ſimply to return, diſburthened of debts to which himſelf had not conſented.

The injuſtice of this eluſion was too crying, not to require a remedy; and therefore the judges of the court of ſeſſion interpoſed; and without ſtatute, without even a feudal analogy to ſupport them, introduced the adjudications on decreets *cognitionis cauſa*; that is to ſay, they allowed an adjudication againſt the *hereditas jacens*, as if it had ſtill been the property of the dead perſon. Craig ‡ ſays this expedient had been contrived only lately before his time. "Erat ſane hæc adjudicationis formula, ma-
" joribus noſtris incognita, et quodammodo neceſ-
" ſitate, a recentioribus, introducta, ad eorum
" bonorum dominium in creditorem transferen-
" dum, quæ, alioqui, commode, transferri non
" poſſunt, aut appretiari."

* Scots acts, an. 1540. cap. 106. † Kaims hiſt. notes n. 1. ‡ Craig, lib. 3. dieg. 2. N° 23.

The introduction of the adjudication *cognitionis causa*, gave execution againſt the eſtate in which the anceſtor had been veſted; but then another difficulty occured, with reſpect to the creditors of an heir apparent, who had during his life continued to poſſeſs the eſtate, but had made up no title to it: If the next heir paſſed him by, and ſerved to another anceſtor, the eſtate could not be attached, as the eſtate of the firſt heir, for he had never been veſted in it; neither could it be attached in the hands of the next heir, becauſe the next heir did not repreſent him.

This gave great room for the frauds of heirs; the interpoſition of the legiſlature became neceſſary; and therefore, by the act of * 1695, it was ordained, that if an apparent heir ſhould poſſeſs for three years, the next heir paſſing him by, and connecting himſelf by ſervice, or by adjudication on his own truſt bond, to an anceſtor veſted in the eſtate, ſhould be liable to the value of the eſtate; for the onerous deeds of the interjected heir whom he paſſed.

The interpretation of this ſtatute produced a controverſy in the law of Scotland, which at the diſtance of half a century, is perhaps, yet undecided.

The words of the ſtatute, it is obſervable, ſubject the ſecond heir, only in the event "of his "paſſing by the firſt heir, and connecting himſelf "by ſervice, or truſt adjudication, with an anceſ-

* 1695. cap. 24.

" tor veſted:" now the ſecond heir, to withdraw himſelf from the words of the ſtatute, did not connect himſelf at all with an anceſtor veſted; but continued to poſſeſs the eſtate merely on his title of apparency. The queſtion aroſe, was this heir ſubject to the onerous deeds of the firſt, or interjected heir three years in poſſeſſion?

On the one hand, it was argued for the heir, that the ſtatute in queſtion being correctory of the common law, admits only a ſtrict interpretation, and ought not to be extended to caſes beyond the letter of it. On the other hand, it was pleaded for the creditors, that when there is a defect in the common law with reſpect to the prevention of fraud, and a remedy is provided by a correctory ſtatute, the ſtatute ought to be extended to every fraud that falls within the purview and reaſon of it.

The judges, by * two ſucceſſive deciſions, gave ſanction to the former of theſe doctrines.

Particular remedies were however applied without doors; for, moved by the favour of the creditors claim, and by the fraud of heirs ſheltering themſelves under the defect of the law, † the barons of exchequer, and likewiſe many ſubject ſuperiors, made gifts of the incident of non entry to the creditors; by which they could force the heir, either to enter, or to loſe all benefit of not entering.

* Feb. 20. 1736. Lady Rater. June 1742. Lo. Bamff. † Bank. lib. 3. tit. 5. p. 196.

The houſe of peers, on an appeal concerning * the eſtate of Kinminity, ſeemed willing to apply a more general remedy, by giving extent to the interpretation of the ſtatute: in that caſe the firſt heir had poſſeſſed three years without making up title; the creditors had charged the next heir, who was a minor, to enter; and on that charge adjudged the eſtate as his, upon the act of 1540; if the next heir had renounced, he had avoided † the ſtatute of 1540, which did not take place if the heir renounced; and muſt have fallen under the doubt of the ſtatute in queſtion, by not making up a title at all; for which reaſon, he brought a reduction on the heads of minority and leſion, of the execution which had been purſued againſt him; and pleaded, that his renunciation being admitted, the eſtate could not be touched, becauſe he had connected himſelf with it, neither by ſervice, nor truſt adjudication. The lords of ſeſſion found, that the eſtate could not be reached by the creditors; but the houſe of peers, in bar to the fraud of heirs, reverſed the decree.

A few years after, in the caſe of the eſtate ‡ of Pronſy, the abſtract queſtion occurred again. An apparent heir, three years in poſſeſſion, gave a jointure to his wife by marriage-articles, but made up no title to the eſtate; the next heir refuſed to make up title, and refuſed to pay the widow her jointure; and argued, by not paſſing

* Nov. 27. 1738. Sutherland againſt his father's creditors.
† An. 1540. cap. 16. ‡ 4 Colleс. Iſobella Grant againſt Sutherland. Dec. 12. 1754.

by

by the firſt heir, that he fell not under the ſtatute of 1695: The court of ſeſſion adhered to the letter of the ſtatute, and to the train of their deciſions, and ſuſtained his refuſal; and perhaps, influenced by the uniform train of deciding the queſtion in Scotland, and by the ſteadineſs of the judges there, the houſe of lords gave their aſſent to the decree.

But whether in future times, a ſtatute calculated to obviate frauds, will be allowed to give ſanction to a very great fraud; and whether a ſecond heir making up no title at all to the eſtate, will be allowed to be in a better condition, than a ſecond heir making up titles fairly to it, may perhaps, with juſtice, be doubted.

Such is the progreſs of the involuntary alienation of land property, both in England and in Scotland. Upon a review of this deduction, it is no pleaſing reflection, to obſerve, after the conſummation of centuries, the law of England labouring under this defect, that in common caſes, the creditor gets a diſtant, and not immediate payment, the poſſeſſion, but not the property of his debtor's land; and the law of Scotland labouring under this abſurdity, that if a debtor having lands is in fact inſolvent, his creditors get direct payment; but if he is able to pay, they do not. The firſt of theſe aſſertions ſeems ſtrange of ſo commercial a nation as the Engliſh, and the other ſeems paradoxical in any nation; yet both are true: In England, if a man is not of a certain denomination to come under the ſtatutes of trading bankrupts, his

his creditors only get, according to the nature of their debts, the benefit of the elegit, or of the ſtatutes merchant or ſtaple; that is, they get the poſſeſſion, in ſome caſes, of the half, and in other caſes, of the whole of their debtor's land; but in no caſe, the property of it. Again, in Scotland, if a debtor is in good circumſtances, a creditor, by running an adjudication againſt his eſtate, gets not his money; he gets indeed land, but that land may be redeemed from him in a certain number of years; and thus he gets only a ſecurity for, or at moſt an indirect payment of, his debt; on the other hand, if the debtor is in fact inſolvent, his lands are brought directly to a ſale before the lords of ſeſſion, and the creditor gets immediate payment.

The feudal law carries with it not only a ſyſtem of private rights, which ſwallow up all others, wherever it comes; it involves too, in giving effect to thoſe rights, a ſyſtem of forms, which remain, even when the original rights are no more. Nor is this all, for ſome of theſe rights, by the force which each gave once to the other, remain, even when moſt of the forms have periſhed too; but the day will probably come, when all land becoming allodial, and the more compleat and eaſy attachment of it becoming neceſſary, the rule of the Roman emperor laid down in * the Pandects, and made when the feudal relations, and the bar to the alienation of land property conſequent on them, were unknown, will be the law of the

* L. 15. D. de re judicata 2 & 3.

world.

world. By that law it was ordered, that a portion of the moveables equivalent to the debt, ſhould firſt be ſold; but if theſe did not ſuffice, that an equivalent portion of the land ſhould be ſold; and if no purchaſer appeared, that the ſubject offered to ſale, ſhould become the property for ever of the creditor. "Primo quidem, res "mobiles animales pignori capi jubent, mox diſ- "trahi; quarum prætium ſi ſuffecerit, bene eſt; "ſi non ſuffecerit, etiam ſoli pignora capi jubent, "& diſtrahi. Quod ſi nulla moventia ſint, a "pignoribus ſoli initium faciunt; ſi pignora quæ "capta ſunt, emptorem non inveniant, reſcrip- "tum eſt, ut addicantur ipſi, cui quis condemna- "tus eſt."

SECT. III.

Alienation by will.

FROM the foregoing deductions of the alienation of land property, by immediate deed of party, and by attachment of law, it is plain, that it would be very long before men could have a notion in the feudal law, or in any law, of the third branch of alienation; to wit, of that alienation which is to take effect, only after the death of the grantor.

When a man has beſtowed much coſt and labour upon a ſubject, he reckons it hard, that he ſhould not have the complete enjoyment of it, and conſequently the voluntary alienation of it during his life; but his enjoyment ceaſing after death, the liberty of alienating at a time when he can no longer enjoy,

enjoy, is, to a rude people, no very natural conception.

The introduction of money which buys all things, and in consequence of that, the favour due to creditors, who have lent their money to a possessor of land, brings in the necessity of legal alienation for the payment of what has been thus lent: But the same favour does not intervene, for an alienation by testament, which depends solely upon the will of a person who is now forgot, and against which, the favour attending the heir of blood, is a bar.

Hence, in the progress of society, those first and second species of alienations very much precede this, of which we are now treating; and in many of the instances given in this chapter, men could alienate during their lives, who yet could not alienate so as to take effect after their deaths.

At first, this power of alienation is so little thought of, that men do not imagine they have a power of conveying even moveables, by testament.

Thus, before the time * of Solon, the Athenians could not make testaments: nor could the Romans † before the time of the twelve tables, and even then the use of testaments came not in, by the natural course of things, but was borrowed from the Greeks, and was the act of the legislature rather than of the people. Tacitus testifies to the same effect, of the limited idea of property among the Germans of his time. His words are, *Hæredes juc-*

* Plut. in vita Solonis. † Heinec. Roman antiq. & 12. tabulæ.

cessoresque

ceſſoreſque ſui cuique liberi, & nullum teſtamentum; ſi liberi non ſint, proximus gradus in poſſeſſione, fratres, patrui, avunculi.

Afterwards, men get a notion of making teſtaments, but only of their moveables, and in ſome nations, of a part of theſe moveables only. Thus * in the *regiam majeſtatem*, teſtaments of moveables are permitted, but they are confined to one third of the moveables only, called the dead's part. The ſame was the ancient law in England, as we learn from † Glanville and ‡ Bracton; and although from the favour to power over property, this limitation wore out, in the other parts of that kingdom, yet till the ſtatute of George § the firſt enabling men to deviſe in ſpite of all ſpecial cuſtoms whatever, it remained the law in the province of York, and the city of London. In Scotland, at this day, where our notions of powers over property are not altogether ſo extenſive, it remains ſtill the law of the land.

The notion of a power over moveables even beyond the grave, once introduced, made way for a notion of the ſame power over immoveables; yet ſtill, in giving effect to this laſt power, people were obliged, at firſt, to uſe many arts, in order to ſmooth over the difficulty which the mind in a rude age had, to conceive, that a perſon's will could have any effect, when he himſelf was no more.

* Reg. Maj. lib. 2. cap. 37. † Glanv. lib. 7. cap. 5.
‡ Brac. lib. 2. cap. 26. § cap. 18. an. 11. Geo. 1.

Thus

Thus in the * Roman law, before the time of the twelve tables, no man could transfer his inheritance, except *in calatis commitiis*, with conſent of the people, and by way of adoption; in which caſe the donee took, rather as legal, than as teſtamentary heir. In the ſame manner † from the *Regiam Majeſtatem* and Glanville, it appears, that our anceſtors imagined, the ceremony of delivery to be abſolutely neceſſary, to give effect to the deed of the teſtator; in which caſe, the donee did not ſo properly take after death by teſtament, for the law ſays, *Deus et non homo facit hæredes*; as he took, by donation, during life. According to thoſe authorities, if delivery had not followed, the heir might have diſputed the gift; for without ſuch delivery, ſays the law, *id intelligitur potius eſſe nuda promiſſio, quam aliqua vera promiſſio, aut donatio:* This is the origin of our diſpoſitions *inter vivos* in Scotland, to take effect, in point of form, *de preſenti*; and even to this day, in England, no deed of feoffment is good againſt the heir at common law, if delivery hath not followed upon it.

But there is a long interval, in the progreſs of human ſociety, between ſuch alienation, *mortis cauſa*, as is made good by delivery during life, and that alienation, which is made good, by barely notifying a few words in a teſtament: The latter follows the former, at the diſtance of centuries One thing which very much helps on the progreſs of

* Heinec. antiq. Rom. Glanv. lib. 7. cap. 1.

† Reg. Maj. lib. 2. cap. 18.

this

this laſt, is the uſe of letters becoming common; for even ſuppoſing the idea of property were pretty much extended, before letters came into common uſe; yet ſtill the mind would have difficulty to aſſent to this, that a man's will ſhould have effect after he himſelf was no more; but the invention and common uſe of writing make all illuſions, to ſmooth over this difficulty, unneceſſary. When I ſee the will of a perſon lying on a table before me, he ſeems preſent with me, and commanding as if he was alive: This ſtrikes the ſenſes, and aſſiſts the imagination in transferring property to a living, from a dead perſon, by the will of the deceaſed. Thus it comes to be law, becauſe it is every body's intereſt it ſhould be law, that men may name heirs by teſtament as they pleaſe: nor is this all, for men being fond of power, and letters expreſſing the exertion of that fondneſs, they name heirs to theſe heirs. Thus ſubſtitutions come into law; and *fidei commiſſes*, conditions, entails, with many other effects of pride, refinement, and an extended idea of property accompany them.

To the exertion of this power, the conſent of the heir was taken at firſt, as appears from a variety of old charters both in * England and Scotland; and, at an after period, when this conſent was not aſked, the heirs, as we learn from † Sir Henry Spellman, were influenced to ratify the deeds, *ob pietatem*. But as it depended upon theſe heirs, during the former of theſe periods to conſent to the donation

* Mad. form. Angliæ. † Spellm. of ancient deeds, 234.

at

at all, or during the latter to confirm it; their doing either of these, was rather a matter of private choice, that of publick enforcement; and during neither of the periods can it be said, that the validity of testaments was established.

We have already seen, that the free voluntary immediate alienation, and the free involuntary alienation of land property, either for the debt of the vassal, or for the debt of the ancestor, arose originally in burroughs: In the same manner, the same causes always producing the same effects, the first free alienation of land by testament, arose, in the decline of the feudal law, originally in burroughs.

This we learn from Lyttleton, who lived in the reign of Edward the fourth: That most accurate of lawyers * informs us, that the custom of devising land by testament, had taken place first in burroughs.

This species of alienation, like the other two branches of alienation, was quickly transferred from burroughs, to the rest of the country, partly by the interposition of courts, partly by devices of lawyers, and in the end by publick law.

Partly by the interposition of courts: For though a deed of feoffment was not good at common law, without livery, yet validity was bestowed upon it by the courts of equity.——*Partly by the devices of lawyers:* For though the ancient rule, that a man could not alienate his lands by testa-

* Lyttl. lib. 2. sect. 167.

ment,

ment, ſtood in the law books, yet the invention of the diſtinction, between uſes and lands, gave great room for a teſtator to diſpoſe of the profits, though he could not diſpoſe of the land itſelf. Lawyers found out too, that he might order, in his teſtament, his executors to alienate his lands for certain purpoſes. At firſt he was allowed to exerciſe ſuch powers for the good of his ſoul; but by the preamble of act 4th, *ann.* 21. Hen. VIII. it appears, that this pretence had been extended to paying his debts, ſatisfying his legacies, &c. Afterwards, many people were not even at the pains to uſe theſe circuits, but deviſed directly by will; as appears from the preamble, and a particular clauſe * in a ſtatute of the 27th of Henry VIII.——*Partly by the aid of publick law:* Henry the VIIIth in the 23d year of his reign, endeavoured indeed to check the unlimited power of deviſing: he made offer to the Commons, as is related † by the hiſtorians of his reign, to permit people to deviſe one half of their lands; and when the Commons refuſed to accept that offer, he ordered the import of the ancient incapacity of deviſing to be debated in chancery by the judges and learned men of the realm, and in conſequence of their determination formed an order diſcharging men to deviſe any part whatever of their lands. But four years after, he was obliged to yield to the univerſality of the cuſtom, and conſented ‡ to a ſtatute, declaring all wills made 40 years

* An. 27. Hen. 8. cap. 10. preamb. and ſect. 11. † Hall. fo. 202 & 203. ‡ 27 Hen. 8. cap. 10.

preceding

preceding the date of it, *to be taken and accepted as good and effectual in the law.* And in the end the practice of deviſing became by the ſtatutes * of the 32d and 34th of the ſame prince, no longer the device of lawyers, no longer an exception from the old law, weak as it was, no longer an acquieſcence in that exception, but received the explicit and ample ſanction of the legiſlature. By theſe laſt ſtatutes, lands, with an exception of thoſe which were held by knights ſervice, were allowed to be deviſed by will; and when knights ſervice came to be aboliſhed, theſe lands were allowed to be deviſed too. Nay, ſo extenſive is the notion of mens powers over property in England, that not only can a perſon deviſe his immoveables by will, in writing, but he may deviſe his moveables, to the greateſt value, by a nuncupative teſtament, if it be ſufficiently proved.

In Scotland again, we could not originally give away land to diſappoint the heir, unleſs by ſeiſin during life; afterwards the diſtinction betwixt the life rent and the fee was fallen upon, and the donor gave away in his life-time, the latter, while he retained to himſelf, with a power of revocation, the former. In the further progreſs of things, the uſe of procuratories was uſed; theſe anſwer to the Engliſh powers of attorney, but they differ from them in this, that by a particular ſtatute † in Scotland, they may be executed after the death

* 32 Hen. 8. cap. 1. 34 Hen. 8. cap. 5. † An. 1693. cap. 3.

of

of the donor; ſo that by the introduction of theſe, it became unneceſſary to deliver ſeiſin during the life of the donor. Now-a-days, though we once attended the Engliſh too cloſely, in the voluntary alienation of land property, and moſt abſurdly ran before them in the involuntary alienation of it; yet our cuſtoms are ſo far accommodated to the degree in which the feudal law is ſtill amongſt us, that we do not deviſe moveables by nuncupative teſtament beyond a trifling value; and in the alienation of land property to take effect after death, we uſe the ceremony of a diſpoſition *inter vivos*, to be carried into effect by the execution of the procuratory. At the ſame time we are approaching ſo faſt to the practice of deviſing lands, that at preſent a bare diſpoſition with a clauſe diſpenſing with non-delivery, found lying by a man at his death, though it had neither procuratory of reſignation, nor precept of ſaſine, would bind his heir: It would indeed require the circuit of an adjudication in implement, to make it effectual, and by that means may be ſaid to derive it's validity from the act of the heir, or of the law; but whatever be in this, ſuch a diſpoſition would, in the end, be valid in law, and againſt the heir.

Upon a review of theſe three branches of alienation, it appears, that the laws of England and Scotland, originally the ſame, have, after departing long from each other, arrived by different courſes, at being nearly the ſame again. The difference of circumſtances obliged them to forſake each other, the ſimiliarity

ſimiliarity of circumſtances is now bringing them together anew; and a few ages will probably make the re-union complete.

There is, however, ſome doubt, whether there be not one reſtraint in the law of Scotland common to all the three branches of alienation, which cannot now ſubſiſt in the law of England; the doubt is, whether a ſuperior can be forced to receive a body politick? and the difficulty ariſes, from the hurt done to the ſuperior, in being forced to receive a vaſſal, who never dies, and from whom therefore, when once admitted, none of the emoluments of ſuperiority can accrue. Craig * declares againſt receiving ſuch body politick; lord Stairs does the ſame; and Spotſwood, in his † obſervations on Sir George M'kenzie's inſtitutions, ſays, that the barons of exchequer, after the union, refuſed to paſs any ſignature of land holden of the crown, in favour of ſocieties, or corporations, or bodies politick.

This point received a deciſion in the † caſe of the univerſity of Glaſgow, not many years ago, in favour of the body politick; but that decree was afterwards reverſed in the houſe of peers.

The ſtatute 20th of George II. in providing for the more eaſy and compleat transferring of land property, leaves this doubt as undetermined as before; that ſtatute in ordering who ſhall be admitted, and how that admiſſion ſhall be made good, uſes the words, *perſon who ſhall purchaſe or acquire*

* Craig. lib. 2. tit. 2. † M'kenzie's Inſt. lib. 2. tit. 4.
‡ Dict. Deciſ. v. 2. p. 402. Bankton, v. 2. p. 235.

lands

lands in Scotland; leaving it thereby uncertain, whether theſe words be limited to natural perſons, or can be extended to bodies politick. A few words in the ſtatute would have ended the doubt; but what the explanation of the words, which are now in it, will be, muſt be left to future deciſions of judges, or to future parliaments. It is probable, however, that the genius of the times, in favour of the compleat commerce of land property, will make a particular ſtatute unneceſſary, and that the judges, notwithſtanding the above-mentioned judgment of the peers, will take upon them, to give to bodies politick, the ſame privileges which natural perſons have.

CHAP. IV.

Hiſtory of ENTAILS.

AFTER the feudal law had, in the manner deſcribed in theſe papers, been for ſome time on the decline; it was again, notwithſtanding the general bent of men againſt it, in ſome degree revived, by the bent of particular perſons.

It was obvious to the ancient nobles, that the allowing land to come ſo much into commerce, tended to weaken them; by the prodigality of ſome, and the misfortunes of others of their own body, their lands, they ſaw, were continually ſhifting into the hands of people, who had formerly been little better than their ſlaves. In order to prevent ſuch conſequences, the great nobles

invented the artifice of entails, which took particular eſtates out of commerce, and with regard to thoſe eſtates, revived the ſpirit of the feudal law.

Engliſh Entails. Thus in England, in the time of Edward I. the feudal ſyſtem had ſo far deviated from its original ſtrictneſs, that proprietors in general were attaining the capacity of alienating their lands, of charging them with rents, and by their crimes could ſubject them to forfeiture: but the nobles, to ſtop the effect of this freedom of alienation, extorted from that prince * the ſtatute *de donis conditionalibus.* This ſtatute gave a ſanction by publick law to private men to entail their eſtates; and declared, that fines levied upon eſtates ſo entailed ſhould be void. Moſt of the great families took advantage of the permiſſion, and by ſo doing, prevented their poſterity from alienating, from forfeiting, or from charging with rents.

There is no maxim in politicks more generally true, than that power follows property: In proceſs of time, the property of theſe great families continually increaſing, and never diminiſhing, their power grew to ſuch a height, as enabled them totally to enſlave the people, and ſometimes to overſhadow the crown.

Theſe entails continued long in force, and the effects of them long in force too. But in the end, as the ſtill progreſſive increaſe of commerce gave a more general and univerſal bent for the alienation

* St. Weſt. cap. 1.

of

of land; and as that commerce eſtabliſhed a luxury, which the great families, beyond others, ruſhed into; many of the nobles, to ſupply their prodigality, were willing to ſhake off the fetters of their entails; and the more ſo, as monied men were willing to give them any money for their land: entails then, came to decreaſe in their force, and in time, in their effects.

The great lords could not indeed be prevailed upon to make an alteration, in parliament, of the law of entails; but then, entails were ſuffered to be greatly diſcouraged in courts of juſtice.

For, on the one hand, the judges reſtrained all devices for new ſpecies of entails, and therefore, when in the reigns * of Richard II. and Henry IV. attempts were made to ſettle eſtates, with ſubſtitutes, under conditions, that if any of the ſubſtitutes or their iſſue ſhould alienate, then their right in the eſtate ſhould ceaſe, and the eſtate be forfeited to the next in order, the judges refuſed to give their ſanction to ſettlements of that kind.

On the other hand, ſuch devices as had been invented to elude the old entails, were ſuſtained †. Several are collected in the new abridgment of the law which had been early introduced, and in the end, the device of a common recovery to bar an entail, was ſupported by a ſolemn deciſion in the reign ‡ of Edward IV. The form of a recovery is that of a colluſive ſuit and judgment, and there-

* Coke, Lyttl. p. 377. † Bacon, Voc. Fine and Recovery. p. 541. ‡ Sir Anthony Mildmay's caſe. Coke 6. rep. fol. 40. (B.)

fore under the very form of the law itſelf, the law was eluded.

But the politick prince Henry VII. who ſaw in all its lights, that ſuperiority, which the preſervation of land property in their families had given to the nobles; a ſuperiority which had coſt ſome of his predeceſſors their lives and their crowns, freed lawyers from the trouble of inventing future devices againſt entails: He got the famous ſtatute paſſed *, in the fourth year of his reign, which made a fine, with proclamations, to conclude all perſons, both ſtrangers and privys. This was not ſo properly evading, as repealing the ſtatute *de donis*; for as it was the purport of the ſtatute *de donis*, that a fine ſhould be *ipſo jure* null, ſo it was the purport, on the contrary, of the ſtatute of Henry VII. that a fine ſhould be valid, to bar the perſons therein intended to be barred. The form of a recovery had been that of a colluſive ſuit and judgment; the form of a fine, was that of a colluſive agreement acknowledged on ſuch terms, and with ſuch circumſtances, as were ſufficient to defeat the entail.

By this ſtatute the rights and intereſts of all perſons were ſaved, which accrued after ingroſſing of the fine, they purſuing their rights within a certain time after it accrued: On this clauſe, a doubt occurred in the reign of Henry VII. whether the iſſue of a tenant in tail could be barred by the ſtatute, notwithſtanding that by the general tenor

* An. 4. H. 7. cap. 24.

of it, privys were barred. The judges * embraced the occaſion, which the ambiguity gave them, of defeating entails, and bound the iſſue by the fine. A ſtatute of † the ſucceeding prince approved their conſtruction, gave a retroſpection to that conſtruction, and prevented the ambiguity for the future.

Nor were theſe ſtatutes agreeable to theſe princes only; the genius of the times too, was bent againſt the feudal ſyſtem, and every thing which tended to revive the effects of it. A commercial diſpoſition had brought in the neceſſity of allowing an unbounded commerce of land; the landed men, the monied men, found their views equally hurt by entails: The lawyers in their writings had been long inveighing againſt them, and the judge, by their judgments, had long been diſcouraging them.

Perhaps thoſe various ranks of men did not foreſee, in all their conſequences, thoſe important effects which quickly followed from the diſſolution of entails, and from the tranſition of property conſequent on it. Perhaps too, it would be pleading too far in favour of a ſyſtem, to ſay, that this diſſolution was the ſole cauſe of the great alterations, which have ſince happened in the conſtitution of England; yet ſo far, it is obvious and certain, that added to the diſſipation of the church-lands by Henry VIIIth, and the alienation of great part of the crown-lands by queen Elizabeth, the

* Bacon, voc. Fine and Recovery. (E.) † An. 32. H. 8. cap. 36.

diſſolution of entails produced that tranſition of property from the lords to the commons, which ſo ſoon after made the commons, when poſſeſſed of almoſt all the land property of the kingdom, too powerful for both the nobility and the king; ſo inſolent, as by a vote to declare the nobles no neceſſary part of the conſtitution, and by a publick trial and publick execution, to put their ſovereign to death.

Scotch Entails.

The ſame deſire of reviving the ſpirit of the feudal law, at a time when that ſpirit was decaying, which had introduced the ſtatute *de donis* into England, introduced likewiſe the artifice of entails into Scotland. But as the general bent of the nation againſt the ſtrictneſs of the feudal ſyſtem, came much later into Scotland, than into England; the attempts of particular perſons to revive the effects of that ſyſtem, were neceſſarily more late too, in the one nation than in the other.

As long as a great part of the lands in the country were unalienable beyond a half; as long as there was not a ſufficient commerce, to cauſe a conſiderable fluctuation of land property; and even when land came more into commerce, as long as the great families were powerful enough to defy the law, and to laugh at execution by appriſings uſed againſt their eſtates; there was no need of entails. In the highlands of Scotland, at this day, entails are far leſs frequent than in the low-countries.

But when arts and commerce introduced luxury, when the alienation of land property became more frequent, and when the voice of the laws was heard through the land, then people, to ſecure their families, introduced entails.

The firſt inſtance, ſo far as I can find, that occurs in our records, of a prohibitory clauſe *de non alienando*, ingroſſed in the infeoffment, is, * in the year 1489; and even that inſtance is ſingular: In the revocation of tailzies by the Scotch princes in parliament, nothing more is meant by a tailzie, than a conveyance, altering the courſe of ſucceſſion from heirs general to heirs male. † Preſident Balfour, in his Body of Law, accurate and complete, ſeems to have had no other idea of them: Skeen in his treatiſe *de verborum ſignificatione*, in which he gives an account of all the objects of law, that were of conſequence in his time, makes no mention of entails. Craig indeed has a chapter upon the ſubject of entails; but the ſuperficial way in which he treats it, ſhows plainly, that the age in which he wrote, which was about the year 1600, had not the knowledge of entails, in the ſame degree which we now have.

By that author's account of them, they ſeem to have been no more than ſimple deſtinations, cutting the ordinary courſe of ſucceſſion, defeaſible by every poſſeſſor, attachable by creditors, and the heirs of which were rather heirs of pro-

* Record of Charters, lib. 12. N° 106. 1489. Jan. 4. cart. Alex. Hume. † Balfour, tit. tailzies.

viſion than of tailzie. In this light * Craig ſays juſtly, " hi autem ex tallia hæredes alio etiam no-" mine hæredes proviſionales dicuntur:" and afterward, " itaque proviſio nihil aliud eſt, in ef-" fectu, quam tallia:" and in another paragraph, " rumpitur autem, ſive diſſolvitur tallia, ex mu-" tuo conſenſu domini ſuperioris et vaſſali, eodem " quo conſtituebatur modo; cum nihil ſit tam " naturale, quam unumquodque, eodem modo " diſſolvi, quo colligatum eſt, ſive conſtitutum " fuit."

After this period it appears, from the deciſions of the court of ſeſſion, and from the records, that people came into the uſe of inſerting prohibitory clauſes in their ſettlements. By theſe the heir was prohibited to alienate, or to create charges on the eſtate. But as there was no neceſſity for the regiſtration of theſe prohibitions, and without regiſtration creditors could have no knowledge of the limited nature of the ſettlement; the judges, in order to pay as much regard to the will of the entailer as they could, conſiſtently with the ſafety of others, reſolved, to conſider ſuch eſtate, as abſolute and unfettered with regard to creditors, but as limited and fettered with regard to the proprietor: in which view they allowed the former to attach it for debt, but they did not allow the latter to convey it gratuitouſly.

To get free of this diſtinction, and to fetter their eſtates equally in both caſes; people fell next upon the contrivance of ſerving inhibitions

* Craig. lib. 2. dieg. 16.

upon

upon theſe prohibitory clauſes. Inhibitions were obliged to be recorded, and therefore the contrivance ſeemed favourable; yet even the force due to ſettlements in that form, was called in queſtion * by lawyers adhering to the maxim, that though an inhibition may give force to an old ſecurity, it cannot create a new one.

The invention of thoſe, who wiſhed to preſerve their families by entails, and of thoſe who were employed to execute what the others wiſhed, felt therefore upon further expedients; and at length, clauſes irritant and clauſes reſolutive were invented, which inforced the ſettlement, by ſubjecting to penalties, thoſe who were concerned in infringing it. By the one clauſe, all the new charges upon the eſtate were made void, and the creditors were diſappointed; by the other the right of the contraveening or tranſgreſſing member of entail was made void, and the next heir was called to the ſucceſſion.

Theſe clauſes, in the time † of lord Stairs, that is to ſay, about the middle of the laſt century, became very frequent in entails: Sir Thomas Hope who was advocate to Charles the Iſt ſays ‡, "They were forms newly found out." Theſe authors when they mention thoſe clauſes ſeem, and indeed all the lawyers of their age ſeem to have been greatly at a loſs, to determine what regard was due to them; for on the one hand, there ſtood the will of the entailer, a will contrary to no law; and on the other hand, there

* Hope, p. 402. Bankton, vol. 1. p. 584. † Stairs, p. 220, 228, 591. ‡ Hope 403.

ſtood the danger of entrapping the reſt of the ſubjects, through the want of a regiſter for entails.

At laſt a prohibition to contract debt, with an irritancy of the contraveeners right in an entail, both of them indeed contained in the original ſeiſins, and repeated in the ſubſequent ones, received, *anno* 1662, a ſolemn deciſion, after a pleading appointed in preſence of all the judges, in the caſe of the viſcount of Stormonth againſt the creditors of the earl of Annandale *. By that deciſion not only the right of the earl of Annandale, who had contraveened, but that of all his creditors, who had appriſed, was made void.

This deciſion was juſtifiable, on the repetition of the prohibitory and reſolutive clauſes in the infeoffment; but as it was not certain, that the ſame deciſion might not follow, though the ſame repetition was not obſerved, it became high time for the legiſlature to interpoſe, and to give preciſion to a form of conveyance, that was now becoming ſo extremely important in its conſequences.

For this reaſon the ſtatute † of 1685 was made: That ſtatute though it gave ſanction to entails by publick law, yet on the other hand took care, that third parties ſhould be acquainted with the exiſtence of the entail; for at the ſame time that it prevented entailed eſtates from being alienated, or charged, or carried off by creditors, it

* Stair's Deciſions, Feb. 26. 1662. † An. 1685. cap. 22.

likewiſe

likewiſe ordained, that the entail ſhould be produced before the lords of ſeſſion, to be approved by them; that it ſhould be recorded in a particular regiſter, and that all the proviſions and irritancies ſhould be inſerted in the original, and every ſubſequent ſeiſin. With regard to this laſt requiſite of entails, it was further ordained, that though the non-repetition of theſe proviſions and irritancies ſhould infer a diſſolution of the right of the preſent proprietor, yet it ſhould not pre-judge the creditors. Theſe laſt had contracted *bona fide*, they had not ſeen the proviſions and irritancies in the regiſter, and therefore it was thought right that they ſhould be obliged to attend to nothing but what they ſaw in it.

Thus entails were made as effectual by ſtatute among us, as they had been made by the ſtatute *de donis* among the Engliſh.

As the ſame cauſe which introduced entails in England, introduced them in Scotland; ſo the ſame cauſe which brought about the diſcouragement of them in England, brought about likewiſe the diſcouragement of them in Scotland: In all ages and all countries, the ſame cauſes muſt have the ſame effects.

At one period, it had become the aim of the lawyers and judges of the one country, when entails grew troubleſome, to elude that ſpecies of ſettlement. At another period, it became the aim of the lawyers and judges of the other country, if not to elude altogether, yet very much to limit their entails.

Thus, in the case of the viscount of Stormonth, though there was no clause irritating, that is, annulling the right of the creditor, yet the lords had disappointed the creditors; but now, on the contrary, they found, in the case * of Baily against Carmichael of Mauldsly, *anno* 1732, that if there was not a clause irritating the right of the creditor, the charging the estate, though it would irritate the right of the heir, yet would not irritate that of the creditors. Thus, in the case † of the estate of Carlowry, where there was a prohibition, *to alter the succession or contract debts, or do any deed whatsoever whereby the lands might be evicted, or the succession prejudged:* And in another case, where there was prohibition ‡ *to alter, innovate, or infringe the aforesaid tailzie, or the order of succession therein appointed, or the nature or quality thereof, any manner of way,* they found, that the heir of entail was not barred from selling. These two decisions were given on the apparent medium, that in those clauses there were no express words of prohibiting to sell; but on the real medium of aversion to, and contempt of entails. And thus, though by the statute of 1685, on a contravention, the right of the contraveener was declared to be *ipso jure* void; yet the judges have allowed it to be only voidable upon declarator; and even upon that declarator, they have held the irritancy to be purgeable at the bar.

* Dict. Decis. voce Tailzie. † An. 1745. ‡ 7 June, 1746. Heirs of Campbell against Representatives of Wightman.

Yea

Yea ſo far did the judges go in diſappointing entails, that when ſome of their judgments went up to the houſe of peers, that aſſembly, in a country ſtill more an enemy to entails than our own, drew the rule of deciſion more from the letter of the law-books, than from the genius of the times, and refuſed their ſanction to the judgments.

Thus, in the diſpute not many years ago, between the heir of tailzie and the creditors of Sir Robert Denham, the court of ſeſſion had found a tailzie continuing in the form of a perſonal deed, but not recorded, to be ineffectual againſt creditors. The houſe of peers*, on the contrary, although it is law, that a deed of tailzie not recorded, if compleated by infeoffment, is not good againſt creditors; yet were of opinion, that a tailzie, as long as it remained a perſonal deed, and not compleated by infeoffment although not recorded, was good againſt them.

Forfeiture of Entails in England.

Hitherto entails have been conſidered, as diſabling the heir to alienate, or the creditor to attach; it ſtill remains to take notice how far they were ſubject to forfeiture.

On this head a remarkable difference occurs between the laws of England and of Scotland. In the firſt of theſe countries, till a very late period, entails were never ſubject to forfeiture; in the other, till a very late period, they always were.

* Bank. vol. I. p. 590.

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To find out the reaſon of this, we muſt look very far back into the laws of both kingdoms.

Before the ſtatute *de donis*, lands in England were divided into fee ſimple, and what Lyttleton calls fee ſimple conditional: One poſſeſſed in fee ſimple, who held an eſtate of inheritance deſcendible to his heirs; one poſſeſt a fee ſimple conditional, to whom an eſtate had been given, deſcendible to the heirs of his body. In the firſt caſe, the poſſeſſor had an abſolute property in him, and could alienate, charge with rents, and forfeit: In the other caſe he had in him only an eſtate conditional: The donor ſtill retained an intereſt in the eſtate, and failing the condition, that is, failing iſſue of the donee, had a right of reverſion in it. In conſequence of this, unleſs the donee had iſſue, he was reſtrained from doing any thing to the prejudice of the donor; and as he was not capable of alienating his land, ſo no more was it in his power to ſubject it to forfeiture, ſeeing this laſt, would have created as much prejudice to the donor as the other.

Thus, it came to be a maxim in the Engliſh law, that who cannot alienate, cannot forfeit; a maxim unknown in the older Engliſh law, and unknown in the feudal law, in both of which, though a man could not alienate above a certain part of his fief, yet for his treaſon the whole of it was forfeited.

When the ſtatute *de donis* was made, this maxim which had been firſt introduced, and juſtly, in favour of the donor, was extended, and erroneouſly,

ouſly, in favour of the heir. It had been juſt that who could not alienate, could not forfeit to the prejudice of that perſon from whom the gift came, and only conditionally came; but it was abſurd to ſay, that who cannot alienate, cannot forfeit to the prejudice of an heir, from whom nothing came. The application of this rule however, was made to preſerve eſtates tail, upon the ſtatute *de donis*, free from forfeiture for ſome centuries.

It is extremely entertaining to a philoſophical mind, to obſerve the different fates of laws, and maxims of law, not only from general cauſes common to mankind, or common to that part of them governed by one ſyſtem; but to obſerve their different fates, from particular exigencies and ſituations. By a miſtaken interpretation, the Engliſh extended the rule, that who cannot alienate cannot forfeit, from fees ſimple conditional, to fees tail upon the ſtatute *de donis*; and yet, when by the devices of lawyers in the reign of Edward IV. and the ſanction of parliament in that of Henry VII. eſtates tail became by conſent alienable, they refuſed to extend the ſame interpretation to the forfeiture of ſuch eſtates. They had refuſed to ſubject eſtates tail to forfeiture, and on this medium, that who cannot alienate cannot forfeit, and yet, when that medium was taken away, they refuſed to find, that who can alienate can forfeit.

The firſt interpretation had been applied in the days of ignorance, and when the conceptions

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of men were not very accurate with regard to law matters: the other interpretation was refuſed in the days indeed of knowledge, and when mens notions were on ſuch ſubjects more accurate; but in the days too of civil diſcord, when the diſpute between the houſes of York and Lancaſter, made the judges fearful, even upon the moſt obvious interpretation, of opening any more doors to forfeiture, at a time when, as lord Coke expreſſes it, *the pains of treaſon were ſo diverſe, that there was no man did know how to behave himſelf, to do, ſpeak, or ſay, for doubt of ſuch pains.*

When thoſe diſputes, and thoſe dangers were over, eſtates tail were put upon the ſame footing with other eſtates. And, by a * ſtatute in the reign of Henry VIII. were ſubjected to the ſame penalties of forfeiture with them.

At the ſame time, as this laſt ſtatute had a clauſe, ſaving all rights, titles, or intereſts of third parties, the rights of remainder men or ſubſtitutes fell under the ſalvo; for theſe remainder men were conſidered to have in them a conditional eſtate, to take place upon the failure of the tenant in tail and his iſſue, and ſeparate from their eſtate.

In another ſtatute † of Henry VIII. the ſaving clauſe is more particularly expreſſed; and thoſe are ſaved from forfeiture, under the expreſs name of remainder men, who, in the former ſtatute, had been by implication ſaved from it under that of third parties.

* An. 26. H. 8. † An. 33. H. 8. cap. 20.

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With regard to Scotland again, that there once was a period in the law of that country, when one poſſeſt of a fee ſimple conditional, could not do any thing to prejudice the donor, may be very true; and if entails had been introduced during that period, it is very probable the privileges of donors would have been extended to heirs of entail. Forfeiture in Scotland.

But entails were introduced at a different period in Scotland; at a period when the donor himſelf had loſt his privilege; for when donors, to preſerve ſtill more firmly their intereſt in the gift, had invented clauſes of return to themſelves failing the heirs named, and thrown them into their grants, yet lord Stairs, in many paſſages of his book, and other lawyers of his time, repreſent it to be law, that ſuch limited eſtate could be appriſed by creditors, from the donee, notwithſtanding ſuch clauſe of return.

Now, as every ſuch eſtate could be alienated, unleſs limited by the nature of the holding, the maxim who cannot alienate cannot forfeit, could not be thought of.

When the modern entails then came in, this maxim which was before unknown in the law of Scotland, could not be applied; and if in point of forfeiture, ſo little attention had been paid to the intereſt of the donor, from whom the eſtate came, it is not to be expected, that any more attention in point of forfeiture, ſhould have been paid to the intereſt of the heir, from whom nothing came: and therefore, entailed eſtates were

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ſubjected to forfeiture in prejudice of the heirs, in the ſame manner that eſtates with clauſes of return had been forfeitable to the prejudice of the donor.

We read nothing of the maxim, who cannot alienate cannot forfeit, in the old books of the laws of Scotland, nor in the ſtatute of 1685; which laſt, on the contrary, makes a particular proviſo, that the entails confirmed by it, ſhall not diſappoint the king of his forfeitures; nor in the writings of any of our lawyers, till the year 1690, in an act of king William. At that period, we borrowed from England and brought into the ſtatute book of the one kingdom, a maxim, which had been invented four hundred years before, in the other. In that ſtatute, men, as the appendix to Conſiderations upon forfeiture elegantly expreſſes it, *not looking forward with enlarged views to future contingent dangers from the abdicated family, but attentive only to that dark ſcene, which had been juſt cloſed with ſuch wonderful circumſtances of felicity to both kingdoms*, ordained, that entailed eſtates ſhould be ſafe againſt forfeitures, except for the life of the forfeiting perſon. The maxim who cannot alienate cannot forfeit, was the pretence; but the ſame remembrance of the bad uſe made of forfeitures, which in England, till the reign of Henry VIII. ſaved entails from forfeiture, even when they could be alienated, was the real cauſe of this ſaving in Scotland. Nay, ſo great was the remembrance of the miſeries brought on the country by forfeitures, during the two reigns immediately

immediately preceding the revolution, that people were not contented with the ſecurity conferred by this ſtatute; and therefore in order that the eſtate might be ſecured, not only after the death, but even during the life of the forfeiting perſon, they frequently added clauſes, irritating the poſſeſſor's right in caſe he ſhould become rebel, and directing that in that event the eſtate ſhould devolve, *ipſo jure*, on the next heir.

What effect ſuch clauſes would have had, or whether they would have enabled the next heir, during the life of the traitor, to have run off with the eſtate from the crown, was never determined by regular deciſions on the point, in the law of Scotland; nor could that effect well be determined, as the whole ſyſtem of our law of forfeiture was ſoon afterwards overturned.

By an act of the 7th of Queen Anne, entitled, Act for improving the Union, the Scots law of forfeiture was made to give place to that of the Engliſh.

This act was made, as appears by the preamble of it, with a general view, to make the laws of the two parts of the iſland with regard to forfeiture, the ſame. But whatever were the particular objects, which the parliament of Great Britain had at that time in their view, it is certain, a great doubt was on that ſtatute created in law, whether it was the meaning of the legiſlature, thereby, to ſubject the entails of Scotland upon treaſon to a total forfeiture. On the one hand it was maintained that the Engliſh having no

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conveyance of eſtates like the conveyance in queſtion, it could not be the intention of the Engliſh law, though extended to Scotland, to forfeit, without expreſs words, an eſtate not known in that law: On the other hand, firſt, from the comprehenſive words of the Engliſh ſtatutes of treaſon, referred to in the act of queen Anne; and next from the neceſſity there was, conſidering the diſſimilarity of conveyances, in the two nations, to compare the conveyance which ſubſiſts in the one country, with that which comes neareſt to it in the other, in order to be able to apply the law; it was maintained, that tailzied eſtates in Scotland fell to be ſubject to forfeiture, as eſtates tail in England were.

After the rebellion in 1715, the court of ſeſſion, the commiſſioners of forfeitures, and the court of delegates ſeemed all greatly perplexed, what determination to give upon theſe entails. The judgments of the two laſt courts particularly, often went croſs to each other, but in general, the judgments ran * in favour of entails.

The houſe of peers was under the ſame difficulties at the ſame period, in the caſes brought before them by appeal, and laid hold of ſpecial circumſtances, in order to avoid determining the general point. Thus, in the caſes of Caſſie of Kirkhouſe, and of Sir Robert Grierſon of Lag, they reverſed the decrees of the court of ſeſſion, which had been given in favour of the heirs of entail; but they reverſed them on the footing of want of

* Caſes of Coul, of Calumby, of Kirkhouſe, of Lag, of Crombie, and of Seaforth.

juriſ

juriſdiction in the court of ſeſſion. And in the caſe of Aſſint claiming the eſtate of Seaforth, though the judgment of the court of ſeſſion in favour of the ſubſtitute in the entail was reverſed; yet the reverſal, as there were ſpecialities in the caſe, was far from fixing the general queſtion in the law of Scotland.

But after the rebellion of 1745, the houſe of peers, upon the ſolemn opinion of all the judges in England, made uſe of an expedient, which on the one hand, is a ſufficient penalty to deter men from treaſon; and on the other hand, does not forfeit entails altogether; and both of which ends were attained, in conſiſtency with law, and the exacteſt analogy of law. In the caſe of captain Gordon claiming his brother Sir William's eſtate, the peers found that Sir William forfeited for himſelf, and ſuch iſſue of his body, as would have been inheritable to his eſtate, if he had not been attainted; but they found, that he did not forfeit for his brother, who in virtue of the ſubſtitution to him, in the original entail, was accounted the ſame with a remainder man in England.

By this judgment that ſoleciſm in politicks is taken away from the law of Scotland, that a man ſhould have it in his power, by his mere will, to prevent his poſterity from being puniſhed for their crimes; and that inequality between the laws of England and Scotland was abrogated, ſo inconſiſtent with the otherwiſe equal rights of the two nations; that an Engliſhman poſſeſt of any eſtate ex-

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cept one for life, ſhould be ſubject to forfeiture for treaſon, but a Scotſman, not only if poſſeſt of an eſtate for life, but if poſſeſt of an entailed eſtate, ſhould not.

The only diſſimilarity in reſpect of ſubjection to forfeiture, that remains now in the two ſpecies of entails, is to the diſadvantage of the Scotch entails; for whereas poſſeſſors of entailed eſtates in England, meditating treaſon, may, if he can conceal the fraud, by fine and recovery prejudge the king; on the contrary, a poſſeſſor of an entailed eſtate in Scotland, muſt in his treaſon ſee the certain and uneludable forfeiture of himſelf and his iſſue.

As the laws of the two countries are otherwiſe come now to be the ſame, with regard to the forfeiture of entailed eſtates; ſo in moſt other reſpects, there is by no means that exceſſive ſuperiority in ſtrictneſs of the Scotch over the Engliſh entails, which is often ſuperficially imagined.

Thus in Scotland, if the tenant in poſſeſſion has been called as heir whatſoever, the entail breaks of itſelf; or where he has not been called in that laſt place, the prophecy of * lord Stairs has come to paſs, that when entails became frequent, the heirs of ſuch of them as were inconvenient, would apply to parliament for redreſs: upon ſuch ſpecial application, redreſs is conſtantly granted. When the firſt nominee repudiates the entail, it deſcends as a fee ſimple to the other nominees. If the limitations be laid on the heirs of entail, and the maker of the entail takes

* Stairs, p. 229.

the inveſtitures to himſelf in liferent and to the perſon he intends to favour in fee, this laſt will be deemed to be a diſponee not an heir, a firſt inſtitute not a ſubſtitute, even although he was ſon and heir to the maker of the entail; and in conſequence of this ſuppoſition he may avoid and deſtroy the entail altogether. Again, even when the perſon favoured is fixed in the apprehenſion of law to be a ſubſtitute, he may ſtill by neglecting to repeat the reſolutive and irritant clauſes in his infeoffment, charge the eſtate with debts to its value, or even ſell the eſtate. In the event of ſuch charge or ſuch ſale, the charger or the ſeller would indeed ſubject himſelf to an action at the inſtance of the next heir; but the creditor or the purchaſer would be ſafe. To give another inſtance; the intereſts of an original debt upon an entailed eſtate allowed to run up unpaid by one tenant in tail, will affect the entail in the hands of the next tenant upon his ſucceſſion: theſe intereſts formed into a capital ſum will create a new debt on the eſtate, and as he likewiſe may allow the intereſts of this debt to run on unpaid, it is obvious that in proceſs of time the entail by repeated negligences of this kind, either real or affected, may be eat out altogether. Nor have entails in Scotland the ſame fair interpretation, that entails in England have; on the contrary, the judges by limiting their interpretation, when that interpretation would make for entails, and extending it, when it will make againſt them, impoſe

poſe additional clogs, upon that ſpecies of ſettlement.

By theſe encouragements in the attack, and thoſe diſcouragements in the defence, and by many others, it happens, that there are almoſt as many entailed eſtates in Scotland, gradually turning into fees ſimple, as there are fees ſimple turning into entails: when yet by the law as remaining, many of the old families are ſtill enabled to preſerve themſelves in their eſtates, and while they ſhare the wealth, the liberty, and ſafety of the Engliſh, find their antient luſtre the ſame; inſtead of ſeeing (as a lord in the Scotch parliament, in the debate on the union, pretended to foretell) an exciſe-man more honoured and revered than an antient noble of the land.

Men who were to conſider the meaſure of a total diſſolution of entails in Scotland, as it regards their country, might perhaps foreſee, that this would bring ſo much land property into the market, as from the cheapneſs occaſioned thereby, would call the money out of trade to the purchaſe of land; as would render our landed men diſcontented aud bankrupt, and favour the too eager propenſity of our traders, when they have got a little money, to become little lairds, poor, proud and idle. Inſtead, therefore, of wiſhing that more land property were brought into market, he would perhaps wiſh that we had as little as the Dutch, or that the price of what we had was kept high; the former to turn our inactive country-men into manufacturers and mer-

chants,

chants, and the latter to put it out of their thoughts when they were become ſuch, to convert their circulating caſh into a dead ſtock of land. And in general, he would in part foreſee, and in part dread many conſequences, which attend the innovation of every ſyſtem, if not at the exact period of ſociety ripe for that innovation.

But whatever regard might be due to thoſe who reaſoned thus, upon the conſtitution of their country, and the ſtate of families, or on the favour of trade, and againſt the riſk of hurting it; thus, ſurely one who was a lawyer, and who was inquiſitive in tracing laws, their regular progreſs and declenſion, would reaſon. Firſt, he would look back, and unmoved, by all that clamour, which paſt lawyers foreſeeing rather what might happen, than what has happened, have raiſed againſt entails; he would reflect, that though their prophecies were founded on reaſon, yet from many circumſtances, they have come to nothing. Next, he would look forward, and conclude, if ever the miſchiefs, which in reaſon ſeem to attend upon entails, ſhould in fact happen; ſhould the number of entailed eſtates, inſtead of decreaſing, increaſe, and ſhould there be any conſiderable failure in the commerce of land upon that account; or ſhould there be ſo extended a trade, as to make even an inconſiderable failure in that commerce a detriment; ſhould there be ſo much money to keep up the price of lands, and ſo much induſtry to ſtock trade ſufficiently,

as that any attempt to preclude men from the moſt unbounded commerce of land, would be no advantage to a nation, and only a cruelty to private men: that then our entails will ſhare the fate of almoſt all the other remains of the feudal law. He would foreſee that they will either be aboliſhed altogether, or exchanged for thoſe of the Engliſh; and as in the act of the 7th of queen Anne, which ſubjected entailed eſtates to forfeiture, there was an exception made, in tenderneſs to the wife who had contracted with a man ſo ſeemingly ſecure againſt forfeiture, and in tenderneſs to her children; ſo when our entails come to be aboliſhed, or exchanged for thoſe of the Engliſh; ſuch an enquirer and reaſoner would expect that the ſame tenderneſs to the wife who contracted with a man ſo ſeemingly ſecure againſt alienation, and the ſame tenderneſs to her children, will produce the ſame exception, in favour of the children of thoſe, who being poſſeſſed of entailed eſtates, or of thoſe who being immediate heirs of ſuch eſtates, are married at the time of paſſing the act.

This exception will preſerve a few of our entails only one generation longer, and no more, and perhaps, in future ages, as in the caſe of many other branches of the feudal ſyſtem, it will be remembred no where but in books of antiquities, that ſuch a ſpecies of conveyance ever exiſted.

Till this period arrives, our conveyancers will be inventing new clauſes to guard entails; our lawyers will be inventing new devices to elude

theſe

theſe clauſes; our judges will for ſome time fluctuate between the two, and our parliaments will be paſſing laws to enlarge the powers of thoſe who are too much limited by the limitations of their entails.

Since this treatiſe was wrote, an application is preparing to parliament, for allowing tenants in tail, in Scotland, to provide wives and children with moderation; to exchange lands; to charge with debt in proportion to the improvement of the rent made by the proprietor; to grant long leaſes; and to feu to certain extents.

Wiſe governments find it ſafer to conduct than to thwart, to point out to men their good, than to drive them to it; to enable them to relieve themſelves if they pleaſe, than to force relief upon them againſt their wills; and to ſoften by degrees, inſtead of overturning at once without the moſt urgent neceſſity thoſe general cuſtoms of a country, which once had the authority and encouragement of law.

CHAP. V.

Hiſtory of the Rules of Deſcent or Succeſſion.

IT has been a great loſs both to hiſtory and to law, that they have too little contributed their mutual aids to each other: lawyers themſelves ſeldom give hiſtorical deductions of laws, and hiſtorians more rarely meddle with laws at

all, even with thoſe which gave occaſion for the conſtitution of a ſtate, and on which, more than on battles and negotiations, the fate of it doth often turn.

For this reaſon, it is difficult to trace the ſeveral revolutions of the feudal laws of deſcent in any one ſtate in Europe; nor could ſuch revolutions be often traced at all, were it not for the lights which the hiſtories of publick ſucceſſions afford.

The feudal ſyſtem, in its regulations, was orderly and univerſal. Thoſe rules which it applied to fiefs, it extended over kingdoms; and therefore, as in general the ſame relations who were heirs to the king, were heirs to the lords, ſo, on the other hand, for the moſt part, the ſame rules which regulated private, were likewiſe the meaſures of publick ſucceſſion.

Before Edward I. proceeded to hear the claims of Bruce and Baliol for the crown of Scotland, he put the following queſtion to the parliaments of both kingdoms aſſembled together: "By what "law of ſucceſſion is the right of ſucceſſion to "the kingdom to be determined?" The anſwer made unanimouſly by the parliaments of both kingdoms, was, "That the right of ſucceſſion to the "kingdom is to be judged by the rules obſerved "in the caſes of counties, baronies, and other "unpartible tenures."

SECT.

SECT. I.

Deſcending line.

WHEN the nations of Germany firſt took poſſeſſion of the Roman provinces *, the grants of the conquered lands were made to laſt no longer than during the pleaſure of the grantors. It was natural it ſhould be ſo in a ſubordinate body, and where every member of that body was ſure of a ſubſiſtence on the lands of ſome chieftain or other, as long as he had a ſword and a ſhield: at that time theſe grants were properly called *Munera*.

Soon afterwards they were granted for life, and they were then called *Beneficia*, as we now-a-days term the poſſeſſions for life of clergymen *Benefices*.

But when the connection of ſucceeding generations with their native country was entirely broken, and their attachment to that in which they lived was grown ſtrong, it was accounted hard, after the father's death, that the ſons ſhould not have the poſſeſſion of what they had formerly had a ſhare in the enjoyment of; it occurred likewiſe readily to ſuperiors, that a man would venture himſelf leſs in battle, when the loſs of his life was to be attended with the ruin of his family: from theſe conſiderations the grants were extended to the vaſſal and his ſons, and they were then, and not till then, properly ſtiled *Feuda*.

* Lib. feud. tit. 1. par. 1. Eſprit de loix, book 30. chap. 16.

Yet ſtill, during this laſt period, the right of ſucceſſion was ſo limited, that after the death of the vaſſal and his ſons, the fief reverted to the lord.

But the former continually and gradually gaining upon the latter, and becoming leſs dependant upon him; and on the other hand, the lord ſtanding more and more in need of vaſſals, to ſupport a conſtitution, which, in any but unſettled times, was an extreme unnatural one, the ſucceſſion was firſt extended * by law to grandſons, and afterwards by practice to deſcendants *in infinitum*; for thoſe vaſſals who had been in poſſeſſion of lands for three generations, and had built upon, and improved them, grew accuſtomed to look upon them as their own; ſuperiors too, by length of time, and alterations in the lands, at a period when lands were of little value, and when the improvements upon them were rather the *principale* than the *acceſſorium*, forgot they had ever been theirs.

The diſtinction between *dominium directum*, and *dominium utile*, came then to be invented, in order to reconcile the difficulty which the mind had, to conceive a perpetual property belonging to one perſon, when yet the perpetual enjoyment of it was, and by the conceſſion of all, in another.

This deduction, gradual and uniform as it is, may be followed ſtep by ſtep in the laws and hiſtories of foreign fiefs, but is not ſo eaſily traced in Great Britain; for though it be known

* Lib. feud. 1. tit. 1. p. 2.

that the dukedoms and earldoms * were in the Saxon times during pleaſure, or a very few of them during life, yet it is certain the book-land went in general to the heirs of the immediate crown-vaſſals, among the Saxons, more early than in any other ſtate in Europe: But at what preciſe time it began to do ſo, or by what ſteps it was granted to more and more heirs, is impoſſible to ſay: The Engliſh antiquities are involved in miſt, and the Scotch in the moſt profound darkneſs, during the period in which ſuch alterations might be expected to be found.

Primogeniture.

It is to be obſerved, that during the whole of the foregoing period of feudal ſucceſſion, the inheritance, without fixing upon the eldeſt ſon, or indeed on any ſon at all, was equally divided among all the ſons †. *Si quis igitur deceſſerit, filiis et filiabus ſuperſtitibus, ſuccedunt tantum filii æqualiter*, ſays the law of the books of the fiefs.

But the incompatibility of performing that ſervice by many, which, as the feudal ſervices were of various kinds, could perhaps be performed only by one, being obſerved; the law of nature, and which, till then, had been in private ſucceſſions with very little exception the law of the world, gave place totally to a law which was peculiar to feudal principles, and the ſucceſſion, not only of the daughters who had long before been ‡ excluded, but that of all the ſons in gene-

* Aſſur. de Geſt. Alfred. p. 21. † Lib. feud. 1. tit. 8.
‡ Ibid.

ral, gave way to the ſucceſſion of one ſon, and one ſon only.

At the ſame time, as the feudal nations were very long in continual dangers, both from foreign invaſions, and from inteſtine commotions, it was plainly incongruous, that the chance of being the firſt born ſhould give the poſſeſſion to a perſon perhaps unfit to defend it; therefore the grantor reſerved to himſelf a power of chuſing the particular ſon whom he pleaſed to give the fief to: *Sic progreſſum eſt ut ad filios deveniret, in quem dominus vellet hoc beneficium confirmare*, ſays the law of the books of the fiefs *.

A beautiful inſtance of the remains of this ancient practice, is ſtill to be ſeen in the law of England, at this day, when a peerage devolves to heirs female †. In that emergency, it is the king's privilege, to confer the peerage upon any of the daughters he pleaſes.

Some ages after, when ſecurity in the feudal ſettlement made this chance direction of leſs dangerous conſequence, the natural principle of giving the fief, ſince only one could regularly have it, to that ſon who firſt preſented himſelf in the train of ideas, took place; and the right of primogeniture came to be fully eſtabliſhed.

The progreſs of the minds of men in Great Britain, through this laſt progreſs of ſucceſſion, to the eſtabliſhment of primogeniture, is very eaſily traced.

* Lib. feud. 1, tit. 1. † Bacon voce coparceners (C.)

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By a law of Edward the Confeſſor, and * many other Saxon laws, it is obvious, the feudal principle was ſo weak, and that of the ancient law ſo ſtrong, that all the children ſucceeded equally; *Si quis inteſtatus obierit, liberi ejus ſuccedunt in capita,* ſays † the law of that prince.

At a lower period in the Saxon times, it appears by many charters, that though the rule of ſucceſſion, *ab inteſtato,* was *in capita,* yet people were come into the uſe of abſtracting themſelves from that rule, by taking the deſtination in their charters to one ſon only; the principle of primogeniture, however, was at that time ſo weak, that the nomination of the ſon, in whoſe favour the deſtination ſhould operate, was left to the grantee. Thus though ‡ in theſe charters the grant generally runs *poſt mortem hæredi uni*, yet it runs too, *hæredi uni cuicumque voluerit:* That is to ſay, though the grant was limited to one ſon, it was open to that ſon, whom the grantee ſhould be pleaſed to nominate.

The people of Kent, at an after period, having been left, through the favour of William the conqueror, in the enjoyment of their ancient laws, the ſucceſſion *in capita* of the ſons, called by the Saxon name *Gavelkind*, was long the univerſal law of that country, and does, in great part of it, remain even unto this day. The Welch not being ſubjected to the power, were ſtill leſs ſubjected to the laws of the Normans; and therefore

* Lex. Canut. 68. † Leg. Ed. Conf. 176.— ‡ Spelm. of feuds.

among them that equality of ſucceſſion which had prevailed before fiefs were introduced, remained as far down as the reign of * Edward I. The Orkney men being left from neglect more than from either favour or independancy in the poſſeſſion of their antient laws, the ſons till within theſe hundred years ſucceeded *in capita* in the udal rights of Orkney; nor was this altered by publick law, but by private limitations of different ſucceſſions.

The feudal ſyſtem having been compleated by William the Conqueror, there is no doubt the right of primogeniture was eſtabliſhed by that prince; and yet in the reign of Henry I. the traces of the ancient law were far from being loſt †. By one of his laws it is ordained, not indeed that one fief ſhould be ſplit, but that if there were more than one, the ſucceſſion ſhould be ſplit, and the eldeſt ſon have only *primum patris feudum.*

In the time of Henry II. however, theſe exceptions diſappeared in the Engliſh law, and the eldeſt ſon became the heir, *ab inteſtato*; nor was this all, the principle of primogeniture about that time grew ſo ſtrong, that though, from the darkneſs of our antiquities, we cannot trace the foregoing progreſs in Scotland, yet, according to the earlieſt law authorities in this country, as well as according to the ſame authorities in England ‡, a perſon not only was unable to diſappoint

* Stat. Wallæ 12 Ed. 1. † Leg. 70. H. 1. ‡ Sup. chap. alienation.

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the right of primogeniture altogether, but he could ſcarce even alienate a part of his eſtate to the diminution of that right.

Hitherto, in the progreſs of the right of primogeniture, we have been ſpeaking of the ſucceſſion to a military, but not of the ſucceſſion, to a ſoccage fief.

In thoſe military fiefs, the neceſſity of having one certain vaſſal to perform that ſervice which perhaps could be performed only by one, had introduced the right of primogeniture; but the ſame neceſſity not interveening in theſe (as I may call them) civil fiefs, the preference of primogeniture did not appear ſo obviouſly advantageous in them; and therefore *, both in England, during the reign of Henry II. and in Scotland, during that of David I. in ſoccage fiefs, all the ſons ſucceeded *in capita.*

But in the after law both of England and of Scotland, this rule of ſucceſſion appears to have gone into diſuſe; and both military and ſoccage fiefs came to be on the ſame footing.

The example of far the greateſt number of fiefs; the diſtinction of a ſoldier and ſoccoman wearing away, together with the rigour of the feudal law; the converſion of moſt of the military into civil fiefs; and the imagination of ſuperiors, that the rent would be eaſier levied, and better paid, when the fief was in the hands of one, than when diſſipated among many; the un-

* Glanv. lib. 7. cap. 1. Reg. Maj. lib. 2. cap. 21.

willingneſs of the ſoccage vaſſals to have their ſucceſſion ſplit, or their families brought into greater decline, than thoſe of the military vaſſals, who were neighbours to them; theſe imperceptible cauſes in the circumſtances of mankind more powerful than any publick law; and no publick law itſelf, brought about this alteration.

This alteration was made, and the diſtinction was loſt, between the ſucceſſion to a military, and the ſucceſſion to a ſoccage fief, before the time * that Fleta was wrote in England, and ſome hundred years before the time of † Skene, Balfour, and Craig, in Scotland.

The progreſs of the right of primogeniture in publick, correſponds to the ſame progreſs of it in private ſucceſſions.

Thus in the two firſt races of the French monarchs, the ſucceſſion to the kingdom was divided among all the ſons; and in the earlier periods of the Saxon hiſtory, the ſame diviſion of the kingdom is frequently obſerved to take place.

Nay, even in much later times, when the rule of primogeniture had taken place in private ſucceſſions, yet the ancient notions of the rules of ſucceſſion, added to the power of thoſe who could claim the benefit of them, were ſo far an obſtruction to the principle of primogeniture in kingdoms, that to make up for any weakneſs in that principle, kings were in uſe, not only to declare their eldeſt ſons to be their ſucceſſors,

* Flet. lib. 6. cap. 12. † Skene voce Encya, Balf. tit. heirs & ſucceſſors. Craig, lib. 2. dieg. 13. N° 39.

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but to cauſe the ceremony of coronation to be performed, and the oath of fidelity taken to them by the vaſſals. This practice was obſerved in France without a ſingle exception, from Hugh Capet, the firſt king of the third race, down to Lewis VIII. and in England by William the Conqueror, to his ſon Robert, in his French dominions, and by a number of foreign princes, down to the 13th century.

Repreſentation.

After the right of primogeniture was eſtabliſhed, it was very long, however, before the right of repreſentation, or the preference of the remoter heir, repreſenting his anceſtor, to the excluſion of a nearer, was added to it, either in Great Britain, or in foreign countries.

Many things were obſtacles to the progreſs of the law of repreſentation: The ſimple notions of a groſs people, who were apt to take up with the principle of nearneſs of blood, inſtead of looking forward to a more enlarged juſtice; the barbarity of the times, in which the rights of infants were little attended to, while the uncle had age and power with which to ſecond his pretenſions; the neceſſity there was, that the vaſſal in the fief ſhould always be ready for ſervice, and which ſervice, an infant was incapable of; the hardſhip upon the uncle, when primogeniture came to be eſtabliſhed, that his nephew, perhaps an infant, ſhould run off with the whole of the fief, whereas, in the Roman law, the nephew could

could have only carried off that equal ſhare which his father ſhould have had.

Accordingly, there is ſcarce an inſtance in Europe, till the 13th century, in publick ſucceſſions, in which, upon the death of a grandfather, leaving a ſon of age, and a grandſon under age, by an elder ſon deceaſed, the ſon did not take to the excluſion of the infant: for though in Scotland *, Kenneth III. brigued a contrary law from his barons, yet that law was not obſerved.

Nay, the excluſion of minors was ſo ſtrong, that upon the death of the brother, who being major, had taken the crown, to the prejudice of his brother's infant children, it ſometimes returned to thoſe children, if they were then majors, to the prejudice of his own, being then minors. Thus in England, upon the death of Edmund I. in the year 949, his brother Edrid inherited the crown, to the excluſion of Edwy and Edgar, then minors, who were his brother's ſons; but at his death theſe princes being majors, the eldeſt of them, Edwy, ſucceeded to the crown, in preference to the ſons being then minors of Edrid. And examples to the ſame purpoſe, are to be met with in the ancient hiſtory of Scotland.

Again, although the preference of the ſon had been introduced, in a competition between him and the infant grandſon, yet it extended itſelf to the prejudice of the grandſon of perfect age.

Thus Lewis ſucceeded his father *Charlemaigne*, to the excluſion of Barnard, his deceaſt eldeſt

* Buchanan.

brother's

brother's ſon, though that ſon was ſixteen years of age at the time; neither is this mentioned as any thing extraordinary, by the hiſtorians of the age. And in like manner, in the reign of Philip the Fair, Maud ſucceeded in the county of Artois, to her brother Robert II. to the excluſion of Robert III. grandſon, by his eldeſt ſon deceaſt, to Robert II. although Robert III. was of perfect age, and aſſerting his right: This laſt ſucceſſion took place upon a ſolemn trial and judgment of all the peers of France.

There was one thing particularly which made both of theſe excluſions laſt longer, and conſequently the right of repreſentation advance more ſlowly: A notion in thoſe times prevailed, perhaps borrowed from the Romans, in whoſe dominions the feudal nations ſettled, or at any rate, by no means incongruous to the ſituation and to the turn of thinking of ſuch nations themſelves; that when a ſon was provided for, or as it is termed, both in the feudal and civil law books, *foris-familiated*, he had ſcarce any right to expect any thing further from his father, a conſequence of which was that the grandſon could expect ſtill leſs from his grandfather.

Hence, in the publick ſucceſſions of England, on the death of William the Conqueror, William Rufus ſucceeded to the crown, in excluſion of his elder brother, already provided in the dutchy of Normandy: On the death of Henry I. Stephen took the ſame crown, in preference to his elder brother Theobald, already earl of Blois: On the death

death of Richard I. John ſucceeded, to the excluſion of Arthur, his elder brother's ſon, already duke of Britany. With reſpect to this laſt excluſion, it may indeed be obſerved, that at the time of it, the right of repreſentation being more advanced towards its eſtabliſhment in France than in England, almoſt the whole French lords took ſide with Arthur, and though the title of John was but little queſtioned in the laſt of theſe kingdoms, yet in France he was univerſally looked upon as an uſurper.

The rules of publick, were the meaſures of private ſucceſſions; and therefore, in private ſucceſſions, it is laid down upon the ſame plan in * Glanville, and the *Regiam Majeſtatem*, that when a ſon died, who was already provided, his ſon ſhould ſucceed to that proviſion, in preference of his uncles, and to no more.

By degrees, however, this right of repreſentation in the deſcending line, came on and took place, equally and at the ſame periods, both in private and in publick ſucceſſions.

Thus in the time of † Glanville, and David I. the grandſon, whoſe father had not been provided by his father, had the benefit of the duel, againſt the claim of his uncle, inſtead of being excluded altogether; but when ‡ Fleta was wrote in England, which was in the reign of Edward I. the right of repreſentation, in this competition, was

* Glanv. lib. 7. cap. 3. Reg. Maj. lib. 2. cap. 33. † Glanv. lib. 7. cap. 3. Reg. Maj. lib. 2. cap. 33. ‡ Flet. lib. 6. cap. 2, 2.

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the law of the land. It is probable, that about the ſame time, it became in Scotland, the law of the land too; for after the *Regiam Majſtatem*, we * hear no more of this doubt in our law books, and at a ſtill earlier period, it had become the law of moſt other foreign nations.

Upon the ſame plan, again, in more publick ſucceſſions, the judgment already mentioned, in the ſucceſſion to the county of Artois, was the laſt of conſequence, that was determined on the old principle of nearneſs of blood; for about fifty years after, Joana, grand daughter to Arthur II. duke of Bretagne, by a deceaſt ſon, ſucceeded in the dutchy of Bretagne, to the prejudice of John, ſecond ſon to duke Arthur. In the ſame way, Richard II. ſon to the black prince, ſucceeded without diſpute, to his grandfather Edward III. to the excluſion of his uncles, who were men of great abilities, and of great power; and in Spain, a century before, Sancho I. taking the crown on the death of his father, and thereby excluding the ſons of his deceaſt elder brother, was excommunicated by the pope, involved in civil wars, and all his life looked upon as an uſurper.

It is no objection to tracing ſuch rules of ſucceſſion, that in the earlier ages of Europe, the crowns were generally given by election; for if the rules of that election were eſtabliſhed, and generally followed, they were properly rules of ſucceſſion. The diſpute is merely about words; the only difference between theſe words, is, that

* Balf. tit. heirs & ſucceſſors.

in

in the laſt caſe, the rule of law points out the ſucceſſion in a law book; whereas, in the other caſe, the rule of law, in an aſſembly of the law-makers, did the ſame.

SECT. II.

Collateral line.

SUCH being the progreſs of ſucceſſion and repreſentation in the deſcending line, a ſtill further progreſs, and from the ſame cauſes, may be ſeen extending itſelf in the other lines of ſucceſſion.

Originally, none could ſucceed in the fief, except thoſe who were ſpecified in the original grant; now, as anciently, the intereſt of the lord in the fief, was greater than that of the vaſſal; and as it was a favour to this laſt, to give him a fief, for which he paid only, what in a military age was no great trouble to him, to wit, his perſonal ſervice; he was well contented to get it to himſelf and his poſterity; but thought not of aſking the ſucceſſion to his collaterals.

Nor is it any objection to this doctrine, that collaterals are obſerved, in the earlieſt fiefs, to have ſometimes ſucceeded; for this their ſucceſſion was not in a fief acquired by the vaſſal himſelf, but only *in feudo paterno*; and in a fief of this laſt kind, the ſucceſſor took as deſcendant to the original vaſſal, and thereby *nominee* in the original grant, but not at all as collateral to the laſt vaſſal. Accordingly *, in a law in the

* Lib. feud. 1. tit. 1. N° 2. Craig. lib. 2. dieg. 15.

books

books of the fiefs, the diſtinction between the ſucceſſion to the one of theſe fiefs, and that to the other, is laid down: "Frater fratri ſine legi-"timo hærede defuncto, in beneficio, quod eo-"rum patris fuit, ſuccedat. Sin autem unus ex "fratribus a domino feudum acceperit, eo de-"functo, ſine legitimo hærede, frater ejus in feu-"dum non ſuccedit." And by the promulgation of that law, it appears, that even *in feudis paternis*, the real quality of deſcendant to the original vaſſal, had been ſo far forgot, in the ſeeming quality of collateral to the laſt one, that a publick law was neceſſary to overcome the difficulty which was made of receiving ſuch real deſcendant.

By degrees, however, the collateral ſucceſſion gained ground. It firſt took place * in brothers only, afterwards it was extended to the father's brother, and in proceſs of time, to the collateral line, even to the ſeventh degree. Craig † relates, that whether this ſucceſſion was extended beyond that degree, was ſo much a doubt, as to be the ſubject of two conteſts before courts in Scotland, in his time. But in the end, when wars came to be waged in Europe by ſtanding armies, and not by vaſſals; when trade, manufactures, and money, introduced luxury; when by this luxury the great lords were impoveriſhed, and that money was in the hands of thoſe who had been formerly their ſlaves, it then became of little conſequence to

* Lib. feud. 1. tit. 1. N° 4. † Craig, lib. 2. dieg. 17. N° 11. comp. lib. 2. dieg. 15. N° 7.

the

the lord, who was the vaſſal in the fief; and therefore he gave it to him who was willing to advance moſt money for the grant; the vaſſal, on his part again, as he gave value for that grant, was not contented with a right of ſucceſſion to his deſcending, but inſiſted it ſhould go likewiſe to his collateral line.

Thus by practice, without a publick ordonnance, it crept into the law of Great Britain, as well as into that of other European nations; that not only *in feudis paterni*, but even in fiefs which a man had purchaſed himſelf, his collaterals *in infinitum*, as well as his deſcendants *in infinitum*, ſhould ſucceed.

When collateral ſucceſſion came to take place, it will readily occur, that difficulties could not fail to ariſe ſpeedily in law, concerning the ſucceſſion of a middle brother dying without children, and leaving an elder and younger brother alive.

When that happened, the law took the following courſe, and for the following reaſons:

If the fief had come by deſcent, it went to the younger brother: if it was a purchaſe, it went to the elder.

A fief of the nature of the firſt kind could be in a middle brother only, in conſequence of a grant from his anceſtor, or in conſequence of a grant from his elder brother, both of which were in conſtruction of the ancient law deemed to be *feuda paterna:* In either of theſe caſes, it behoved the elder brother to be either ſuperior,

or

or heir in the ſuperiority, and it behoved the middle brother to be vaſſal; but the feudal law had an averſion at joining again, without a neceſſity ariſing from the feudal relations themſelves, the property and ſuperiority in one perſon, when they had been once disjoined. The whole ſyſtem was built on the diſtinct rights of ſuperior and vaſſal, and the blending theſe two characters in one perſon, without the neceſſity I have mentioned, appeared to be the blending of contrary qualities together.

As a purchaſe, on the contrary, had come to the middle brother from a ſtranger, when the law allowed the ſucceſſion of ſuch a fief to go to the elder brother, there was no danger of the junction of the property and ſuperiority in one perſon; the ſtranger remained ſuperior, whoever was the heir.

So ſtood the law, and ſuch was the diſtinction, in the time * of the *Regiam Majeſtatem*, and in the time of Glanville.

In England, the relations of ſuperior and vaſſal having been long ago loſt, the danger of uniting theſe two characters in one perſon no longer ſubſiſts; and therefore the excluſion of the elder brother *in feudo paterno*, has for many ages been forgot, perhaps ever ſince the end of the reign † of Edward I.

In Scotland, on the contrary, where the diſtinction between ſuperior and vaſſal is ſtill formally

* Reg. Maj. lib. 2. cap. 22. Glanv. lib. 7. cap. 1. † Hale's hiſt. p. 229.

kept

kept up, and where many maxims, however unneceſſary in reality, yet founded upon the form of that diſtinction, are ſtill kept up, the diſtinction handed down through the writings of our * lawyers, between the heir of line, and the heir of conqueſt, is as perfect at this day, as it was five hundred years ago. And therefore at preſent, if a middle brother ſhould die, poſſeſſed of an eſtate which had come to him by deſcent, and ſhould have a ſon who made afterward a purchaſe, upon the death of this ſon without iſſue or brothers, the ſucceſſion would ſplit; his younger uncle would take what had come by deſcent; or as it is called in Scotland, the heritage; and his elder uncle would take what had come by purchaſe; or as it is called in Scotland, the conqueſt.

Repreſentation.

The right of repreſentation, was † more ſlowly introduced into the collateral, than into the deſcending line, and conſequently it took longer time to be firmly eſtabliſhed in that line than in the other.

In the original law of nature, repreſentation muſt be unknown; thoſe who are neareſt in blood to a man, will be conceived to be neareſt connected with him. Afterwards, it is obſerved to be a hardſhip, that children bred up in a rank ſuitable to that of their father, and with a proſpect of ſucceeding to his rights, ſhould be cut off at once from that rank, and that proſpect; it

* Balf. tit. heirs & ſucceſſors. Craig, lib. 2. dieg. 15. Skene voce eneya. † Craig, lib. 2. dieg. 17. N° 21.

comes

comes to be obſerved as a farther hardſhip, that a woman who has married one ſeemingly her equal, ſhould by his untimely death, loſe not only her huſband, but ſee her children reduced to beggary.

Theſe conſiderations bring in the right of repreſentation in the deſcending, but the ſame conſiderations do not occur in the collateral line. The children of a brother or couſin, have not the proſpect of ſucceeding to their uncle's or couſin's eſtates, becauſe it is always to be ſuppoſed, every man is to have children of his own; it is therefore no hardſhip upon them, to be removed by another uncle, or another couſin, from a ſucceſſion to which they could have no views.

Thus repreſentation muſt be late of coming into the collateral line, and when it comes in, it does ſo rather by analogy of the other, than by principles of its own.

The ſteps by which, in private ſucceſſions, it came into the collateral line in Great Britain, or even in any other country in Europe, are extremely difficult to be traced, and perhaps are not very certain when they are traced; therefore we muſt ſupply them by the progreſs of the ſame repreſentation in publick ſucceſſions.

In theſe laſt ſucceſſions, it is plain, that repreſentation was originally unknown: In the hiſtories of modern Europe, for a long tract of time, wherever a ſucceſſion opens to collaterals, the neareſt of blood takes to the excluſion of repreſentation.

In

In the time of Edward I. when repreſentation in the deſcending line was tolerably well eſtabliſhed throughout Europe, the point was ſo doubtful in the collateral line, that upon the death of Margaret of Norway, and the diſpute for her ſucceſſion, between her couſins Bruce and Baliol, not only the eighty Scotch commiſſioners, named by the candidates, and the twenty-four Engliſh, named by king Edward, were long doubtful, but all Europe was doubtful, which ſide ought to prevail. The preciſe queſtion, in the end put by the king to the commiſſioners, was: *Whether the more remote by one degree in ſucceſſion, coming from the eldeſt ſiſter, ought to exclude the nearer by a degree, coming from the ſecond ſiſter?* And on the anſwer, importing, that repreſentation ſhould take place, judgment was given for Baliol.

The Scotch writers of thoſe days are poſitive this judgment was wrong; the Engliſh writers of thoſe days are as poſitive that it was right: Theſe different ſentiments are reconcileable: In England, at that time, repreſentation in collateral ſucceſſion was beginning to take place, and this advance of their own nation the Engliſh made the meaſure of their opinion: The Scotch, on the other hand, at the ſame period, had not arrived the ſame length; this ſpecies of repreſentation was unknown to them; and therefore they diſapproved of the judgment.

Solemn as this deciſion was, yet even in England, a century afterward, the right of repreſentation in this line was ſo far from being com-

pleat,

pleat, that it was the ſame doubt, which in the diſputes between the houſes of York and Lancaſter, laid that kingdom for ages in blood. On the abdication of Richard II. the two perſons ſtanding in the right of the crown, were his two couſins, the duke of Lancaſter, ſon of John of Gaunt, who was fourth ſon to Edward III. and the earl of March, grandſon to Lionel, duke of Clarence, who was third ſon to the ſame prince. It was the doubt concerning the rights of theſe perſons, and therefore, in conſequence of the uncertainty, whether repreſentation in collateral ſucceſſion ſhould take place, from which all the miſeries attending the competition, enſued.

Yea, even in much later times, and when the growth of law was much firmer, it was on the ſame ground, that upon the death of Henry III. of France, the league ſet up the cardinal of Bourbon as heir to the crown, in oppoſition to his nephew the king of Navarre. This laſt prince was ſon of the elder branch to the cardinal, but the cardinal being one ſtep nearer to the common ſtock, it was aſſerted, that nearneſs of blood, and not repreſentation, took place in collateral ſucceſſion.

For many ages, it has now been fixed in private ſucceſſions, that repreſentation in the collateral line ſhall take place; and although of late in Europe, there has ſcarce been any ſuch diſpute in publick ſucceſſions, as to give room for either principle to prevail, yet the example of thoſe private ſucceſſions, and the now riveted notions of mankind,

in favour of repreſentation, will probably prevent it from being ever made again the ſubject of a diſpute.

Theſe notions in favour of repreſentation, both in the deſcending and collateral lines, are now ſo ſtrong, that we are apt to term rebels and uſurpers, thoſe who ever called them in queſtion. Hiſtory and law will convince us of our error; theſe will exhibit to us thouſands of our anceſtors dying in the field, in a priſon, or on a ſcaffold, for rights which once were real, though we, meaſuring every thing by our preſent notions, ſuperficially imagine they could never exiſt.

SECT. III.

Aſcending line.

IF in the origin of fiefs there was any difficulty in admitting collateral relations to ſucceſſion, it will readily occur, that the aſcending line muſt have had ſtill greater difficulty to be admitted. A man who was ſufficiently obliged by getting a fief to himſelf would little think of aſking it for his aſcendants; theſe aſcendants too, it was not natural to ſuppoſe, would ſurvive him; and above all, it could not fail to occur, that a grandfather, or great grandfather, would have been but very uſeleſs vaſſals, to be offered to a ſuperior.

Thus it came to be a rule in fiefs, that they always deſcend, but never aſcend; a rule laid down in the books of the fiefs, and for a long time obſerved in the feudal law of all Europe.

This

This excluſion of the direct aſcending line went ſo far both in England and Scotland, that the ſucceſſion paſſing by the father, went to his brother the uncle *; after which, if that brother entered, and died without children, it might indeed return to the father; but then it returned to him, as brother to the uncle, and not as father to the ſon. This regulation, by an unaccountable tenaciouſneſs of the Engliſh to ſingle points of doctrine in their law, when their genius and circumſtances have made them overturn in general the doctrines themſelves, ſubſiſts to this day.

In Scotland †, Craig, who wrote about the year 1600, relates, that in the caſe of the earl of Angus, which was decided a little before his time, the aſcending ſucceſſion had been debarred. From him too it may be gathered, that the deciſions were taking a contrary turn, at the time when he wrote, although he, always favouring the old law, diſapproves of them. Skene aſſerts likewiſe, that a father ‡ cannot be heir to his ſon: And Balfour §, treating of all the lines of ſucceſſion in uſe when he wrote, takes no notice of this line.

Soon after the age of theſe authors, however, the ſucceſſion of aſcendants in their order, was as univerſally received into the Scotch law, as that of either of the other two lines in their order. In ſhort, the ſucceſſion of all relations whatſoever,

* Reg. Maj. lib. 2. cap. 25. 34. † Craig, lib. 2. dieg. 13 N° 47. ‡ Skene voce eneya. § Balf. tit. heirs & ſucceſſors.

if not excluded, continually took place. And thus fiefs, which originally were a right of poſſeſſion of the land only as long as the lord pleaſed, and which afterwards were a right of uſufruct during the vaſſal's life; are now, in point of ſucceſſion, a right of property, to him and to all his heirs.

Half blood.

In both the collateral and aſcending lines, ſo far as the aſcending line can take place in England, there is a remarkable difference between the laws of England and of Scotland; to wit, that in the firſt country half blood is excluded altogether from the ſucceſſion of lands; whereas, in the other it is only excluded by the whole blood.

On this head, anciently in England, the following diſtinction was made:

A fief was either a late purchaſe, or had deſcended from an anceſtor: if it was a late purchaſe, the half blood was totally excluded: if it had deſcended, and the vaſſal was entered in it, it is probable, that originally the half blood was admitted; becauſe that which was only half blood to him, was whole blood to the anceſtor from whom the eſtate came: but whatever way the law ſtood originally, it appears, that * in the time of Bracton and Britton, it was made a diſpute, whether in this laſt caſe the half blood could take the ſucceſſion.

But that diſpute came to an end; the principle on which the claimant by half blood had founded his claim, was, that he could deduce his pedi-

* Hale's hiſt. 232.

gree

gree through anceſtors, from the firſt acquirer; but in a long courſe of ages, it became impoſſible, or difficult for him, to prove ſuch connection; and therefore the law eſtabliſhed a rule, that the laſt actual ſeiſin ſhould make the perſon ſeiſed the root of deſcent, equally to many intents, as if he had been the purchaſer. From this rule it followed, that in the queſtion in hand, the half blood could * no longer pretend to be admitted.

In Scotland we have followed a middle courſe, between admitting or excluding the half blood entirely; in competition with the whole blood, in the ſame degree, we exclude it; in competition with the whole blood, in a remoter degree, unleſs repreſentation interpoſes, we admit it.

From the train of theſe papers, it will Women. be eaſily imagined, that women at firſt were not admitted to the ſucceſſion of a fief.

In all barbarous ages, where courage and ſtrength of body are more neceſſary than the virtues of the mind, the rights of women muſt be but little regarded.

In the more ancient period of the Athenian and Spartan ſtates, women were excluded, as long as there was a male of the ſame degree exiſting.

In Rome, before the time of the twelve tables, women were likewiſe excluded; nor is it even certain, that they were admitted by theſe tables; on the contrary, it is probable they were firſt admitted by the equity of the prætor, correcting

* Bacon voce deſcent. (C.)

the harſhneſs of the ancient law, and by his edict *unde cognoti.*

In the ancient feudal ages, to the barbarity of the times there was added, the nature of the ſervices to be performed by the vaſſal, and which women, from their weakneſs, were uncapable of performing.

Hence, in the Salick law, they were excluded altogether: hence the books * of the fiefs exclude them and their poſterity, if not expreſly mentioned in the original grant: hence † all feudal writers agree in the maxim *natura ab omni feudo fæminas ſecludere videtur:* Hence, in publick ſucceſſions, except in Spain, where, by reaſon of the inundations from Africa, the ſyſtem introduced by the German nations, had not the ſame vigour that it had in neighbouring countries, they were in the earlier ages, throughout all Europe, overlooked.

In theſe laſt, to wit, the publick ſucceſſions, the neglecting of women went ſo far, that among the Goths, even the infant grandſon was preferred to his mother; for on the death of Theodoric, his infant grandſon Athalaric ſucceeded, to the excluſion of his mother Amaluzonta.

But when the original barbarity of the feudal nations, yielded in the natural courſe of things, to a greater ſoftning of manners; and when many of the military came to be converted into ſoccage, or burgage fiefs, the rights of women came to be attended to, and regarded.

* Lib. feud. 1. tit. 1. N° 3. & lib. 1. tit. 8. † Craig, lib. 2. dieg. 14.

It

It is probable they were firſt admitted into ſoccage, or even into burgage fiefs; for in theſe the offer of performing the duties by another, would have been no injury to the lord; and from thence, it is likely, their right of ſucceſſion was extended into military fiefs.

In England, unleſs excluded by the patent *, they were admitted to a peerage; in Scotland, unleſs admitted by the patent †, they were excluded from it. The quicker progreſs of ſociety in the one nation than in the other, accounts for the difference.

With reſpect to other inheritances, though they be admitted to them; yet the remains of their former excluſion are in the very midſt of their admiſſion to be ſeen.

Thus in the deſcending and collateral lines, though they are admitted, yet the order in which they are received, is ſtill removed as far as poſſible; they are not attended to, till the whole male order, in the ſame degree, has failed: And indeed, in theſe lines, our anceſtors have conſidered, the admiſſion of them at all, as ſo ſubverſive of all feudal notions, that in forming the rules of ſucceſſion in their favour, they have not even applied the common feudal principles, but inſtead of eſtabliſhing among them the right of primogeniture, have let the ſucceſſion to the fief go equally, by the ancient law of nature among them all.

* Bacon voce coparcenars. (C.) † Caſe of lord Lovat.

In the aſcending line again, although in England the rule *materna maternis* takes place, yet in a deſcent to a ſon from the father, the mother ſhall never ſucceed: and even to a purchaſe by a ſon, the mother ſhall not ſucceed, as long as there is one relation left on the ſide of the father. In Scotland we do not even admit ſucceſſion upwards on the ſide of the mother at all; ſo rigid is the law in this reſpect, that the king ſhall take as *ultimus hæres*, to the excluſion of a perſon's neareſt relations by his mother.

When the feudal branches are lopped off, or even when the trunk is cut down, it ſtill takes a very long time, before the roots from whence they ſprung, can decay.

CHAP. VI.

HISTORY of the FORMS of CONVEYANCE.

THE forms in which property is transferred, muſt vary with the nature of the right enjoyed by the perſon from whom the transfer proceeds: it will therefore equally gratify our curioſity, both as philoſophers and lawyers, to trace the congruity between the feudal forms and the feudal rights, through the three great channels of conveyance, the deed of the party to take effect either immediately, or to take effect after his death,

death, attachment by force of law, and making title by deſcent.

SECT. I.

Voluntary Conveyance.

THE hiſtory both natural and feudal of the firſt form of conveying property, ſeems to go in the following gradual and regular progreſs.

Natural progreſs.

The notion of property it has been ſeen was originally created by the long connection of a perſon with the thing which he occupied, the affection which from that connection he had conceived for it, and the hardſhip which it was conceived there was in breaking that connection and diſappointing that affection.

It was theſe circumſtances which at firſt gave to the perſon who had long lived upon one ſpot of ground, the property of it: It was theſe, which for ſo many centuries in Europe, gradually ſtrengthened the rights of vaſſals in their lands againſt their ſuperiors: It was theſe, which converted the rights * of copyholders in England, and of rentallers in Scotland, both originally no more than rights of poſſeſſion, to be at this day both of them rights of property.

Property being founded originally upon ſuch principles, it is not eaſily conceived among a rude people, how it can be transferred to another ſo as to be veſted in him, until there is evidence that the connection as well as the affection of the

* Craig, lib. 1. dieg. 11. No 24.

former proprietor is ceaſed. Hence the rule *Nudo conſenſu dominia rerum non transferuntur*, muſt in ſuch a ſtate of ſociety take place; the *emiſſio verborum* in the act of conſent, affords indeed preſumptive evidence that the conveyer's affection in the property is ceaſed; but as that *emiſſio* is a ſound and no other thing, it is not a proper medium to diſſolve the corporeal connection between the proprietor and the ſubject, and much leſs to create a corporeal connection between that ſubject and another perſon; a different medium in conveying is therefore requiſite, to wit, that of delivery; delivery gives further evidence, that the affection of the conveyer is likewiſe ceaſed, for as it breaks his corporeal connection with the ſubject, ſo it alſo carries the mind to connect it with another, and juſtifies that other in conceiving an affection for it.

Moveables are the firſt ſubject of property, and theſe from the facility of moving them were transferred *de manu in manum:* again, when men came to transfer the next ſubject of property, to wit, immoveables, theſe were transferred by putting the intended new proprietor into poſſeſſion, by placing him in, or upon the ſubject itſelf. In the antient burrough laws of Scotland it is ſaid, if any one ſell his houſe, the ſeller ſhall ſtand within the houſe and come out of it, and the buyer ſhall ſtand without it and enter. The ſame likewiſe was the regular method of conveying a houſe antiently in England.

In the transfer of both moveables and immoveables, at firſt, in order to fix the remembrance of what had been done, many witneſſes were called, many ceremonies uſed, and magiſtrates reſorted to. Abraham in the patriarchial ages, bought the field of Macpelah before the whole people: In the very old * Roman law not only the ceremonies in conveying immoveables were very numerous, but even ſuch moveables as were *res mancipi*, that is moveables of value, were transferred before a magiſtrate: and among † the Lombards, ‡ Saxons, and § Normans, moſt deeds in law and even ſales of moveables were made good before a magiſtrate.

Afterwards, the trouble in ſome caſes, and the impoſſibility in others, of delivering actual poſſeſſion, made the introduction of ſymbolical poſſeſſion neceſſary.

Thus, the land of Elimelech many ages after the patriarchal one, was conveyed to Boaz by the delivery of a ſhoe, and calling the elders with the people to witneſs. And land in England is now transferred by delivery of a bough or turf, and in Scotland, by that of earth and ſtone.

When in the further progreſs of Society writing comes much into faſhion, many of the ſet forms of ceremonies give way to ſet forms of writing in conveyances. Hence, in a ſtill more refined ſtate of the Jewiſh nation, Jeremiah buys the field

* Heinec. Roman. antiq. lib. 2. tit. 1. N. 19. and 20. † Leg. Longobard. lib. 2. tit. 18. ‡ Leg. Illot. and Ead. N. 16. § Leg. Gul. 1. in Wilkins, p. 218.

of Hamamiel, by writing, ſealing, and witneſſes; hence conveyances in writing come to all poliſhed nations whatever.

Feudal Progreſs.

Theſe ſet forms, whether of ceremonies or of writing, muſt prevail more in the feudal, than in any other law; becauſe in the conveyances under other laws, all connection between the grantor and grantee, unleſs what ariſes from particular covenants and qualifications, are at an end, on compleating the grant; whereas a feudal grant is ſubject not only to the like covenants and qualifications, but to a great many more, from the relations between ſuperior and vaſſal.

As the moſt ancient grants in Great Britain as well as in other countries, were gratuitous on the part of the ſuperior, who, retaining in himſelf the *dominium directum*, gave only the *dominium utile* to the vaſſal; ſo by the interpoſition of homage and fealty they were * given with much ſtate on his ſide, and received with much humility on that of the vaſſal: at the ſame time, to make both impreſſions ſtronger, as well as to keep alive the remembrance of the grant, poſſeſſion was delivered by the ſuperior himſelf, which was called *inveſtitura propria*, in preſence of the *pares curiæ*, and on the land itſelf, though without writing, as writing was at that time but very little known.

* Lib. feud. paſſim. cujac. comment. in lib. feud. 1. tit. 1. p. 18. edit. 1566. form. anglic. differt. p. 1, 10, 11, 24, 26. Craig, lib. 2. dieg. 2. N. 13. Skene voce Homagium.

In

In Scotland, ſo late as the time of Craig, * that author informs us, that in the mountainous parts of the country, the ſuperiors themſelves delivered poſſeſſion of the lands to the vaſſals without writing, and before the *pares curiæ*. And conveyances made good by livery, and without writing, took ſo firm a root, that the frequent uſe of them † remained in England till they were aboliſhed by a ſtatute in the reign ‡ of Charles II. which ordained, that parole conveyances ſhould extend no further than to an eſtate at will, or a leaſe for three years.

However, in moſt lands, as ſoon as the fiefs ceaſing to be perſonal came to deſcend to the heirs of the vaſſal, there could not fail frequently to occur upon the death of a vaſſal, a defect of proof as to the origin and conditions of the grant. Vaſſals to remedy this, applied to ſuperiors, and prevailed upon them to give in writing, what in the books of fiefs is called § a *breve teſtatum*, declaring the tenour of the *inveſtiture:* To this teſtification there was no date, nor did the witneſſes ſign it, and as the intereſts of mankind were at that time extremely ſimple in themſelves, there were no involved qualifications annexed to it. Yet rude and unformal as theſe writings were, they are the origin of the charters which are uſed at this day.

* Craig, lib. 2. dieg. 2. N. 16. † Bract. lib. 2. cap. 16. N. 1. Flet. lib. 6. cap. 34. ſect. 1. ‡ An. 29. C. 2. cap. 3. § Lib. feud. 1. tit. 4. Craig, lib. 2. dieg. 2. N. 16.

This

This gradation from the moſt ancient form to the uſe of the *breve teſtatum*, and the variation in the points of that gradation, according to the ancient diviſion of Scotland in the progreſs of ſociety, into the low-lands on the one part, and into the high-lands and border lands on the other, is moſt curious, as marked by Craig: "Hujus "noſtræ obſervationis exempla adhuc habemus "apud nos (neque enim omnia antiquitatis veſtigia "adhuc exoleverint) *nam in limitaneis regni parti-* "*bus et inter montanos*, noſtro ævo propriam in- "veſtituram retinebant, cum dominus in loco "feudi conſtitutus poſſeſſionem tradebat ſine "ſcripto; *in locis mediterraneis*, his quingentis "annis elapſis, breve teſtatum, quod nos chartam "dicimus, ſoliti ſunt vaſſalli a dominis accipere, "quo ſe inveſtiiſſe vaſſallum domini ſignificabant; "quæ merito brevia teſtata dici poterant: nam "ſi quis monumenta antiquarum familiarum ex- "cuſſerit, breviſſimas chartas has compendioſam- "que earum formam reperiet."

When writing came more fully into uſe, theſe declarations came to be ſo much extended, as to contain more clauſes than they had originally contained words; for as the power over property from the progreſs of ſociety grew more extended, and as the intereſts of mankind from the ſame progreſs grew more involved; theſe conveyances were clogged with qualifications, conditions, and covenants, extenſive as the powers, and various as the intereſts of mankind.

This

This extent of ſociety made men leſs fond of that feudal pageantry which had ariſen only from a more narrow ſtate of ſociety. In conſequence of this, homage and fealty were diſpenced with; and ſuperiors, inſtead of delivering poſſeſſion themſelves, gave orders * to their bailiffs or attorneys to do it; and any witneſſes ſigning, though not *pares curiæ*, were ſufficient. And thus the † improper inveſtiture was eſtabliſhed.

In England theſe inveſtitures when reduced into writing, were executed by feoffment and livery, and in Scotland, by charter and ſeiſin.

As long as the poſſeſſion was given before the *pares curiæ*, there was a neceſſity for the livery of each particular manor, becauſe thoſe who were *pares curiæ* to the inveſtiture of one manor, were not *pares curiæ* to that of another.

But the introduction of ſymbolical delivery, and the diſpenſing with the *pares curiæ* as witneſſes, made people more remiſs in requiring livery of each particular parcel of land. Hence, in ‡ England, at preſent, if a man ſeiſed of many vills in one county, makes a feoffment of the whole, and gives ſeiſin in one vill in name of the whole, all the lands of the feoffor lying in that county ſhall paſs: Hence in Scotland, in an erection of ſeveral parcels of lands with a clauſe for their union, ſeiſin of one parcel ſhall be ſeiſin of the whole barony.

* Mad. form. Angelic. diff. p. 10, & notæ (M.) † Mad. form. Angelic. & Craig. loc. citat. ‡ Coke, Lytt. 253.

Such

Such were the forms of original grants; in derivative grants the forms neceſſarily admitted ſome variations.

In an original grant, nothing but a charter by the giver and delivery to the receiver was needed: but in a derivative grant, as anciently the vaſſal of himſelf could not alienate, there was beſides the vaſſal's grant, further need either of a confirmation by the ſuperior, or of a ſurrender into his hand, if the fief was to remain with him, or of a ſurrender to, and new grant from the ſuperior, if it was intended to be transferred to another: And accordingly, in the * *formulare anglicanum*, there are a multitude of examples, of ſuch confirmatious and ſurrenders in the ancient law of England.

But afterwards, the ſtatute *Quia emptores* in England, took away the diſtinction between an original and a derivative grant, for as it allowed a free alienation, and made the donee hold not of the donor, but directly of the chief lord, it removed the neceſſity † of confirmation by the chef lord, or of ſurrender to him. In Scotland, on the contrary, as that ſtatute did not take effect, ſuperiors claimed a title to bar alienation; their conſent then continued to be ſought, and needed; and in conſequence of this, the forms of original and derivative grants remained in the law; ſo that now in theſe laſt, where the grant is in favour

* Mad. differt. p. 19, 26, et ibid. notæ C. D. et loc. cit. in notis et tit. confirmation and releaſe. † Mad. form. Anglic. diſſert. p. 4.

of

of a third perſon, the gift, and the poſſeſſion, the charter and the ſeiſin, appear in point of form, to proceed from the ſuperior, in the ſame manner, as if the grant had been from him, gratuituous and original.

Not only ſo, but a proprietor of an eſtate cannot complete the ſmalleſt alteration in the ſettlement of his eſtate, without application to the ſuperior in the antient ſtrict and regular forms.

To this ancient ſtrictneſs our judges adhere ſo rigorouſly, that in * a late caſe, in which, upon the death of an anceſtor the heir not entered, had procured from the ſuperior, a charter *de novo*, altering the former courſe of ſucceſſion; they found the alteration not effectual; and were of opinion, that the ſuperior, being by the original grant diveſted of his property, could make no new grant till he was re-inveſted in it: for which reaſon it was held, that the heir ought firſt to have got himſelf infeft on the ancient inveſtitures, then reſigned in the hands of the ſuperior, and after that taken the new limitations as he pleaſed.

Alienation to take effect after death of granter.

The power of alienating to take effect only after the death of the granter was ſo much ſupported, and needed ſo much to be ſupported by the forms which uſhered it in, without its being almoſt perceived, that the ſame chapter of this work which has marked the progreſs of that ſpecies of alienation,

† Landales againſt Landales, 12 Jun 1752. (4 collectors.)

muſt

muſt have marked likewiſe the progreſs of the forms in which it was made good.

SECT. II.

Involuntary conveyance.

THE involuntary transfer of land property by force of law, happens two ways, either by forfeiture, or by attachment for debt.

As only the king or the lord was intereſted in the transfer by forfeiture, ſo anciently in the law of England, and poſſibly in that of Scotland, the transfer was made good by the immediate ſeizure of the ſubject forfeited.

This was agreeable to the genius of the feudal ſyſtem; for that ſyſtem went on the general plan, that wherever there was a deficiency of a vaſſal, the fief ſhould revert to the lord; which rule had originally taken place in eſcheats, when the property and ſuperiority were reunited; and took place likewiſe, even when the deficiency was only a temporary one, as during the interval between the death of one tenant, and the entry of another.

Theſe laſt contingencies gave more frequent opportunities for the application of this rule, than the emergencies of forfeiture; and therefore it was firſt in the caſes of non-entry and eſcheat, that the ſeverity of the regulation was checked; for in England, the lord, as has been ſeen, loſt the power of taking poſſeſſion at all upon the death

death of a vaſſal: and by a ſtatute in the reign of Edward I. the king was reſtrained from taking poſſeſſion, either upon the death or eſcheat of a vaſſal, till an office was found. This reſtraint paved the way for reſtraining the king's power of ſeizure on forfeiture; it readily occurred, that if the king's power of ſeizing upon the death of a vaſſal or the failure of an heir was dangerous, his power of ſeizing upon forfeiture, was ſtill more dangerous, and as he was reſtrained in the two firſt caſes by the neceſſity of having an office found, it appeared, that he ought equally to be reſtrained in the latter.

Between theſe ſuggeſtions in favour of the neceſſity of an office on the one hand, and the king's ancient right againſt it on the other, it appears, that the law of England † was unfixed for ſome time; but at length, the following diſtinction was made: If the perſon attainted died, his lands were veſted in the king without any office, becauſe by the attainder, there was no heir to claim; but on the contrary, when the alledged offender was alive, who might have injuſtice done him by the ſeizure, it was agreed that his lands were not veſted in the king till an office was found.

A ſtatute of * Henry VIII. however, put an end to this diſtinction in attainders of treaſon, and declared, that the lands of perſons ſo attainted, ſhould be veſted in the king without any of-

† Viner. rit. office (D.) & loc. ib. cit.
* An. 33. H. 8. cap. 20.

fice

fice; at the ſame time, as this ſtatute relates only to attainders of treaſon, ſo the common law † in other caſes is left on it ancient footing.

In Scotland, the law took a different courſe. When the forfeiture was in parliament, the eſtate was indeed directly veſted in the king; but in other forfeitures, the king could not ſeize till he had brought a declarator or action of declaration of the forfeiture. As there was once a time when the law of Scotland required no declarator in the caſe of non-entry or eſcheat, it is likely that the introduction of it on theſe occaſions, paved the way to the introduction of it in the caſe of forfeiture.

Another difference occurred between the cuſtoms of England and Scotland; in the firſt of theſe countries, whatever was forfeited or eſcheated, was levied by the king's officers, and accounted for to him. In Scotland, on the contrary, the king almoſt conſtantly made gifts both of the forfeitures and of the eſcheats. In England, the ſubordination of ſuperior and vaſſal having ſoon ceaſed to be ſtrict, there ſeemed no incongruity in the king's holding an eſtate by forfeiture, which the forfeiting perſon had even held of another; but in Scotland, that ſubordination remaining entire, it was deemed an inconſiſtency in the king to hold an eſtate which was in vaſſalage to another ſuperior: and the cuſtom of making gifts of ſuch eſtates, probably led the way to making gifts of almoſt all other eſtates that fell

† Staundf. prerog. cap. 18.

to the crown by forfeiture or eſcheat; and perhaps the greater neceſſities of the nobility in Scotland, than in England, together with the ſubjection in which the king was kept to his nobles, extended and eſtabliſhed the practice.

This difference in the cuſtoms of the two nations, inſignificant as it may appear, led to conſequences that were terrible in Scotland. As the great families who remained were to enjoy the ſpoils of thoſe who were forfeited, they were very ready to thunder out their dooms againſt each other; and on the other hand, as a pardon after the gift did † not reſtore the eſtate, all acceſs to mercy was ſhut up. In conſequence of which, for ages, this land was torn in pieces by a nobility on the one hand greedy, and on the other hand driven to deſpair; and by a race of princes, many of whom, in order to protect themſelves, played the mutual furies of both againſt each other.

The late Britiſh ſtatutes are bringing the laws of Scotland and England nearer together, both on the contingencies of forfeiture and eſcheat. By the veſting acts of 1715 and 1745, the forfeited eſtates are veſted without any office of inquiſition, and without declarator. The clan act made the ſuperiority to be veſted in the loyal vaſſal, without declarator of forfeiture, and the property to be veſted in the loyal ſuperior without declarator of eſcheat; and by the late veſting act,

† Scots acts, an. 1606. cap. 4.

the

the eſtate of the forfeiting vaſſal was underſtood to be veſted directly in the crown, though holding of a ſubject ſuperior.

Attachment for debt.

The manner of making the transfer good upon attachment for debt, was originally the ſame both in England and Scotland. The attachment was made good by a petition to the king or the king's judges, who upon that iſſued an order to the ſheriff to deliver poſſeſſion.

But in the form of delivering this poſſeſſion, a difference aroſe between the Engliſh and the Scotch law: in England the ſheriff delivered conſtantly the ſeiſin, whether the land was held of the king or of the lord: as the lord's connection with his vaſſal came early in England to be but ſlight, he intereſted himſelf but little in the attachment; the ſtatute *Quia emptores* too taking effect there almoſt as ſoon as the attachment of land, it appeared no hardſhip upon the lord, to have that tenant put in by the ſheriff, who could have been forced upon him by the voluntary conveyance of the debtor; but in Scotland, where the connection between lord and tenant remained ſtrict, the lord thought he had a right to intereſt himſelf in the attachment; and as the ſtatute *Quia emptores* went into diſuſe, the lord often refuſed to accept for tenant as attacher, him, whom he could have refuſed as voluntary diſponee. In conſequence of this, the infeoffment of the ſheriff, except in lands holden of the king, would have been to no purpoſe; ſeeing the debtor would ſtill have continued immediate tenant, and he

he and thoſe in his right remained ſubject to the incidents due the lord. In order to avoid thoſe incidents then, it became neceſſary in Scotland for the attacher to receive ſeiſin from the lord, if the land was held of him: and accordingly in the law * of Alexander, though it is the ſheriff who ſells, and in the ſtatute of † 1469, though it is the ſheriff who compriſes, yet it is the lord, when the lands are held of him, who infeoffs. In the laſt of theſe ſtatutes, a privilege granted to the debtor is clogged with this burden: "he payand the expences made on the over-lord, "for charter, ſeiſin, and infeoffment."

From that day to this, in Scotland, the form in which the law transfers land from the debtor to the creditor, remains the ſame; for though a variety of means have been uſed to force the lord to infeoff, or in ſome caſes to render his infeoffment unneceſſary; and though ſince the late ſtatute of the 20th of the preſent king, the lord can refuſe no perſon attacher who is within the meaning of the ſtatute, yet even independent in fact as the creditor is of the lord, he muſt ſtill in point of form apply to him, and from him ſeek poſſeſſion. The grant is made by the lord, the ſeiſin is delivered by him, and his power alone, not the operation of law, appears in the form of the transfer.

Again, with reſpect to the attachment of land for the debt of the anceſtor, the novelty of the

* Alexander 24. † An 1469. cap. 36.

attempt

attempt to reach land for such debt, could not fail to be attended with embarrassments, and variations in the form of doing it. It had been seen, ‖ that this attachment first took place among trading people, by the statute merchant in England, of Edward I. which declared, "that "if the debtor died, the merchant should have "possession of the lands," and by a similar statute together with the laws of the burroughs in Scotland. Now it is probable, that at first, upon the strict words of the statute of Edward I. the land was directly atatched without taking any notice at all of the heir, although the method came afterwards to be changed, and the * heir was sued for the assets descended to him. It is certain in Scotland, that at first, the creditor attached the lands of the deceased debtor directly, without any previous constitution of the debt against the heir, or any charge to enter heir. This appears from some ancient deeds, in which the bailiff † either gave to the creditor in a burrough, the brief of distress, directly against the inheritance of the debtor, or only ‡ called the heir upon his *jus retractus*, to assert his preference, and to redeem the lands if he pleased. But this method came afterwards to be changed, as it had been changed in England, and a decree of constitution was previously used against the heir.

‖ Hist. of Alienation, sect. 2.
* Bacon voc. heir and ancestor (B. 2.)
† Instrumen. Sas. Thom. de Forrest, Jan. 29, 1450.
‡ Record. Charters, lib. 16. N. 77. Jan. 29, 1508. Cart. Ricardi Kine.

The

The ſingular effect of the heirs renunciation in Scotland, was remedied, as has been ſeen, * by the introduction of the adjudication *cognitionis cauſa*. The ſingularity of the remedy was attended, as all novelties muſt be, with variations in the form of making it good. According to Sir Thomas Hope †, the ſuperior was originally made the defender in this adjudication, the heir being called only for his intereſt, and decreet was given againſt the ſuperior ſolely. This was natural at a time, when the lord's intereſt was extremely ſtrong in the fief; but at preſent the proceſs is directed againſt the heir alone, without even calling the ſuperior; and by the decree the land is adjudged from the heir directly to belong to the creditor. This is equally natural, at a time when the intereſt of the vaſſal in the fief is become ſtronger than that of the lord. Again, originally, the decree againſt the ſuperior was only perſonal, ordering him to infeoff the creditor in the land for payment of his debt, but gave no real lien directly on the land: and perhaps the judges at firſt thought, they had made ſtretch enough, in giving this perſonal decree; but now, from the ripening of the execution, and the favour of creditors, direct acceſs is given to the land, and a real lien created on it by the adjudication.

* Hiſt. of Alienation, ſect. 2. p. 353. Kaimas hiſt. notes, N. I.

† Hope minor practicks,

SECT. III.

Making title by deſcent.

THE forms of taking an eſtate by ſucceſſion, proceeded originally upon the ſame plan of connection between ſuperior and vaſſal, on which the other forms of conveyances proceeded.

In the ancient conſtitution of a feudal grant, the lord gave the fief to the vaſſal, under the expreſs condition, that certain ſervices ſhould be performed or duties paid to himſelf; and under an implied condition, that when the vaſſal failed in his part of the obligation, the fief ſhould return to the lord. In conſequence of this, when the grantee died, the property of the land returned to the lord. Afterwards, when the rights of the vaſſals gained ſo much upon thoſe of the lords, that fiefs deſcended univerſally to heirs; yet ſtill the old form founded on the old right, ſo far remained, that on the death of a vaſſal his fief returned into the hands of the lord; but then the lord on his part, was underſtood to be ſubject to an obligation which he could not defeat, of renewing the grant, in the perſon of the vaſſal's heir.

In the old laws therefore both of Eng'and and Scotland, the vaſſal, in order to make title to the fief of his anceſtor, was obliged to apply to the lord, and to get a renewal of the inveſtiture from him: and indeed this notion of a right of reverſion in the ſuperior, went at one period ſo far in

both

both kingdoms, that the heir not being ſuppoſed to take through the anceſtor, but directly from the ſuperior, was not ſubject to the debts of his anceſtor; and in Scotland, at a much later period *, the renunciation of the apparent heir even when the deceaſed vaſſal had left creditors, would have ſent back the property of the fief to the ſuperior, and diſappointed the creditors altogether.

In England, by the time † of Henry II. the rigorous dependance of the vaſſal, upon the lord had ſo far ceaſed, that the vaſſal, provided he payed the ſimplex faſina, or relief, could have taken up the fief without applying to the lord.

But even then, the king continued in poſſeſſion of his old right; upon the death of the vaſſal he took poſſeſſion of the land, and the heir could not enter into poſſeſſion, till he ſued out a livery, by means of a ſervice upon the brieve or writ *diem clauſit extremum*; the right of the king in the ſtatute *de prerogativa regis* is deſcribed, *poſt mortem, &c. capiendo omnes exitus, earundem terrarum et tenementorum, donec facta fuerit inquiſitio; ſicut mo is eſt, et ceperit homagium hæredis.* And the writ of *diem clauſit extremum*, whereby this writ was put in execution, ran thus, *cape in manum noſtram, omnes terras et tenementa, &c. donec aliud inde præceperimus, et per ſacramentum proborum hominum diligenter inquiras, &c.*

* Kaim's hiſt. notes, No. 1. and 3.

† Hiſt. of tenures, ſect. 2.

In Scotland, as the dependance of the vaſſals on the lords remained ſtrong; not only the king, but the lords retained their ancient right. As ſoon as a vaſſal died, his lands became open to the ſuperior, or as the law terms it, fell in non-entry; to him the heir of the vaſſal was obliged to come, and from him ſought entry: If he was a ſubject ſuperior, as every ſuch ſuperior is ſuppoſed to know all his vaſſals, he generally granted a writing, called from the narrative of it, a precept of *clare conſtat.* This writing declared it was known to the lord, that the claimant was next heir to the vaſſal laſt deceaſed, &c. and therefore ordered the bailiff to deliver him poſſeſſion of his predeceſſor's land: but if the king was ſuperior, as from the multiplicity of his vaſſals and the cares of government, it was impoſſible he could be acquainted with all his vaſſals, he referred the queſtion of the right of the claimant, to the cognizance of an inqueſt, by a brief or writ out of the chancery, which is the king's great charter room, and anciently was ambulatory with him. Upon the report of this inqueſt in favour of the claimant, returned into chancery, a precept was iſſued from it by the king's officers, who did now, by their office, what the king it is likely more anciently did in his own perſon: this precept ordered ſeiſin to be given to the claimant, was directed to the ſheriff, who is the king's bailiff, and was by him executed.

The ſame ceremonies in the tranſmiſſion of common eſtates, and ſimilar ceremonies in the tranſmiſſion

miſſion of burgage eſtates, remain in Scotland, in favour both of the king and of the lord, to this day. And founded on theſe ceremonies, which ſuppoſe a right of property in the ſuperior, but ſubject to an obligation of renewal in the perſon of the heir, which cannot be defeated; it is now maintained by ſome lawyers in Scotland, that the renunciation of an heir before he is admitted, although a renunciation is not a proper mean of conveyance, yet is ſufficient, where the intereſt of creditors does not oppoſe it, to veſt the property of the eſtate compleatly in the ſeperior, or rather to diſburden that eſtate, which was before deemed to be in him, of the incumbrance which affected it in favour of the heir.

Whether this opinion be juſt I do not enquire. In giving a hiſtory of the law it is ſometimes neceſſary to give a hiſtory of the opinions of men as well as of the law itſelf.

In England, the ſame form of an heir's taking a military, or ſoccage eſtate, in capite, rather from the ſuperior, than through his anceſtor, remained, with only ſuch differences, as the different offices and officers of the two kingdoms created, as long as the court of wards and liveries remained; for the king *, as has been ſeen, took poſſeſſion upon an office found, and the heir was obliged to ſue out a livery, before he could recover it.

Such is the progreſs of the feudal forms of conveyance by deed of party, to take immediate

* Staundf. prerog.

effect, or to take effect after death, by attachment of law, and by making title in descent. In all of them, the connection between the feudal rights and the feudal forms, and a regard to the interest of the superior, even when the fief is continuing to pass from him, may be traced.

In the end, however, when a very extensive degree of commerce, causes a continual fluctuation of land-property; and that fluctuation arises much more from onerous, than gratuitous causes; the connection between the grantor and grantee, and between this latter and the grantor's superior, comes to be but slight: the dispatch of business at the same time so necessary in extensive dealings, cannot admit the slow forms of a grant from one person, and of an after application to another. These feudal forms therefore give way to other forms, more accommodated to the natural state of mankind.

Property comes then to be transferred, when by deed of party, in no other ceremony of words, than is sufficient to shew the intention of the grantor. This intention, for the sake of evidence, is generally indeed though not always expressed in writing, and the transfer, though often attended with possession, is sometimes however made good without it.

Thus in England, although originally conveyances by deed of party were executed by acts of infeoffment; which, as will appear from a comparison of * Madox and Craig, correspond in their

* Mad. form. anglic. diss. p. 11. & alibi. Craig, lib. 2. dieg. 2.

nature

nature and progreſs to our charter and ſeiſin; or by fines, which were originally an acknowledgment of ſuch feoffment in a court of record; yet earlier than the time of Lyttleton, it had come into faſhion, to tranſmit land by attornment, if there was a tenant, and by leaſe and releaſe, if there was none; in the firſt of which caſes, the form of getting the conſent of the tenant of the ground to the transfer, ſupplied the place of that livery, which could not be given; and in the other caſe, the grantor gave to the grantee, an imaginary leaſe, in order to put him into poſſeſſion, and the next minute releaſed; or in the language of the law of Scotland, renounced all right or intereſt he had in the land.

In attornment ſomething was done to ſupply the want of livery, and in leaſe and releaſe the entry gave livery; but a ſtatute of * Henry VIII. by making proviſions concerning a form of conveyance, which had been before in uſe, enabled people to diſpenſe with theſe two ſhadows of a form, and with the circuit of a feoffment altogether. The form of conveyance by bargain and ſale, made ſecure by writing and enrolment, by virtue of this ſtatute, correſponds to our diſpoſition, without infeoffment in Scotland: This laſt with us does not transfer; it is only a ſtep to the transfer; but in England, on a bargain and ſale, all notion of a ſuperior or delivery is loſt; the moment the deed is inrolled, the eſtate, to almoſt all effects whatever, is veſted *ab initio*; nor can

* An. 27. H. 8. cap. 16.

there be any diſpute between competitor purchaſers, except what ariſes from the dates of their reſpective inrolments. And ſo much did the Engliſh in this form of conveyance diſpenſe with the ſtrictneſs of forms, that till the ſtatute directing the inrolment, lands might have been conveyed by even a parole bargain and ſale; and even after this ſtatute, as the eaſieſt forms of conveyance take place always in boroughs before other places, it ſtill remained allowable, till a ſtatute * of Charles II. by bargain and ſale, to convey lands, by parole, in cities and boroughs.

In Scotland we are ſo far approaching to a moderation in the rigour of our forms of conveyance, that though in the ſtrict feudal notions no one could grant to another what was granted to himſelf, till he was ſeiſed in it, yet at preſent a man can aſſign over his author's perſonal obligation to diſpone in the diſpoſition, before he is himſelf infeoffed; and for a long time, a perſonal diſpoſition without infeoffment, was preferable to a poſterior diſpoſition, though attended with it.

Upon the ſame plan of facility of conveyance, indead of the circuit of a diſpoſition *de præſenti*, and ſeiſin upon it, a man may at preſent, in England, deviſe a land eſtate by a mere teſtament, with the ſame eaſe, with which he may deviſe the moſt inconſiderable ſum.

* An. 29. C. 2. cap. 3. Bacon voce Bargain & Sale (C.) N°. 1. & note.

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In the ſame manner, in the attachment by law at preſent in England, the judgment of law only appears. The feudal forms, except in the tranſmiſſion by eſcheat, are not even to be traced in it. The land changes its maſter with as few ceremonies, as land originally allodial could have done. On forfeiture it is veſted as often in the publick as in the king; and on attachment for debt, the creditor is obliged to apply to none but the judge.

The tranſmiſſion of ſucceſſion *ab inteſtato*, has had the ſame fate; the heir, inſtead of application to the ſuperior, rather continues that right which his predeceſſor had, than acquires a renewal of his predeceſſor's right, and now takes the eſtate in the ſame way, that in the Roman law a Roman would have done: That is, he takes it by any ouvert act, ſhowing his intention to do ſo.

The form of taking an anceſtor's eſtate through the ſuperior, was the laſt feudal form of conveyance, that was kept up in the law of England; but the ſame ſtatute, which by aboliſhing the tenures by knights ſervice, aboliſhed ſo great a number of the private rights of the feudal ſyſtem, put an end to the almoſt only remaining feudal form of conveyance in it. And thus thoſe rights, and thoſe forms, which ariſing from the peculiar circumſtances of a rude people, abſorbed in themſelves all other rights, and all other forms; which for ſo many centuries in Europe, were a continual bond of union, and yet a continual ſource of wars; which by one general tenor, ſubjected to

the ſame rules, princes and ſubjects, kingdoms and private eſtates; that ſyſtem, which by the ſimplicity and conſiſtency of its principles, ſo long flouriſhed, and is ſtill ſo much revered; fell not at once, but by ſlow degrees: Every age impaired ſome part of the fabrick, till in the end, unnatural, though well compacted and dependant as it was, it gave up moſt of its particular rights to the natural equality and police of ſociety, and ſubmitted its peculiar forms to the diſpatch and eaſe required in the extended, varying, and intricate dealings of mankind. At what period we ſhall arrive at the ſame ſtate in Scotland, is uncertain; but it is certain we have been for ſome time faſt approaching to it; and as almoſt every nation in Europe, has run, or is running the ſame courſe, it is not probable that we ſhall be the only exception to that chain of cauſes and effects which is always the ſame.

One difference, a conſiderable and a curious one, may be obſerved in the different channels, which the declenſion of the feudal law has taken in England and in Scotland. In the firſt of theſe countries, the tranſmiſſion of land-property through the feudal forms, had gone into diſuſe, when yet many of the moſt rigorous feudal rights remained in the dependency of tenure by knight's ſervice: In Scotland, on the contrary, the dependency of this laſt tenure has been aboliſhed, though yet the old forms of tranſmiſſion univerſally remain over the country.

In England, the great commerce, and frequent fluctuation of land-property ariſing from it, made the embarraſſment of the feudal forms of tranſmiſſion too inconvenient to be born with; while, on the other hand, the power of the king, and of the great families, ſupported the military tenures, with the ſolid intereſts to themſelves ariſing from them. In Scotland again, as the power of the nobility is viſibly decayed, they have not been able to ſupport the dependency of a holding, which has been eſteemed ſo detrimental to the reſt of their fellow-ſubjects; while, on the other hand, we have not yet arrived at ſo extended a commerce, and conſequently frequent fluctuation of land-property, as to make the embarraſſment of the feudal forms of tranſmiſſion, be very ſenſibly felt.

When from a greater extent of commerce, theſe embarraſſments come to be more ſenſible, we ſhall probably come to ſell lands by a form ſimilar to that of bargain and ſale. We ſhall deviſe lands by teſtament, not by a diſpoſition *de præſenti*. Our adjudications will be compleated without acknowledgment of the ſuperior. The heir will take his anceſtor's eſtate by entry, not by ſervice and charter. And as there is already an union of kingdoms and of intereſts, there will probably be in theſe reſpects, in future generations, an union of forms and of laws.

8

SECT. IV.

Regiſters. FORMS of conveyances are to be regarded, almoſt only in proportion as they give ſecurity to purchaſers and creditors: Hitherto they have been traced, as recurring to, or deviating from feudal principles; but in this ſection we ſhall enquire, how far the forms of conveyances in Great Britain, have a more intrinſick and independent value, as conferring ſecurity upon purchaſers or creditors. Perhaps the digreſſion will be pardoned, in conſideration of its importance.

It is not a little to be wondered at, that a nation ſo wiſe and provident as the Engliſh, ſhould at all times have been ſo deficient in the uſe of regiſters, by which alone purchaſers or creditors can know with certainty, the eſtate of the perſon from whom they buy, or to whom they lend.

In the ancient voluntary conveyances by feoffment and livery, and the after one by leaſe and releaſe, and the ſtill more modern one by bargain and ſale, there was no obligation to record the tranſmiſſion: Nay, ſo careleſs were the anceſtors of the Engliſh, that theſe conveyances would have been good, though not reduced into writing, and only executed by parole.

This negligence was bad enough, in all theſe modes of tranſmiſſion; but in that of bargain and ſale, by which the eſtate was veſted without livery of the land, it was intolerable: and therefore,

fore, by a * ſtatute in the reign of Henry VIII. all bargains and ſales were ordered to be inrolled, within ſix months from their date; and by a ſubſequent † ſtatute, all conveyances of land for more than three years, were ordered to be executed in writing.

In the ſecurities for debt, the law of that country ſeems to have been more provident; for on a recognizance or ſtatute being entered into by a debtor, the ſecurity was inrolled; and lands could not be extended by elegit without it's appearing on record that they were ſubject on a judgment to ſuch an incumbrance.

Notwithſtanding theſe precautions, purchaſers and creditors remained upon an extreme uncertain footing; for ſtill many kinds of voluntary conveyances were not under a neceſſity of being recorded: and therefore, through theſe a man might convey over the ſame eſtate to ſeveral different people: or, as there was no record of wills, he might grant falſe ſecurity on that eſtate from which he had been diſinherited.

To remedy theſe things, a practice which had been originally inſtituted for other purpoſes, was turned into an inſtrument of conveyance ‡. Fines were originally no more than a friendly compoſition and determination of real differences recorded in the ſuperior's court, and they were the more eaſily admitted, becauſe the pares of the

* An. 27. H. 8. cap. 16. † An. 29. Ch. 2. cap. 3.
‡ Mad. form. Angl. differt. pag. 13, & ſeq. Bacon, vol. 2. pag. 520, & ſeq.

court,

court, who were the judges of it, were through them, the ſooner diſmiſſed from their attendance on the court, and the ſuperior received a fine upon the compoſition made. But as fines were very much favoured in the law, people took advantage of them, and by feigned acknowledgments of a feoffment, recorded originally in the lord's court, and afterwards removed into, and limited to the king's court, turned theſe fines into a very ſecure form of conveyance; for the effect of them was to conclude not only the right of thoſe who were parties to them and their heirs, but to *conclude alſo all others*, as the ſtatutes of fines of the 18th of * Edward I. declares, if they make not their claim within a year and a day.

Although theſe fines ſtanding thus at common law, or at common law explained and aſcertained by ſtatute, were a remedy to much of the uncertainty to which purchaſers were formerly expoſed; yet another ſtatute †, authorizing eſtates tail, having declared, that any fine levied of them, ſhould be null and void; no fine could extinguiſh the rights of heirs of entail: and theſe ſettlements in tail being private, and not recorded, the purchaſer or creditor had no proper ſecurity againſt them.

To remedy this ‡, a ſtatute of Henry VII. and another of § Henry VIII. explaining it, enacted, that fines for the future, ſhould bar the iſſue of tenant in tail.

* An. 18. Ed. 1. Stat. of fines. cap. 1. † An. 13. Ed. 1. ‡ An. 4. H. 7. cap. 24. § An. 32. H. 8. cap. 36.

At

At the ſame time, as it would have been very partial to have introduced all theſe things in favour of purchaſers, unleſs ſome additional care had likewiſe been taken of thoſe who had rights in ſuch eſtates, the neceſſity of proclamations, was therefore by theſe laſt ſtatutes eſtabliſhed, and the right of claim, in thoſe having intereſt in the eſtate, was extended from one year to five.

The ſtatutes of Henry VII. and Henry VIII. remedied by ſuch means, part of the inſecurity of purchaſers; but they did not remedy it entirely; for though thoſe ſtatutes barred the iſſue of tenant in tail, they barred not thoſe who had the remainder or reverſion in fee.

A contrivance was therefore fallen upon to bar theſe laſt by a common recovery, a form of conveyance, which had formerly been ſometimes uſed to defeat entails, but which after the time of Henry VIII. was uſed continually, whenever it was neceſſary to extinguiſh theſe remainders and reverſions in fee, and by that means became, like a fine, one of the common aſſurances of the kingdom. This recovery was made good by a feigned ſuit and judgment recorded, in which the eſtate was evicted from the tenant in tail, and relief given to him upon the lands of an imaginary warrantee who was worth nothing. As the relief was ſuppoſed when obtained, to go in the ſame courſe of deſcent in which the lands recovered would have gone, this was deemed a recompence both to thoſe in remainder and reverſion, and

though

though it was imaginary, they were not permitted to impeach it.

Extended in their effects, as thoſe fines and recoveries are become, though they confer additional ſecurity upon purchaſers, yet they confer none upon creditors; and even to purchaſers there ſtill remain two dangers, againſt which no foreſight can be ſecure: for as there is no regiſter either for rents or mortgages, the purchaſer cannot be certain of the rents to which the land is ſubjected, and ſtill leſs of the mortgages affecting it, of which the mortgagee may not even be in poſſeſſion.

In Scotland it was a conſiderable time before the alienations of land property were frequent, and at the time they became ſo, we had before our eyes all the miſchiefs ariſing from the want of regiſters in the Engliſh forms of conveyances: and therefore the eſtabliſhment of our regiſters, inſtead of being the produce of partial remedies to partial evils, ſeems to have been the reſult of an univerſal, and wiſe, and provident plan.

Thus by an act of * James VI. extended by two of † Charles II. ſeiſins upon voluntary conveyances were ordained to be regiſtered in certain regiſters. In involuntary conveyances again, the privy council ‡ ordered all compriſings to be regiſtered; a ſhort record on the allowance of compriſings, came by practice in the place of

* An. 1617. cap. 16. † An. 1669. cap. 3. An. 1681. cap. 11. ‡ Books of privy-council, lib. 1. pag. 1. 1636. March 18.

that

that regiſtration; and this practice, was by a ſtatute * of Charles II. approved of. In tranſmiſſions from the dead to the living, by the conſtitution of the chancery, the retour or verdict of the jury on the ſervice was obliged to be recorded, or though there had been no ſuch neceſſity, the neceſſity of regiſtering the ſeiſin, would have been ſufficient. The ſame ſtatutes which ordered the regiſtration of ſeiſins, made more effectual, than it had been, the regiſtration of reverſions. Real burdens being made good in the feudal form, fell under the neceſſity of the ſame regiſtration of ſeiſins. By an act in the reign of † James VII. not only the irritant and reſolutive clauſes of entails, were ordered to be repeated in the inſtruments of ſeiſin, but a particular record was directed for that ſpecies of ſettlement. Statutes were made in the reign of ‡ James VI. to eſtabliſh, and to perfect the regiſtration of inhibitions, and interdictions, againſt thoſe who were prohibited to convey by the law. Many acts of ſederunt, and other ſtatutes, proceeded upon the ſame plan with thoſe already mentioned. And to crown all, by a proceſs of reduction, and improbation, and certification following upon it, which cuts off every thing, even rents and mortgages, purchaſers are more effectually cleared of incumbrances in Scotland, than by a fine and recovery they are cleared of them in England.

* An. 1661. cap. 31. † An. 1685. cap. 22. ‡ An. 1581. cap. 119. An. 1600. cap. 13. An. 1597. cap. 275.

In

In short, by the number and regularity of our registers, not only purchasers of, but creditors upon land estates, if they are tolerably attentive, are as well assured of the condition of their subject, in the law of Scotland, as they are in the law of any nation upon earth.

Of late years it appears, that the English are becoming sensible of their deficiency in the want of registers, and are attempting to remedy it.

Thus by an act of * queen Anne, a registry is ordained to be kept, of all deeds and conveyances executed, which effect lands in the west riding of Yorkshire. Another statute of the same † queen, established a similar register in the east riding of Yorkshire. A third ‡ does the same in the county of Middlesex. And a statute of the § present king extends it to the north riding of Yorkshire.

In most of the regulations affecting land-property, the law of Scotland is approaching to the law of England. But in the establishment and completion of registers, it is probable, the law of England will rather approach to, and imitate that of Scotland.

* An. 2. An. cap. 4.
† An. 6. An. cap. 35.
‡ An. 7. An. cap. 20.
§ An. 8. G. 2. cap. 6.

CHAP.

CHAP. VII.

Hiſtory of Juriſdictions, and of the Forms of Procedure in Courts.

I AM far from attempting in this chapter, to give a compleat hiſtory of the courts, and far leſs of the procedure in the courts of Great Britain. I pretend to trace thoſe courts, and that procedure, ſo far only, as they are connected with the progreſs, and declenſion of the feudal ſyſtem of land-property in that country.

SECT. I.

THE natural progreſs of juriſdiction ſeems to be this: Juriſdiction.

In the rudiments of ſociety, people unite more from the accident of living in the ſame family, than from any notion of advantage or order: they are all children, or wives, or ſervants of one head; the former were under his ſubjection from their age, the others from their condition, and that power which in his youth he was able to hold through force, he retains in the decline of his life, from authority.

The firſt tribunals, in the order of things, then, were the domeſtick.

When many ſuch families are reſiding together, it cannot be long, till one head of a family, from his ſuperior wiſdom or force, becomes maſter of the

the reſt; but his ſuperiority muſt be ſupported by the ſame activity which gained it; and therefore, in this tranſition from domeſtick to political government, the chieftain himſelf, will be not only general in war, but judge in peace.

It ſeem an invariable truth in the political world, that ſociety ſhall not remain long in the ſame ſtate. The ſame princedom we are ſpeaking of, if the ſociety ſubſiſts for any time, either extends itſelf by conqueſt, or is changed into a republick; one of which caſes muſt happen, whenever the inhabitants encreaſe greatly in numbers: in either caſe, theſe numbers of inhabitants make it impoſſible for the ſupreme magiſtrate to take cognizance of every cauſe; and the complexneſs of their actions producing an equal complexneſs in the regulations of their actions, puts it out of his power to take cognizance of almoſt any. The chief magiſtrate muſt be too much employed in military, and political, to have either time, or knowledge, for juriſprudential functions. Juriſdiction is therefore intruſted to ſubordinate magiſtrates, who may make juriſdiction more immediately their concern.

At the ſame time, law is not yet, during this period, become ſo extenſive an art, as to give entire occupation to thoſe ſubordinate magiſtrates, and therefore, for a long time, they perform the functions of prieſts, of ſoldiers, or of ſenators, together with thoſe of judges. Who the particular perſons ſhall be, who are intruſted with theſe magiſtracies, varies with the imagina-

tions

tions and circumſtances of different nations. By the Jews, among whom the ſubordination of internal policy was profound, juriſdiction was given to age. By the Romans, haughty and vain, to ſplendor of race. The ancient Germans, fierce and free, ſcorning human, would yield to none but the divine authority; and, as Tacitus relates, made the miniſters of God, the avengers of injuſtice.

But when the ſtate of ſociety comes nearer its perfection, the greater number of men, and their ſtill greater number of rights, the folly of ſome, the injuſtice of others, and the continual intercourſe of all, make the ſcience and art of law ſo extenſive, that it can allow no conjunct occupation to thoſe who are intruſted with the care of it; lawyers then are formed into bodies by themſelves, and from theſe bodies the judges are taken.

This progreſs is confirmed by the hiſtories of all nations, particularly by that of our anceſtors. Tacitus relates, that among the antient Germans, men had power of life and death in their own families.——The princes who gave a beginning to the feudal ſyſtem in Great Britain, were at once generals and judges.—When the conqueſts were ſettled, their officers ſhared with them in a regular juriſdiction.—And in the end the power of judging taken from thoſe who formerly enjoyed it, is at preſent intruſted entirely to judges.

The gradation from the third to the laſt ſtep of this progreſs, conſtitutes the hiſtory of feudal

feudal juriſdictions in Great Britain, and muſt therefore be traced by itſelf.

Juriſdictions in England.

It is obſervable, of all the conqueſts made by all the feudal nations, that to the poſſeſſion of lands there was always attached a power of judging the people who lived on them. Many particular reaſons contributed to this, but a general one is obvious. Thoſe old nations had not arrived at that regularity of police, which makes the arm of the governor, and the voice of the law attended to, through the furtheſt bounds of the ſtate: fierce as well as independent, they would ſubmit to that authority alone, which could immediately obſerve, ſeize, and puniſh, and that juriſdiction, which in the hands of kings or of judges would have been vain, was therefore given to the proprietors of lands over their own territories.

Upon this ſyſtem, the lords of charter land, whether * eccleſiaſtical or civil, among the Saxons, were inveſted with a power of judging their own people in their own courts, which from the great hall of the manor in which they were held, were called † Halmotes.

In the ſame manner, the people on the king's land were ſubject to the king's judge; and the allodial people, or the Liberi ‡, being attached to no lord, in a feignioral capacity, were ſubject likewiſe to the king's judge. The name of this judge, in each county, was the Reve or Sheriff,

* L. Ed. Confeſſ. N° 5. † Spel. Gloſſ. voce Halmot.
‡ Chap. 1.

who

who had ſeveral judges under him, according * to the ſeveral diviſions of the county; and the name of his court was the Revemote, when he ſat as judge of the county, and the † Burghmote, when he ſat as judge of a borough.

Theſe courts of the king, and of the lords, had their ſeparate limits; nor could the former ‡ intermeddle in the firſt inſtance, with the cauſes, or the people belonging to the latter.

The only exceptions to this independence of the lords, were the following: When the lord refuſed juſtice altogether, or when he was ſo poor as not to have a court of his own, recourſe was had to the king's court; although in this laſt caſe, ſays the § law, *Salvo poſtea jure baronum illorum.* Again, when one lord pretended to give judgment in the caſe of a perſon ſubject to another lord, in order to prevent the juriſdictions from claſhing, they were both obliged to remove to the Revemote, which being the king's court, was deemed to be ſuperior in dignity to both; and for the ſame reaſon, when a diſpute aroſe between two thanes, they were obliged, as appears from a ‖ Norman law, reciting a law of Edward the Confeſſor, to apply to the king's great council, in which he ſat himſelf in perſon.

It is no objection to this ſeparation of juriſdictions, that the biſhop, who, as a lord of charter land, had a court of his own, is yet deſcribed in

* L. Ed. Confeſſ. N° 13. Spel. Gloſſ. voce Hundredus. † L. Canut. N° 17. ‡ L. Ed. Confeſſ. N° 9. L. Eadg. N° 2. L. Canut. N° 16. § L. Ed. Confeſſ. N° 9. ‖ Cart. Hen. 1.

many

many of the Saxon laws, as ſitting together with the ſheriff in the king's court: For he ſat not there in his own right of juriſdiction, but as called to be an aſſiſtant and adviſer of the ſheriff, who in thoſe times could not be ſo learned in matters of judgment as the other. What proves this beyond contradiction, is, that the biſhop had no * ſhare in the fines of the court; and the right to the fines of the court, was at that time, in all nations of feudal origin †, the ſure teſt, of having, or not having a proper juriſdiction.

From the court either of the lord, or of the ſheriff, among the Saxons, there lay an appeal to the king, who ſat in his great council, and took cognizance of it. But theſe ‡ appeals were rare, took place only in ſingular caſes, and were diſcountenanced.

Upon the Norman conqueſt, all the § allodial were converted into feudal lands, by which means the earls acquired the ſame power over the freemen become now their vaſſals, which had formerly belonged to the king; or rather retaining their former titles, they became in reality lords, and as ſuch, had juriſdiction in their own lands. The neceſſary conſequence of the interpoſition of the earls between the king and the freemen, was, to throw the power of the king over theſe laſt, one ſtep further back. But to prevent the king's power from being by this means entirely excluded the provinces, the ſheriff court was ſtill re-

* Doomſday. Cheſter.—Spel. Gloſſ. Vicecomes. † L'Eſprit des Loix, lib. 3. cap. 20. ‡ L. Eadg. N° 2. L. Canut. N° 16. § Chap. 1.

tained

tained, and not only upheld in it's ancient powers, but new powers were added to it. It was made * co-ordinate with the lords courts in moſt caſes: it was made ſuperior to them, in many caſes enumerated by † Glanville, and received appeals from them: and as the ‡ Norman princes obliged the biſhops, the lately created earls, and the old lords, all to attendance in it, it receive additionial ſplendor.

To give more ſtate to his own juriſdiction, and to keep the provincial juriſdictions in awe, § William the Conqueror eſtabliſhed a conſtant court in the hall of his own palace, called *Aula Regis*, for all matters of right, of crimes, and of finances. This ſingle court executed that buſineſs, which is at preſent divided among the four courts of chancery, king's bench, common pleas, and exchequer. It conſiſted of the chief officers of the king's palace. The *juſticiarius capitalis*, inſtead of the king, preſided in it: and appeals from both the lords courts, and the kings courts, and complaints againſt all inferior judges, were greedily received, and encouraged in it.

Yet during the reigns of the firſt princes of the Norman race, almoſt all ſuits ‖, even thoſe of the higheſt conſequence, as appears from the famous * deciſion againſt the biſhop of Bajeux, brother to the conqueror, were determined in the inferior courts, with a power of appeal to the king's *juſticiarius capitalis*, in *aula regis*.

* Bract. lib. 3. cap. 7. † Glanv. lib. 12. cap. 9.
‡ L. Hen. 1. N° 7. § Bacon voce courts (A.) ‖ Bacon voce court Baron. * Orig. juriſdict. p. 30.

It will be eaſily imagined, that the king could not be very fond of theſe territorial juriſdictions of the lords, or even of the ſheriff courts, which were ſometimes under the influence of the lords. And therefore Henry II. divided the kingdom into ſix circuits, and ſent judges itinerant through the land.

The ignorance of the judges in inferior courts, the variety of cuſtoms introduced by ſo many independent courts, and the management of buſineſs by parties and factions in them, were the pretences for this alteration; but the real cauſe was, the view of humbling the power of the great men in their counties.

Henry was not contented with this; he divided part of the buſineſs of the *aula regis*, or of the court of the *juſticiarius capitalis*, among two new courts, called the king's bench, and the common pleas; the one for criminal, the other for civil matters; and theſe drew to them, not only by appeal, but in the firſt inſtance, many ſuits which had been anciently decided in the counties: and Edward I. who compleated this diviſion, in order to give more ſtate to theſe courts, ſat ſometimes himſelf in the court of king's bench.

The ſame prince *, aſcertained the boundaries of another ſupreme court, which had been raiſed out of the *aula regis*, the court of exchequer. He took opportunities to † abridge the powers of the lords in their own courts. He ‡ invented

* An. 10. Ed. 1. Stat. Rut. † An. 3. Ed. 1. cap. 35.
‡ An. 15. Ed. 1.

a new

a new juriſdiction, to wit, that of the juſtices of peace; which being a wheel within a wheel, tended greatly to diſtract the power of the lords upon their eſtates. And his ſucceſſor took the nomination of all the ſheriffs into his own hands *, ſome of whom † his predeceſſors had been ſo unwary as to make ſheriffs in fee, and of others they had allowed the election to remain in the free-holders, if they inclined to elect.

Edward III. is ſaid to have extended the juriſdiction of the court of chancery; a ſupreme court, which had likewiſe its foundation in the *aula regis*; but which afterwards, by applying the remedies of equity to ſtrict law, and by granting injunctions, came to curb the juriſdiction of the other courts, and to ſwallow up a great part of the buſineſs of the common law.

Upon the diſſolution of the *aula regis*, and the formation of the four great courts out of its ruins, the houſe of peers came to be the ſupreme court of appeal. The king's great council, among the Saxons, had conſiſted chiefly of the great thanes of the kingdom: and as the *aula regis*, among the Normans, had been made up of the officers of the palace, it likewiſe had conſiſted chiefly of the great lords of the kingdom, who were inveſted with the great offices: and when the firſt of theſe courts of dernier reſort was ſunk, and the other divided into other courts, the great lords of the realm being aſſembled by

* An. 9. Ed. 2. cap. 24. † Art. ſup. Cart. Ed. 2. cap. 8.

themſelves, and though in their political capacity they were now become only a part of the parliament, yet in their judicative capacity retaining their ancient diſtinction, they fell naturally, according to the analogy of ancient practice, to be conſidered as the great court of appeal to the nation.

By theſe means the buſineſs of the inferior courts gradually decayed: the king, and the king's courts, by ſtatutes and devices, drew that buſineſs to themſelves: the feudal juriſdictions ſunk: the official juriſdictions roſe: at preſent a landlord cannot hold plea of debt, or treſpaſs, when the debt or damage amounts to forty ſhillings; and a ſheriff is more properly an officer than a judge, and in his county court cannot determine in a debt amounting to forty ſhillings, unleſs in conſequence of a commiſſion, and by a writ of juſticies.

Yet even when the feudal juriſdictions were in general put an end to in England, the remains of them appeared, and with vigour too, in the courts Palatine. The Palatines had anciently their own courts, into which the king's writs could not go, and they had a power of pardoning all murders, treaſons, *&c.* with many other royal powers, and many royal appearances, in which theſe powers were executed. But as it had been the bent of the king, and of his judges, to cruſh in general the courts of the lords, ſo it continued to be the aim of both, till they ſucceeded, to ſubject theſe laſt particular exceptions, as much as poſſible, to the general law of the land.

The

The county Palatine of Pembroke falling into the king's hands *, was taken away by ſtatute. Although Hexam † had by one parliament been acknowledged to be a franchiſe where the king's writ went not, and by another had been named a county Palatine; yet in the reign of queen Elizabeth its authority was ſifted, and its privileges were taken away by parliament. And ‡ in the reign of Charles I. a juriſdiction in the dutchy of Lancaſter, ſimilar to that of the ſtar chamber, was aboliſhed by ſtatute.—Even to the counties Palatine that were allowed to remain, contrivances § were fallen upon, in ſome caſes, to extend the force of the common law. By a ſtatute of Henry VIII. ‖ the county Palatine of Cheſter, which before was not even linked to the political body, was ordered to ſend repreſentatives to parliament; and this ſtatute proceeds on a complaint from the inhabitants of the county, that ſeveral incroachments had been made, upon "the ancient "juriſdictions, liberties, and privileges of the an-"cient county Palatine." Under pretence that juſtice was not exactly adminiſtered in the county Palatine of Cheſter, power was given to the lord chancellor, by a ſtatute of * Henry VIII. to appoint juſtices of the peace, and of goal delivery, within the county of Cheſter. And an after ſtatute of the 27th † of the ſame prince, gave a

* Coke, 4 Inſt. p. 221. † Coke, ibid. 222. ‡ An. 16. Car. 1. chap. 10. § Coke, 4 Inſt. 215, 218. 2 Inſt. 219, 220. ‖ An. 34. Hen. 8. cap. 14. * An. 27. Hen. 8. cap. 5. † An. 27. Hen. 8. cap. 24.

general and important blow to all thoſe private juriſdictions. This ſtatute recites, "That where "divers of the moſt ancient prerogatives, and "authorities of juſtice, appertaining to the impe- "rial crown of this realm, had been ſevered from "the ſame, by ſundry gifts of the king's progeni- "tors, to the great diminution and detriment of "the royal eſtate of the ſame, and to the hin- "derance and great delay of juſtice:" Therefore, it takes from the proprietors of the counties Palatine, the power of pardon, it takes from them the power of naming juſtices of eyre, of aſſize, of peace, and of goal delivery: whatever powers it takes from the proprietors, it gives to the king: and in order to aboliſh even the form of the ancient authority, when the reality was gone, it ordains, that all writs and proceſs within the counties Palatine, ſhall run in the name of the king.

Scots juriſdictions.

Such is the progreſs from territorial to official juriſdictions in England. A progreſs ſimilar in general, though differing in particulars, may be traced in Scotland. The law of the one country is often no more, than a reflection, with ſome variations, of that of the other.

As we have not the knowledge of our antiquities ſo far back as the Engliſh have of theirs, it is impoſſible in our law, to trace the diſtinction between the vaſſals and the freemen, the lords preſiding over the one, and the king's officers over the other. But after that diſtinction was aboliſhed,

aboliſhed, the ſame courts appear equally in the antiquities of both countries.

The kings in Scotland had very early * given away all the crown lands; this made them dependent upon their nobles. The want of property too in feudal times, could not fail to be attended with the want of juriſdiction. And for a very long time, they do not ſeem to have been ſo provident, even in controuling the territorial juriſdictions, as the princes in England were.

Hence they granted conſiderable civil juriſdiction to boroughs and baronies; they granted likewiſe the power of puniſhing with death, to ſuch of the former as they erected into ſheriffdoms, and to ſuch of the latter as they indued *cum foſſa et furca.* They made many of the ſheriffs † chamberlains, conſtables, and other officers of the law hereditary. The king's ſheriff loſt by diſuſe, the right which he anciently had, of being preſent when the lords held their courts ‡, *ad videndum ſi curia recte tractetur.* Hereditary regalities both eccleſiaſtical and civil, were erected, with power to judge even in the four pleas of the crown, and with many other powers almoſt equal to thoſe of the courts palatine in England: and although upon the reformation the eccleſiaſtical regalities might have fallen, the juriſdictions of the church were preſerved § in the hands of private noblemen, when her temporalities were ſeized. Even private hereditary juſticiaries were

* Leg. Malc. 2. † An. 1687. cap. 65. An. 1597. cap. 242.
‡ Stat. Alex. c. cap. 14. § An. 1587. cap. 29.

erected in favour of private persons over their estates: and at last by one grant, the king in a manner surrendered the sword of justice out of his hands, by making the office of the justiciarius of Scotland, an office of inheritance in the family of Argyle.

As these feudal courts, in their constitution, were independent of the king, so in their procedure they were still less dependant upon him, and in a good measure independant of each other. The right of repledging gave a judge a power to * reclaim from another court any person who was subject to his own. Now one baron † could repledge from another. In certain cases a baron could pledge ‡ from the sheriff. The borough could pledge not only from § the sheriff, but from ‖ the justice eyre. And the proprietors of regalities could pledge from * all courts whatever. And not only could the people under these territorial judges be repledged, but when they submitted to other jurisdictions, they † were subject to punishment.

Our kings seem at last to have been sensible of those weaknesses in their government; they became rapacious in their forfeitures, their revocations of the gifts of the crown were frequent, and their attempts to perpetual annexations as frequent.

* Stat. Alex. cap. 4.—Rob. 1. cap. 10. cap. 8. ‡ Balf. p. 40.
‖ Leg. Burg. 55. & 61—It. Just. 12. Skene voce Iter. 12.—Balf. anent Regality. Quon. Attach. cap. 27.—Rob. 1. cap. 32.—Balf. of judges.
† Quon. Attach.
§ An. 1488. cap. 1.
* It. Just. 11—
† Quon. At-

During

During this period, the attempts of the princes to raiſe their own courts above the feudal courts, and the endeavours of the feudal judges, to keep the determination of law matters in the ancient provincial courts, are very obſervable.

The king was ſo far favoured by the ſubordination of the feudal ſyſtem, that there lay an appeal from the baron *, to the ſheriff or his deputies, and from them † to the juſticiary or his deputies, and from the borough ‡ to the chamberlain: a complaint lay § againſt the judge of the regality to the juſticiary; and an appeal from both the juſticiary and the chamberlain, to the king and his council. The parliament originally conſiſted chiefly of the great lords eccleſiaſtical and civil. By the king's council therefore was meant ‖, the parliament when it was ſitting, or ſuch of the members as were attending the king, when it was not ſitting.

From the ſame feudal ſubordination, as the king ſat in judgment himſelf, which he continued ſometimes to do, ſo late as the reign * of James VI. ſo he had at all times, upon a complaint, a power † of bringing the feudal judges, as well as their parties, directly before himſelf and his council, or even *before himſelf, at his empleaſance* as a ‡ ſtatute expreſſes it.

* Reg. Maj. lib. 3. cap. 21 & 22. † An. 1503. cap. 95. ‡ An. 1503. cap. 9 . § Stat. Rob. 2. cap. 13, 1 . Rob. 3. cap. 31. ‖ Skene not. ad Reg. Maj. lib. 1. cap. 3. * Craig, lib. 3. D. 7. N. 12. † Skene voce Sheriff. an. 14 4. cap. 45. an. 1426. cap. 94. ‡ An. 1469. cap. 26.

But when many of the jurisdictions were become hereditary in families, those appeals to the king's courts were of little use to him; appeals to a parliament independant of him were of still less. And complaints directly to himself, were rare from the dread of the territorial jurisdictions, and from the consequences of a defeat. For which reasons, when a regality fell into the king's hands, he came into the practice of subjecting * the people in it to his ordinary judges, and of annexing the regality itself to the royalty; and in a † particular case he stretched the execution of the sheriff into the bounds of the regality. In one reign he sent a new set of judges, called lords of session ‡, to hold courts where he pleased, three times in the year, and forty days at a time. These judges were chosen by the king as he pleased, from among the estates of parliament. All the powers of jurisdiction which had formerly belonged to the king's great council, were given to them. Although an appeal § from the inferior jurisdictions to the parliament, was allowed, yet, as the lords of session gave more attention to private business than a parliament could do, people chose rather to apply to them than to appeal to it; and as they were a committee of parliament, no appeal lay from them ‖ to the parliament. In another reign, under pretence of the short sessions of these lords, the king put

* An. 1449. cap. 26. An. 1455. cap. 43 † An. 1449. cap. 11. ‡ An. 1425. cap. 65. § An. 1471. cap. 41. ‖ An. 1457. cap. 62.

another

another ſet of judges in their place, called * the lords of daily council. Theſe were a fixed court, ſitting continually, as buſineſs occurred, at Edinburgh, or where the king reſided: they were choſen by him: there was no neceſſity for his chuſing them from among the eſtates of parliament: they got all the late powers of the lords of ſeſſion, and which the great council more anciently had. As no appeal had been allowed from the lords of ſeſſion to the parliament, ſo it was underſtood, that no appeal lay from the lords of council to it: and ſtill further, to give leſs importance even to appeals from the juſticiary to parliament, the king, upon a petition to him for an appeal, or, as it is called, a falſing of doom, inſtead of remitting the affair to parliament, remitted it to thirty or forty perſons named by himſelf, who, acccording to the words of the ſtatute †, "had power, as it were, in an par-"liament, to decide, and diſcuſs the ſaid "doom."

So far on the one hand went the endeavours of the princes to raiſe their own courts above the feudal courts. The poſſeſſors of feudal juriſdictions on their ſide again, procured at one time, a law ‡, repeated often § afterwards, that all ſuits ſhould paſs at firſt through their ordinary courts. At another time ‖, that the lords of ſeſſion ſhould not judge in queſtions of heritage,

* An. 1503. cap. 58. † An. 1503. cap. 97. ‡ An. 1424. cap. 27. § An. 1469. cap. 26. An. 1475. cap. 52. ‖ An. 1457. cap. 61.

and that in other queſtions, parties might apply to them or the judges ordinary as they pleaſed. And afterwards *, that appeals from the ſheriff ſhould be diſcuſſed in the county, by a juſtice eyre, conſiſting of the freeholders of the county.

In this ſtruggle betwixt the king and the lords in ſupport of their reſpective juriſdictions, one law both of them readily concurred in, though from far different views. By two ſtatutes in 1455, it was enacted †, that no regalities ſhould afterwards be granted without *deliverance of Parliament*; and that no office ſhould be granted for the future in inheritance at all. This law was favourable to the crown, as it tended to ſecure it againſt the future alienation of its juriſdictions. On the other hand, thoſe already poſſeſt of regalities and heretable offices, ſaw the greater ſplendor ariſing to their families, from the ſingularity of a priviledge, which all others were precluded from procuring. But the views of both were diſappointed by the neceſſities of ſucceeding princes, and the ambition of ſucceeding great families; things took their natural courſe in ſpite of the political prohibition, and regalities and other hereditary offices continued to be granted as formerly. The king and the parliament on the ſucceſſion of every prince repeated the farce of revoking them; but every king added to the number of the grants, and every member of thoſe parliaments who could get ſuch grants, took them.

* An. 1503. cap. 95. † An. 1455. cap. 43, 44.

The

The * lords of ſeſſion once avoided giving a judgment upon the force of the act, but when urged to it in another caſe, they found that the act itſelf was in deſuetude.

But when the feudal ſyſtem abated in the cloſeneſs of its relations, when the dignity of the crown roſe, and when the riſing of the people diminiſhed in ſome degree, the power of thoſe who had moſt intereſt in upholding that ſyſtem, then the feudal juriſdictions yielded to thoſe of the ſovereign.

In the degradations of the feudal ſyſtem, the burroughs, from their tendency to a more general ſyſtem, were always the firſt to give way: they firſt then loſt the power of repledging by diſuſe, and by † ſtatute. The barons followed, and loſt by diſuſe the ſame power; in the time of ‡ Balfour this power in the barons had almoſt intirely diſappeared. Upon the reformation the weakneſs of the eccleſiaſtical regalities made their right of repledging dwindle into a right of ſitting in judgment with the juſticiary, when he had uſed a prior ſeizure or citation.

What the feudal courts loſt, the king's courts acquired. The ſupreme court of council and ſeſſion § was erected by James V. and indued with all the powers, which the lords of ſeſſion or the lords of daily council formerly had, and with many more. Under the titles of extraordinary lords, ſeveral peers of the realm took their ſeats

* Dict. tit. deſuetude. † Ann. 1488. cap. 1. ‡ Balf. p. 19. § 1537. cap. 39.

in

in it; privileges were beſtowed on its members, its forms were preſcribed, its ſeſſions fixed, and regularity, power, and ſplendor conferred upon it. The importance of the conſtitution, was attended with equal importance in the effects of it; for in proceſs of time, this court put an end to appeals * through inferior courts, and by ſuſpenſion or advocation brought cauſes from the loweſt directly to itſelf: it made regalities ſubordinate to it in civil matters: it withdrew † the whole civil buſineſs from the juſticiary: it reduced infeoffments though confirmed ‡ in parliament. It even aſſumed a legiſlative power under pretence of paſſing acts of ſederunt, for the furthering of juſtice before itſelf; and it became a great § doubt among lawyers and politicians, whether its judgments were reviewable in parliament.

In order to balance the feudal juriſdictions even in the ſmalleſt matters, the ſame art which had been uſed in England for the ſame purpoſe, was uſed in Scotland. The inſtitution of ‖ juſtices of peace was introduced by James VI. and their powers were daily extended.

Upon the ſame general plan, the office of juſticiary of Scotland was purchaſed back * by Charles I. from its proprietor. The court belonging to that office was new modelled by

* Skene, voc. ſheriff. Bank. vol. 2. p. 551. † Bank. vol. 2. p. 523. ‡ An. 1567. cap 18. § Sir G. M'kenzie obſ. on act 1457. cap. 62. ‖ An. 1503. cap. 7. * April, 1628.

Charles

Charles II. * and though confined to criminal matters, the juſticiary received new ſplendor in the model. As in thoſe reigns of which we have been juſt ſpeaking, it ſtill maintained its right of judging in the eccleſiaſtical regalities together with the baillie, if he neglected firſt to cite or to ſeize; ſo in the reign of king William, it endeavoured to aſſert the ſame right of judging in laic regalities, together with the lord who had neglected to cite or ſeize the criminal within fifteen days of his committing the fact. The acts of 1693, 1695, and 1702, ſtretch the power of the juſticiary into whatever regalities were in the highlands without ceremony; and the method of extending the ſame into the private juſticiary which the family of Argyle had reſerved to itſelf, when it parted with the office of juſticiary general of Scotland, is moſt curious: The act of † 1693 empowers the king to appoint for two years, commiſſioners of juſticiary for the highlands, and though theſe are not allowed to extend their juriſdiction into the bounds of the private juſticiary, yet the earl of Argyle is obliged to grant a commiſſion to the king's commiſſioners, who under pretence of the earl's commiſſion, are to ſtretch their authority into his bounds. The act ‡ of 1695 renews the commiſſion for three years, and ſtill the earl of Argyle is obliged to concur in it. In this form the commiſſion continued to be renewed, till the year 1702 §, when

* An. 1672. cap. 16. † An. 1693. cap. 39. ‡ An. 1695. cap. 37. § An. 1702. cap. 8.

a ſtatute

a ſtatute varies the expreſſion ſomewhat, only *recommends* it to the duke of Argyle to give his commiſſion to the king's commiſſioners, orders the court to be held in the duke's name as well as the king's, and allows the duke to ſit as preſident in the court. With the antient proprietor of the feudal juriſdiction, the ſhow and the form of authority remained, but the reality and ſubſtance was with the king. And not contented with all this, the court of juſticiary in latter times, took upon it *, to review, as a ſuperior court, the ſentences of all the different regalities.

Yet even when the king's courts were gaining thoſe various ſuperiorities over the feudal courts, theſe laſt were far from being ſunk altogether. Many baronies had ſtill a power of puniſhing with death; many ſheriffdoms and regalities were hereditary, with conſiderable juriſdictions; and the attempts to extend the court of juſticiary into the bounds of the laic regalities, had ended in a few local temporary experiments, and no more.

James VI. formed a plan of putting an end to the heretable juriſdictions of his kingdom: with vivacity enough to form a project, but with little prudence to conduct, and with ſtill leſs conſtancy to perſevere in it, he got an act of parliament paſt †, extolling the wiſdom of his deſign, ordaining that reparation ſhould be made to the private proprietors, and naming commiſſioners, the higheſt perſons of the kingdom, to tranſact with

* Bank. vol. 2. p. 563. † Unprinted rolls of parliament, Jac. VI.

them.

them. All this great apparatus ended in nothing; a few ſheriffdoms were bought in, and ſome other project equally vaunted and equally unſucceſsful came in the place of this.

Charles I. under pretence of the general revocations in the beginning of every reign, made an attack upon all thoſe regalities and heretable offices, which had been granted poſterior to the acts of 1455, prohibiting ſuch grants for the future. He wrote a letter to the lords of ſeſſion, declaring that he meant not to be precluded by the preſcription of the ſtatute 1617, from attacking theſe grants: but being afterwards adviſed of the impropriety of cutting down ſo many grants which had been made and acquieſced in, by ſo many of his anceſtors, which thoſe who got them, thought they were ſecure in taking, and which had paſt from hand to hand by ſales and execution, he deſiſted from his meaſure. Like many other incidents in this unfortunate prince's reign, the unpopularity of the attempt remained with the king, the popularity of dropping it with his miniſters.

Cromwell had enough of the monarch to ſee how inconſiſtent theſe private juriſdictions were, either with the intereſt of the ſupreme power, or the ſafety of the people, but he had too much of the tyrant, to think of making any reparation to the private proprietors, from whom * he took their juriſdictions, but to whom he gave nothing in return.

* Scoball's acts, an. 1654. cap. 9.

In

In this progreſs of the gaining of the kings upon the feudal courts, I hardly take into my view, the act of 1681 *; an act forming propoſitions concerning the moſt antient feudal rights, yet founded on abſtract, not on feudal principles; an act unhinging the rights of the orders of the ſtate, granting no equivalent for thoſe rights, yet aſſerting there is nothing taken from their proprietors; an act, in fine, compoſed in the days of ſlavery, and † repealed in the days of liberty.

The ſtatute of the preſent king came laſt, which aboliſhed ſome, and limited others, of ſuch of the territorial juriſdictions, as were found dangerous to the community; gave their proprietors a juſt equivalent, beſtowed additional elevation upon the members of the ſupreme courts, who beſt could know the laws of their country, and had the moſt intereſt to ſupport them; made the power of judging in general official, and brought the courts in Scotland nearly on the ſame footing with the courts in England.

This ſtatute was plan'd, was paſſed, was executed, and received the thanks of a grateful people within the compaſs of two years. The ward-holding act and the juriſdiction act were the ideas of ‡ one, to whoſe plans of police and of law, lord Bacon, had he ſeen them, would have given the character, which he gave of the laws of another framer of the Britiſh police: That "they were deep and not vulgar, not made

* An. 1681. cap. 18. † An. 1690. cap. 28. ‡ Earl of Hardwicke.

"upon

" upon the ſpur of a particular occaſion for the " preſent; but out of providence of the future; " to make the eſtate of the people ſtill more and " more happy, *after the manner of the legiſlators in* " *ancient and heroical times.*"

It has been urged againſt the laſt of theſe ſtatutes, that hereditary juriſdictions are barriers againſt the power of the crown; and for this the weight of preſident Monteſquieu's authority has been cited. Perverſion of judgment not to reconcile that illuſtrious author's ſentiments! and not to ſee this truth reſulting from ſuch reconciliation; that though hereditary juriſdictions in abſolute monarchies are barriers againſt the crown, even whilſt they form petty tyrannies over the meaner ſubjects; yet in limited monarchies, the abolition of them tends to eſtabliſh, and diffuſe law and liberty.

SECT. II.

ALL barbarous nations are obſerved to have a great deal of ſuperſtition, one benefit ariſing from which, is, that in ſuch nations that ſuperſtition tends highly to inforce the natural principles which produce regard for the ſanction of an oath: legiſlators obſerve this, and endeavour through religion, to ſubject to the rules of juſtice, that people, whom juſtice by herſelf could not bind. Forms of procedure.

Our Saxon anceſtors particularly, took advantage of this circumſtance, and drew the firſt determination

termination of law-ſuits from the ſacred regard paid to an oath. As far back as the reign of * Hlothar and Eadric, when a complaint was preferred againſt a party, he defended himſelf by his own oath, and the oaths of a certain number of compurgators, ſwearing to their belief of his credibility.

This form of procedure might be tolerable in civil caſes, but in criminal caſes the temptation to perjury was higher; therefore in theſe, the ordeal was † afterwards introduced; and exorciſm, and ‡ many other awful ceremonies were uſed in it, the more effectually to diſcover the truth.

Abſurd as theſe methods of carrying on law-ſuits may appear, they were neither of them deſtitute of foundation in the political ſituation of the people. As the Saxons were very regular and minute in the diviſions of their people, as every family had an eye on the neighbouring families in it proper diviſion, and as the compurgators could be taken only from that diviſion, it is more than probable, that their oaths to the credibility of a party, gave a tolerable certainty that he was worthy of credit; and in the ordeal again, as the defender was allowed § to compound with the accuſer, the ordeal was only an expedient to force him to give ſatisfaction to the perſon he had injured.

* Leg. Hloth. & Ead. N. 4, &c. poſtrem. Inæ. Athelſt. N. 21.

‡ Spell. Gloſſ. ordalium.

† Lex.

§ Lex.

During

During the whole Saxon period then, theſe were the only forms in which controverſies in law were decided.

But when the Normans came over and ſettled in England; the mixture of foreigners and natives, the mutual hatred they bore to each other, the extenſions of a new ſyſtem, the convulſions in the old one, and the daily increaſe of numbers and of intercourſe, made people diſtruſt, and juſtly, the oaths both of parties and compurgators.

It was very natutal for a ſoldier, when he ſaw another going to carry off his property by a falſe oath, to challenge him to fight; the ſuperſtition of the times too, made people readily imagine, that heaven would interpoſe for the ſide that had right; and the frequent injuſtice ariſing from the perjury of parties, ſtood in need of a check. Theſe things had introduced the deciſion of law ſuits by combat into Normandy, and it was by the Normans * tranſplanted into England: probably too, it was the example of the ſame Normans which made it find its way into Scotland, as the Saxon conqueſt or the Saxon example had formerly introduced the oath and ordeal into it.

However abſurd this form of maintaining actions may appear, it was like the foregoing not altogether deſtitute of reaſon. At a time when the paſſions of men were furious, and the voice of the laws weak, it was right to prevent general

* L. Gul. 1. Wilk. p. 218. Cod. leg. vet. in Wilk. p. 288.

quarrels

quarrels by particular combats, and to ſubject to rules in a court, that ſword, which might have raged abroad without any.

During the reigns of the Norman princes, there appears to have been a ſtruggle betwixt the clergy on the one hand, in ſupport of the oath and ordeal, and the laity on the other, in ſupport of the form of the combat; for though the oath and the ordeal remained * in the publick ordonances, and though ſome biſhops † took a right in their charters of uſing the ordeal, yet it appears, from almoſt every page of Doomſday, that the claimants were continually offering battle in ſupport of their rights.

But when more regular governments came to be ſettled, the uncertainty ariſing from ſuch rules of judgment, was eaſily remarked.——The trial by oath went into diſuſe.—Henry III. in England, by a ſpecial precept ‡ to his itinerant judges, prohibited the trial by ordeal; William the Lyon in Scotland §, reſtrained the abuſe of it, by diſcharging it in the courts of the lords, unleſs in preſence of his own judges: and Alexander II. ‖ prohibited it altogether.—Henry II. in England *, and David I. Scotland †, although they were not allowed to aboliſh the duel entirely, yet granted to the defendant the privilege either to fight, or to throw himſelf upon an aſſize of

* L. Gul. 1. 11, 16, & 71. † Brad. v. 1. p. 147. ‡ Orig. Jurid. p. 87. § Stat. Will. cap. 16. ‖ Stat. Alex. 2. cap. 7. * Glanv. lib. 2. cap. 7. † Reg. Maj. lib. 4. cap. 1. quon. attach. cap. 61.

twelve men. And even in this alternative, the duel was limited almoſt as ſoon as the alternative was introduced: For as in the courſe of theſe papers it has been often obſerved, that all declenſions in the feudal manners took place firſt in the burroughs, ſo many of king John's * charters to burroughs contain this clauſe, *nullus eorum faciat duellum*; and David I. † exempted burgeſſes in almoſt every caſe, from the neceſſity of fighting: The ſame exemption was afterwards extended by degrees to other people: David II. ‡ granted to gentlemen the privilege of fighting by a champion.

Laws, eſpecially laws ſo much connected with the manners of a people as theſe were, take a long time before they are entirely rooted out; and therefore, notwithſtanding theſe various diſcouragements, it continued ſtill poſſible, to trace theſe forms of procedure in the law.—As ſome § biſhops in England had taken the right of ordeal in their charters, that right could not be taken from them but by publick law.—The combat ‖ laſted in England, with the alternative of an aſſize, for ſeveral reigns: One of the ſons of Edward III. * wrote a treatiſe on the form and the rules of the duel; and in one particular caſe it was uſed as late as the reign † of queen Elizabeth, and in Scotland it was uſed without any alternative, in capital crimes, where there was a

* Brad. of Bur. append. p. 8. † Leg. Burg. cap. 14.
‡ Stat. David 2. cap. 28. § Spellm. gloſſ. p. 435. ‖ Brac. lil. 3. cap. 18. Segar. fol. 157. * Spellm. gloſſ. campus.
† Spellm. gloſſ. voc. campus, p. 103.

defi-

deficiency of other proof, in the time * of Robert III, and even later, as appears from the authority † of Skene:—The trial by oath continued in Scotland, in the reign of David II. ‡ when either no proof was offered againſt the defendant, or § the proof was difficult to be brought: and in England it remains at this day in the wager at law. By wager at law, the defendant, where apparent proof is not brought by the plaintiff, is allowed to clear himſelf by his own oath, and the oath of as many credible perſons, averring they believe he ſwears true, as the court ſhall appoint.

With theſe exceptions, however, the form of procedure by aſſize continually gained ground, till it came to be firmly eſtabliſhed both in England and in Scotland.

But a remarkable difference ariſing from the different conſtitutions of the ſuperior courts in England and Scotland, ſoon appeared in the two countries.

The court of ſeſſion by James I. and II. the court of daily council by James IV. and the court of council and ſeſſion by James V. were all made to conſiſt of ſuch a number of judges as were ſufficient for an aſſize, and were therefore ſuppoſed to ſupply the place of one.

In the ſheriff courts and in the juſticiary courts, the trial by juries it is likely, remained as late as the reign ‖ of James IV. but when the juſticiary was

* Stat. Rob. 3 cap. 16. † Skene duellum. ‡ Stat. David. 2. cap. 4. § Stat. David. 2. cap. 1. N. 6. ‖ An. 1503. cap. 95.

ſup-

ſupplanted in his civil juriſdiction, by a more numerous ſet of judges, the practice of thoſe judges, to judge without a jury, ſet an example to the inferior courts likewiſe, and the trial by jury in civil caſes fell into diſuſe.

But the remains of the antient form of trial by jury in civil caſes are ſtill to be ſeen, in the procedure * upon the three retourable and the four unretourable brieves.

From the ſame principle that the court of ſeſſion is a jury, it is, that in one particular caſe †, it is neceſſitated to take the whole proof in preſence of the whole judges: and that all proofs allowed by the court, ought regularly to be, and are generally reported to the whole judges.

The example of the civil courts led the inferior criminal ones, to judge in ſmaller crimes without the aſſiſtance of a jury; but the court of juſticiary being ſupreme, takes examples from its ancient cuſtoms alone, and according to theſe continues ſtill to judge by an aſſize.

The ſame extent and refinement of ſociety, which removed men from particular to general courts, and which made forms of trial depending upon chance, yield to the certain and uniform deciſions of law, produced another alteration in the form of procedure at law.

In all ſimple nations it is obſervable, that as there are a great many ceremonies uſed in conſtituting an obligation, or making good a transfer,

* Bank. vol. 2. p. 554. † Forgery.

ſo there are certain ſtrict and fixed forms uſed in all proceedings at law. Among ſuch a people, the tranſactions of mankind are not very intricate or numerous; all the claims ariſing from theſe tranſactions are eaſily reduceable into ſtrict forms; they are accordingly reduced into them, and judgment is given in the preciſe terms of theſe forms.

Thus in the Roman law, originally, all actions were *ſtricti juris*, the Patricians invented the *legis actiones*, they reduced every claim that could be preferred into a certain brief, or what is in that law called a formula, and upon that formula, judgment *ſtricti juris* was given.

The ſame cauſe produced the ſame effect, both in England and in Scotland. Originally, in both countries, every right had its particular brief *, iſſuing from the chancery, in which it was to be made good; and at that time no judgments could be given except they applied preciſely to the terms of the brief. This in England went ſo far, that before the reign of Edward I. whenever there was a new caſe, that ſeemed to require a remedy, the chancery referred the plaintiff to petition the next parliament; but becauſe this multiplied petitions to parliament, a ſtatute was paſt, authorizing the clerks of chancery to invent a new writ if the caſe was ſimilar to any caſe falling under a former writ, or if the clerks could not agree, ordering the caſe to be hung up till in the next parliament a writ ſhould be contrived for

* Skene breve. Fitz. de nat. brev.

it,

it. The ſtatute is in theſe * words: "Et quotieſ-
"cunque de cætero evenerit, in chancellar, quod
"in uno caſu reperitur breve, et in conſimili caſu
"cadente ſub eodem jure, et ſimili indigente re-
"medio, non reperitur; concordent clerici de can-
"cellaria, in brevi faciendo, vel atterminent que-
"rentes in proximum parliamentum, et ſcribantur
"caſus in quibus concordare non poſſunt, et refe-
"rant eos ad proximum parliamentum et de con-
"ſenſu juriſperitorum fiat breve, ne contingat de
"cætero, quod curia domini regis deficiat conque-
"rentibus, in juſticia perquirenda." And in Scot-
land, by an act of † James IV. it was ordained,
"That na brieves, nor uthers letters, be given to na
"partie, bot after the forme of the brieves of the
"chancelarie uſed in all times of before." And
by another ‡ of James VI. it was ordained, "That
"nae writer to the ſignet ſhould take upon hand,
"to wryte, or put in forme, any manner of ſigna-
"ture or letter to be paſt his majeſty's hand,
"that conteins noveltie contrair the accuſtomed
"ſtile and forme."

But when men become more numerous, their intercourſe is greater, their actions are more complex, and conſequently their claims are leſs ſimple; for rights ſupported on new modifications of the actions of mankind, cannot be ſubjected to briefs invented at a time when theſe modifications were unknown; and as there is a greater latitude in the form of the claim, ſo there is a greater latitude in the views of the court.

* Weſtm. 2. cap. 24. † An. 1491. cap. 24. ‡ An. 1585 cap. 13.

Hence in the Roman law, the distinction betwixt actions *stricti juris* and *bonæ fidei*; the directions of the prætor in these last to determine, *uti inter bonos et æquos agier oportet*; the office of the prætor himself *ad corrigendum et temperandum juris rigorem*; and the invention of actions *præscriptis verbis*; hence in England, the permission given to the chancery of forming new writs; the invention of actions on the case; and the jurisdiction of the chancery itself considered as a court of equity. Hence, in Scotland, the gradual extension * within these two hundred years, in the natures of summonses; and the powers of the clerks to the signet; the acts before answer granted by all † courts; the general interlocutors inferring only in general the pains of law, passed on the relevancy of criminal libels; and the junction of a court of equity and of strict law, in the constitution of the college of justice.

It is thus that laws gradually alter and gradually refine. Men complain of the multiplication of laws, of forms, and of courts; they do not see, (to use the words of an author ‡ who saw through the whole spirit of law) *that the trouble, expence, delays, and even dangers of judiciary proceedings, are the price which every subject pays for his liberty.*

* Craig, lib. 2. D. 17. par. 25. & Stair, lib. 4. tit. 1. p. 2.
† Bank. vol. 2. p. 556. ‡ Esprit de loix, lib. 6. cap. 2.

CHAP.

CHAP. VIII.

Hiſtory of the Conſtitution of Parliament.

FEW ſubjects of enquiry have more engaged the writings and the paſſions of men in Great Britain, than thoſe regarding the conſtitution of parliament. But while ſome have directed their enquiries only to exalt the power of the crown, and others only to exalt that of the commons, few have tried the juſtneſs of their notions, by the only object which could throw light on the queſtion, or beſtow certainty upon their concluſions. The object I mean is that feudal ſyſtem, which varying in its ſtate, and extenſive in all its operations, made the conſtitution of parliament follow its gradual changes, in the ſame manner that it cauſed the nature of tenures, the power of alienation, the force of entails, the rules of ſucceſſion, the forms of conveyance, and the property of juriſdiction, to vary with all its variations.

From the obligation of the king's vaſſals to be ſuitors in his court is generally derived the origin of parliaments: the concluſion ſeems too haſty: did it follow from the vaſſal's being the object of juriſdiction himſelf in the king's court, or even from his attending there as a peer to his brother vaſſals in a judicative capacity, that therefore he was entitled to become a law-maker himſelf, to adviſe and reprove that lord paramount, to whoſe court he owed attendance, only as an object, or an in-

ment of juſtice, or to controul his ſovereign in the adminiſtration of his government? parliaments then muſt have ariſen upon ſome further foundation.

The ſupreme government in all uncivilized nations is exceeding lax. If the chief ruler is general in war and judge in peace, he is *general only* from the dread of the enemy, and becauſe in the time of war, it becomes the intereſt of all to ſubmit to one. He is *judge only* from the dread, that without a common arbitrator, the country would become, even in time of peace, a ſcene of blood. But when queſtions concerning the ſociety in general come to be conſulted or determined, the power of conſulting and of determining is conceived to lie in the ſociety itſelf, or in the heads of the tribes of it. As one of the ſociety the chief ruler has a right to be preſent at the deliberation, and as the chief perſon of the ſociety he aſſerts and is allowed, the right of preſiding in it; but his power is merely that of preſiding, attended with the influence which, perhaps, his preſiding may give him, and nothing more. If even as general in war his ſoldiers are diſobedient to him; if even as judge in peace he is not able to reſtrain his people from outrages; it can hardly be thought, that he ſhould have a power of regulating the publick concerns of the ſociety without the publick conſent. A general aſſembly of a nation, or of the heads of its tribes, ariſes, therefore, from the natural courſe of things; and the

the powers of ſuch an aſſembly, muſt in the ſame natural courſe be very extenſive.

Perhaps with regard to uncivilized nations, all reaſonings and concluſions from political views are fallacious, becauſe uncivilized nations are generally incapable of forming ſuch views; yet, if theſe were attended to among the feudal nations at all, it could not but occur, that poſſeſſed as the king was of the military ſervice of his vaſſals, of the power of judging them in his own courts, and of applying moſt of the profits of thoſe courts to his own uſe; if he had likewiſe had the excluſive political part of the government in his hands, the military, judicative, fiſcal, and political powers, would all have centered in his perſon; a junction which could not fail to be productive of deſpotiſm. But the feudal manners and ſpirit tended to an oligarchy: It was not likely that chieftains, who in the countries from which they originally came, were ſo little inferior to the prince, as to be called his *Comites*, that is, his companions; and who in the conquered countries were aſſerting the ſame military, judicative, and fiſcal powers upon their own eſtates; would give up the ſole political adminiſtration to a perſon, the value of whoſe life was eſtimated by the law like any other perſon's, and whoſe murder was forgiven on the payment of a few * thouſand thrimſas by his murderer. Even in an age dark in political views, it required no great reach of thought in

* Jud. civ. Lund.

the chieftains to foreſee the danger to themſelves of joining ſo many powers in the prince. Their former equality gave them a right to be of his counſels. The rule of the fiefs, that the vaſſal ſhould give intelligence and advice to his lord againſt his enemies, made this right a duty. And the frequent occaſions of attending in a judicative capacity, it muſt be owned, gave them the better opportunity of aſſerting that right, under pretence of performing the duties of vaſſals and of judges.

In the feudal ſettlements the perſons attending the king's great councils, called ſince parliaments, were the *proceres regni*, thoſe who had originally been his companions, and were now his immediate vaſſals, whether civil or eccleſiaſtical, and the more conſiderable officers of his court and crown. I ſpeak at preſent not of Britain, but of Normandy, of all France, of the Low-Countries, of Germany, of Italy, and of the whole feudal world. In the antiquities of none of thoſe counties, are the commons or the burgeſſes to be heard of as members of the great councils; the immediate vaſſals eccleſiaſtical and civil of the ſovereign, and the officers either civil or military of the ſovereign, are the only perſons appearing in them.

Barons. They who think that during the reigns of the Saxon kings, and of the firſt princes of the Norman race, there were no parliaments in England, attend little to the ſtate of the feudal ſyſtem at that time; but they who think that the commons ſat during thoſe reigns in parliament attend ſtill leſs to it. In the Saxon times the nation

was

was compoſed of the lords of charterland both civil and eccleſiaſtical and the people under them, of the counts or earls and the allodial people under them; the people under the lords were either tenants at will, or for a few lives: ſlaves in a manner to their maſters, they could not pretend to become rulers over their countrymen: Thoſe again, who were under the counts, or the allodial people, were not even tied to the community by the feudal bond, and therefore could have no ſuffrage in the feudal councils; ſo that * the lords eccleſiaſtical and civil, as holding of the crown, and the great officers in virtue of their offices, as well as in virtue of their being generally vaſſals to the crown †, together with the ſages of the law, either the king's judges or the king's council, called *Sapientes*, were the only conſtituent members of the Saxon parliaments. This will appear obvious to any one, who takes a view of the preambles to the laws of moſt of the Saxon kings. We have no records of the laws of Scotland in thoſe diſtant ages; but from the authorities of our hiſtorians, the *proceres regni*, and the *ſapientes* or the ſages of the law, were the firſt conſtituent members of our parliaments.

During the reigns of the firſt Norman princes, the commons were continued ‡ in the ſame ſubjection; the allodial people were indeed brought into the feudal ſyſtem, but then from the book of doomſday it appears, that the whole lands of the

* Spellm. gloſſ. parliamentum and remains. † Cart. vol. I. p. 241. ‡. Brad. pref. hiſt.—and of Bur.

country were either the demeſne of the king and cultivated by his ſlaves, or tenants at will; or were held by the great barons, or the counts, or the church; and that in like manner the burroughs were either demeſnes of the king; or were held by the barons, or the counts, or the church. From the ſame book it appears, that in the time of the conqueror, the whole lands of England, excluſive of thoſe of the church, were poſſeſſed by 700 immediate vaſſals of the crown, an infinite number of men under them of a ſlaviſh condition, called *ſervi*, *villani*, *bordarii*, and a very few ſoccage tenants of poor and trifling poſſeſſions. As all who held of the king in capite ſat in parliament, the nation was at that time repreſented by a body as numerous as at preſent, and by the proprietors of almoſt the whole land of the kingdom, if one can apply the word repreſentation to men who ſat in parliament, not as repreſenting others, an idea at that time unknown, but in their own right, not to protect the people from ſlavery, but to preſerve themſelves againſt tyranny.

Commons. Calculated as the feudal ſyſtem was, to bar the alienation of land property, it could not however withſtand the natural neceſſities and deſires of mankind; it was impoſſible in the nature of things that theſe 700 original vaſſals could keep their fiefs for ever intire: creditors were clamorous, younger children were to be provided for, and therefore, in ſpite of all the reſtraints of the feudal law, partitions of eſtates were made, either

ther voluntarily by their proprietors, or by force of law.

This increaſed the number of the king's vaſſals in the counties.

Again, although in the Saxon times the inhabitants of the towns or the burgwaren were in the loweſt condition, yet for the benefit of trade they had formed themſelves into communities and gilds: though in a manner the property of others, and ſubject to the officers and magiſtrates of thoſe in whoſe dominion they were; yet with reſpect to each other in matters of trade, they were allowed to have their own laws and police. As the Normans were further advanced in the arts of life, than the Saxons had been, the inhabitants of the towns grew into ſome eſtimation ſoon after the conqueſt: the Norman kings and lords beſtowed upon thoſe communities and gilds which they found erected for the benefit of their members only as traders, the privileges of men and of freemen: they enfranchiſed the inhabitants; to the communities, by way of appanage, they gave territories in property; they farmed to them their own cenſus and taxes; they withdrew the officers, who in right of the king or the lords, had governed the town, or collected its taxes, and allowed the inhabitants courts, and officers, and magiſtrates of their own. The charter of enfranchiſement of Great Yarmouth by king John, points out moſt of theſe alterations; and relates *, *Quod, progenitores domini regis tenuerunt, predictum*

* Brady Bur. append,

burgum, in manibus ſuis propriis, percipiendo omnia proficua inde excuntia, de portu, uſque ad tempus Joannis regis qui conceſſit villam, burgenſibus villæ, ad feodi firmam. The gift of the territory in perpetuity, and the feofarm of the cenſus and taxes in perpetuity, conſtituted a fief not in the particular members of the community, but in the community itſelf in general. This fief was ſaid to hold by a tenure, from the ſubject of it, called burgage; the community repreſented by the governing part of the burrough was the vaſſal; and when, either by the original right of the king, or by a right derived to the king from a lord, the king was ſuperior in this fief, that governing part was the immediate vaſſal of the crown, and if the members of it obſerved the feudal principles and orders, they owed attendance in parliament, not as barons, but as vaſſals to the crown, and if not in perſon, from the inconveniency of their too numerous appearance, yet by repreſentatives elected by themſelves.

Lord Coke ſays *, the king ſhall not have "primer ſeiſin of land holden in burgage, as "ſome have ſaid; for that is no tenure in capite." Madox †, in his *Firma Burgi*, brings a number of authorities to ſhow, that burgage was accounted a tenure in capite. It may be true with lord Coke, that it was not a tenure in capite, to the effect to carry primer ſeiſin, but ſurely it can bear no doubt, that it was a tenure in capite,

* Coke Lyttlet. ſect. 103. † Mad. form. burg. cap. 1. ſect. 8.

to

to the effect of obliging to attendance in parliament——In the time of the conqueror, none but vaſſals by military tenures were entitled to ſit in parliament, becauſe at that time all the vaſſals in capite who had their lands in deſcent, held by military tenures; but when many of theſe tenures were changed into tenure by ſoccage, the perſons poſſeſſed of them ſtill ſate in parliament, becauſe, on the one hand, they were not *vilani*, and on the other hand, they were the king's immediate vaſſals. In the ſame manner, when ſome time after the conqueſt, the tenure of burroughs was changed, or rather was created, and their communities were made to hold freely of the crown, inſtead of being demeſne, can it be doubted, that their members or the repreſentatives of their members, ſat likewiſe in parliament? they were not *vilani* more than the ſoccage tenants; and they held immediately, that is in capite, of the king equally with them, The preamble to the ſtatutes of Robert III. ſays, "ſummonitis, more ſolito, burgen-"ſibus, qui de domino rege *tenent in capite.*"

The alteration made in the condition of theſe inhabitants, then, tended to increaſe the number of the king's vaſſals in burroughs.

Add to this partition of the original fiefs, and to this erection of the burgage fiefs, that the crown came further into the cuſtom, of granting its demeſne lands, both in the counties, and in the burroughs, in fief.

This was a third ſource of increaſe to the number of the king's vaſſals.

These changes produced a great alteration in the appearance of the orders of the state; for as the ancient summons to parliament ordered all those to come *, *qui de nobis tenent in capite*, the vassals who had a right to come thither, once few and powerful, were now become numerous beyond measure, and many of them poor.

This attendance at a time when the same advantage did not accrue from it as at present, and when parliaments were called much oftener than they are at present, was by these last, complained of as a burden. There are instances in the history of England, of barons denying their tenures to avoid the attendance, of burroughs denying their title, of sheriffs returning, that in whole counties they could not get a burgess to send up; and lord Coke's authority †, that charters granted of exemption from parliament, are against law, shows that such charters were asked, and were given. In order to relieve those who were unable to bear the burden of attendance, it was therefore ordained, that the great barons should attend in person, but the small barons and the burgesses only by their representatives; and it is likely that a representation from the burgesses, as early as the burgesses came into parliament, had paved the way for a representation from the small barons. At the same time a distinction was made in the form of summoning the greater and the smaller vassals; the former were summoned each *sigillatim*

* Mag chart. Joan. & preamb. to stat. of Rob. 3. † Coke 4. inst. 43.

per

per literas regis, the latter only in general *per vicecomites*.

This alteration in reſpect to the perſons ſummoned, and the manner of ſummoning to parliament, was probably made by ſtatute in the reign of king John. The record of the ſtatute is loſt, together with the other ſtatutes of his reign; but the form of the diſtinction in the ſummons is preſerved, in the *Magna charta* of that prince. And in the writs of his ſon Henry III. the ſheriffs are directed to return the knights of the ſhire, and the burgeſſes.

The like alteration happened in Scotland, though at ſomewhat a later period, as the declenſion of the ſtrict feudal ſyſtem came always later in this country than in England. The record of the ſtatute is preſerved in the year 1427*. By that ſtatute it was declared, that the ſmall barons and free tenants needed not come to parliament, provided they ſent commiſſioners from the ſhires, but that the king ſhould ſummon the great barons, and church-men, by his ſpecial precept.

Theſe laws bringing the repreſentatives of the ſhires and of the burroughs into parliament, laid the foundation of the power of the commons, in Great Britain.

The great number of members in the Engliſh parliament made it difficult, in all the perambulations of parliaments, to find one room capable of holding the whole members; and therefore they

* An. 1427. cap. 101.

came

came to be divided into two houſes. The members of the Scotch parliament, on the contrary, being leſs numerous, the ſame difficulty of finding a room large enough did not occur; and therefore, even after the introduction of the commons, the whole members ſat in one houſe, and made but one aſſembly.

It has been ſaid, that the privilege of ſitting in parliament was given to commiſſioners of ſhires, in England, by Simon de Montfort, to ſecure him in his power. It has been ſaid, that the ſame privilege was given to the commiſſioners for burroughs, by Edward I. in order to procure from them ſupplies, when he was in war with France, and foreſaw it from Scotland. The miſtake ariſes from attending too much to political, and too little to natural and to feudal views. The feudal ſyſtem, ſlow and regular in its movements, was not to be whirled about, in ſubſerviency to miniſters, or even to exigencies. The ranks of the ſtate, intitled to government, were fixed in the original conſtitution; gradual alterations in the conſtitution might produce gradual alterations in the ranks of the ſtate, and accordingly, the gradual infranchiſement of the burroughs, the gradual diſmembering of the great baronies, and the gradual diſtribution of the demeſne lands of the crown, brought the burgeſſes and the freeholders into parliament; but that new ranks ſhould be made, by a political nod, to ſtart up at once, in order to deprive thoſe of government, who had poſſeſſed it for centuries, is not to

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be credited, in that ſyſtem, which of all others, was the moſt exact, in aſcertaining the orders of men. If the commons were brought into parliament, to ſerve a political purpoſe, in England, what was the political purpoſe, and where was the Montfort, or the Edward, who brought them into parliament in Scotland?

Peers.

The ſame diſſipation of land property, which brought the commons into parliament, produced a great alteration in the nature of the nobility, intitled to ſit there.

Originally, dukes, earls, and barons were no other than officers appointed over certain diſtricts, the poſſeſſion of which gave them a title to certain emoluments and privileges, and ſubjected them to certain duties. One of theſe privileges, and likewiſe duties, was attendance in parliament. It has been ſhown, that originally feudal grants, were not even hereditary: as ſoon then, as a duke, earl, or baron was ſtripped by the prince, of power over his diſtrict, he ceaſed to be an officer; he owed no longer attendance in parliament, and the perſon who was put in his place in the province, took his place in the great council: afterwards, theſe offices came to be hereditary, and none could be ſtripped of them, except for their crimes; but ſtill, if a perſon ſtripped himſelf of his office, by giving away, or ſelling his fief, it is obvious, by a continuation of the ſame principles, that he ceaſed to be a feudal officer; he could not enjoy the privileges attached to a ſubject which he had given

given away, nor render duties in return for that fief which another enjoyed. Hence it appears, that the feudal peerage was originally territorial, not attached to the perſon of the man, but to the poſſeſſion of the feudal eſtate. The caſtle of Arundel conferring an earldom on the proprietor of it, is ſaid to be a remain of the old law, in this reſpect, in England: and * the late eſſays on Britiſh antiquities give us an inſtance, in Scotland, of an † earldom ſold for money, by which ſale, all the honours attending it, were transferred to the purchaſer.

This conſtitution might laſt as long as there were few ſales of fiefs, and as long as only powerful families or perſons were the purchaſers: but when in the progreſs of luxury, alienations became frequent, and through the ſame progreſs mean people were enabled to become purchaſers; it was impoſſible, that either the pride of the nobility, or the ſplendor of the kingdom, could ſuffer ſo unnatural a mixture. The peerage then ceaſed to paſs with the fief: the king, in order to prevent the body from expiring, created peers himſelf; theſe ſat with the ancient peers by preſcription; and the dignity of peerage from being feudal, territorial, and official, became allodial, perſonal, and honorary.

The author of the late Eſſays on Britiſh Antiquities, has traced the progreſs of this alteration with an accuracy that equally entertains and inſtructs. From his enquiries it appears, that "the

* P. 85. † Earldom of Wigton.

"firſt

" firſt form of the creation of an earl, was that " of a grant of an office over a county.——When " by the multiplication of earls, the earldoms " were become more numerous than the counties, " the form was to erect a particular eſtate into " an earldom, or county; which was all that was " neceſſary, to beſtow upon the proprietor, the " territorial dignity —Afterwards, when the no- " tion of perſonal honour crept in; certain ſo- " lemnities were uſed at the creation of a peer, " ſuch as girding him with a ſword, covering his " head with a cap of honour and circle of gold, " all of them marks of perſonal reſpect.—And " now, both in England and Scotland, the notion " of territorial dignity being quite worn out, an " earl's patent is ſo framed, as to import a mere " perſonal dignity, without relation either to of- " fice, or to land."

The erection of the houſe of commons in England, whoſe intereſts being to ſupport the people, were oppoſite to thoſe of the lords; and the introduction of the new nobility, who owing their riſe to the crown, were devoted to it; tended much to weaken the power of the ancient barons. At an æra when the commons had riſen upon the barons, and yet had not quite ſunk them, ſo that both balanced and weakened each other, Henry VIII. was the moſt abſolute monarch that ever ſat on the Engliſh throne. At an æra when the commons had riſen upon both the king and the peerage, Charles I. was in a ſtate, the weakeſt that a king of England had ever been reduced to.

The

The ſimilar conſtitutions of parliament in England and Scotland, by the introduction of the commons, and of the new nobility, ought to have had, it would be thought, ſimilar effects in both countries; yet they had not. In England, the commons roſe immediately to vaſt power: In Scotland they never attained any power in the legiſlature, and it is only ſince the revolution, they attained even common freedom.

Many things contributed to this difference.

The moſt general and important cauſe was the different circumſtances of the two nations themſelves: England was a trading country, and though originally the land property was ingroſſed by the great nobles, yet in the progreſs of trade, the commons bought from thoſe nobles, great part of their lands: but power follows property: the ſame cauſe which made the nobility powerful originally, made the commons powerful afterwards. In Scotland, on the other hand, we had little or no commerce; the land property was ingroſſed by the nobility, and it continued to remain ſo, as long as we had parliaments: the ſame cauſe then, which raiſed the commons in the one country, depreſſed them in the country.

Again, the commons in England forming an aſſembly ſeparate from that of the peers, became a body more diſtinguiſhed by themſelves: they reared up rights and privileges peculiar to their aſſembly: once made a diſtinct order in the conſtitution of government, they ſtruggled to ballance the peers, and having ballanced them, they

ſtruggled

ſtruggled next to overcome them: being taken from the commons, they were favoured by them, and favoured the commons in return. The knights of ſhires, and the burgeſſes in Scotland, on the contrary, continued all along to ſit in the ſame houſe with the peers: the nation, carried away with the ſplendor of theſe laſt, loſt ſight of their own repreſentatives; and the repreſentatives themſelves, impoſed upon by the ſame ſplendor, loſt the idea of their own importance. There could be no balance where there was no diſtinction of aſſemblies: the commons could ſet up no diſtinct rights and privileges in a ſingle body, of which they only made a part: and not favoured by the people, they would not favour the people in return.

Again, by the ſtatute *Quia Emptores* in England, upon the diſmembering of a fief, the new purchaſers were made to hold not of the alienor, but of the chief lord; and therefore when the king's vaſſals were allowed to alienate, all the purchaſers from them were made to hold directly of the crown: whereas, in Scotland, as the ſtatute *Quia Emptores* did not take effect, many of the purchaſers held of the lords from whom they purchaſed, ſo that the crown vaſſals were not multiplied by the addition of all the new purchaſers.—Further, in England, by an act of * Henry VI. every free-holder poſſeſſed of land of forty ſhillings of preſent rent, was intitled to vote at elections, which law ſtands to this day: whereas,

* An. 8. Hen. 6. chap. 7.

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in Scotland, by an act of James * VI. none were intitled to vote in the counties, who had not a forty shilling land, not of present rent, but of old extent, holding of the king. By an act of † Charles II. those voting on church lands were obliged to have 1600 *l.* Scots of present rent. By another act in that ‡ reign, voters were obliged to have either a forty shilling land of old extent, or 400 *l.* Scots of valued rent. And by later statutes still greater attention is required to the purity of rolls, so circumscribed in their nature, and where intrusion and abuse would be so provoking. ——Lastly, by repeated resolutions of the house of commons in England, it has been determined, where prescription has not fixed the manner of electing in particular boroughs, that the election of members for boroughs, shall be, not in the common council, but in the whole body of the burgesses; whereas, in Scotland, the election for a borough lies in the common council, and not in the whole body of burgesses.

From these different circumstances, it has happened, that while there are above 30,000 voters in some particular counties in England, there are not above 3000 voters in the whole kingdom of Scotland, free-holders and common council men included.

The constitution of Scotland, till incorporated with that of England, was in fact a mixture of monarchy and oligarchy: the nation consisted of

* An. 1587. cap. 114. † An. 1661. cap. 35. ‡ An. 1681. cap. 21.

a commonality without the privilege of chuſing their own repreſentatives; of a gentry intitled indeed to repreſent by election, but unable to ſerve the nation; and of a nobility, who oppreſſed the one, and deſpiſed both.

In this ſituation, the repreſentatives of the commons, diſcouraged with their own inſignificancy, either did not attend the parliament, or ſurrendered their privileges when in it. It appears by the acts of 1457, and 1503, that though the act of 1427 had given the free holders a power of ſending repreſentatives to parliament, yet none, or few, were ſent: and when the rolls of parliament * are looked into, it appears that during more than 70 years preceding that called in 1560, moſt parliaments were attended by no repreſentative barons at all, the reſt by three or four, and once I think by twelve at the utmoſt.

The erection of the lords of articles, a court committee, which, under pretence of preparing buſineſs for the parliament, admitted, and excluded what they pleaſed, adnihilated almoſt the conſtitution of that body. Is it then to be wondered at, that while the Engliſh parliament, in the reign of Charles II. were arraigning the conduct of that king and his miniſters, the Scotch parliament were pouring forth, to a prince not beloved by their nation, addreſſes, filled with adulations, to a miniſter † who was hated by themſelves.

The revolution firſt brought other maxims into our government, and the union gave other

* Keith hiſt. p. 146. & rot. parl. † Duke of Lauderdale.

rights

rights to our part of the legiſlature; ſo that now our lords and commons being incorporated with thoſe of the Engliſh, the conſtitution of Scotland is ſettled upon that juſt poiſe, betwixt monarchy, ariſtocracy, and democracy, which has made the conſtitution of England the wonder of mankind.

Whether the limited number of the Scotch electors, or the extended number of the Engliſh, is the moſt advantageous, is doubtful. For if the former is more eaſily managed by a miniſter, the latter is more eaſily driven into fury by a faction. And though it is true, that what concerns all, ſhould be judged by all, yet it is equally juſt, that thoſe who have the largeſt ſhare of the property, ſhould likewiſe have the largeſt ſhare of that legiſlature, which is to diſpoſe of it.

In the declenſions of almoſt every part of the feudal ſyſtem, the Engliſh have gone before us: at the diſtance ſometimes of one, and ſometimes of many centuries, we follow. However diſtant, at preſent, the proſpect may appear, there is no impoſſibility, in a future age, that that limitation of electors, which ſubſiſts at preſent, from the lingering of the feudal ſyſtem amongſt us, may give way, to the more extended, and allodial right of election, which takes place among the Engliſh.

FINIS.