WORKS

OF

SIR WILLIAM JONES.

WITE

THE LIFE OF THE AUTHOR,

BY

LORD TEIGNMOUTH.

IN THIRTEEN VOLUMES.

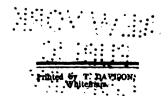
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LAWS OF MENU,

SON OF BRAHMA,

(CONTINUED.)

CHAPTER THE NINTH.

On Judicature; on Law, Private and Criminal; and on the Commercial and Servile Classes.

- 1. ' I NOW will propound the immemorial
- duties of man and woman, who must both
- fremain firm in the legal path, whether united
- or separated.
- 2. Day and night must women be held by
- their protectors in a state of dependence; but
- in lawful and innocent recreations, though
- frather addicted to them, they may be left at
- ' their own disposal.
- 3. 'Their fathers protect them in childhood;
- their husbands protect them in youth; their
- ' fons protect them in age: a woman is never
- ' fit for independence.

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- 4. 'Reprehensible is the father, who gives
- onot his daughter in marriage at the proper
- time; and the husband, who approaches not
- ' his wife in due season; reprehensible also is
- the fon, who protects not his mother after the
- death of her lord.
 - 5. 'Women must, above all, be restrained
- from the smallest illicit gratification; for, not
- being thus restrained, they bring sorrow on
- both families:
 - 6. ' Let husbands consider this as the supreme
- law, ordained for all classes; and let them,
- ' how weak foever, diligently keep their wives
- ' under lawful restrictions;
 - 7. 'For he, who preserves his wife from
- ' vice, preserves his offspring from suspicion of
- bastardy, his ancient usages from neglect, his
- family from difgrace, himself from anguish, and
- his duty from violation.
- 8. 'The husband, after conception by his
- wife, becomes himself an embryo, and is born
- a second time here below; for which reason
- 4 the wife is called jáyá, fince by her (jáyaté)
- he is born again:
 - 9. 'Now the wife brings forth a fon endued
- with similar qualities to those of the father;
- · fo that, with a view to an excellent offspring,
- ' he must vigilantly guard his wife.
 - 10. 'No man, indeed, can wholly restrain

- women by violent measures; but, by these expedients, they may be restrained:
- 11. Let the husband keep his wife employed in the collection and expenditure of wealth,
- in purification and female duty, in the pre-
- e paration of daily food, and the superintend-
- ence of household utenfils.
- 12. By confinement at home, even under
- affectionate and observant guardians, they are
- onot fecure; but those women are truly secure,
- who are guarded by their own good inclina-
- f tions.
- 13. 'Drinking Spirituous liquor, affociating
- with evil persons, absence from her husband,
- rambling abroad, unfeafonable fleep, and
- dwelling in the house of another, are six
- faults which bring infamy on a married wo-
- man:
- 14. Such women examine not beauty, nor
- opay attention to age; whether their lover be
- handsome or ugly, they think it is enough
- that he is a man, and purfue their pleafures.
- 15. 'Through their passion for men, their
- " mutable temper, their want of settled affection,
- and their perverse nature (let them be guard-
- ed in this world ever so well) they soon be-
- come alienated from their husbands.
- 16. 'Yet should their husbands be diligently
- careful in guarding them; though they well

- know the disposition, with which the lord of creation formed them:
- 17. ' MENU allotted to fuch women a love of
- their bed, of their feat, and of ornament, im-
- pure appetites, wrath, weak flexibility, defire
- of mischief, and bad conduct.
 - 18. Women have no business with the
- texts of the Veda; thus is the law fully fettled:
- having, therefore, no evidence of law, and no
- ' knowledge of expiatory texts, finful women
- ' must be as foul as falsehood itself; and this is
- ' a fixed rule.
- 19. 'To this effect many texts, which may
- ' show their true disposition, are chanted in the.
- 'Védas: hear now their expiation for fin.
- 20. "That pure blood, which my mother
- " defiled by adulterous defire, frequenting the
- " houses of other men, and violating her duty
- " to her lord, that blood may my father pu-
- "rify!" Such is the tenour of the holy text,
- which her fon, who knows her guilt, must pro-
- ' nounce for her;
- 21. ' And this expiation has been declared
- for every unbecoming thought, which en-
- ters her mind, concerning infidelity to her
- husband; since that is the beginning of adul-
- fery.
- 22. 'Whatever be the qualities of the man,
- with whom a woman is united by lawful

- 'marriage, fuch qualities even she assumes;
- ' like a river united with the fea.
 - 23. 'ACSHAMA'LA', a woman of the lowest
- ' birth, being thus united to VASISHT'HA, and
- 'Sa'rangi', being united to Mandapa'la,
- were entitled to very high honour:
 - 24. 'These, and other semales of low birth,
- have attained eminence in this world by the
- respective good qualities of their lords.
 - 25. 'Thus has the law, ever pure, been pro-
- e pounded for the civil conduct of men and
- women: hear, next, the laws concerning
- children, by obedience to which may happi-
- e nets be attained in this and the future life.
 - 26. 'WHEN good women, united with hus-
- bands in expectation of progeny, eminently
- fortunate and worthy of reverence, irradiate
- the houses of their lords, between them and
- goddesses of abundance there is no diversity
- "whatever.
 - 27. 'The production of children, the nur-
 - ture of them, when produced, and the daily
 - 's superintendence of domestick affairs, are pe-
 - culiar to the wife:
 - 28. 'From the wife alone proceed offspring,
 - 6 good household management, folicitous atten-
 - ' tion, most exquisite caresses, and that heavenly
 - beatitude, which she obtains for the manes of
 - ancestors, and for the busband himself.

- s
- 29. 'She, who deserts not her lord, but
- keeps in subjection to him her heart, her
- fipeech, and her body, shall attain his mansion
- in heaven, and, by the virtuous in this world,
- be called Sádhwì, or good and faithful;
 - 30. But a wife, by disloyalty to her hus-
- band, shall incur disgrace in this life, and be
- born in the next from the womb of a shakal,
- f or be tormented with horrible diseases, which
- f punish vice.
 - 31. 'LEARN now that excellent law, univer-
- fally falutary, which was declared, concerning
- issue, by great and good sages formerly born,
 - 32. 'They consider the male issue of a wo-
- man as the fon of the lord; but, on the fub-
- s ject of that lord, a difference of opinion is
- 'mentioned in the Véda; some giving that
- s name to the real procreator of the child, and
- others applying it to the married possessor of
- the woman.
- 33. 'The woman is confidered in law as the
- field, and the man as the grain: now vegeta-
- f ble bodies are formed by the united operation
- of the feed and the field.
- 34. In some cases the prolifick power of
- the male is chiefly distinguished; in others,
- f the receptacle of the female; but, when both
- fare equal in dignity, the offspring is most
- highly esteemed:

- 35. 'In general, as between the male and
- female powers of procreation, the male is held
- fuperiour; fince the offspring of all procreant
- beings is diftinguished by marks of the male power.
 - 36. 'Whatever be the quality of feed, scat-
- tered in a field prepared in due season, a plant
- of the same quality springs in that field, with
- ' peculiar visible properties.
- 37. 'Certainly this earth is called the pri-
- ' meval womb of many beings; but the feed
- exhibits not in its vegetation any properties
- of the womb.
 - 38. 'On earth here below, even in the same
- · ploughed field, feeds of many different forms,
- having been fown by husbandmen in the
- 'proper feason, vegetate according to their
- 'nature:
 - 39. 'Riceplants, mature in fixty days, and
- those, which require transplantation, mudga,
- ' tila, másha, barley, leaks, and sugarcanes all
- ' spring up according to the seeds.
- 40. 'That one plant should be fown, and
- another produced, cannot happen: whatever
- feed may be fown, even that produces its
- ' proper stem.
 - 41. 'Never must it be sown in another
- 'man's field by him, who has natural good
- fense, who has been well instructed, who

- 'knows the Véda and its Angas, who desires long life:
- 42. They, who are acquainted with past times, have preserved, on this subject, holy
- ftrains chanted by every breeze, declaring,
- 'that "feed must not be sown in the field of another man."
- 43. As the arrow of that hunter is vain,
- who shoots it into the wound, which another
- had made just before in the antelope, thus
- instantly perishes the seed, which a man
- f throws into the foil of another:
 - 44. Sages, who know former times, consi-
- der this earth (Prit'bivi) as the wife of king
- F PRITHU; and thus they pronounce cultivated
- 4 land to be the property of him, who cut away
- the wood, or who cleared and tilled it; and the
- antelope, of the first hunter, who mortally
- wounded it.
- 45. 'Then only is a man perfect, when he
- consists of three persons united, his wife, him-
- felf, and his son; and thus have learned Bráb-
- " mens announced this maxim: " The husband
- " is even one person with his wife," far all do-
- · mestick and religious, not for all civil, purposes.
 - 46. 'Neither by fale nor defertion can a
- wife be released from her husband: thus we
- fully acknowledge the law enacted of old by
- the lord of creatures.

- 47. 'Once is the partition of an inheritance
- made; once is a damsel given in marriage;
- ' and once does a man fay " I give:" thefe
- three are, by good men, done once for all and
- · irrevocably.
 - 48. As with cows, mares, female camels,
- ' flave girls, milch buffalos, shegoats, and ewes,
- ' it is not the owner of the bull or other father,
- who owns the offspring, even thus is it with
- the wives of others.
 - 49. 'They, who have no property in the
- field, but, having grain in their poffession,
- fow it in foil owned by another, can receive
- on advantage whatever from the corn, which
- may be produced:
 - 50. 'Should a bull beget a hundred calves
- on cows not owned by his master, those
- calves belong folely to the proprietors of
- ' the cows; and the strength of the bull was
- ' wasted:
 - 51. 'Thus men, who have no marital pro-
- ' perty in women, but fow in the fields owned
- by others, may raise up fruit to the husbands;
- but the procreator can have no advantage
- from it.
- 52. 'Unless there be a special agreement
- between the owners of the land and of the
- feed, the fruit belongs clearly to the land-

- owner; for the receptacle is more important
 than the feed:
 - 53. But the owners of the feed and of the
 - foil may be considered in this world as joint
 - owners of the crop, which they agree, by
 - fpecial compact in confideration of the feed,
 - to divide between them.
 - 54. Whatever man owns a field, if seed,
 - conveyed into it by water or wind, should
 - germinate, the plant belongs to the land-
 - owner: the mere fower takes not the fruit,
 - 55. 'Such is the law concerning the off-
 - fpring of cows, and mares, of female camels,
 - goats, and sheep, of slave girls, hens, and
 - ' milch buffalos, unless there be a special agree-
 - " ment.
 - 56. 'Thus has the comparative importance
 - of the foil and the feed been declared to you:
 - · I will next propound the law concerning
 - women, who have no issue by their husbands.
 - 57. 'The wife of an elder brother is con-
 - fidered as mother-in-law to the younger; and
 - the wife of the younger as daughter-in-law to
 - the elder:
 - 58. 'The elder brother, amorously ap-
 - f proaching the wife of the younger, and the
 - 4 younger, careffing the wife of the elder, are
 - both degraded, even though anthorized by the

- 'husband or spiritual guide, except when such wife has no issue.
- 59. On failure of issue by the husband, if he be of the fervile class, the desired offspring
- 'may be procreated, either by his brother or
- ' some other sapinda, on the wife, who has been
- ' duly authorized:
- 60. 'Sprinkled with clarified butter, filent, 'in the night, let the kinfman thus appointed beget one son, but a second by no means, on the widow or childles wife:
- 61. 'Some sages, learned in the laws con-'cerning women, thinking it possible, that the 'great object of that appointment may not be
- obtained by the birth of a fingle son, are of opi-
- 'nion, that the wife and appointed kinfman
- ' may legally procreate a second.
- 62. 'The first object of the appointment being obtained according to law, both the brother and the widow must live together like a father and a daughter by affinity.
- 63. 'Either brother, appointed for this pur'pose, who deviates from the strict rule, and
 'acts from carnal desire, shall be degraded, as
 'having desiled the bed of his daughter-in-law
 'or of his father.
- 64. 'By men of twiceborn classes no widow, 'or childless wife, must be authorized to con'ceive by any other than her lord; for they,

- who authorize her to conceive by any other,
- ' violate the primeval law.
 - 65. Such a commission to a brother or other
- e near kinsman is nowhere mentioned in the
- nuptial texts of the Veda; nor is the marriage
- of a widow even named in the laws con-
- cerning marriage.
 - 66. 'This practice, fit only for cattle, is re-
- e prehended by learned Brahmens; yet it is de-
- clared to have been the practice even of men,
- while Ve'na had fovereign power:
 - 67. ' He, possessing the whole earth, and
- thence only called the chief of fage monarchs,
- gave rife to a confusion of classes, when his
- · intellect became weak through lust.
 - 68. Since his time the virtuous disapprove
- of that man, who, through delufion of mind,
- directs a widow to receive the caresses of another
- for the fake of progeny.
 - 69. ' The damfel, indeed, whose husband
- fhall die after troth verbally plighted, but
- before consummation, his brother shall take in
- * marriage according to this rule:
 - 70. 'Having espoused her in due form of
- law, the being clad in a white robe, and pure
- in her moral conduct, let him approach her
- once in each proper season, and until issue
- · be had.
 - 71. LET no man of fense, who has once

- ' given his daughter to a suitor, give her again
- to another; for he, who gives away his
- ' daughter, whom he had before given, incurs
- the guilt and fine of speaking falsely in a
- ' cause concerning mankind,
- 72. 'EVEN though a man have married a 'young woman in legal form, yet he may aban-
- don her, if he find her blemished, afflicted
- with disease, or previously deflowered, and
- ' given to him with fraud:
- 73. 'If any man give a faulty damfel in marriage, without disclosing her blemish, the
- 'husband may annul that act of her illminded
- ' giver.
- 74. 'SHOULD a man have business abroad,
- · let him affure a fit maintenance to his wife,
- ' and then refide for a time in a foreign country;
- ' fince a wife, even though virtuous, may be
- ' tempted to act amis, if she be distressed by
- ' want of sublistence:
- 75. While her husband, having settled her maintenance, resides abroad, let her continue
- firm in religious austerities; but, if he leave
- her no support, let her subsist by spinning and
- other blameless arts.
- 76. If he live abroad on account of some
- facred duty, let her wait for him eight
- years; if on account of knowledge or fame,

- fix; if on account of pleasure, three: after
- * those terms have expired, she must follow him.
 - 77. 'For a whole year let a husband bear
- with his wife, who treats him with aversion;
- but, after a year, let him deprive her of hersepa-
- rate property, and cease to cohabit with her.
 - 78. 'She, who neglects her lord, though ad-
- dicted to gaming, fond of spirituous liquors,
- or diseased, must be deserted for three months,
- and deprived of her ornaments and household
- furniture:
 - 79. 'But she, who is averse from a mad hus-
- band, or a deadly finner, or an eunuch, or one
- without manly strength, or one afflicted with
- fuch maladies as punish crimes, must neither
- be deserted nor stripped of her property.
- 80. ' A WIFE, who drinks any spirituous
- eliquors, who acts immorally, who shows
- 'hatred to her lord, who is incurably diseased,
- who is mischievous, who wastes his property,
- may at all times be superseded by another
- wife.
- 81. A barren wife may be superseded by
- another in the eighth year: she, whose chil-
- dren are all dead, in the tenth; she, who
- brings forth only daughters, in the eleventh;
- fhe, who speaks unkindly, without delay;
 - 82. But she, who, though afflicted with

- 'illness, is beloved and virtuous, must never be
 - · difgraced, though she may be superseded by
- another wife with her own confent.
 - 83. If a wife, legally superseded, shall de-
- part in wrath from the house, she must either
- instantly be confined, or abandoned in the
- ' presence of the whole family:
- 84. But she, who, having been forbidden,
- 'addicts herself to intoxicating liquor even at
- 'jubilees, or mixes in crowds at theatres, must
- ' be fined fix racticas of gold.
 - 85. 'WHEN twiceborn men take wives, both
- of their own class and others, the precedence,
- honour, and habitation of those wives, must
- be fettled according to the order of their
- ' classes:
 - 86. 'To all fuch married men, the wives of
- the fame class only (not wives of a different
- 'class by any means) must perform the duty
- of personal attendance, and the daily business
- relating to acts of religion;
- 87. ' For he, who foolishly causes those
- duties to be performed by any other than his
- wife of the same class, when she is near at
- hand, has been immemorially confidered as a
- ' mere Chandála begotten on a Bráhment.
- 88. 'To an excellent and handsome youth
- of the same class, let every man give his
- daughter in marriage, according to law; even

- though she have not attained her age of eight years:
- 89. But it is better, that the damsel,
- ' though marriageable, should stay at home till
- her death, than that he should ever give her
- in marriage to a bridegroom void of excellent qualities.
- 90. 'Three years let a damsel wait, though
- 's she be marriageable; but, after that term, let
- her chuse for herself a bridegroom of equal rank:
- 91. 'If, not being given in marriage, she 'chuse her bridegroom, neither she, nor the 'youth chosen, commits any offence;
 - 92. 'But a damsel, thus electing her hus-
- band, shall not carry with her the ornaments,
- which she received from her father, nor those
- ' given by her mother or brethren: if the carry
- them away, she commits theft.
 - 93. 'He, who takes to wife a damfel of full
- 'age, shall not give a nuptial present to her
- father; fince the father lost his dominion
- over her, by detaining her at a time, when
- fhe might have been a parent.
- 94. 'A man, aged thirty years, may marry
- a girl of twelve, if he find one dear to his
- heart; or a man of twenty-four years, a
- damsel of eight: but, if he finish his studentship
- earlier, and the duties of his next order would

- diately.
- 95. A wife, given by the gods, who are named in the bridal texts, let the husband te-
- e ceive and support constantly, if she be vir-
- tuous, though he married her not from inclination: such conduct will please the gods.
- 96. To be mothers were women created; and to be fathers, men; religious rites, therefore, are ordained in the Vėda to be performed by the hulband together with the wife.
- 97. If a nuptial gratuity has actually been given to a damfel, and he, who gave it, should die before marriage, the damfel shall be married to his brother, if she consent;
- 98. But even a man of the fervile class ought not to receive a gratuity, when he gives his daughter in marriage; since a father, who takes a fee on that occasion, tacitly sells his daughter.
- 99. Neither ancients nor moderns, who were good men, have ever given a damfel in marriage, after she had been promised to another man;
- 160. Nor, even in former creations, have we heard the virtuous approve the tacit sale of a daughter for a price, under the name of a nuptial gratuity.
 - 101. "Let mutual fidelity continue till death:"
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this, in few words, may be confidered as the

fupreme law between husband and wife.

102. Let a man and woman, united by

marriage, constantly beware, lest, at any

time difunited, they violate their mutual

fidelity.

- 103. 'Thus has been declared to you the
- law, abounding in the purest affection, for the conduct of man and wife; together with
- the practice of raising up offspring to a husband of the servile class on failure of issue by him be-
- e gotten: learn now the law of inheritance.
 - 104. ' After the death of the father and the
- mother, the brothers, being assembled, may
- divide among themselves the paternal and
- " maternal estate; but they have no power over
- it, while their parents live, unless the father
- · chuse to distribute it.
 - 105. The eldest brother may take entire
- possession of the patrimony; and the others
- ' may live under him, as they lived under their
- father, unless they chuse to be separated.
 - 106. By the eldest, at the moment of his
- birth, the father, having begotten a fon, dif-
- charges his debt to his own progenitors; the
- eldest son, therefore, ought before partition to
- manage the whole patrimony:
- 107. 'That son alone, by whose birth he
- discharges his debt, and through whom he

- attains immortality, was begotten from a
- fense of duty: all the rest are considered by
- the wife as begotten from love of pleasure.
 - 108. Let the father alone support his sons;
- ' and the first born, his younger brothers; and
- 'let them behave to the eldest, according to
- ' law, as children should behave to their father.
 - 109. 'The first born, if virtuous, exalts the
- family, or, if vitious, destroys it: the first born
- is in this world the most respectable; and the
- ' good never treat him with disdain.
- 110. 'If an elder brother act, as an elder
- brother ought, he is to be revered as a mother,
- as a father; and, even if he have not the be-
- haviour of a good elder brother, he should be
- 'respected as a maternal uncle, or other kins-
- 'man.
- 111. Either let them thus live together,
- or, if they defire feparately to perform religious
- 'rites, let them live apart; fince religious du-
- ties are multiplied in separate houses, their
- 'sfeparation is, therefore, legal and even laud-
- 'able.
- 112. 'The portion deducted for the eldest is
- 'a twentieth part of the heritage, with the best
- of all the chattels; for the middlemost, half
- of that, or a fortieth; for the youngest, a quarter of it, or an eightieth.
 - 113. The eldest and youngest respectively

- take their just mentioned portions; and, if
- there be more than one between them, each
- of the intermediate fons has the mean portion, or the fortieth.
- 114. 'Of all the goods collected, let the first born, if be be transcendantly learned and vir-
- twous, take the best article, whatever is most
- excellent in its kind, and the best of ten cows or the like:
- 115. But, among brothers equally skilled in performing their several duties, there is no
- deduction of the best in ten, or the most excel-
- ' lent chattel; though some trifle, as a mark of
- greater veneration, should be given to the first born.
- 116. 'If a deduction be thus made, let equal
- fhares of the residue be ascertained and re-
- ceived; but, if there be no deduction, the
- 'shares must be distributed in this manner:
 - 117. Let the eldest have a double share,
- and the next born, a share and a half, if they
- clearly surpass the rest in virtue and learning;
- the younger fons must have each a share: if
- all be equal in good qualities, they must all take
- * share and share alike.
- 118. 'To the unmarried daughters by the 'same mother, let their brothers give portions
- out of their own allotments respectively, ac-
- cording to the classes of their several mothers:

- e let each give a fourth part of his own distinct
- fhare; and they, who refuse to give it, shall
- be degraded.
 - 119. Let them never divide the value of a
- fingle goat or sheep, or a single beast with
- uncloven hoofs; a fingle goat or sheep re-
- 'maining after an equal distribution belongs to
- the first born.
 - 120. Should a younger brother in the man-
- " ner before mentioned have begotten a son on the
- wife of his deceased elder brother, the division
- 'must then be made equally between that son,
- who represents the deceased, and his natural fa-
- ther: thus is the law fettled.
- 121. 'The representative is not so far wholly
- ' substituted by law in the place of the deceased
- ' principal, as to have the portion of an elder son;
- and the principal became a father in confe-
- 'quence of the procreation by his younger bro-
- ther; the son, therefore, is entitled by law to
- an equal share, but not to a double portion.
- 122. A younger son being born of a first
- 'married wife, after an elder fon had been
- born of a wife last married, but of a lower
- " class, it may be a doubt in that case, how the
- division shall be made:
- 123. Let the fon, born of the elder wife,
- 'take one most excellent bull deducted from
 - ' the inheritance: the next excellent bulls are

- for those, who were born first, but are inferior
- on account of their mothers, who were married last.
- 124. 'A fon, indeed, who was first born, and brought forth by the wife first married.
- may take, if learned and virtuous, one bull and
- 'fifteen cows; and the other fons may then
- take, each in right of his feveral mother;
- fuch is the fixed rule.
 - 125. 'As between fons, born of wives equal
- in their class and without any other distinction,
- there can be no feniority in right of the mo-
- ther; but the feniority ordained by law, is
- according to the birth.
 - 126. 'The right of invoking INDRA by the
- texts, called fwabrábmanyá, depends on actual
- ' priority of birth; and of twins also, if any such
- be conceived among different wives, the eldeft
- is he, who was first actually born.
- 127. 'He, who has no fon, may appoint his
- daughter in this manner to raise up a son for
- him, faying: "the male child, who shall be
- " born from her in wedlock, shall be mine for
- " the purpose of performing my obsequies."
 - 128. In this manner Dacsha himfelf, lord
- 6 of created beings, anciently appointed all his
- 'fifty daughters to raise up sons to him, for the
- fake of multiplying his race:
 - 129. ' He gave ten to DHERMA, thirteen to

- CASYAPA, twenty-seven to Soma, king of
- · Brahmens and medical plants, after doing ho-
- onour to them with an affectionate heart.
 - 130. The fon of a man is even as himself;
- and as the fon, fuch is the daughter thus ap-
- ' pointed: how then, if he bave no son, can any
- inherit his property, but a daughter, who is
- closely united with his own foul?
 - 131. Property, given to the mother on
- her marriage, is inherited by her unmarried
- daughter; and the fon of a daughter, appoint-
- ed in the manner just mentioned, shall inherit
- the whole estate of her father, who leaves no
- fon by himself begotten:
 - 132. 'The fon, however, of fuch a daughter,
- who fucceeds to all the wealth of her father
- dying without a fon, must offer two funeral
- cakes, one to his own father, and one to the
- ' father of his mother.
- 133. Between a fon's fon and the fon of
- 'fuch a daughter, there is no difference in law;
- fince their father and mother both sprang
- from the body of the same man:
- 134. 'But, a daughter having been appoint-
- ed to produce a fon for her father, and a fon,
- ' begotten by bimself, being afterwards born, the
- 'division of the heritage must in that case be
- 'equal; fince there is no right of primogeni-
- ' ture for a woman.

- 135. Should a daughter, thus appointed to raise up a son for her father, die by any accident without a son, the husband of that daughter may, without hesitation, possess himfels of her property.
- 136. By that male child, whom a daughter thus appointed, either by an implied intention or a plain declaration, shall produce from an
- ' husband of an equal class, the maternal grand-
- father becomes in law the father of a fon;
- ! let that fon give the funeral cake and possess the inheritance.
- 137. 'By a fon, a man obtains victory over all people; by a fon's fon, he enjoys immer-tality; and, afterwards, by the fon of that grandfon, he reaches the folar abode.
- 138. 'Since the son (tráyaté) delivers his father from the hell named put, he was, 'therefore, called puttra by BRAHMA' himsels:
- 139. 'Now between the sons of his son and of his daughter thus appointed, there subsists in this world no difference; for even the son of such a daughter delivers him in the next, like the son of his son.
- 140. 'Let the son of such a daughter offer the first suneral cake to his mother; the second to her father; the third, to her paternal grandfather,
 - 141. 'Or the man, to whom a fon has been

- egiven, according to a fubsequent law, adorned
- with every virtue, that fon shall take a fifth
- or fixth part of the heritage, though brought
- from a different family.
- 142. A given fon must never claim the
- family and estate of his natural father: the
- funeral cake follows the family and estate:
- but of him, who has given away his fon, the
- funeral oblation is extinct.
 - 143. 'THE son of a wife, not authorized to
- have iffue by another, and the fon begotten.
- by the brother of the husband, on a wife, who
- has a fon then living, are both unworthy of
- the heritage; one being the child of an adul-
- terer, and the other produced through mere
- · luft.
 - 144. 'Even the son of a wife duly authorized,
- onot begotten according to the law already pro-
- pounded, is unworthy of the paternal estate;
- for he was procreated by an outcast:
- 145. But the fon legally begotten on a wife,
- authorized for the purpose before mentioned,
- ' may inherit in all respects, if he he virtuous and
- e learned, as a fon begotten by the husband;
- fince in that case the seed and the produce be-
- long of right to the owner of the field.
- 146. 'He, who keeps a fixed and moveable
- estate of his deceased brother, maintains the
- widow, and raises up a son to that brother,

- must give to that son, at the age of sisteen, the
- whole of his brother's divided property.
 - 147. 'Should a wife, even though legally
- authorized, produce a fon by the brother, or
- any other fapinda, of her husband, that fon, if
- begotten with amorous embraces, and tokens of
- impure desire, the sages proclaim baseborn
- and incapable of inheriting.
 - 148. 'THIS law, which has preceded, must be
- understood of a distribution among sons be-
- gotten on women of the same class: hear now
- the law concerning fons by several women of
- different classes.
- 149. 'If there be four wives of a Brábmen
- in the direct order of the classes, and sons are
- oproduced by them all, this is the rule of par-
- tition among them:
 - 150. 'The chief fervant in husbandry, the
- bull kept for impregnating cows, the riding
- horse or carriage, the ring and other ornaments,
- and the principal messuage, shall be deducted
- from the inheritance and given to the Bráb-
- " men son, together with a larger share by way
- of preeminence.
- 151. Let the Brahmen take three shares of
- the refidue; the son of the Cshatriya wife,
- two shares; the son of the Vaisya wife, a share
- and a half; and the fon of the Sudra wife,
- may take one share.

- 152. 'Or, if no deduction be made, let some
- person learned in the law divide the whole
- collected estate into ten parts, and make a
- · legal distribution by this following rule:
 - 153. 'Let the son of the Brábman' take four
- parts; the fon of the Cshatriya, three; let the
- ' son of the Vaifyá have two parts; let the son
- of the Súdra take a single part, if he be vir-
- tuous.
 - 154. 'But whether the Brahmen have fons,
- or have no fons, by wives of the three first
- classes, no more than a tenth part must be
- ' given to the son of a Súdra.
- 155. 'The son of a Bráhmen, a Csbatriyá, or
- ' a Vaisyá by a woman of the servile class, shall
- s inherit no part of the estate, unless be be vir-
- tuous; nor jointly with other sons, unless his mo-
- ther was lawfully married: whatever his fa-
- 'ther may give him, let that be his own.
- 156. 'All the fons of twiceborn men, pro-
- 'duced by wives of the same class, must divide
- the heritage equally, after the younger bro-
- thers have given the first born his deducted
- allotment.
- 157. 'For a Sudra is ordained a wife of his
- own class, and no other: all, produced by her,
- I shall have equal shares, though she have a
- hundred fons.
 - 158. 'Or the twelve fons of men, whom

- MENU, sprung from the Self-existent, has
- named, fix are kinfmen and heirs; fix, not
- heirs, except to their own fathers, but kinfmen.
 - 159. 'The fon begotten by a man himself
- in lawful wedlock, the fon of his wife begotten
- in the manner before described, a son given to
- him, a fon made or adopted, a fon of concealed
- birth, or whose real father cannot be known, and
- a son rejected by bis natural parents, are the
- fix kinfmen and heirs:
 - 160. 'The fon of a young woman unmarried,
- the fon of a pregnant bride, a fon bought, a
- fon by a twice married woman, a fon felf-
- given, and a son by a Súdra, are the six kins-
- men, but not heirs to collaterals.
 - 161. 'Such advantage, as a man would gain,
- who should attempt to pass deep water in a
- boat made of woven reeds, that father obtains,
- who passes the gloom of death, leaving only
- contemptible fons, who are the eleven, or at least
- · the fix, last mentioned.
- 162. 'If the two heirs of one man be the
- fon of his own body and a fon of his wife by
- a kinsman, the former of whom was begotten
- · after bis recovery from an illness thought incura-
- ble, each of the fons, exclusively of the other,
- fhall fucceed to the whole estate of his natural
- father.
 - 163. 'The fon of his own body is the fole

- heir to his estate, but, that all evil may be removed, let him allow a maintenance to the reft:
- 164. And, when the fon of the body has taken an account of the paternal inheritance. 'let him give a fixth part of it to the fon of the wife begotten by a kinfman, before his father's recovery; or a fifth part, if that fon be
- eminently virtuous. 165. The fon of the body, and the fon of • the wife may succeed immediately to the pa-'ternal estate in the manner just mentioned; but the ten other fons can only succeed in order to the family duties and to their share of the 'inheritance, those last named being excluded by eny one of the preceding.
 - 166. 'Him, whom a man has begotten on his own wedded wife, let him know to be the first in rank, as the son of his body.
 - 167. 'He, who was begotten, according to · law, on the wife of a man deceased, or im-' potent, or disordered, after due authority given to her, is called the lawful fon of the wife.
 - 168. 'He, whom his father, or mother with ber husband's assent, gives to another as his fon, provided that the donee have no iffue, if the boy be of the fame class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water.

- 169. He is confidered as a fon made or
- adopted, whom a man takes as his own fon,
- the boy being equal in class, endued with filial
- virtues, acquainted with the merit of perform-
- ing obsequies to bis adopter, and with the fin of omitting them.
- 170. In whose mansions soever a male
- child shall be brought forth by a married wo-
- man, whose husband has long been absent, if the
- e real father cannot be discovered, but if it be
- probable that be was of an equal class, that child
- belongs to the lord of the unfaithful wife, and
- is called a fon of concealed birth in his man-
- fion.
- 171. A boy, whom a man receives as his
- own son, after he has been deserted with-
- out just cause by his parents, or by either of
- them, if one be dead, is called a fon rejected.
- 172. 'A fon, whom the daughter of any
- * man privately brings forth in the house of her
- father, if she afterwards marry her lover, is
- described as a son begotten on an unmarried
- girl.
 - 173. 'If a pregnant young woman marry,
- whether her pregnancy be known or unknown.
- s the male child in her womb belongs to the
- bridegroom, and is called a fon received with
- his bride.
 - 174. He is called a fon bought, whom a

- ' man, for the fake of having a fon to perform his
- obsequies, purchases from his father and mo-
- ther, whether the boy be equal or unequal to
- himself in good qualities, for in class all adopted fons must be equal.
 - 175. 'He, whom a woman, either forsaken
- by her lord or a widow, conceived by a fecond
- 'husband, whom she took by her own desire,
- ' though against law, is called the son of a wo-
- ' man twice married:
- 176. 'If, on ber second marriage, she be still
- 'a virgin, or if she left her husband under the
- age of puberty and return to him at his full
- ' age, she must again perform the nuptial cere-
- ' mony, either with her second, or her young and
- ' deferted, husband.
- 177. He, who has lost his parents, or been
- 'abandoned by them without just cause, and
- offers himself to a man as bis son, is called a
- ' fon selfgiven.
- 178. A fon, begotten through lust on a Sk-
- ' dra by a man of the priestly class, is even as
- 'a corpse, though alive, and is thence called in
- 'law a living corpse:
- 179. 'But a fon, begotten by a man of the
- ' servile class on his female slave, or on the fe-
- 'male flave of his male flave, may take a
- 's share of the heritage, if permitted by the other
- ' fous: thus is the law established.

- 18a. These cleven sons (the son of the wife,
- and the rest as enumerated) are allowed by
- wise legislators to be substitutes in order for
- fons of the body, for the fake of preventing a
- failure of obsequies;
- 181. 'Though such, as are called sons for
- that purpose, but were produced from the
- manhood of others, belong in truth to the fa-
- ther, from whose manhood they severally
- fprang, and to no other, except by a just siction of law.
- 182. If, among several brothers of the
- whole blood, one have a fon born, Menu
- pronounces them all fathers of a male child
- by means of that fon; so that, if such nephew
- " would be the heir, the uncles have no power to
- adopt sons:
- 183. 'Thus if, among all the wives of the
- fame husband, one bring forth a male child,
- MENU has declared them all, by means of
- that fon, to be mothers of male issue.
- 184. 'On failure of the best, and of the next
- best, among those twelve sons, let the inferiour
- in order take the heritage; but, if there be
- e many of equal rank, let all be sharers of the
- estate.
- 185. Not brothers, nor parents, but sons,
- 'if living, or their male issue, are heirs to the de-
- ceased, but of him, who leaves no son, nor a

- ' wife, nor a daughter, the father shall take the
- inheritance; and, if he leave neither father, nor
- mother, the brothers.
- 186. 'To three ancestors must water be given
- at their obsequies; for three (the father, his
- * father, and the paternal grandfather) is the fu-
- eneral cake ordained: the fourth in descent is
- the giver of oblations to them, and their heir, if
- they die without nearer descendants; but the
- fifth has no concern with the gift of the funeral
- 'cake.
- 187. 'To the nearest sapinda, male or female,
- after him in the third degree, the inheritance
- inext belongs; then, on failure of fapindas and
- of their issue, the famánódaca, or distant kins-
- man, shall be the heir; or the spiritual pre-
- e ceptor, or the pupil, or the fellowstudent, of the
- · deceased:
- 188. On failure of all those, the lawful
- heirs are such Brahmens, as have read the
- three Védas, as are pure in body and mind, as
- have fubdued their passions; and they must
- consequently offer the cake: thus the rites of
- obsequies cannot fail.
- 189. The property of a Brahmen shall never
- be taken as an escheat by the king: this is a
- fixed law: but the wealth of the other classes,
 - on failure of all heirs, the king may take.
 - 190. 'If the widow of a man, who died vol. vi.

- without a fon, raise up a son to him by one of
- his kinsmen, let her deliver to that son, at his
- full age, the collected estate of the deceased, whatever it be.
- 191. If two sons, begotten by two fuccessive, husbands, who are both dead, contend for their
- property, then in the hands of their mother,
- elet each take, exclusively of the other, his own
- father's estate.
- 192. 'On the death of the mother, let all the uterine brothers, and the uterine fifters, if
- ' unmarried, equally divide the maternal estate:
- each married fifter shall have a fourth part of a brother's allotment.
- 193. Even to the daughters of those
- daughters, it is fit, that fomething should be
- ' given, from the assets of their maternal grand,
- ' mother, on the score of natural affection.
- 194. 'WHAT was given before the nuptial
- fire, what was given on the bridal procession,
- what was given in token of love, and what
- was received from a brother, a mother, or a
- 'father, are considered as the sixfold feparate
- * property of a married woman:
- 195. 'What she received after marriage
- from the family of her husband, and what
- ' her affectionate lord may have given her, shall
- be inherited, even if she die in his lifetime, by
- her children.

196. 'It is ordained, that the property of a 'woman, married by the ceremonies called 'Brábma, Daiva, Arsha, Gándharva, or Prá-'jápatya, shall go to her husband, if she die 'without issue.

197. 'But her wealth given on the marriage called Afura, or on either of the two others, is ordained, on her death without iffue, to become the property of her father and mother.

198. 'If a widow, whose husband had other wives of different classes, shall have received wealth at any time as a gift from her father, and shall die without issue, it shall go to the daughter of the Bráhmani wife, or to the issue of that daughter.

199. 'A woman should never make a hoard 'from the goods of her kindred, which are common to her and many; or even from the 'property of her lord, without his affent.

200. 'Such ornamental apparel, as women 'wear during the lives of their husbands, the 'heirs of those husbands shall not divide among 'themselves: they, who divide it among themselves, fall deep into sin.

201. 'Eunuchs and outcasts, persons born 'blind or deaf, madmen, idiots, the dumb, and 'fuch as have lost the use of a limb, are excluded 'from a share of the heritage;

202. But it pjust, that the heir, who

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- knows his duty, should give all of them food
- and raiment for life without stint, according to
- the best of his power: he, who gives them
- anothing, links affuredly to a region of punish-
- ment.
- 203. If the eunuch and the rest should at
- any time defire to marry, and if the wife of the
- eunuch should raise up a son to him by a man le-
- ' gally appointed, that son and the issue of such,
- 'as have children, shall be capable of inheriting. 204. 'After the death of the father, if the
- eldest brother acquire wealth by his own efforts
- before partition, a share of that acquisition shall
- 'go to the younger brothers, if they have made
- 'a due progress in learning;
 - 205. 'And if all of them, being unlearned,
- * acquire property before partition by their own
- labour, there shall be an equal division of that
- ' property without regard to the first born; for it
- was not the wealth of their father: this rule is
- clearly fettled.
- 206. Wealth, however, acquired by learn-
- 'ing, belongs exclusively to any one of them,
- 'who acquired it; fo does any thing given by a
- friend, received on account of marriage, or
- ' presented as a mark of respect to a guest.
- 207. 'If any one of the brethren has a com-'petence from his own occupation, and wants
- not the property of his facer, he may debar

- himself from his own share, some trisle being egiven him as a confideration, to prevent future · ftrife.
- 208. 'What a brother has acquired by labour or skill, without using the patrimony, he 's shall not give up without his affent; for it was gained by his own exertion:
- 209. 'And if a son, by his own efforts, re-'cover a debt or property unjustly detained, which could not be recovered before by his father, he ' shall not, unless by his free will, put it into ' parcenary with his brethren, fince in fact it was acquired by himfelf.
- 210. 'IF brethren, once divided and living again together as parceners, make a second partition, the shares must in that case be equal; and the first born shall have no right of deduction.
- 211. 'Should the eldest or youngest of seve-'ral brothers be deprived of his share by a civil death on his entrance into the fourth order, or should any one of them die, his vested inter-" eft in a share shall not wholly be lost;
- 12. But, if he leave neither son, nor wife, nor daughter, nor father, nor mother, his uterine brothers and fifters, and fuch brothers as were reunited after a separation, shall assemble 'and divide his share equally.
- 213. Any eldest brother, who from avarice ' shall defraud his younger brother, shall forfeit

- the bonours of his primogeniture, be deprived of his own share, and pay a fine to the king.
- 214. 'All those brothers, who are addicted to any vice, lose their title to the inheritance:
- the first born shall not appropriate it to him-
- felf, but shall give shares to the youngest, if they be not vitious.
- 215. 'If, among undivided brethren living' with their father, there be a common exertion for common gain, the father shall never make
- f an unequal division among them, when they families.
- 216. 'A fon, born after a division in the lifetime of bis father, shall alone inherit the patrimony, or shall have a share of it with the divided brethren, if they return and unite themselves with him.
- 217. 'Or a fon, dying childless and leaving on widow, the father and mother shall take the estate; and, the mother also being dead, the paternal grandfather and grandmother shall take the heritage on failure of brothers and nephews.
- 218. 'When all the debts and wealth have been justly distributed according to law, any property, that may afterwards be discovered, shall be subject to a similar distribution.
- 219. Apparel, carriages, or riding horses, and ornaments of ordinary value, which any of the heirs had used by consent before partition,

- dressed rice, water in a well or cistern, semale
- ' slaves, family priests, or spiritual counsellors,
- and pasture ground for cattle, the wife have
- declared indivisible, and still to be used as before.
- 220. 'Thus have the laws of inheritance,
- and the rule for the conduct of fons (whether
- 'the fon of the wife or others) been expound-
- 'ed to you in order: learn at present the law
- concerning games of chance.
- 221. 'GAMING, either with inanimate or
- with animated things, let the king exclude
- 'wholly from his realm: both those modes of
- * play cause destruction to princes.
- 222. 'Such play with dice and the like, or by
- matches between rams and cocks, amounts to
- open theft; and the king must ever be vigilant
- 'in suppressing both modes of play:
- 223. Gaming with lifeless things is known
- among men by the name of dyúta; but sa-
- 'mahwaya signisies a match between living
- creatures.
- 224. Let the king punish corporally at dif-
- cretion both the gamester and the keeper of a,
- gaming house, whether they play with inani-
- mate or animated things: and men of the
- fervile class, who wear the string and other
- * marks of the twiceborn.
 - 225. Gamesters, publick dancers and fing-

- ers, revilers of scripture, open hereticks,/ men
- who perform not the duties of their several
- f classes, and sellers of spirituous liquor, let him
- finstantly banish from the town:
 - 226. 'Those wretches, lurking like unseen
- thieves in the dominion of a prince, conti-
- f nually harafs his good subjects with their viti-
- ous conduct.
- 227. Even in a former creation was this
- vice of gaming found a great provoker of en-
- mity; let no sensible man, therefore, addict
- himself to play even for his amusement:
 - 228. On the man addicted to it, either pri-
- vately or openly, let punishment be inflicted
- f at the discretion of the king.
- 229. A MAN of the military, commercial,
- or servile class, who cannot pay a fine, shall
- discharge the debt by his labour: a priest shall
- 6 discharge it by little and little.
- 230. 'For women, children, persons of crazy
- s intellect, the old, the poor, and the infirm,
- the king shall order punishment with a small
- whip, a twig, or a rope.
- 231, 'Those ministers, who are employed
- in publick affairs, and, inflamed by the blaze
- of wealth, mar the business of any person
- concerned, let the king strip of all their property.
 - 232. Such, as forge royal edicts. and dif-

- fensions among the great ministers, or kill women, priests, or children, let the king put to death; and such, as adhere to his enemies.
- 233. Whatever business has at any time been transacted conformably to law, let him confider as finally settled, and refuse to unravel:
- 234. But whatever business has been conscluded illegally by his ministers or by a judge,
 slet the king himself reexamine; and let him
 sine them each a thousand panas.
- 235. 'The flayer of a priest, a soldier or merchant drinking arak, or a priest drinking arak, mead, or rum, he, who steads the gold of a priest, and he, who violates the bed of his natural or spiritual sather, are all to be considered respectively as offenders in the highest degree, except those, whose crimes are not sit to be named:
- 236. On fuch of those four, as have not actually performed an expiation, let the king legally inflict corporal punishment, together with a fine.
- 237. 'For violating the paternal bed, let the mark of a female part be impressed on the fore-bead with bot iron; for drinking spirits, a vint-ner's slag; for stealing sacred gold, a dog's soot; for murdering a priest, the figure of a headless corpse;

- 238. 'With none to eat with them, with onone to facrifice with them, with none to read with them, with none to be allied by marriage to them, abject and excluded from all focial duties, let them wander over this
- earth:
- 239. 'Branded with indelible marks, they fhall be deferted by their paternal and mater-
- e nal relations, treated by none with affection,
- received by none with respect: such is the or-
- 4 dinance of MENU.
- 240. 'Criminals of all the classes, having e performed an expiation, as ordained by law,
- fhall not be marked on the forehead, but con-
- demned to pay the highest fine:
- 241. 'For crimes by a priest, who had a • good character before bis offence, the middle
- fine shall be set on him; or, if bis crime was
- premeditated, he shall be banished from the
- realm, taking with him his effects and his fa-'mily;
- 242. 'But men of the other classes, who
- have committed those crimes, though without
- ' premeditation, shall be stripped of all their pos-
- fessions; and, if their offence was premedi-
- tated, shall be corporally, or even capitally, 'punished, according to circumstances.
- 243. 'LET no virtuous prince appropriate
- the wealth of a criminal in the highest degree;

- for he, who appropriates it through covetoufness, is contaminated with the same guilt:
 - 244. 'Having thrown such a fine into the
- waters, let him offer it to VARUNA; or let
- * him bestow it on some priest of eminent learn-
- ing in the scriptures:
 - 245. 'VARUNA is the lord of punishment;
- he holds a rod even over kings; and a priest,
- who has gone through the whole Véda, is
- equal to a fovereign of all the world.
 - 246. 'Where the king abstains from receiva-
- 'ing to bis own use the wealth of such offenders,
- 'there children are born in due feafon and en-
- ' joy long lives;
 - 247. 'There the grain of husbandmen rises
- abundantly, as it was respectively sown; there
- 'no younglings die, nor is one deformed ani-
- f mal-born.
 - 248. 'Should a man of the basest class, '
- 'with preconceived malice, give pain to Bráb-
- mens, let the prince corporally punish him by
- 'various modes, that may raife terrour.
- 249. 'A king is pronounced equally unjust
- in releafing the man, who deferves punish-
- 'ment, and in punishing the man, who de-
- ' ferves it not: he is just, who always inslicts
- ' the punishment ordained by law.
- 250. 'These established rules for administer-
- ing justice, between two litigant parties, have

- been propounded at length under eighteen heads.
- 251. 'THUS fully performing all duties required by law, let a king feek with justice to
- possess regions yet unpossessed, and, when
- they are in his possession, let him govern them
- well.
 - 252. 'His realm being completely arranged
- and his fortresses amply provided, let him ever
- apply the most diligent care to eradicate bad
- men resembling thorny weeds, as the law di-
- rects.
 - 253. 'By protecting fuch as live virtuously,
- and by rooting up fuch as live wickedly, those
- kings, whose hearts are intent on the security
- of their people, shall rise to heaven.
- 254. Of that prince, who takes a revenue,
- without restraining rogues, the dominions are
- thrown into disorder, and himself shall be pre-
- cluded from a celestial abode;
 - 255. 'But of him, whose realm, by the
- ftrength of his arm, is defended and free from
- terrour, the dominions continually flourish,
- ' like trees duly watered.
- 256. LET the king, whose emissaries are
- his eyes, difcern well the two forts of rogues,
- the open and the concealed, who deprive
- 6 other men of their wealth:
 - 257. 'Open rogues are they, who subsist by

- cheating in various marketable commodities;
- and concealed rogues are they, who steal and
- ' rob in forests and the like secret places.
- 258. 'Receivers of bribes, extorters of mo-
- e new by threats, debasers of metals, gamesters,
- fortunetellers, imposters, and professors of pal-'mistry;
 - 250. 'Elephant breakers and quacks, not per-
- forming what they engage to perform, pre-
- tended artists, and subtil harlots;
 - 260. 'These and the like thorny weeds,
- overspreading the world, let the king discover
- with a quick fight, and others, who act ill in
- fecret; worthless men, yet bearing the out-
- ward figns of the worthy.
 - 261. 'Having detected them, by the means
- of trusty persons disguised, who pretend to
- have the same occupation with them, and of
- 'fpies placed in feveral stations, let him bring
- them by artifice into his power:
- 262. 'Then, having fully proclaimed their
- respective criminal acts, let the king inflict
- 'punishment legally, according to the crimes " proved;
 - 263. 'Since, without certain punishment, it
- is impossible to restrain the delinquency of
- 'fcoundrels with depraved fouls, who fecretly
- prowl over this earth.
 - 264. 'Muchfrequented places, cisterns of

- water, bake houses, the lodgings of harlots,
- taverns and victualling shops, squares where
- four ways meet, large well known trees,
- affemblies, and publick spectacles;
 - 265. 'Old courtyards, thick ts, the houses
- of artists, empty mansions, groves, and gar-
- dens:
- 266. 'These and the like places let the king
- guard, for the prevention of robberies, with
- foldiers, both stationary and patroling, as well
- as with fecret watchmen.
 - 267. 'By the means of able spies, once
- thieves but reformed, who, well knowing the
- various machinations of rogues, affociate with
- them and follow them, let the king detect and
- 4 draw them forth:
 - 268. 'On pretexts of dainty food and gra-
- tifications, or of feeing fome wife prieft, who
- could ensure their success, or on pretence of
- 's mock battles and the like feats of strength, let
 - the fpies procure an affembly of those men.
 - 269. 'Such as refuse to go forth on those oc-
- casions, deterred by former punishments, which
- the king had inflicted, let him feize by force,
- ' and put to death, on proof of their guilt, with
- their friends and kinsmen, paternal and ma-
- ternal, if proved to be their confederates.
 - 270. 'Let not a just prince kill a man con-
- victed of simple theft, unless taken with the

- mainer or with implements of robbery; but
- any thief, taken with the mainer, or with
- fuch implements, let him destroy without hefitation:
- 271. 'And let him flay all those, who give 'robbers food in towns, or supply them with 'implements, or afford them shelter.
- 272. 'Should those men, who are appointed 'to guard any districts, or those of the vicinity, 'who were employed for that purpose, be neutral in attacks by robbers and inactive in seizing them, let him instantly punish them as 'thieves.
- 273. 'Him, who lives apparently by the 'rules of his class, but really departs from those 'rules, let the king severely punish by fine, as a 'wretch, who violates his duty.
- 274. 'They, who give no affistance on the 'plundering of a town, on the forcible breaking 'of a dike, or on seeing a robbery on the high- way, shall be banished with their cattle and 'utensile.
- 275. 'Men, who rob the king's treasure, or obstinately oppose his commands, let him deferoy by various modes of just punishment; and those, who encourage his enemies.
- 276. Of robbers, who break a wall or partition, and commit theft in the night, let

the prince order the hands to be lopped off,
and themselves to be fixed on a sharp stake.

277. 'Two fingers of a cutpurse, the thumb and the index, let him cause to be amputated

- on his first conviction; on the second, one
- hand and one foot; on the third, he shall suffer
- death.
 - 278. 'Such, as give thieves fire, fuch as give
- them food, such as give them arms and apart-
- ments, and fuch as knowingly receive a thing
- folen, let the king punish as he would punish a thief.
 - 279. 'The breaker of a dam to secure a pool,
- let him punish by long immersion under
- water or by keen corporal fuffering; or the of-
- fender shall repair it, but must pay the highest
- mulct.
- 280. 'Those, who break open the treasury,
- or the arfenal, or the temple of a deity, and
- those, who carry off royal elephants, horses,
- or cars, let him without hesitation destroy.
- 281. 'He, who shall take away the water of
- an ancient pool, or shall obstruct a watercourse,
- 'must be condemned to pay the lowest usual
- 'amercement.
 - 282. 'HE, who shall drop his ordure on the
- king's highway, except in case of necessity,
- fhall pay two panas and immediately remove
- 'the filth;

- 283. But a person in urgent necessity, a very old man, a pregnant woman, and a child, only deserve reproof, and shall clean the place themselves: that is a settled rule.
- 284. ALL physicians and surgeons acting unskilfully in their several professions, must pay for injury to brute animals the lowest, but for injury to human creatures the middle, amercement.
- 285. 'THE breaker of a footbridge, of a publick flag, of a palisade, and of idols made of clay, shall repair what he has broken, and pay a mulct of five hundred panas.
- 286. FOR mixing impure with pure com-"modities, for piercing fine gems, as diamonds "or rubies, and for boring pearls or inferiour gems improperly, the fine is the lowest of the three; but damages must always be paid.
- 287. 'THE man, who shall deal unjustly with purchasers at a fair price by delivering goods of less value, or shall sell at a high price goods of ordinary value, shall pay according to circumstances, the lowest or the middle americament.
- 288. LET the king place all prisons near a publick road, where offenders may be seen wretched or disfigured.
- 289. 'Him, who breaks down a publick wall, him, who fills up a publick ditch, him,

who throws down a publick gate, the king shall freedily banish.

290. 'For all facrifices to destroy innocent men, the punishment is a fine of two hundred

panas; and for machinations with poisonous

roots, and for the various charms and witch-

eries intended to kill, by persons not effecting

their purpose.

- 291. 'THE seller of bad grain for good, or of good seed placed at the top of the bag, to conceed the bad below, and the destroyer of known landmarks, must suffer such corporal punish-
- ment as will disfigure them;
 292. But the most pernicious of all deceivers is a goldsmith, who commits frauds:
 the king shall order him to be cut piecemeal

with razors.

- 293. 'For stealing implements of husban-'dry, weapons, and prepared medicines, let 'the king award punishment according to the 'time and according to their use.
- 294. 'THE king, and his council, his metropolis, his realm, his treasure, and his army, together with his ally, are the seven members of his kingdom; whence it is called Septanga:

 295. 'Among those seven members of a
- kingdom, let him confider the ruin of the first, and so forth in order, as the greatest ca-

· lamity;

- 296. 'Yet, in a fevenparted kingdom here below, there is no supremacy among the se'veral parts, from any preeminence in useful
 'qualities: but all the parts must reciprocally
- qualities: but all the parts must reciprocally fupport each other, like the three staves of a
- holy mendicant:
- 297. In these and those acts, indeed, this and that member may be distinguished; and the member, by which any affair is transfacted, has the preeminence in that particular affair.
- 298. WHEN the king employs emissaries, when he exerts power, when he regulates publick business, let him invariably know both his own strength and that of his enemy,
- 299. With all their feveral distresses and vices: let him then begin his operations, having maturely considered the greater and less importance of particular acts:
- 300. Let him, though frequently disappointed, renew his operations, how fatigued soever, again and again: since fortune always attends the man, who, having begun well, strenuously renews his efforts.
- 301. ALL the ages, called Satya, Trétd, Dwapara, and Cali, depend on the conduct of the king; who is declared in turn to represent each of those ages:
 - 302. 'Sleeping, he is the Cali age; waking

- the Dwapara; exerting himself in action, the
- ' Trétá; living virtuously, the Satya.
 - 303. Of Indra, of Su'rya, of Pavana,
- of YAMA, of VARUNA, of CHANDRA, of
- "AGNI, and of PRIT'HIVI, let the king emulate
- the power and attributes.
 - 304. 'As INDRA sheds plentiful showers
- during the four rainy months, thus let him,
- acting like the regent of clouds, rain just gra-
- tifications over his kingdom:
 - 305. 'As Su'RYA with strong rays draws up
- the water during eight months, thus let him,
- * performing the function of the fun, gradually
- draw from his realm the legal revenue:
 - 306. 'As PAVANA, when he moves, per-
- vades all creatures, thus let him, imitating
- the regent of wind, pervade all places by his
- 4 concealed emissaries:
- 307. 'As YAMA, at the appointed time,
- punishes friends and foes, or those who revere,
- and those who contemn, him, thus let the king,
- resembling the judge of departed spirits,
- funish offending subjects:
- 308. As VARUNA most affuredly binds the
- 'guilty in fatal cords, thus let him, represent-
- ing the genius of water, keep offenders in
- ' close confinement:
- 309. When the people are no less delighted
- on seeing the king, than on seeing the full

- moon, he appears in the character of Chan-DRA:
- 310. 'Against criminals let him ever be ar-* dent in wrath, let him be splendid in glory,
- elet him confume wicked ministers, thus
- emulating the functions of Agni, regent of fire.
- 311. 'As Prit'hivì supports all creatures equally, thus a king, sustaining all subjects, resembles in his office the goddess of earth.
- 312. Engaged in these duties and in others,
- with continual activity, let the king above all
- 'things restrain robbers, both in his own terri-
- tories and in those of other princes, from which
- they come, or in which they seek refuge.
- 213. LET him not, although in the great-
- est distress for money, provoke Brahmens to
- 'anger by taking their property; for they, once
- enraged, could immediately by facrifices and
- imprecations destroy him with his troops, ele-
- 'phants, horses and cars.
- 314. Who, without perishing, could pro-
- 'voke those holy men, by whom, that is, by
- whose ancestors, under BRAHMA', the allde-
- vouring fire was created, the fea with waters
- onot drinkable, and the moon with its wane
- and increase?
- 315. 'What prince could gain wealth by oppressing those, who, if angry, could frame

- other worlds and regents of worlds, could give
- being to new gods and mortals?
 - 316. 'What man, desirous of life, would
- injure those, by the aid of whom, that is, by
- " whose oblations, worlds and gods perpetually
- ' fublist; those who are rich in the learning of
- ' the Véda?
 - 317. ' A Bråhmen, whether learned or igno-
- frant, is a powerful divinity; even as fire is a
- powerful divinity, whether confecrated or
- · popular.
- 318. Even in places for burning the dead,
- the bright fire is undefiled; and, when pre-
- sented with clarified butter at fubsequent sacri-
- ' fices, blazes again with extreme splendour:
 - 319. 'Thus, although Bráhmens employ
- themselves in all forts of mean occupation,
- 'they must invariably be honoured; for they
- are fomething transcendently divine.
- 320. Of a military man, who raises his
- arm violently on all occasions against the
- e priestly class, the priest himself shall be the
- 'chastifer; fince the foldier originally proceed-
- ed from the Bráhmen.
- 321. 'From the waters arose fire; from the
- f priest, the soldier; from stone, iron: their all-
- * penetrating force is ineffectual in the places,
- whence they respectively sprang.
 - 322. 'The military class cannot prosper

- "without the sacerdotal, nor can the sacerdotal
- be raised without the military: both classes, by
- cordial union, are exalted in this world and
- in the next.
- 323. 'SHOULD the king be near bis end through
- ' some incurable disease, he must bestow on the
- priests all his riches accumulated from legal
- fines; and, having duly committed his king-
- dom to his fon, let him feek death in battle, or,
- if there be no war, by abstaining from food.
- 324. Thus conducting himself, and ever
- firm in discharging his royal duties, let the king
- employ all his ministers in acts beneficial to his
- people.
- 325. These rules for the conduct of a mi-
- flitary man having been propounded, let man-
- kind next hear the rules for the commercial
- and fervile classes in due order.
- 326. LET the Vaifya, having been girt with
- 6 his proper facrificial thread, and having mar-
- 'ried an equal wife, be always attentive to his
- business of agriculture and trade, and to that of
- 'keeping cattle;
- 327. 'Since the lord of created beings, hav-
- ing formed herd, and flocks, intrusted them to
- the eare of the Vaifya, while he intrusted the
- ' whole human species to the Brábmen and the
- 6 Csbatriya:
 - 328. 'Never must a Vaisya be disposed to say,

- "I keep no cattle;" nor, he being willing to
- ' keep them, must they by any means be kept
- by men of another class.
- 329. Of gems, pearls, and coral, of iron, of woven cloth, of perfumes and of liquids, let
- him well know the prices both high and low:
- 330. Let him be skilled likewise in the time
- and manner of sowing seeds, and in the bad or
- good qualities of land; let him also perfectly
- know th ecorrect modes of measuring and weighing,
 - 331. The excellence or defects of commo-
- dities, the advantages and disadvantages of
- different regions, the probable gain or loss on
- vendible goods, and the means of breeding
- cattle with large augmentation:
 - 332. Let him know the just wages of ser-
- vants, the various dialects of men, the best
- way of keeping goods, and whatever else be-
- · longs to purchase and sale.
- 333. Let him apply the most vigilant care
- to augment his wealth by performing his duty;
- and, with great folicitude, let him give nou-
- ' rishment to all sentient creatures.
- 334. SERVILE attendance on Bráhmens
- blearned in the Veda, chiefly on fuch as keep
 - house and are famed for virtue, is of itself the
 - highest duty of a Súdra, and leads him to
 - future beatitude;

- 335. Pure in body and mind, humbly ferving the three higher classes, mild in speech, never arrogant, ever seeking resuge in Bráhmens principally, he may attain the most eminent class in another transmigration.
- 336. This clear fystem of duties has been promulgated for the four classes, when they are not in distress for subsistence; now learn in order their several duties in times of necesity.

CHAPTER THE TENTH.

On the mixed Classes; and on Times of Distress.

- 1. LET the three twiceborn classes, remain-
- ing firm in their feveral duties, carefully read
- the Veda; but a Brahmen must explain it to
- them, not a man of the other two classes: this
- ' is an established rule.
 - 2, 'The Brábmen must know the means of
- ' subsistence ordained by law for all the classes,
- and must declare them to the rest: let him-
- felf likewise act in conformity to law.
- 3. 'From priority of birth, from superiority
- of origin, from a more exact knowledge of
- fcripture, and from a distinction in the sacri-
- ficial thread, the Brábmen is the lord of all
- ' classes.
- 4. 'The three twiceborn classes are the sa-
- cerdotal, the military, and the commercial;
- but the fourth, or fervile, is onceborn, that is,
- has no fecond birth from the gayatri, and wears
- " no thread: nor is there a fifth pure class.
- 5. 'In all classes they, and they only, who
- are born, in a direct order, of wives equal in

- class and virgins at the time of marriage, are to be considered as the same in class with their fathers:
- 6. 'Sons, begotten by twiceborn men, on women of the class next immediately below them, wise legislators call similar, not the same, in class with their parents, because they are degraded, to a middle rank between both, by the lowness of their mothers: they are named in order, Murdhabhishicta, Mahishya, and Carana, or Cayast'ha; and their several employments are teaching military exercises; musick, astronomy, and keeping herds; and attendance on
- 7. 'Such is the primeval rule for the fons of women one degree lower than their bushands: 'for the fons of women two or three degrees 'lower, let this rule of law be known.

· princes.

- 8. 'From a Bráhmen, on a wife of the Vaifya 'class, is born a son called Amhasht'ha, or 'Vaidya, on a Súdra wise a Nisháda, named 'also Párasava:
- 9. 'From a Cshatriya, on a wife of the Súdra 'class, springs a creature, called Ugra, with a 'nature partly warlike and partly servile, sero-'cious in his manners, cruel in his acts.
- 10. The fons of a Brábmen by women of three lower classes, of a Cshatriya by women of two, and of a Vaifya by one lower class, are

- called apasadab, or degraded below their fu-
 - 11. 'From a Cshatriya, by a Bráhmeni wife,
- fprings a Súta by birth; from a Vaifya, by a
- * military or sacerdotal wife, spring a Mágadhæ
- ' and a Vaidéha.
 - 12. ' From a Súdra, on women of the com-
- mercial, military, and priestly classes, are born
- fons of a mixed breed, called A'yógava, Cshat-
- tri, and Chandála, the lowest of mortals.
 - 13. 'As the Ambasht'ha and Ugra, born in
- a direct order with one class between those of
- their parents, are considered in law, so are the
- " Cshattri and the Vaidéha, born in an inverse
- order with one intermediate class; and all four
- s may be touched without impurity.
 - 14. 'Those sons of the twiceborn, who are
- begotten on women without an interval (An-
- tara) between the classes mentioned in order,
- the wife called Anantaras, giving them a di-
- finet name from the lower degree of their
- mothers.
 - 15. 'From a Brábmen, by a girl of the Ugra
- tribe, is born an A'vrita; by one of the Am-
- · bast'ba tribe, an Abhira; by one of the Ayó-
- ' gava tribe, a Dhigvana.
 - 16. 'The Ayogava, the Chattri, and the
- 6 Chandála, the lowest of men, spring from a
- · Súdra in an inverse order of the classes, and

- are, therefore, all three excluded from the performance of obsequies to their ancestors:
 - 17. 'From a Vaisya the Mágadha and Vaide-
- ' ba, from a Cshatriya the Súta only, are born
- ' in an inverse order; and they are three other
- ' fons excluded from funeral rites to their fathers.
 - 18. 'The son of a Nisháda, by a woman of
- the Súdra class, is by tribe a Puccasa; but the
- ' son of a Súdra by a Nishad's woman, is named
- · Cuccutaca.
- 19. 'One, born of a Cshattri by an Ugrá, is
- ' called Swapáca; and one, begotten by a Vaidé-
- ' ha on an Ambashthì wife, is called Vėna.
 - 20. 'Those, whom the twiceborn beget on
- 4 women of equal classes, but who perform not
- the proper ceremonies of assuming the thread,
- ' and the like, people denominate Vrátyas, or
- excluded from the gáyatri.
 - 21. 'From such an outcast Brahmen springs
- 'a son of a sinful nature, who in different coun-
- 'tries is named a Bhúrjacantaca, an A'vantya,
- ' a Vátadhána, a Pushpadha, and a Saic'ha:
 - 22. 'From such an outcast C/batriya comes
- 'a fon called a J'halla, a Malla, a Nich'hivi, a
- ' Nata, a Carana, a C'hasa, and a Dravira:
 - 23. 'From such an outcast Vaisya is born a
- ' son called Sudhanwan, Chárya, Cárusha, Vi-
- ' janman, Maitra, and Satwata.
 - 24. By intermixtures of the classes, by their

- matriages with women who ought not to be
- married, and by their omission of prescribed.
- duties, impure classes have been formed.
 - 25. 'THOSE men of mingled births, who
- were born in the inverse order of classes, and
- who intermarry among themselves, I will now
- compendiously describe.
 - 26. 'The Súta, the Vaidéba, and the Chan-
- dála, that lowest of mortals, the Mágadha, the
- · Cshattri by tribe, and the Ayogava,
 - 27. 'These six beget similar sons on women
- of their own classes, or on women of the same
- class with their mothers; and they produce
- the like from women of the two highest
- classes, and of the lowest:
 - 28. As a twiceborn fon may fpring from a
- 6 Brahmen by women of two classes out of
- three, a similar son, when there is no interval,
- and an equal son from a woman of his own
- class, it is thus in the case of the low tribes
- in order.
- 29. 'Those six beget, on women of their
- own tribes, reciprocally, very many despica-
- ble and abject races even more foul than their
- begetters.
 - 30. ' Even as a Súdra begets, on a Bráhmen?
- woman, a fon more vile than himself, thus
- any other low man begets, on woman of the
- four classes, a son yet lower.

- 31. The fix low classes, marrying inversely,
- beget fisteen yet lower tribes, the base pro-
- ducing still baser; and in a direct order they
- · produce fifteen more.
 - 32. ' A Dasyu, or outcast of any pure class,
- begets on an Ayógavi woman a Sairindhra,
- who should know how to attend and to dress
- 'his master; though not a slave, he must live
- by flavish work, and may also gain subsistence
- ' by catching wild beafts in toils:
 - 33. ' A Vaidéba begets on her a sweetvoiced
- 'Maitréyaca, who, ringing a bell at the ap-
- pearance of dawn, continually praises great
- f men:
- 34. 'A Nisháda begets on her a Márgava,
- ' or Dása, who subsists by his labour in boats,
- ' and is named Caiverta by those, who dwell in
- ' A'ryáverta, or the land of the venerable.
 - 35. 'Those three of a base tribe are severally
- ' begotten on A'yôgavî women, who wear the
- clothes of the deceased and eat reprehensible
- food.
- 36. 'From a Nishada springs by a woman of
- 'the Vaidéha tribe, a Cárávara, who cuts lea-
- ther, and from a Vaideba spring by women of
- 'the Caravara and Nishada casts, an Andhra
- ' and a Méda, who must live without the town.
 - 37. 'From a Chandála, by a Vaidéhì woman,
- 'comes a Pándusópáca, who works with cane

- and reeds; and from a Nishada, an Abindica, who acts as a jailor.
- 38. 'From a Chandála, by a Puccasi woman, 'is born a Sópáca, who lives by punishing crimi-
- anals condemned by the king, a finful wretch
- ever despised by the virtuous.
 - 39. ' A Nisbad' woman, by a Chandala, pro-
- duces a fon called Antyavafayin, employed in
- places for burning the dead, contemned even
- by the contemptible.
- 40. 'These, among various mixed classes,
- have been described by their several fathers
- and mothers; and, whether concealed or open,
- they may be known by their occupations.
 - 41. Six fons, three begotten on women of
- the same class, and three on women of lower
- classes, must perform the duties of twiceborn
- men; but those, who are born in an inverse
- corder, and called lowborn, are equal, in respect
- of duty, to mere Súdras.
 - 42. 'By the force of extreme devotion and
- of exalted fathers, all of them may rife in time
- to high birth, as by the reverse they may fink
- to a lower state, in every age among mortals
- ' in this inferiour world.
- 43. 'THE following races of Cshatriyas, by
- their omission of holy rites and by seeing no
- Brahmens, have gradually funk among men to
- ' the lowest of the four classes:

- 44. ' Paund'racas, Odras, and Draviras;
- Cámbojas, Yavanas, and Sacas; Páradas,
- · Pablavas, Chinas, Cirátas, Deradas, and
- · C'basas.
- 45. 'All those tribes of men, who sprang
- from the mouth, the arm, the thigh, and the
- foot of BRAHMA', but who became outcasts by
- ' having neglected their duties, are called Dasyus,
- ' or plunderers, whether they speak the language
- of Mlechch' bas, or that of Aryas.
- 46. 'Those fons of the twiceborn, who are
- ' faid to be degraded, and who are confidered as
- 'lowborn, shall subsist only by such employ-
- 'ments, as the twiceborn despise.
- 47. 'Sútas must live by managing horses and
- 'by driving cars; Ambasht'bas, by curing dis-
- 'orders; Vaidėbas, by waiting on women; Má-
- ' gadbas, by travelling with merchandize;
- 48. ' Nishadas, by catching fish; an A'yogava,
- 'by the work of a carpenter; a Méda, an An-
- ' dbra, and (the fons of a Brábmen by wives of
- ' the Vaideba and Ugra classes, respectively called)
- 'a Chunchu and a Madgu, by slaying beasts of
- 'the forest;
- 49. 'A Cshattri, an Ugra, and a Puccasa,
- 'by killing or confining fuch animals as live in
- 'holes: Dhigvanas, by felling leather; Vénas,
- 'by striking musical instruments:

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- 50. Near large publick trees, in places for burning the dead, on mountains, and in
- ' groves, let those tribes dwell, generally known,
- ' and engaged in their feveral works.
 - 51. 'The abode of a Chandula and a Swa-
- páca must be out of the town; they must not
- ' have the use of entire vessels; their sole wealth
- ' must be dogs and affes:
- 52. 'Their clothes must be the mantles of the deceased; their dishes for food, broken
- pots; their ornaments, rusty iron; continually
- ' must they roam from place to place:
 - 53. 'Let no man, who regards his duty re-
- 'ligious and civil, hold any intercourse with
- them; let their transactions be confined to
- themselves, and their marriages only between
- equals:
- 54. Let food be given to them in pot-
- ' sherds, but not by the hands of the giver;
- and let them not walk by night in cities or
- towns:
- 55. 'By day they may walk about for the 'purpose of work, distinguished by the king's
 - ' badges; and they shall carry out the corpse of
- 'every one, who dies without kindred: fuch
- ' is the fixed rule.
- 56. 'They shall always kill those, who are to be slain by the sentence of the law, and by
- 'the royal warrant; and let them take the

- clothes of the flain, their beds, and their or-
- 57. 'HIM, who was born of a finful mother, and consequently in a low class, but is not
- openly known, who, though worthless in
- truth, bears the semblance of a worthy man, let
- ' people discover by his acts:
 - 58. 'Want of virtuous dignity, harshness of
- 'fpeech, cruelty, and habitual neglect of pre-
- ' scribed duties, betray in this world the son of
- 'a criminal mother.
- 59. 'Whether a man of debased birth assume
- 'the character of his father or of his mother, he can at no time conceal his origin:
- 60. 'He, whose family had been exalted,
- but whose parents were criminal in marrying,
- 'has a base nature, according as the offence of
- ' bis mother was great or small.
- 61. In whatever country such men are
- born, as deftroy the purity of the four classes,
- 'that country soon perishes together with the na-
- 'tives of it.
 - 62. Desertion of life, without reward, for
- the fake of preserving a priest or a cow, a wo-
- 'man or a child, may cause the beatitude of
- 'those baseborn tribes.
- 63. Avoiding all injury to animated beings, veracity, abstinence from thest, and from unjust
- 'feizure of property, cleanliness, and command

- over the bodily organs, form the compendious
- ' fystem of duty, which MENU has ordained for
- ' the four classes.
- 64. 'SHOULD the tribe sprung from a Bráb-
- " men, by a Súdra woman, produce a fuccession of
- "children by the marriages of its women with
- other Brabmens, the low tribe shall be raised
- to the highest in the seventh generation.
- 65. As the fon of a Sudra may thus attain
- the rank of a Bráhmen, and as the fon of a
- Brabmen may fink to a level with Súdras, even
- " so must it be with him, who springs from a
- "Cshatriya; even so with him, who was born
- of a Vaifya.
 - 66. If there be a doubt, as to the preference
- ' hetween him, who was begotten by a Brábmen
- ' for his pleasure, but not in wedlock, on a Sudra
- 'woman, and him, who was begotten by a
- · Súdra on a Bráhmení,
- 67. 'Thus is it removed: he, who was be-
- 'gotten by an exalted man on a base woman,
- ' may by his good acts become respectable; but
- 'he, who was begotten on an exalted woman
- ' by a base man, must himself continue base:
 - 68. 'Neither of the two (as the law is fixed);
- ' shall be girt with a facred string; not the for-
- mer, because his mother was low; nor the
- ' fecond, because the order of the classes was in-
- 'verted.

- 59. As good grain, springing from good
- foil, is in all respects excellent, thus a man,
- fpringing from a respectable father by a respect-
- 'able mother, has a claim to the whole institu-
- stion of the twice born.
- 70. Some sages give a preference to the
- grain; others to the field; and others confider
- both field and grain; on this point the decision
- ≪follows:
- 71. 'Grain, cast into bad ground, wholly
- * perishes, and a good field with no grain fown
- ' in it, is a mere heap of clods;
 - 72. 'But fince, by the virtue of eminent fa-
- thers, even the fons of wild animals, as Rish-
- 4 yasringa, and others, have been transformed
- 4 into holy men revered and extolled, the pa-
- f ternal fide, therefore, prevails.
 - 73. BRAHMA' himself, having compared a
- Súdra, who performs the duties of the twice-
- born, with a twiceborn man, who does the
- "acts of a Súdra, faid: "Those two are neither
- "equal nor unequal," that is, they are neither
- equal in rank, nor unequal in bad conduct.
- 74. LET such Brahmens as are intent on the
- means of attaining the supreme godhead, and
- firm in their own duties, completely perform
- ' in order, the fix following acts:
- 75. 'Reading the Védas, and teaching others
- ' to read them, facrificing, and affifting others to

- ' facrifice, giving to the poor, if themselves have
- ' enough, and accepting gifts from the virtuous, if
- s themselves are poor, are the six prescribed acts
- of the firstborn class;
 - 76. 'But, among those six acts of a Brahmen,
- three are his means of subsistence; assisting to
- ' facrifice, teaching the Veaas, and receiving
- ' gifts from a purehanded giver.
 - 77. 'Three acts of duty cease with the Brab-
- men, and belong not to the Cshatriya; teaching
- the Védas, officiating at a facrifice, and, thirdly,
- receiving presents;
 - 78. 'Those three are also (by the fixed rule
- of law) forbidden to the Vaisya; since MENU,
- the lord of all men, prescribed not those acts to
- the two classes, military and commercial,
 - 79. 'The means of subfishence, peculiar to
- ' the Cshatriya, are bearing arms, either held for
- ftriking or missile; to the Vaisya, merchandize,
- attending on cattle, and agriculture: but with
- " a view to the next life the duties of both are
- almsgiving, reading, sacrificing.
 - 80. 'Among the feveral occupations for gain-
- ing a livelihood the most commendable respect-
- ' ively for the facerdotal, military, and mercan-
- tile classes, are teaching the Véda, defending
- the people, and commerce or keeping herds
- and flocks.
 - 81. 'Yet a Brahmen, unable to subsist by his

- duties just mentioned, may live by the duty of a foldier; for that is the next in rank.
- 82. 'If it be asked, how he must live, should
- 'he be unable to get a sussifience by either of
- those employments; the answer is, he may
- fublist as a mercantile man, applying himself
- in person to tillage and attendance on cattle:
 - 83. 'But a Bráhmen and a Cshatriya, obliged
- to subsist by the acts of a Vaisya, must avoid
- with care, if they can live by keeping berds, the
- business of tillage, which gives great pain to
- fentient creatures, and is dependant on the la-
- bour of others, as bulls and fo forth,
- 84. 'Some are of opinion, that agriculture is
- excellent; but it is a mode of fubfistence,
- 'which the benevolent greatly blame; for the
- ironmouthed pieces of wood not only wound
- ' the earth, but the creatures dwelling in it.
- 85. If, through want of a virtuous live-
- 'lihood, they cannot follow laudable occupa-
- 'tions, they may then gain a competence of
- wealth by felling commodities usually fold
- 'by merchants, avoiding what ought to be
- 'avoided:
- 86. 'They must avoid selling liquids of all
- forts, dreffed grain, feeds of tila, stones, falt,
- 'cattle and human creatures;
- 87. 'All woven cloth dyed red, cloth made
- of fana, of csbumá bark, and of wool, even

- 'though not red; fruit, roots, and medicinal 'plants;
- 88. Water, iron, poison, fleshmeat, the moonplant, and perfumes of any fort; milk,
- honey, buttermilk, clarified butter, oil of tila,
- wax, fugar, and blades of cus a-grafs;
 - 89. 'All beafts of the forest, as deer and the
- · like; ravenous beafts, birds, and fish; spi-
- ' rituous liquors, nili, or indigo, and lácshá,
- or lac; and all beafts with uncloven hoofs.
 - 90. But the Bráhmen husbandman may at
- ' pleasure sell pure tila seeds for the purpose of
- holy rites, if he keep them not long with a hope
- of more gain, and shall have produced them
- by his own culture:
 - 91. 'If he apply feeds of tila to any purpose
- but food, anointing, and facred oblations, he
- ' shall be plunged, in the shape of a worm, to-
- egether with his parents, into the ordure of dogs.
 - 92. 'By selling fleshmeat, lácsbá, or salt, a
- Bráhmen immediately finks low; by felling
- 'milk three days, he falls to a level with a
- · Sudra:
 - 93. And by felling the other forbidden
- ' commodities with his own free will, he assumes
- in this world, after feven nights, the nature of
- ' a mere Vaisya.
- 94. 'Fluid things may, however, be bartered
- for other fluids, but not falt for any thing

- fliquid; so may dressed grain for grain unfdressed, and tila seeds for grain in the husk, fequal weights or measures being given and ftaken.
 - 95. A MILITARY man, in diffres, may fublish by all these means, but at no time must he have recourse to the highest, or facerdotal, function.
 - 96. A man of the lowest class, who, through covetousness, lives by the acts of the highest, let the king strip of all his wealth and instantly banish:
 - 97. His own office, though defectively performed, is preferable to that of another, though performed completely; for he, who without necessity discharges the duties of another class, immediately forfeits his own.
 - 98. 'A MERCANTILE man, unable to subsist by his own duties, may descend even to the service acts of a Súdra, taking care never to do what ought never to be done; but, when he has gained a competence, let him depart from service.
 - 99. A MAN of the fourth class, not finding employment by waiting on the twiceborn, while his wife and son are tormented with hunger, may subsist by handicrafts:
 - 100. Let him principally follow those met chanical occupations, as joinery and masonry, or

- those various practical arts, as painting and writing, by following which, he may serve the
- f twiceborn.
- 101. 'SHOULD a Bråhmen, afflicted and pin-
- 4 ing through want of food, choose rather to re-
- f main fixed in the path of his own duty, than
- to adopt the practice of Vaifyas, let him act in
- this manner:
 - 102. 'The Brahmen, having fallen into dif-
- tress, may receive gifts from any person what-
- ever; for by no facred rule can it be shown,
- that absolute purity can be sullied.
 - 103. 'From interpreting the Veda, from offi-
- ciating at facrifices, or from taking prefents,
- though in modes generally disapproved, no fin
- is committed by priests in distress; for they are
- · pure as fire or water.
 - 104. 'He, who receives food, when his life
 - could not otherwise be sustained, from any
 - man whatever, is no more tainted by fin, than
 - the fubtil ether by mud;
 - 105. 'AJI'GARTA, dying with hunger, was
 - 'going to destroy his own son (named S'UNAH-
 - * S'E'P'HA) by felling him for some cattle; yet he
 - was guilty of no crime, fince he only fought a
 - remedy against famishing:
 - 106. 'VA'MADE'VA, who well knew right
 - and wrong, was by no means rendered impure,
 - shough desirous, when oppressed with hunger,

- of eating the flesh of dogs for the preservation of his life:
- 107. 'BHARADWA'JA, eminent in devotion, when he and his fon were almost starved in a
- dreary forest, accepted several cows from the
- carpenter Vridhu:
 - 108. 'VISWA'MITRA too, than whom none
- better knew the distinctions between virtue
- and vice, refolved, when he was perishing with
- hunger, to eat the haunch of a dog, which he
- had received from a Chandála.
- 109. Among the acts generally disapproved. ! namely, accepting presents from low men, assist-
- ing them to facrifice, and explaining the scripture
- to them, the receipt of presents is the meanest
- in this world, and the most blamed in a Bráb-
- men after his present life;
- 110. 'Because affishing to facrifice and ex-
- f plaining the scripture are two acts always per-
- formed for those, whose minds have been im-
- ! proved by the sacred initiation; but gifts are
- also received from a servile man of the lowest
- class.
- 111. 'The guilt, incurred by affifting low
- men to facrifice and by teaching them the
- fcripture, is removed by repetitions of the
- ' gáyatrì and oblations to fire; but that, incurred
- by accepting gifts from them, is expiated only

- by abandoning the gifts and by rigorous devotion.
 - 112. It were better for a Brábmen, who could not maintain himself, to glean ears and
- * grains after harvest from the field of any person
- whatever: gleaning whole ears would be better
- * than accepting a prefent, and picking up fin-
- ⁶ gle grains would be still more laudable.
 - 113. ' Brábmens, who keep house, and are in
- want of any metals except gold and filver, or of
- other articles for good uses, may ask the king
- for them, if he be of the military class; but a
- king, known to be avaricious and unwilling to
- s give, must not be solicited.
 - 114. 'The foremost, in order, of these things
- may be received more innocently than that,
- which follows it: a field untilled, a tilled field,
- cows, goats, sheep, precious metals or gems,
- e new grain, dressed grain.
- 115. THERE are seven virtuous means of
- * acquiring property; fuccession, occupancy or
- donation, and purchase or exchange, which are
- allowed to all classes; conquest, which is peculiar
- to the military class; lending at interest, hus-
- bandry or commerce, which belong to the mer-
- * cantile class; and acceptance of presents, by the
- ⁶ Sacerdotal class, from respectable men.
 - 116] 'Learning, except that contained in the

- fcriptures, art, as mixing perfumes and the
- · like, work for wages, menial service, attend-
- ance on cattle, traffick, agriculture, content
- with little, alms, and receiving high interest
- on money, are ten modes of subsistence in times
- of distress.
- 117. 'Neither a priest nor a military man,
- ' though distressed, must receive interest on loans;
- 'but each of them, if he please, may pay the
- 'small interest permitted by law, on borrowing
- for some pious use, to the sinful man, who de-
- " mands it.
- 118. A MILITARY king, who takes even a
- 'fourth part of the crops of his realm at a time
- ' of urgent necessity, as of war or invasion, and
- * protects his people to the utmost of his power,
- ' commits no fin:
- 119. 'His peculiar duty is conquest, and he
- ' must not recede from battle; so that, while he
- defends by his arms the merchant and huf-
- 'bandman, he may levy the legal tax as the
- 'price of protection.
- 120. 'The tax on the mercantile class, which
- ' in times of prosperity must be only a twelfth part
- of their crops, and a fiftieth of their personal
- 'profits, may be an eighth of their crops in a
- ' time of distress, or a sixth, which is the medium,
- ' or even a fourth in great publick adversity; but
- 'a twentieth of their gains on money, and

- other moveables, is the highest tax: serving
- men, artisans, and mechanicks must affist by
- their labour, but at no time pay taxes.
 - 121. 'IF a Súdra want a subsistence and
- cannot attend a priest, he may serve a Csha-
- triya; or, if he cannot wait on a soldier by birth,
- he may gain his livelihood by ferving an opu-
- lent Vaisya.
 - 122. 'To him, who ferves Brahmens with a
- view to a heavenly reward, or even with a
- view to both this life and the next, the union
- of the word Brahmen with his name of fervant
- will affuredly bring fuccess.
 - , 123. 'Attendance on Bráhmens' is pro-
- onounced the best work of a Súdra: whatever
- else he may perform will comparatively avail
- him nothing.
- 124. 'They must allot him a fit mainte-
- ance according to their own circumstances,
- 4 after confidering his ability, his exertions, and
- the number of those, whom he must provide
- with nourishment:
- 125. 'What remains of their dreffed rice
- · must be given to him; and apparel which
- they have worn, and the refuse of their grain,
- ' and their old household furniture.
 - 126. 'THERE is no guilt in a man of the
- fervile class, who eats leeks and other forbidden
- · vegetables: he must not have the sacred inves-

titure: he has no business with the duty of making oblations to fire and the like; but there is no prohibition against his offering dressed grain as a sacrifice, by way of discharging his own duty.

'perform their entire duty, and, knowing what they should perform, imitate the practice of good men in the household sacraments, but without any holy text, except those containing praise and salutation, are so far from sinning, that they acquire just applause:

- 128. As a Súdra, without injuring another man, performs the lawful acts of the twice-born, even thus, without being cenfured, he gains exaltation in this world and in the next.
- nust be made by a Súdra, even though he has power to make it, since a servile man, who has amassed riches, becomes proud, and, by bis insolence or neglect, gives pain even to Brahmens.
- 130. 'Such, as have been fully declared, 'are the several duties of the four classes in distress for subsistence; and, if they perform them exactly, they shall attain the highest beatitude.

131. 'Thus has been propounded the fy'flem of duties, religious and civil, ordained

for all classes: I next will declare the pure law

of expiation for fin.

CHAPTER THE ELEVENTH.

On Penance and Expiation.

- 1. 'HIM, who intends to marry for the fake of having issue; him, who wishes to make a factifice; him, who travels; him, who has given all his wealth at a facred rite; him, who desires to maintain his preceptor, his father, or his mother; him, who needs a maintenance for himself, when he first reads the 'Vėdas, and him, who is afflicted with illness;
- 2. 'These nine Bráhmens let mankind con-'fider as virtuous mendicants, called fnátacas; 'and, to relieve their wants, let gifts of cattle or 'gold be presented to them in proportion to 'their learning:
- 3. 'To these most excellent Bráhmens must rice also be given with holy presents at oblations to fire and within the consecrated circle; but the dressed rice, which others are to receive, must be delivered on the outside of the facred hearth: gold and the like may be given any where.
 - 4. 'On fuch Bráhmens, as well know the Vol. VI. G

- · Vėda, let the king bestow, as it becomes him,
- 'jewels of all forts, and the solemn reward for officiating at the sacrifice.
- 5. 'He, who has a wife, and, having begged money to defray his nuptial expences, mar-
- ged money to destray wis napital expenses, man
- but fenfual enjoyment: the offspring belongs
- to the bestower of the gift.
- 6. 'LET every man, according to his ability,
- ' give wealth to Brahmens detached from the
- world and learned in scripture: such a giver
- ' shall attain heaven after this life.
 - 7. 'HE alone is worthy to drink the juice of
- the moonplant, who keeps a provision of
- grain fufficient to fupply those, whom the law
 - commands him to nourish, for the term of
 - three years or more;
 - 8. 'But a twiceborn man, who keeps a less
 - provision of grain, yet presumes to taste the
 - 'juice of the moonplant, shall gather no fruit
 - from that facrament, even though he taste it at
 - the first, or folemn, much less at any occasional, ceremony.
 - 9. 'HE, who bestows gifts on strangers with a view to worldly fame, while he suffers his fa-
 - ' mily to live in distress, though he has power
 - to support them, touches his lips with honey,
 - but swallows poison; such virtue is counter-
 - feit:

- 10. Even what he does for the fake of his future spiritual body, to the injury of those, whom he is bound to maintain, shall bring him ultimate misery both in this life and in the next.
- twiceborn facrificer, and by a Bráhm n especially, be impersect from the want of some ingredient, during the reign of a prince, who knows the law,
- 12. Let him take that article, for the completion of the facrifice, from the house of any Vaifya, who possesses considerable herds, but neither facrifices, nor drinks the juice of the moonplant:
- 13. 'If such a Vaisya be not near, he may take two or three such necessary articles at pleasure from the house of a Súdra; since a Súdra has no business with solemn rites.
- 'a Cshatriya, who possesses a hundred cows, but has no consecrated fire, or a thousand cows, but performs no facrifice with the moon-plant, let a priest without scruple take the articles wanted.
- 15. 'From another Bráhmen. who continu-'ally receives presents but never gives, let him 'take such ingredients of the sacrisice, if not

- bestowed on request: so shall his fame be spread abroad, and his habits of virtue increase.
- 16. 'Thus, likewise, may a Brábmen, who has not eaten at the time of six meals, or bas
- fasted three whole days, take at the time of the
- feventh meal, or on the fourth morning, from
- the man, who behaves basely by not offering
- ' bim food, enough to supply him till the mor-
- fow:
- 17. 'He may take it from the floor, where 'the grain is trodden out of the husk, or from
- the field, or from the house, or from any
- oplace whatever; but, if the owner ask why be
- takes it, the cause of the taking must be de-
- clared.
- 18. 'The wealth of a virtuous Bráhmen must at no time be seized by a Cshatriya;
- but, having no other means to complete a facri-
- 'fice, he may take the goods of any man, who
- acts wickedly, and of any, who performs not
- ' his religious duties:
- 19. 'He, who takes property from the bad for the purpose before-mentioned, and bestows it
- on the good, transforms himself into a boat,
- 'and carries both the good and the bad over a sea' of calamities.
- 20. 'Wealth, possessed by men for the performance of sacrifices, the wise call the pro-

- perty of the gods; but the wealth of men,
 who perform no facrifice, they confider as the
 property of demons.
- 21. Let no pious king fine the man, who takes by stealth or by force what he wants to make a facrifice perfect; fince it is the king's folly, that causes the hunger or wants of a Rráhmen:
- 22. 'Having reckoned up the persons, whom the Bráhmen is obliged to support, having ascertained his divine knowledge and moral conduct, let the king allow him a suitable maintenance from his own household;
- 23. 'And, having appointed him a mainte-'nance, let the king protect him on all sides; 'for he gains from the Bráhmen, whom he pro-'tects, a sixth part of the reward for his virtue.
- 24. LET no Brábmen ever beg a gift from a Súdra; for, if he perform a facrifice after fuch begging, he shall, in the next life, be born a Chandála.
- 25. 'The Bráhmen, who begs any articles 'for a facrifice, and disposes not of them all for 'that purpose, shall become a kite or a crow 'for a hundred years.
- 26. 'Any evilhearted wretch, who, through covetousness, shall seize the property of the gods or of *Brahmens*, shall seed in another world on the orts of vultures.

- 27. THE facrifice Vaifwanari must be confantly performed on the first day of the new
- year, or on the new moon of Chaitra, as an
- expiation for having omitted through mere for-
- e getfulness the appointed facrifices of cattle and
- the rites of the moonplant:
 - 28. 'But a twiceborn man, who, without
- enecessity, does an act allowed only in a case
- f of necessity, reaps no fruit from it hereafter;
- thus has it been decided.
 - 29. By the Viswedevas, by the Sadbyas, and
- by eminent Rishis of the sacerdotal class, the
- fubstitute was adopted for the principal act,
- when they were apprehensive of dying in
- times of eminent peril;
- 30. But no reward is prepared in a future
- fate for that illminded man, who, when able
- to perform the principal facrifice, has recourse
- to the substitute.
 - 31. A PRIEST, who well knows the law,
- needs not complain to the king of any grievous
- ' injury; fince, even by his own power, he may
- chastise those, who injure him:
- 32. 'His own power, which depends on him-
- 'felf alone, is mightier than the royal power,
- which depends on other men: by his own might,
- therefore, may a Brahmen coerce his foes.
- 33. 'He may use, without hesitation, the pow-
- erful charms revealed to AT'HARVAN, and

- by him to Angiras; for speech is the weapon
- of a Bráhmen: with that he may destroy his
- oppressors.
- 34. ' A soldier may avert danger from him-
- felf by the strength of his arm; a merchant
- and a mechanick, by their property; but the
- chief of the twiceborn, by holy texts and ob-
- ' lations to fire.
- 35. ' A priest, who performs his duties, who
- igustly corrects his children and pupils, who ad-
- vises expiations for sin, and who loves all ani-
- mated creatures, is truly called a Brábmen: to
- him let no man fay any thing unpropitious,
- onor use any offensive language.
- 36. Let not a girl, nor a young woman
- " married or unmarried, nor a man with little
- 6 learning, nor a dunce, perform an oblation to
- fire; nor a man diseased, nor one uninvested
- with the facrificial string;
- 37. 'Since any of those persons, who make
- fuch an oblation, shall fall into a region of
- torture, together with him, who fuffers his
- 'hearth to be used: he alone, who perfectly
- knows the facred ordinances, and has read all
- the Védas, must officiate at an oblation to holy
- fire.
- 38. ' A Brábmen with abundant wealth, who
- ' presents not the priest, that hallows his fire,
- with a horse consecrated to PRAJA'PATI,

- becomes equal to one who has no fire hallowed.
 - 39. Let him, who believes the scripture,
- and keeps his organs in subjection, perform
- all other pious acts; but never in this world
- 'let him offer a facrifice with trifling gifts to
- · the officiating priest:
 - 40. 'The organs of sense and action, repu-
 - tation in this life, a heavenly mansion in the
 - " next, life itself, a great name after death, chil-
 - dren, and cattle, are all defroyed by a facri-
 - fice offered with trifling presents: let no man,
 - therefore, facrifice without liberal gifts.
 - 41. 'THE priest, who keeps a facred hearth,
 - but voluntarily neglects the morning and even-
 - ing oblations to his fires, must perform, in the
- manner to be described, the penance chándráyana
- for one month; fince that neglett is equally
- finful with the slaughter of a son.
 - 42. 'They, who receive property from a
- Súdra for the performance of rites to conse-
- crated fire, are contemned as ministers of the
- ' base, by all such as pronounce texts of the
- · Véda:
- 43. 'Of those ignorant priests, who serve
- the holy fire for the wealth of a Súdra, the .
- f giver shall always tread on the foreheads, and
- thus pass over miseries in the gloom of death.
 - 44. Every man, who does not an act pre-

- fcribed, or does an act forbidden, or is guilty
- of excess even in legal gratifications of the
- · fenses, must perform an expiatory penance.
 - 45. 'Some of the learned confider an expia-
- tion as confined to involuntary fin; but others,
- from the evidence of the Vėda, hold it effec-
- tual even in the case of a voluntary offence:
 - 46. A fin, involuntarily committed, is re-
- 6 moved by repeating certain texts of the scrip-
- ture; but a fin committed intentionally,
- through strange infatuation, by harsh penances
- of different forts.
- 47. 'IF a twiceborn man, by the will of
- God in this world, or from his natural birth,
- have any corporeal mark of an expiable fin
- committed in this or a former state, he must
- 'hold no intercourse with the virtuous, while
- his penance remains unperformed.
 - 48. 'Some evilminded persons, for fins com-
- emitted in this life, and some for bad actions
- ' in a preceding state, suffer a morbid change
- ' in their bodies:
- 49. 'A stealer of gold from a Bráhmen has
- whitlows on his nails; a drinker of spirits,
- 'black teeth; the slayer of a Bráhmen, a ma-
- 'rasmus; the violator of his guru's bed, a de-
- ' formity in the generative organs;
- 50. 'A malignant informer, fetid ulcers in
- his nostrils; a false detractor, stinking breath;

- · a stealer of grain, the defect of some limb; a
- · mixer of bad wares with good, some redundant
- member;
 - 51. 'A stealer of dressed grain, dyspepsia;
- a stealer of holy words, or an unauthorized
- reader of the scriptures, dumbness; a stealer
- of clothes, leprofy; a horsestealer, lameness;
 - 52. 'The stealer of a lamp, total blindness;
- the mischievous extinguisher of it, blindness
- in one eye; a delighter in hurting fentient
- creatures, perpetual illness; an adulterer,
- windy fwelling in his limbs:
 - 53. 'Thus, according to the diversity of ac-
- tions, are born men despised by the good, stupid,
- 4 dumb, blind, deaf, and deformed.
- 54. 'Penance, therefore, must invariably be
- performed for the sake of expiation; since
- they, who have not expiated their fins, will
- again spring to birth with disgraceful marks.
 - 55. 'KILLING a Brahmen, drinking for-
- bidden liquor, stealing gold from a priest,
- adultery with the wife of a father, natural or
- fpiritual, and affociating with fuch as commit
- those offences, wise legislators must declare to
- be crimes in the highest degree, in respect of
- those after mentioned, but less than incest in a
- direct line, and some others.
- 56. 'FALSE boasting of a high tribe, malig-
- nant information, before the king, of a crimi-

- anal who must suffer death, and falsely accusing a
- fipiritual preceptor, are crimes in the second de-
- f gree, and nearly equal to killing a Bráhmen.
 - 57. ' Forgetting the texts of scripture, show-
- ing contempt of the Véda, giving false evi-
- dence without a bad motive, killing a friend
- * without malice, eating things prohibited, or,
- from their manifest impurity, unfit to be tasted,
- f are fix crimes nearly equal to drinking spirits;
- but perjury and bomicide require in atrocious cases
- the harshest expiation.
- 58. 'To appropriate a thing deposited or
- f lent for a time, a human creature, a horse,
- precious metals, a field, a diamond, or any
- other gem, is nearly equal to stealing the gold
- f of a Bráhmen.
- 59. Carnal commerce with fifters by the
- fame mother, with little girls, with women
- f of the lowest mixed class, or with the wives
- 6 of a friend or of a fon, the wife must consider
- f as nearly equal to a violation of the paternal
- f bed.
- 60. 'SLAYING a bull or cow, sacrificing
- f what ought not to be facrificed, adultery, fell-
- ing onefelf, deferting a preceptor, a mother,
- f a father, or a fon, omitting to read the scrip-
- ture, and neglect of the fires prescribed by the
- f Dhermasastra only,
 - 61. 'The marriage of a younger brother be-

- fore the elder, and that elder's omission to
- marry before the younger, giving a daughter
- to either of them, and officiating at their
- 4 nuptial facrifice,
 - 62. Defiling a damfel, usury, want of per-
- fect chastity in a student, selling a holy pool
- or garden, a wife, or a child,
 - 63. 'Omitting the facred investiture, aban-
- 6 doning a kinsman, teaching the Véda for hire,
- · learning it from a hired teacher, felling com-
- modities, that eught not to be fold,
 - 64. Working in mines of any fort, engaging
- in dykes, bridges, or other great mechanical
- works, fpoiling medicinal plants repeatedly,
- fubfifting by the barlotry of a wife, offering
- facrifices and preparing charms to destroy the
- 'innocent,
- 65. 'Cutting down green trees for firewood,
- performing holy rites with a felfish view
- merely, and eating prohibited food once with-
- out a previous design,
- 66. 'Neglecting to keep up the consecrated
- fire, stealing any valuable thing besides gold,
- ' nonpayment of the three debts, application to
- ' the books of a false religion, and excessive at-
- tention to musick or dancing,
- 67. Stealing grain, base metals, or cattle,
- familiarity by the twiceborn with women, who
- · have drunk inebriating liquor, killing without

- e malice, a woman, a Súdra, a Vaifya, or a Csba-
- ' triya, and denying a future state of rewards
- and punishments, are all crimes in the third
- degree, but higher or lower according to circumflances.
- 68. 'Giving pain to a Bráhmen, smelling at
- any spirituous liquor or any thing extremely
- fetid and unfit to be smelt, cheating, and un-
- anatural practices with a male, are confidered
- 'as causing a loss of class.
 - 69. 'To kill an ass, a horse, a camel, a deer,
- 'an elephant, a goat, a sheep, a fish, a snake, or
- 'a buffalo, is declared an offence, which de-
- f grades the killer to a mixed tribe.
- 70. Accepting presents from despicable
- men, illegal traffick, attendance on a Súdra
- mafter, and speaking falsehood, must be con-
- 'fidered as causes of exclusion from social re-
- ' pasts.
- 71. 'KILLING an insect, small or large, a
- 'worm, or a bird, eating what has been brought
- ' in the same basket with spirituous liquor, steal-
- 'ing fruit, wood, or flowers, and great pertur-
- bation of mind on trifling occasions, are of-
- ' fences which cause defilement.
- 72. You shall now be completely instruct-
- 'ed in those penances, by which all the sins just mentioned are expiable.
 - 73. 'IF a Brahmen have killed a man of the

- facerdotal class, without malice prepense, the
- · slayer being far superior to the slain in good qua-
- · lities, he must himself make a hut in a forest
- and dwell in it twelve whole years, subsisting
- on alms for the purification of his foul, placing
- near him, as a token of his crime, the skull of
- the slain, if he can procure it, or, if not, any hu-
- man skull. The time of penance for the three
- · lower classes must be twenty four, thirty six, and
- forty eight, years.
- 74. Or, if the slayer be of the military class,
- he may voluntarily expose himself as a mark
- to archers, who know his intention; or, ac-
- · cording to circumstances, may cast himself head-
- long thrice, or even till he die, into blazing fire.
- 75. Or, if he be a king, and flew a priest
- without malice or knowledge of his class, he may
- e perform, with presents of great wealth, one of
- the following sacrifices; an Aswamedha, or a
- · Swerjit, or a Gósava, or an Abhijit, or a Vis-
- ' wajit, or a Trivrit, or an Agnishtut.
- 76. 'Or, to expiate the guilt of killing a
- e priest without knowing him and without defign,
- the killer may walk on a pilgrimage a hundred
- ' yójanas, repeating any one of the Védas, eating
- barely enough to fustain life, and keeping his
- organs in perfect subjection;
 - 77. 'Or, if in that case the slayer be unlearned

- but rich, he may give all his property to some
- ' Brábmen learned in the Véda, or a sufficiency
- of wealth for his life, or a house and furniture
- ' to hold while he lives:
- 78. 'Or, eating only fuch wild grains as are
- offered to the gods, he may walk to the head
- of the river Sarafwati against the course of
- 'the stream; or, subsisting on very little food,
- 'he may thrice repeat the whole collection of
- 'Vėdas, or the Rich, Yajush, and Saman.
- 79. 'Or, his hair being shorn, he may dwell
- 'near a town, or on pastureground for cows,
- or in some holy place, or at the root of a sa-
- cred tree, taking pleasure in doing good to
- cows and to Bráhmens;
- 80. 'There, for the preservation of a cow
- or a Brahmen, let him instantly abandon life;
- 'fince the preserver of a cow or a Bráhmen
- 'atones for the crime of killing a priest:
- 81. 'Or, by attempting at least three times
- 'forcibly to recover from robbers the property
- 'of a Bráhmen, or by recovering it in one of
- 'his attacks, or even by losing his life in the
- 'attempt, he atones for his crime.
- 82. 'Thus, continually firm in religious 'austerity, chaste as a student in the first order,
- with his mind intent on virtue, he may ex-
- ' piate the guilt of undesignedly killing a Bráb-
- 'men, after the twelfth year has expired.

- 83. Or, if a virtuous Brahmen unintention-
- e ally kill another, who had no good quality, he
- e may atone for his guilt by proclaiming it in
- an assembly of priests and military men, at
- the facrifice of a horse, and by bathing with
- other Bráhmens at the close of the sacrifice:
 - 84. ' Bráhmens are declared to be the basis,
- and Cshatriyas the summit, of the legal system:
- he, therefore, expiates his offence by fully
- proclaiming it in fuch an affembly.
 - 85. 'From his high birth alone, a Brabmen
- is an object of veneration even to deities: his
- declarations to mankind are decifive evidence;
- and the Véda itself confers on him that cha-
- racter.
 - 86. 'Three at least, who are learned in the
- 6 Véda, should be affembled to declare the proper
- expiation for the fin of a priest, but, for the
- three other classes, the number must be doubled,
- ' tripled, and quadrupled: what they declare
- I shall be an atonement for sinners; since the
- words of the learned give purity.
- 87. 'Thus a Bráhmen, who has performed
- one of the preceding expiations, according to
- the circumstances of the homicide and the cha-
- · racters of the persons killed and killing, with his
- whole mind fixed on God, purifies his foul,
- and removes the guilt of flaying a man of his
- 'own class:

- 88. He must perform the same penance
- for killing an embryo, the fex of which was
- unknown, but whose parents were facerdotal,
- or a military or a commercial man employed
- in a facrifice, or a Brábment woman, who has
- bathed after temporary uncleanness;
 - 89. And the fame for giving false evidence
- in a cause concerning land or gold or precious
- 'commodities, and for accusing his preceptor un-
- iguily, and for appropriating a deposit, and
- for killing the wife of a priest, who keeps a
- ' consecrated fire, or for flaying a friend.
- go. Such is the atonement ordained for
- killing a priest without malice; but for killing
- a Bráhmen with malice prepense, this is no
- expiation: the term of twelve years must be
- 'doubled, or, if the case was atrocious, the mur-
- ' derer must actually die in slames or in battle.
- 91. 'Any twiceborn man, who has inten-
- ' tionally drunk spirit of rice, through perverse
- 'delufion of mind, may drink more spirit in
- 'flame, and atone for his offence by feverely
- 'burning his body;
- 92. Or he may drink boiling hot, until he
- 'die, the urine of a cow, or pure water, or
- 'milk, or clarified butter, or juice expressed
- 'from cowdung:
- 93. 'Or, if he tasted it unknowingly, he may
- expiate the fin of drinking spirituous liquor,

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- by eating only fome broken rice or grains of
- tila, from which oil has been extracted, once
- every night for a whole year, wrapped in
- coarse vesture of hairs from a cow's tail, or
- fitting unclothed in his bouse, wearing his locks
- and beard uncut, and putting out the flag of a tavern-keeper.
- 94. 'Since the spirit of rice is distilled from
- the Mala, or filthy refuse, of the grain, and
- fince Mala is also a name for sin, let no Bráb-
- men, Cshatriya, or Vaisya drink that spirit.
- 95. Inebriating liquor may be confidered
- as of three principal forts; that extracted from
- dregs of fugar, that extracted from bruised
- rice, and that extracted from the flowers of
- the Madhuca: as one, fo are all; they shall
- not be tasted by the chief of the twiceborn.
 - 96. 'Those liquors, and eight other sorts,
- ' with the flesh of animals, and Asava, the
- most pernicious beverage, prepared with nar-
- cotick drugs, are swallowed at the juncates of
- ' Yacshas, Racshasas, and Pisachas: they shall
- 'not, therefore, be tasted by a Bráhmen, who
- ' feeds on clarified butter offered to gods.
 - 97. ' A Brahmen, stupesied by drunkenness,
- 6 might fall on something very impure, or might
- even, when intoxicated, pronounce a secret
- ' phrase of the Véda, or might do some other
- 'act, which ought not to be done.

- 98. When the divine spirit, or the light of
- holy knowledge, which has been infused into
- . his body, has once been sprinkled with any
 - intoxicating liquor, even his priestly charac-
 - ter leaves him, and he finks to the low degree
 - of a Sudra.
 - 99. 'Thus have been promulgated the va-
 - frious modes of expiation for drinking spirits:
 - "I will next propound the atonement for steal-
 - ing the gold of a priest to the amount of a su-
 - verna.
 - 100. 'HE, who has purloined the gold of a
- Bråbmen, must hasten to the king, and pro-
- claim his offence; adding, "Inflict on me
- " the punishment due to my crime."
- 101. 'Then shall the king himself, taking
- from him an iron mace, which the criminal must
- bear on his shoulder, strike him with it once;
- and by that stroke, whether he die or be only
- 'left as dead, the thief is released from sin: a
- Brábmen by rigid penance alone can expiate
- 'that offence; another twiceborn man may also
- * perform such a penance at his election.
- 102. 'The twiceborn man, who desires to
- fremove by austere devotion the taint caused
- by stealing gold, must perform in a forest, co-
- vered with a mantle of rough bark, the pe-
- nance before ordained for him, who without
- * malice prepense has killed a Brahmen.

103. By these expiations may the twiceborn

atone for the guilt of stealing gold from a

priest; but the sin of adultery with the wife

of a father, natural or spiritual, they must ex-

piate by the following penances.

104. 'HE, who knowingly and actually has

defiled the wife of his father, she being of the

· same class, must extend himself on a heated ' iron bed, loudly proclaiming his guilt; and,

there embracing the red-hot iron image of a woman, he shall atone for his crime by death;

105. 'Or, having himself amputated his

penis and scrotum, and holding them in his

fingers, he may walk in a direct path toward

the fouthwest, or the region of NIRRITI, un-

til he fall dead on the ground:

106. 'Or, if he had mistaken her for another

woman, he may perform for a whole year,

with intense application of mind, the penance

· prájápatya, with part of a bed, or a human

bone, in his hand, wrapped in vesture of coarse

bark, letting his hair and beard grow, and

· living in a deserted forest:

107. 'Or, if she was of a lower class and a

corrupt waman, he may expiate the fin of vio-

· lating the bed of his father, by continuing the

penance chándráyana for three months, al-

ways mortifying his body by eating only fo-

rest herbs, or wild grains boiled in water.

- 108. 'By the preceding penances may finners of the two higher degrees atone for their guilt; and the less offenders may expiate theirs by the following austerities.
- 109. 'HE, who has committed the smaller offence of killing a cow without malice, must drink for the first month barleycorns boiled foft in water; his head must be shaved entirely; and, covered with the hide of the slain cow, he must fix his abode on her late pasture ground:
- 'wild grains, but without any factitious falt,
 for the next two months at the time of each
 fourth repast, on the evening of every fecond
 day; regularly bathing in the urine of cows,
 and keeping his members under controul:
- 111. All day he must wait on the herd, and stand quasting the dust raised by their hoofs; at night, having servilely attended and stroked and saluted them, he must surround them with a sence, and sit near to guard them:
- 112. Pure and free from passion, he must stand, while they stand; follow them, when they move together; and lie down by them, when they lie down:
 - 113. Should a cow be fick or terrified by

- tigers or thieves, or fall, or flick in mud, he
- must relieve her by all possible means:
- 114. In heat, in rain, or in cold, or while the blast furiously rages, let him not seek his
- own shelter, without first sheltering the cows
- to the utmost of his power.
- 115. ' Neither in his own house, or field, or
- floor for treading out grain, nor in those of
- any other person, let him say a word of a
- cow, who eats corn or grass, or of a calf, who
- drinks milk:
- 116. By waiting on a herd, according to
- these rules, for three months, the slayer of a
- f cow atones for his guilt;
- 117. But, his penance being performed,
- he must give ten cows and a bull, or, his
- flock not being fo large, must deliver all he
- possesses, to such as best know the Véda.
- 118, 'THE preceding penances, or that called
- 'chándráyana, must be performed for the abso-
- 'lution of all twiceborn men, who have com-
- f mitted fins of the lower or third degree; ex-
- cept those, who have incurred the guilt of an
- * cept those, who have incurred the guilt of an
- 119. 'But he, who has become Avacirni, must
- facrifice a black or a oneeyed ass, by way of a
- meatoffering to NIRRITI, patroness of the south-
- west, by night in a place where four ways meet:

- 120. Let him daily offer to her in fire the
- fat of that ass, and, at the close of the ceremony,
- e let him offer clarified butter, with the holy
- text Sem and io forth, to PAVANA, to INDRA,
- to VRIHASPATI, and to AGNI, regents of
- wind, clouds, a planet, and fire.
 - 121. A voluntary effusion, naturally or.
- otherwise, of that which may produce a man
- by a twiceborn youth during the time of his
- 'studentship or before marriage, has been pro-
- 'nounced avacírna, or a violation of the rule
- ' prescribed for the first order, by sages, who
- 'knew the whole fystem of duty, and uttered
- the words of the Véda.
- 122. 'To the four deities of purification,
- 'Ma'ruta, Indra, Vrihaspati, Agni,
- 'goes all the divine light, which the Véda had
- 'imparted, from the student, who commits the
- 'foul fin avacirna;
- 123. 'But, this crime having actually been
- committed, he must go begging to seven
- 'houses, clothed only with the hide of the sa-
- ' crificed ass, and openly proclaiming his act:
- 124. Eating a fingle meal begged from
- them, at the regular time of the day, that is,
- in the morning or evening, and bathing each
- day at the three favanas, He shall be absolved
- from his guilt at the end of one year.

125. 'HE, who has voluntarily committed any fin, which causes a loss of class, must perform the tormenting penance, thence called fantapana; or the prajapatya, if he offended involuntarily.

126. 'FOR fins, which degrade to a mixed class, or exclude from society, the sinner must have recourse to the *lunar* expiation *chándráy*-

- " ana for one month: to atone for acts, which
- occasion defilement, he must swallow nothing

for three days but hot barleygruel.

- 127, 'FOR killing intentionally a virtuous man of the military class, the penance must be
- a fourth part of that ordained for killing a
- 'priest; for killing a Vaisya, only an eighth;
- for killing a Súdra, who had been constant in
- discharging his duties, a fixteenth part:
- 128. But, if a Brahmen kill a Cshatriya
- without malice, he must, after a full perform-
- ance of his religious rites, give the priefts one
- bull together with a thousand cows;
- 129. Or he may perform for three years
- the penance for flaying a Brábmen, mortify-
- ing his organs of fensation and action, letting
- his hair grow long, and living remote from
- the town, with the root of a tree for his man-
- fion,
 - 130, 'If he kill without malice a Vaisya, who

- ' had a good moral character, he may perform
- 'the same penance for one year, or give the
- priests a hundred cows and a bull:
- 131. 'For fix months must he perform this
- ' whole penance, if without intention he kill a Sú-
- ' dra; or he may give ten white cows and a
- 'bull to the priests.
- 132. 'If he kill by design a cat, or an ich-
- ' neumon, the bird Chásha, or a frog, a dog, a
- 'lizard, an owl, or a crow, he must perform
- ' the ordinary penance required for the death of
- 'a Súdra, that is, the chándráyana:
- 133. 'Or, if he kill one of them und-fignedly,
- 'he may drink nothing but milk for three days
- ' and nights, or each night walk a yógan, or
- 'tbrice bathe in a river, or filently repeat the
- 'text on the divinity of water; that is, if he be
- 'disabled by real infirmity from performing the
- ' first mentioned penances, be may bave recourse to
- the next in order.
- 134. ' A Brábmen, if he kill a snake, must
- 'give to some priest a hoe, or ironbeaded stick; if
- ' an eunuch, a load of ricestraw, and a másha of
- 'lead;
- 135. 'If a boar, a pot of clarified butter; if
- the bird tittiri, a drona of tila feeds: if a par-
- 'rot, a steer two years old; if the waterbird
- 'crauncha, a steer aged three years:
 - 136. If he kill a goose, or a phenicopteros, a

- ' beron, or cormorant, a bittern, a peacock, an 'ape, a hawk, or a kite, he must give a cow to 'some Bráhmen:
- 137. 'If he kill a horse, he must give a 'mantle; if an elephant, sive black bulls; if a 'goat or a sheep, one bull; if an ass, a calf one 'year old:
- 138. 'If he kill a carnivorous wild beaft, he must give a cow with abundance of milk; if a wild beast not carnivorous, a fine heifer; and a ractical of gold, if he slay a camel:
- 139. 'If he kill a woman of any class caught in adultery, he must give as an expiation, in the direct order of the four classes, a leathern pouch, a bow, a goat, and a sheep.
- 140. 'Should a Bráhmen be unable to expi-'ate by gifts the fin of killing a fnake and the 'rest, he must atone for his guilt by perform-
- ing, on each occasion, the penance prájápatya.
- 141. For the flaughter of a thousand small animals which have bones, or for that of
- boneless animals enow to fill a cart, he must
- ' perform the chándráyana, or common penance
- ' for killing a Súdra;
- 142. 'But, for killing boned animals, he must also give some trisle, as a pana of copper,
- to a Brábmen: for killing those without bones,
- he may be absolved by holding his breath, at
- · the close of his penance, while he thrice repeats

- the gdyatri with its bead, the pranava, and the vyábritis.
- 'yielding fruit, shrubs with many crowded ftems, creeping or climbing plants, or such as grow again when cut, if they were in blossom when be burt them, he must repeat a hundred texts of the Véda.
- 144. 'For killing infects of any fort bred in 'rice or other grains, or those bred in honey or 'other fluids, or those bred in fruit or flowers, 'eating clarified butter is a full expiation.
- 145 'If a man cut, wantonly and for no good purpose, such grasses as are cultivated, or such as rise in the forest spontaneously, he must wait on a cow for one day, nourished by milk alone.
- 146. 'By these penances may mankind atone for the sin of injuring sentient creatures, whether committed by design or through inadvertence: hear now what penances are ordained for eating or drinking what ought not to be tailed.
- 147. 'He, who drinks undelignedly any spirit but that of rice, may be absolved by a new investiture with the facrificial string: even for drinking intentionally the weaker forts of spirit, a penance extending to death must not (as the law is now fixed) be prescribed.

- 148. 'For drinking water which has flood in a vessel, where spirit of rice or any other fpirituous liquor had been kept, he must swall low nothing for five days and nights, but the
- · low nothing, for five days and nights, but the plant fanc bapushpi boiled in milk:
- 149. 'If he touch any spirituous liquor, or give any away, or accept any in due form, or
- with thanks, or drink water left by a Súdra,
- he must swallow nothing, for three days and nights, but cus'a-grass boiled in water.
- 150. 'Should a Brábmen, who has once tast-
- ed the holy juice of the moonplant, even smell
- the breath of a man who has been drinking
- fpirits, he must remove the taint by thrice re-
- peating the gáyatri, while he suppresses his
- breath in water, and by eating clarified butter
- after that ceremony.
- 151. 'IF any of the three twiceborn classes
- have tasted unknowingly human ordure or
- urine, or any thing that has touched spirituous
- 'liquor, they must, after a penance, be girt
- anew with the facrificial thread;
- 152. 'But, in such new investiture of the 'twiceborn, the partial tonsure, the zone, the 'staff, the petition of alms, and the strict rules of abstinence, need not be renewed.
- 153. 'SHOULD one of them eat the food of those persons, with whom he ought never to eat, or food lest by a woman or a Súdra, or

'any prohibited flesh, he must drink barleygruel' only for seven days and nights.

154. 'If a Brahmen drink sweet liquors turned acid, or astringent juices from impure fruits, he becomes unclean, as long as those fluids remain undigested.

155. Any twiceborn man, who by accident has tasted the dung or urine of a tame boar, an ass, a camel, a shakal, an ape or a crow, must perform the penance chandrayana:

156. 'If he taste dried sleshmeat, or mushrooms rising from the ground, or any thing
brought from a slaughter-house, though he
knew not whence it came, he must perform
the same penance.

157. 'For knowingly eating the flesh of carinvorous beasts, of town-boars, of camels, of
gallinaceous birds, of human creatures, of
crows, or of asses, the penance taptacrich'bra,
or burning and severe, is the only atonement.

158. 'A Bráhmen, who, before he has com-'pleted his theological studies, eats food at 'monthly obsequies to one ancestor, must fast 'three days and nights, and sit in water a day:

159. 'But a student in theology, who at any time unknowingly tastes honey or slesh, must perform the lowest penance, or the prajapatya, and proceed to finish his studentship.

160. 'Having eaten what has been left by a

- f cat, a crow, a mouse, a dog, or an ichneumon,
- For what has even been touched by a loufe, he
- "must drink, boiled in water, the plant brab-
- · musuverchalá.
- 161. 'By the man, who seeks purity of soul,
- on forbidden fcod must be tasted: what he has
- undefignedly fwallowed he must instantly
- vomit up, or must purify himself with speed
- by legal expiations.
 - 162. 'Such, as have been declared, are the
- various penances for eating prohibited food:
- hear now the law of penance for an expiation
- of theft.
 - 163. 'THE chief of the twiceborn, having
- voluntarily stolen such property, as grain, raw
- or dreffed, from the house of another Bráb-
- " men, shall be absolved on performing the pe-
- ' nance prájápatya for a whole year;
- 164. 'But the penance chándráyana must be
- performed for stealing a man, woman, or
- child, for feizing a field, or a house, or for
- taking the waters of an enclosed pool or well.
- 165. 'Having taken goods of little value
- from the house of another man, he must pro-
- cure absolution by performing the penance
- ' sántapana; having first restored, as the peni-
- * tent thief always must, the goods that he stole.
- 166. 'For taking what may be eaten, or
- what may be fipped, a carriage, a bed, or a

- feat, roots, flowers, or fruit, an atonement
- 'may be made by swallowing the five pure
- things produced from a cow, or milk, curds,
- ' butter, urine, dung:
- 167. 'For stealing grass, wood, or trees, rice
- in the husk, molasses, cloth or leather, fish, or
- other animal food, a strict fast must be kept
- 'three days and three nights.
 - 168. 'For stealing gems, pearls, coral, cop-
- * per, filver, iron, brass, or stone, nothing but
- 'broken rice must be swallowed for twelve
- days;
- 169. And nothing but milk for three days,
- 'if cotton, or filk, or wool had been stolen, or
- 'a beaft either with cloven or uncloven hoofs,
- or a bird, or perfumes, or medicinal herbs, or
- 'cordage.
- 170. 'By these penances may a twiceborn
- 'man atone for the guilt of theft; but the fol-
- 'lowing austerities only can remove the sin of
- ' carnally approaching those, who must not be
- carnally approached.
- 171. 'HE, who has wasted his manly
- ftrength with fifters by the same womb, with
- the wives of his friend or of his fon, with girls
- under the age of puberty, or with women of
- the lowest classes, must perform the penance
- ordained for defiling the bed of a preceptor:
- 172. He, who has carnally known the

- daughter of his paternal aunt, who is almost
- equal to a fister, or the daughter of his mater-
- 'nal aunt, or the daughter of his maternal
- uncle, who is a near kinfman, must perform the
- · chándráyana, or lunar penance;
 - 173. 'No man of fense would take one of
- those three as his wife: they shall not be taken
- in marriage by reason of their consanguinity;
- and he, who marries any one of them, falls
- deep into fin.
 - 174. 'He, who has wasted, what might
- have produced a man, with female brute ani-
- * mals, with a woman during her courfes, or in
 - any but the natural part, or in water, must
 - perform the penance sántapana: for a bestial
 - ".act with a cow the penance must be far more se-
 - vere.
 - 175. 'A twiceborn man, dallying lascivious-
 - 'ly with a male in any place or at any time, or
 - with a female in a carriage drawn by bullocks,
 - or in water, or by day, shall be degraded, and
 - must bathe himself publickly, with his apparel.
 - 176. 'Should a Bráhmen carnally know a
- woman of the Chandala or Mléch'ha tribes, or
- tafte their food, or accept a gift from them,
- he loses his own class, if he acted unknowingly,
- or, if knowingly, finks to a level with them.
 - 177. 'A wife, exceffively corrupt, let her
 - · husband confine to one apartment, and compel

- her to perform the penance ordained for a
- man, who has committed adultery:
 - 178. 'If, having been folicited by a man of
- her own class, she again be defiled, her expia-
- ' tion must be the penance prájápatya added to
- the chándráyana.
- 1.79. 'The guilt of a Brahmen, who has dal-
- ' lied a whole night with a Chandálí woman, he
- ' may remove in three years by fubfifting on
- alms, and inceffantly repeating the gáyatri
- ' with other mysterious texts.
- 180. 'These penances have been declared for
- finners of four forts, those who hurt sentient
- creatures, those who eat prohibited food, those
- who commit theft, and those who are guilty of
- ' lasciviousness: hear now the prescribed expia-
- ' tion for fuch, as hold any intercourse with de-
- ' graded offenders.
- 181. 'HE, who affociates himself for one
- 'year with a fallen finner, falls like him; not
- by facrificing, reading the Veda, or contracting
- 'affinity with him, fince by those acts he loses his
- 'class immediately, but even by using the same
- carriage or feat, or by taking his food at the
- ' same board:
- 182. 'That man, who holds an intercourse
- 'with any one of those degraded offenders,
- ' must perform, as an atonement for such inter-

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- course, the penance ordained for that sinner himself.
- 183. 'The sapindas and samanodacas of a man
- degraded, for a crime in the first degree, must offer a libation of water to his manes, as if he
- " were naturally dead, out of the town, in the
- evening of some inauspicious day, as the ninth
- of the moon, his paternal kinfmen, his officiat-
- ing priest, and his spiritual guide being present.
 - 184. 'A female flave must kick down with
 - 'her foot an old pot filled with water, which
 - ' had for that purpose been placed towards the
 - ' fouth, as if it were an oblation for the dead;
 - and all the kinfmen, in the nearer and remoter
 - ' degrees, must remain impure for a day and a ' night:
 - 185. 'They must thenceforth desist from fpeaking to him, from sitting in his company,
 - from delivering to him any inherited or other
 - ' property, and from every civil or usual atten-
 - tion, as inviting him on the first day of the year,
 - and the like.
 - 186. 'His right of primogeniture, if he was 'an elder brother, must be withholden from
 - 'him, and whatever perquisites arise from pri-
 - 'ority of birth: a younger brother excelling
 - 'him in virtue, must appropriate the share of
 - the firstborn.

- 187. But, when he has performed his due penance, his kinfmen and he must throw down a new vessel full of water, after having bathed together in a pure pool:
- 188. 'Then must he cast that vessel into the 'water; and, having entered his house, he may 'perform, as before, all the acts incident to his 'relation by blood.
- 189. 'The same ceremony must be perform-'ed by the kindred even of women degraded, 'for whom clothes, dressed rice, and water must 'be provided; and they must dwell in buts near 'the samily house.
- 190. 'With finners, whose expiations are 'unperformed, let not a man transact business 'of any kind; but those, who have performed 'their expiations, let him at no time re- 'proach:
- 191. Let him not, however, live with those, 'who have slain children, or injured their benefactors, or killed suppliants for protection, or 'put women to death, even though such offendfers have been legally purified.
- 192. 'Those men of the twiceborn classes, to 'whom the gáyatr' has not been repeated and 'explained, according to law, the assembly must 'cause to perform three prájápatya penances, 'and afterwards to be girt with the sacrificial 'string;

- 193. And the same penance they must preferibe to such twiceborn men, as are anxious to atone for some illegal act, or a neglect of
- ' the Véda.
- 194. 'If priests have accepted any property
- from base hands, they may be absolved by re-
- · linquishing the presents, by repeating mysteri-
- ous texts, and by acts of devotion:
- 195. By three thousand repetitions of the gayatri with intense application of mind, and
- by subfifting on milk only for a whole month
- 'in the pasture of cows, a Brábmen, who has
- received any gift from a bad man, or a bad
- ' gift from any man, may be cleared from fin.
- 196. When he has been mortified by abstinance, and has returned from the pasturage,
- e let him bend low to the other Brábmens, who
- 'must thus interrogate him: "Art thou really
- "defirous, good man, of readmission to an
- " equality with us?"
- 197. 'If he answer in the affirmative, let
- him give fome grass to the cows, and in the
- place, made pure by their having eaten on it,
- · let the men of his class give their affent to his
- readmission.
- 198. 'HE, who has officiated at a facrifice
- ' for outcasts, or burned the corpse of a stranger,
- or performed rites to destroy the innocent, or
- ' made the impure facrifice, called Abina, may

- expiate his guilt by three prajapatya pe-
- 199. 'A TWICEBORN man, who has reject-'ed a fuppliant for his protection, or taught the 'Vėda on a forbidden day, may atone for his 'offence by fubfifting a whole year on barley 'alone.
- 200. 'He, who has been bitten by a dog, a 'fhakal, or an ass, by any carnivorous animal' frequenting a town, by a man, a horse, a 'camel, or a boar, may be purified by stopping his breath during one repetition of the 'gáyatr'.
- 201. 'To eat only at the time of the fixth meal, or on the evening of every third day, for a 'month, to repeat a Sanbità of the Vėdas, and 'to make eight oblations to fire, accompanied with eight holy texts, are always an expiation 'for those, who are excluded from society at 'repasts.
- 202. 'SHOULD a Brahmen voluntarily ascend' a carriage borne by camels or drawn by asses, or designedly bathe quite naked, he may be absolved by one suppression of breath, while he repeats in his mind the most holy text.
- 203. 'HE, who has made any excretion, being greatly pressed, either without water near bim, or in water, may be purished by

- bathing in his clothes out of town, and by touching a cow.
 - 204. 'For an omission of the acts, which
- the Véda commands to be constantly perform-
- ed, and for a violation of the duties prescribed
- to a housekeeper, the atonement is fasting one day.
 - 205. 'He, who says hush or pish to a Bráh-
- men, or thou to a superior, must immediately
- f bathe, eat nothing for the rest of the day, and
- appeale him by clasping his feet with respect-
- ful falutation.
 - 206. 'For striking a Brabmen even with a
- blade of grass, or tying him by the neck with
- a cloth, or overpowering him in argument,
- and adding contemptuous words, the offender
- must foothe him by falling prostrate.
 - 207. 'An affaulter of a Bráhm n, with intent
- to kill, shall remain in hell a hund ed years;
- for actually striking him with the like intent, a
- f thousand:
 - 208. As many small pellets of dust as the
- blood of a Bráhmen collects on the ground,
- 6 for fo many thousand years must the shedder
- of that blood be tormented in hell.
 - 209. 'For a simple assault, the first or com-
- mon penance must be performed; for a bat-
- tery, the third or very severe penance; but

- for shedding blood, without killing, both of those penances.
- 21c. To remove the fins, for which no particular penance has been ordained, the
- 'affembly must award a fit expiation, consider-
- 'ing the ability of the finner to perform it, and the nature of the fin.
- 211. 'Those penances, by which a man 'may atone for his crimes, I now will describe 'to you; penances, which have been perform-; ed by deities, by holy sages, and by foresathers 'of the human race.
- the common penance, or that of PRAJA'PATI, he must for three days eat only in the morning; for three days, only in the evening; for three days, food unasked but presented to bim; and for three more days, nothing.
- 213. 'Eating for a whole day the dung and 'urine of cows mixed with curds, milk, cla'rified butter, and water boiled with cus'a-grass,
 'and then fasting entirely for a day and a night,
 'is the penance called Sántapana, either from the devout man SANTAPANA, or from tor'menting.
- 214. 'A twiceborn man performing the pe-'nance, called very severe, in respect of the com-'mon, must eat, as before, a single mouthful, or

- a ball of rice as large as a ben's egg, for three
- times three days; and for the last three days,
- 6 must wholly abstain from food.
 - 215. A Brahmen, performing the ardent
- e penance, must swallow nothing but hot water,
- hot milk, hot clarified butter, and hot steam,
- each of them for three days successively, per-
- forming an ablution, and mortifying all his
- members.
 - 216. A total fast for twelve days and nights,
- by a penitent with his organs controlled and
- his mind attentive, is the penance named pa-
- · ráca, which expiates all degrees of guilt.
 - 217. ' If he diminish his food by one mouth-
- ful each day during the dark fortnight, eating
- fifteen mouthfuls on the day of the opposition, and
- increase it in the fame proportion, during the
- bright fortnight, fasting entirely on the day of
- the conjunction, and perform an ablution regu-
- larly at funrife, noon, and funfet, this is the
- chándráyana, or the lunar penance:
- 218. Such is the penance called ant-shaped
- or narrow in the middle; but, if he perform the
- barley-shaped or broad in the middle, he must
- observe the same rule, beginning with the
- bright halfmonth, and keeping under com-
- 6 mand his organs of action and sense.
 - 219. 'To perform the lunar penance of an

- anchoret, he must eat only eight mouthfuls
- of forest grains at noon for a whole month, tak-
- ' ing care to fubdue his mind.
 - 220. 'If a Brábmen eat only four mouthfuls
- at funrise, and four at funset, for a month,
- keeping his organs controlled, he performs
- the lunar penance of children.
 - 221. 'He, who, for a whole month, eats no
- more than thrice eighty mouthfuls of wild
- e grains, as be happens by any means to meet
- with them, keeping his organs in subjection,
- 4 shall attain the same abode with the regent of
- 4 the moon:
 - 222. 'The eleven Rudras, the twelve A'di-
- tyas, the eight Vasus, the Maruts, or genii of
- the winds, and the seven great Rishis, have
- performed this lunar penance as a fecurity
- from all evil.
 - 223, 'The oblation of clarified butter to fire
- 'must every day be made by the penitent him-
- felf, accompanied with the mighty words
- earth, sky, beaven; he must perfectly abstain
- from injury to fentient creatures, from falle-
- hood, from wrath, and from all crooked
- ways.
- 224. Or, thrice each day and thrice each
- inight for a month, the penitent may plunge
- into water clothed in his mantle, and at no

- * time conversing with a woman, a Súdra, or an outcast.
- 225. LET him be always in motion, fitting and rifing alternately, or, if unable to be thus
- e reftless, let him sleep low on the bare ground;
- chaste as a student of the Veda, bearing the
- facred zone and staff, showing reverence to
- his preceptor, to the gods, and to priests;
 - 226. 'Perpetually must be repeat the gayatri,
- and other pure texts to the best of his know-
- · ledge: thus in all penances for absolution from
- fin, must be vigilantly employ himself.
 - 227. By these expiations are twiceborn
- emen absolved, whose offences are publickly
- known, and are mischievous by their example;
- but for fins not publick, the affembly of priests
- must award them penances, with holy texts
- and oblations to fire.
 - 228. 'By open confession, by repentance,
- by devotion, and by reading the scripture, a
- finner may be released from his guilt; or by
- · almsgiving, in case of his inability to perform
- the other acts of religion.
 - 229. 'In proportion as a man, who has
- committed a fin, shall truly and voluntarily
- confess it, so far he is disengaged from that
- offence, like a fnake from his flough;
 - 230. 'And, in proportion as his heart fin-

- cerely loathes his evil deed, so far shall his tital spirit be freed from the taint of it.
 - 231. If he commit fin, and actually repent,
- that fin shall be removed from him; but if
- he merely fay, "I will fin thus no more,"
- he can only be released by an actual absti-
- 'nence from guilt.
 - 232. 'Thus revolving in his mind the cer-
- tainty of retribution in a future state, let him
- be constantly good in thoughts, words, and action.
- 233. 'If he desire complete remission of any foul act which he has committed, either ignorantly or knowingly, let him beware of committing it again: for the second fault his pe-
- * nance must be doubled.
- 234. 'If, having performed any expiation,
- he feel not a perfect satisfaction of conscience,
- flet him repeat the same devout act, until his
- conscience be persectly satisfied.
- 235. 'All the bliss of deities and of men is
- declared by fages, who differn the fense of
- the Véda, to have in devotion its cause, in de-
- votion its continuance, in devotion its full-
- 'ness,
- 236. 'Devotion is equal to the performance of 'all duties; it is divine knowledge in a Bráh-
- 'men; it is defence of the people in a Cshatriya;
- devotion is the business of trade and agriculture

- in a Vaifya; devotion is dutiful fervice in a Súdra.
 - 237. 'Holy sages, with subdued passions,
- feeding only on fruit, roots, and air, by devo-
- tion alone are enabled to furvey the three
- worlds, terrestrial, ethereal, and celestial, peopled
- with animal creatures, locomotive and fixed.
 - 238. Perfect health, or unfailing medicines,
- divine learning, and the various mansions of
- deities, are acquired by devotion alone: their
- · efficient cause is devotion.
 - 239. Whatever is hard to be traversed, what-
- ever is hard to be acquired, whatever is hard
- to be vifited, whatever is hard to be perform-
- ed, all this may be accomplished by true de-
- votion; for the difficulty of devotion is the
- e greatest of all.
 - 240. Even finners in the highest degree,
- and of course the other offenders, are absolved
- from guilt by austere devotion well-practifed.
 - 241. Souls, that animate worms, and infects,
- · ferpents, moths, beafts, birds, and vegetables,
- attain heaven by the power of devotion.
 - 242. Whatever sin has been conceived in
- the hearts of men, uttered in their speech, or
- * committed in their bodily acts, they speedily
- burn it all away by devotion, if they preserve
- devotion as their best wealth.
 - 243. Of a priest, whom devotion has puri-

- fied, the divine spirits accept the sacrifices, and
- ' grant the desires with ample increase.
 - 244. 'Even BRAHMA', lord of creatures, by
- devotion, enacted this code of laws; and the
- fages by devotion acquired a knowledge of the
- · Védas.
- 245. Thus the gods themselves, observing
- in this universe the incomparable power of
- devotion, have proclaimed aloud the tran-
- feendent excellence of pious austerity.
 - 246. By reading each day as much as pos-
- fible of the Véda, by performing the five great
- facraments, and by forgiving all injuries, even
- fins of the highest degree shall be soon ef-
- faced:
 - 247. As fire consumes in an instant with his
- bright flame the wood, that has been placed
- on it, thus, with the flame of knowledge, a
- ' Bráhmen, who understands the Véda, consumes 'all sin.
 - 248. 'Thus has been declared, according to
- law, the mode of atoning for open fins: now
- · learn the mode of obtaining absolution for
- · secret offences.
- 249. 'SIXTEEN suppressions of the breath,
- 'wbile the holiest of texts is repeated with the
- three mighty words, and the triliteral syllable,
- continued each day for a month, absolve even

- the slayer of a Bráhmen from his hidden
 - 250. 'Even a drinker of spirituous liquors
- is absolved by repeating each day the text apa
- used by the sage CAUTSA, or that beginning
- with preti used by VASISHT'HA, or that called
- mábitra, or that, of which the first word is
- · fuddhavatyab.
 - 251. 'By repeating each day for a month the
- text ásyavámíya, or the hymn Sivasancalpa,
- the stealer of gold from a priest becomes in-
- flantly pure.
 - 252. 'He, who has violated the bed of his
- * preceptor, is cleared from secret faults by re-
- peating fixteen times a day the text havishyan-
- ' tiya, or that beginning with na tamanbab, or
- by revolving in his mind the fixteen holy verses,
- called Paurusha.
 - 253. 'The man, who desires to expiate his
- ' hidden fins, great and small, must repeat once
- " a day for a year the text ava, or the text
- yatcinchida.
 - 254. 'He, who has accepted an illegal pre-
- fent, or eaten prohibited food, may be cleanfed
- in three days by repeating the text taratfa-
- · mandiya.
- 255. 'Though he have committed many
- · fecret fins, he shall be purified by repeating

- 'for a month the text fómáraudra or the three texts áryamna, while he bathes in a facred fiream.
- 256. A grievous offender must repeat the seven verses, beginning with INDRA, for half a year; and he, who has defiled water with any impurity, must sit a whole year subsisting by alms.
- 257. 'A twiceborn man, who shall offer 'clarified butter for a year, with eight texts ap'propriated to eight several oblations, or with 'the text na mé, shall efface a sin even of an 'extremely high degree.
- 258. 'He, who had committed a crime of the first degree, shall be absolved, if he attend a herd of kine for a year, mortify his organs, and continually repeat the texts beginning with pávamáni, living solely on food given in charity:
- 259. 'Or, if he thrice repeat a Sanhitá of 'the Védas, or a large portion of them with all 'the mantras and bráhmanas, dwelling in a fo'rest with subdued organs, and purished by three 'parácas, he shall be set free from all sins how 'heinous soever.
- 260. 'Or he shall be released from all deadly 'sins, if he fast three days, with his members 'mortified, and twice a day plunge into water, 'thrice repeating the text aghamarshana:

- 261. As the facrifice of a horse, the king of facrifices, removes all sins, thus the text aghamarshana destroys all offences.
 - 262. A priest who should retain in his me-
- mory the whole Rigvéda, would be absolved
- from guilt, even if he had flain the inhabitants
- of the three worlds, and had eaten food from
- the foulest hands.
 - 263. 'By thrice repeating the mantras and
- brábmanas of the Rich, or those of the Yajush,
- or those of the Sáman, with the upanishads, he
- fhall perfectly be cleanfed from every possible
- faint:
 - 264. As a clod of earth, cast into a great
- e lake, finks in it, thus is every finful act sub-
- merged in the triple Véda.
 - 265. The divisions of the Rich, the several
- branches of the Yajush, and the manifold
- ftrains of the Saman must be considered as
- forming the triple Véda: he knows the Véda,
- who knows them collectively.
 - 266. 'The primary triliteral syllable, in
- which the three Vėdas themselves are com-
- prised, must be kept secret, as another triple
- · Veda: he knows the Veda, who distinctly
- * knows the mystick sense of that word.'

CHAPTER THE TWELFTH.

On Transmigration and final Beatitude.

- 1. 'O THOU, who art free from fin, faid the devout fages, thou hast declared the whole fystem of duties ordained for the four classes of men: explain to us now, from the first principles, the ultimate retribution for their deeds.'
- 2. BHRIGU, whose heart was the pure essence of virtue, who proceeded from Menu himself, thus addressed the great sages: 'Hear the infallible rules for the fruit of deeds in this 'universe.
- 3. 'ACTION, either mental, verbal, or corporeal, bears good or evil fruit, as itself is good 'or evil; and from the actions of men proceed their various transmigrations in the highest, the mean, and the lowest degree:
- 4. Of that threefold action, connected with bodily functions, disposed in three classes, and consisting of ten orders, be it known in this world, that the heart is the instigator.

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- 5. Devising means to appropriate the wealth of other men, resolving on any forbid-
- den deed, and conceiving notions of atheism
- or materialism, are the three bad acts of the mind:
- 6. 'Scurrilous language, falsehood, indiscri-'minate backbiting, and useless tattle, are the 'four bad acts of the tongue:
- 7. 'Taking effects not given, hurting sentient creatures without the sanction of law, and
- criminal intercourse with the wife of another,
- are the three bad acts of the body; and all the
- ten have their opposites, which are good in an equal degree.
- 8. 'A rational creature has a reward or a punishment for mental acts, in his mind;
- for verbal acts, in his organs of speech; for
- corporeal acts, in his bodily frame.
- 9. 'For finful acts mostly corporeal, a man
- 's shall assume after death a vegetable or mi-
- e neral form; for fuch acts mostly verbal, the
- form of a bird or a beast; for acts mostly
- mental, the lowest of human conditions:
 - 10. 'He, whose firm understanding obtains
- a command over his words, a command over
- his thoughts, and a command over his whole
- body, may justly be called a tridandi, or triple
- commander; not a mere anchoret, who bears
- · three visible staves.

- tr. 'The man, who exerts this triple felf-'command with respect to all animated crea-'tures, wholly subduing both lust and wrath, 'shall by those means attain beatitude.
- 12. 'THAT substance, which gives a power of motion to the body, the wise call cshétra'jnya, or jévátman, the vital spirit; and that body, which thence derives active functions, they name bhútátman, or composed of elements:
- 13. 'Another internal spirit, called mabat, 'or the great soul, attends the birth of all creatures imbodied, and thence in all mortal forms is conveyed a perception either pleasing 'or painful.
- 14. 'Those two, the vital spirit and reason-'able soul, are closely united with sive ele-'ments, but connected with the supreme spirit, 'or divine essence, which pervades all beings 'high and low:
- 15, 'From the substance of that Supreme 'Spirit are diffused, like Sparks from sire, innumerable vital spirits, which perpetually give 'motion to creatures exalted and base.
- 16. 'By the vital fouls of those men, who have committed fins in the body reduced to after, another body, composed of nerves with five sensations, in order to be susceptible of torment, shall certainly be assumed after death;

- 17. 'And, being intimately united with those minute nervous particles, according to
- their distribution, they shall feel, in that new
- body, the pangs inflicted in each case by the ' sentence of YAMA.
- 18. 'When the vital foul has gathered the
- fruit of fins, which arise from a love of
- ' fensual pleasure, but must produce misery,
- and, when its taint has thus been removed, it
- approaches again those two most effulgent
- effences the intellectual foul and the divine spirit:
- 10. 'They two, closely conjoined, examine without remission the virtues and vices of that
- fenfitive foul, according to its union with
- which it acquires pleasure or pain in the pre-
- fent and future worlds.
 - 20. 'If the vital spirit had practised virtue
- for the most part and vice in a small degree,
- it enjoys delight in celestial abodes, clothed
- with a body formed of pure elementary par-
- 'ticles:
 - 21. 'But, if it had generally been addicted
- to vice, and feldom attended to virtue, then
- fhall it be deserted by those pure elements,
- and, baving a coarfer body of fensible nerves, it
- feels the pains to which YAMA shall doom it:
 - 22. 'Having endured those torments ac-
- cording to the sentence of YAMA, and its
- taint being almost removed, it again reaches

- 'those five pure elements in the order of their 'natural distribution.
- 23. 'Let each man, confidering with his 'intellectual powers these migrations of the 'soul according to its virtue or vice, into a 'region of bliss or pain, continually fix his heart 'on virtue.
- 24. 'BE it known, that the three qualities 'of the rational foul are a tendency to goodness, 'to passion, and to darkness; and, endued with 'one or more of them, it remains incessantly 'attached to all these created substances:
- 25. When any one of the three qualities predominates in a mortal frame, it renders the imbodied spirit eminently distinguished for that quality.
- 26. 'Goodness is declared to be true know'ledge; darkness, gross ignorance; passion, an
 'emotion of desire or aversion: such is the
 'compendious description of those qualities,
 'which attend all souls.
- 27. When a man perceives in the reason'able soul a disposition tending to virtuous
 'love, unclouded with any malignant passion,
 'clear as the purest light, let him recognise it
 'as the quality of goodness:
- 28. A temper of mind, which gives uneasiness and produces disaffection, let him consider as the adverse quality of passion,

ever agitating imbodied spirits:

- 29. 'That indistinct, inconceivable, unac-
- countable disposition of a mind naturally
- 'fensual, and clouded with infatuation, let
- him know to be the quality of darkness.
- 30. 'Now will I declare at large the va-
- rious acts, in the highest, middle, and lowest
- degrees, which proceed from those three dis-
- * positions of mind.
 - 31. 'Study of scripture, austere devotion,
- ' facred knowledge, corporeal purity, com-
- mand over the organs, performance of duties,
 - and meditation on the divine spirit, accom-
 - ' pany the good quality of the foul:
 - 32. Interested motives for acts of religion or
 - morality, perturbation of mind on flight oc-
 - casions, commission of acts forbidden by law,
 - and habitual indulgence in selfish gratifica-
 - tions, are attendant on the quality of pas-
 - ! fion:
 - 33. 'Covetousness, indolence, avarice, de-
 - traction, atheism, omission of prescribed acts,
 - a habit of foliciting favours, and inattention
 - to necessary business, belong to the dark
 - quality.
 - 34. 'Of those three qualities, as they appear
 - in the three times, past, present and future,
 - the following in order from the lowest may be
 - considered as a short but certain criterion.
 - 35. Let the wise consider, as belonging to the quality of darkness, every act which a

- man is ashamed of having done, of doing, orof going to do:
- 36. Let them consider, as proceeding from the quality of passion, every act, by which a
- 'man feeks exaltation and celebrity in this
- 'world, though he may not be much afflicted,
- if he fail of attaining his object:
- 37. 'To the quality of goodness belongs 'every act, by which he hopes to acquire di-
- 'vine knowledge, which he is never ashamed
- of doing and which brings placed joy to his
- conscience.
- 38. 'Of the dark quality, as described, the principal object is pleasure; of the passionate,
- 'worldly prosperity; but of the good quality,
- ' the chief object is virtue: the last mentioned
- 'objects are superiour in dignity.
- 39. Such transmigrations, as the foul pro-
- 'cures in this universe by each of those quali-
- 'ties, I now will declare in order fuccinctly.
- 40. 'Souls, endued with goodness, attain al-
- 'ways the state of deities; those filled with
- 'ambitious passions, the condition of men; and
- those immersed in darkness, the nature of
- beasts: this is the triple order of transmigra-
- 'tion.
- 41. Each of those three transmigrations,
- 'caused by the several qualities, must also be
- 'confidered as threefold, the lowest, the mean,

- and the highest, according to as many di-
- flinctions of acts and of knowledge.
 - 42, 'Vegetable and mineral substances,
- worms, infects, and reptiles, some very mi-
- nute, some rather larger, fish, snakes, tor-
- toises, cattle, shakals, are the lowest forms, to
- which the dark quality leads;
 - 43. 'Elephants, horses, men of the servile
- class, and contemptible Mléch'bas, or barbari-
- ans, lions, tigers, and boars, are the mean
- fates procured by the quality of darkness:
 - 44. 'Dancers and fingers, birds and deceit-
- ful men, giants and bloodthirsty savages, are
- the highest conditions, to which the dark
- · quality can afcend.
 - 45. 'J'hallas, or cudgelplayers, Mallas, or
- boxers and wrestlers, Natas, or actors, those
 - who teach the use of weapons, and those who
 - are addicted to gaming or drinking, are the
- · lowest forms occasioned by the passionate
- f quality:
 - 46. 'Kings, men of the fighting class, do-
- mestick priests of kings, and men skilled in the
- war of controversy, are the middle states
- f caused by the quality of passion:
- 47. ' Gandharvas, or aerial musicians, Guhy-
- · · acas and Yacsbas, or servants and companions
 - f of Cuve'RA, genii attending superiour gods,
 - s the Vidyábaras and others, together with

- various companies of Apfarases or nymphs,
- are the highest of those forms, which the
- · quality of passion attains.
 - 48. ' Hermits, religious mendicants, other
- ' Bráhmens, fuch orders of demigods as arc
- wafted in airy cars, genii of the figns and
- ' lunar mansions, and Daityas, or the offspring
- ' of DITI, are the lowest of states procured by
- ' the quality of goodness:
 - 49. Sacrificers, holy fages, deities of the
- 'lower heaven, genii of the Vėdas, regents of
- ' stars not in the paths of the fun and moon, di-
- vinities of years, Pitris or progenitors of
- ' mankind, and the demigods, named Sádhyas,
- 'are the middle forms, to which the good
- 'quality conveys all spirits moderately endued
- with it:
- 50. 'BRAHMA' with four faces, creators of
- worlds under bim, as MARI'CHI and others, the
- ' genius of virtue, the divinities prefiding over
- '(two principles of nature in the philosophy of
- 'CAPILA) mahat, or the mighty, and avyacta,
- or unperceived, are the highest conditions, to
- ' which, by the good quality, fouls are exalted.
- 51. 'This triple fystem of transmigrations,
- in which each class has three orders, accord-
- ing to actions of three kinds, and which com-
- prises all animated beings, has been revealed
- in its full extent:

- 52. 'Thus, by indulging the sensual appe-
- tites, and by neglecting the performance of
- duties, the basest of men, ignorant of sacred
- expiations, assume the basest forms.
 - 53: 'WHAT particular bodies the vital spirit
- enters in this world, and in consequence of
- what fins here committed, now hear at large
- and in order.
- 54. 'Sinners in the first degree, having
- 6 passed through terrible regions of torture for
- a great number of years, are condemned to
- the following births at the close of that period
- to efface all remains of their sin.
 - 55. 'The slayer of a Brábmen must enter
- according to the circumstances of his crime the
- body of a dog, a boar, an ass, a camel, a bull,
- a goat, a sheep, a stag, a bird, a Chandála, or a
- · Puccafa.
 - 56. 'A priest, who has drunk spirituous
- liquor, shall migrate into the form of a
- fmaller or larger worm or infect, of a moth,
- of a fly feeding on ordure, or of some raven-
- ous animal.
 - 57. 'He, who steals the gold of a priest,
- ' shall pass a thousand times into the bodies of
- ' spiders, of snakes and cameleons, of crocodiles
- ' and other aquatick monsters, or of mischievous
- blood fucking demons.
 - 58. ' He, who violates the bed of his natural

- ' or spiritual father, migrates a hundred times
- 'into the forms of graffes, of shrubs with
- · erowded stems, or of creeping and twining
 - plants, of vultures and other carnivorous ani-
 - e mals, of lions and other beafts with sharp teeth,
 - or of tigers and other cruel brutes.
 - 59. 'They who hurt any fentient beings,
 - 'are born cats and other eaters of raw flesh;
 - they, who taste what ought not to be tasted,
 - ' maggots or small flies; they, who steal ordi-
 - 'nary things, devourers of each other: they
 - who embrace very low women, become rest-
 - 'less ghosts.
 - 60. 'He, who has held intercourse with
 - 'degraded men, or been criminally connected
 - with the wife of another, or stolen common
 - 'things from a priest, shall be changed into a
 - ' spirit, called Brabmarácshasa.
 - 61. 'The wretch, who through covetous-
 - ' ness has stolen rubies or other gems, pearls, or
 - coral, or precious things of which there are
 - 'many forts, shall be born in the tribe of gold-
 - 's fmiths, or among birds called hémacaras, or
 - ' goldmakers.
 - 62. 'If a man steal grain in the husk, he
 - 's shall be born a rat; if a yellow mixed metal,
 - 'a gander; if water, a plava, or diver; if
 - honey, a great stinging gnat; if milk, a crow;
 - ' if expressed juice, a dog; if clarified butter, an
 - ' ichneumon weasel;

- 63. 'If he steal sleshmeat, a vulture; if any
- fort of fat, the water-bird madgu; if oil, a
- blatta, or oildrinking beetle; if falt, a cicada
- or cricket; if curds, the bird valáca;
 - 64. 'If filken clothes, the bird tittiri; if
- woven flax, a frog; if cotton cloth, the
- waterbird crauncha; if a cow, the lizard
- gódhá; if molasses, the bird vágguda;
 - 65. 'If exquisite perfumes, a muskrat; if pot-
- herbs, a peacock; if dreffed grain in any of
- its various forms, a porcupine; if raw grain,
- a hedgehog;
 - 66. 'If he steal fire, the bird vaca; if a
- household utefinl, an ichneumon-fly; if dyed
- · cloth, the bird chacora;
 - 67. 'If a deer or an elephant, he shall
- be born a wolf; if a horfe, a tiger; if roots or
- fruit, an ape; if a woman, a bear; if water
- ' from a jar, the bird chátaca; if carriages, a
- ' camel; if small cattle, a goat.
- 68. 'That man, who designedly takes away
- the property of another, or eats any holy
- 'cakes not first presented to the deity at a
- ' folemn rite, shall inevitably fink to the con-
- ' dition of a brute.
 - 69. 'Women, who have committed similar
- thefts, incur a fimilar taint, and shall be
- paired with those male beasts in the form
- of their females.
 - 70. 'IF any of the four classes omit, without

- 'urgent necessity, the performance of their feveral duties, they shall migrate into sinful bodies, and become slaves to their foes.
- 71. 'Should a Bráhmen omit his peculiar 'duty, he shall be changed into a demon called 'Ulcámuc'ba or with a mouth like a firebrand,
- 'who devours what has been vomited; a Cska-
- 'triya, into a demon called Catapútana, who
- feeds on ordure and carrion;
- 72. 'A Vaifya, into an evil being called 'Maitrácshaiyótica, who eats purulent carcasses;
- 'and a Súdra, who neglects his occupations,
- becomes a foul imbodied spirit called *Chailá-* faca, who seeds on lice.
- 73. 'As far as vital fouls, addicted to fen-'fuality, indulge themselves in forbidden plea-
- fures, even to the same degree shall the acute-
- 'ness of their senses be raised in their future
- ' bodies, that they may endure analogous pains;
- 74. 'And, in consequence of their folly, they
- ' shall be doomed as often as they repeat their
- 'criminal acts, to pains more and more intense
- in despicable forms on this earth.
- 75. 'They shall first have a sensation of agony in Támisra or utter darkness, and in
- other feats of horrour; in Asipatravana, or
- ' the fwordleaved forest, and in different places
- of binding fast and of rending:
 - 76. Multifarious tortures await them: they

- 's shall be mangled by ravens and owls, shall
- ' swallow cakes boiling hot; shall walk over
- 'inflamed fands; and shall feel the pangs of
- being baked like the vessels of a potter:
 - 77. 'They shall assume the forms of beasts
- continually miserable, and suffer alternate as-
- · flictions from extremities of cold and of heat,
- furrounded with terrours of various kinds:
 - 78. ' More than once shall they lie in differ-
- ent wombs; and, after agonizing births, be
- condemned to fevere captivity, and to fervile
- 4 attendance on creatures like themselves:
 - 79. 'Then shall follow separations from kin-
- dred and friends, forced residence with the
- wicked, painful gains and ruinous losses of
- wealth; friendships hardly acquired and at
- 4 length changed into enmities,
 - 80. 'Old age without resource, diseases at-
- * tended with anguish, pangs of innumerable
- of forts, and, lastly, unconquerable death.
 - 81. 'With whatever disposition of mind a
 - ' man shall perform in this life any act religious
 - 'or moral, in a future body endued with the
 - fame quality, shall he receive his retribution.
 - 82. 'Thus has been revealed to you the
 - fystem of punishments for evil deeds: next
 - · learn those acts of a Brahmen, which lead to
 - eternal bliss.
 - 83. 'Studying and comprehending the Vėda,

'practifing pious austerities, acquiring divine knowledge of law and philosophy, command over the organs of sense and action, avoiding all injury to sentient creatures, and showing reverence to a natural and spiritual sather, are the chief branches of duty which ensure sinal happiness.'

- 84. 'Among all those good acts performed in this world, faid the fages, is no single act held more powerful than the rest in leading men to beatitude?'
- 85. 'Or all those duties, answered Bhrigu, the principal is to acquire from the Upanishads a true knowledge of one supreme GOD; that is the most exalted of all sciences, because it ensures immortality:
- 86. 'In this life, indeed, as well as the next, the study of the Véda, to acquire a knowledge of GOD, is held the most efficacious of those six duties in procuring felicity to man;
- 87. 'For in the knowledge and adoration of one GOD, which the *Véda* teaches, all the rules of good conduct, *beforementioned* in order, are fully comprised.
- 88. 'THE ceremonial duty, prescribed by the 'Véda, is of two kinds; one connected with this 'world, and causing prosperity on earth; the 'other abstracted from it, and procuring bliss in heaven.

- ' 89. ' A religious act proceeding from selfish
- views in this world, as a facrifice for rain, or
- in the next, as a pious oblation in hope of a fu-
- ture reward, is declared to be concrete and in-
- ' terested; but an act performed with a know-
- ' ledge of God, and without felf love, is called
- 4 abstract and difinterested.
 - go. 'He, who frequently performs interested
- rites, attains an equal station with the regents
- of the lower heaven; but he, who frequently
- e performs difinterested acts of religion, becomes
- for ever exempt from a body composed of the
- five elements:
 - 91. Equally perceiving the supreme soul
- in all beings and all beings in the fupreme
- foul, he facrifices his own spirit by fixing it on
- the spirit of GOD, and approaches the nature
- of that fole divinity, who shines by his own effulgence.
 - 92. 'Thus must the chief of the twiceborn,
- though he neglect the ceremonial rites men-
- ' tioned in the Sástras, be diligent alike in at-
- taining a knowledge of GoD and in repeating
- ' the Véda:
- 93. Such is the advantageous privilege of
- ' those, who have a double birth from their na-
- · tural mothers and from the gayatti their spiritual
- 'mother, especially of a Bráhmen; since the
- 'twiceborn man by performing this duty but

- 'not otherwise, may soon acquire endless se-'licity.
- 94. 'To patriarchs, to deities, and to man-'kind, the scripture is an eye giving constant
- 'light; nor could the Véda Sástra have been
- 'made by human faculties; nor can it be mea-
- 'fured by human reason unassisted by revealed 'glosses and comments: this is a sure proposition.
- 95. 'Such codes of law as are not grounded on the Véda, and the various heterodox theories of men, produce no good fruit after death;
- ' for they all are declared to have their basis on darkness.
- 96. All fystems, which are repugnant to the Véda, must have been composed by mortals, and shall soon perish: their modern date
- 'proves them vain and false.
- 97. 'The three worlds, the four classes of men, and their four distinct orders, with all that has been, all that is, and all that will be, are made known by the Véda:
- 98. 'The nature of found, of tangible and 'visible shape, of taste, and of odour, the fifth 'object of sense, is clearly explained in the Véda 'alone, together with the three qualities of 'mind, the births attended with them, and the 'acts which they occasion.
- 99. 'All creatures are sustained by the pri-'meval Véda Sástra, which the wise therefore VOL. VI.

- ' hold supreme, because it is the supreme source
- of prosperity to this creature, man.
 - roo. 'Command of armies, royal authority,
- opower of inflicting punishment, and sovereign
- dominion over all nations, he only well de-
- ' serves, who persectly understands the Véda
- · Sástra.
 - 101. As fire with augmented force burns
- ' up even humid trees, thus he, who well knows
- the Véda, burns out the taint of fin, which has
- ' infected his foul.
 - 102. 'He, who completely knows the fense
- of the Vėda Sástra, while he remains in any
- one of the four orders, approaches the divine
- 'nature, even though he sojourn in this low
- ' world.
 - 103. 'They, who have read many books, are
- ' more exalted than fuch, as have feldom stu-
- ' died; they, who retain what they have read,
- than forgetful readers; they, who fully under-
- ' stand, than such as only remember; and they,
- 'who perform their known duty, than fuch
- 'men, as barely know it.
 - 104. Devotion and facred knowledge are
- the best means by which a Brábmen can arrive
- at beatitude: by devotion he may destroy
- 'guilt; by facred knowledge he may acquire
- 'immortal glory.
 - 105. 'Three modes of proof, ocular demon-

- fration, logical inference, and the authority
- of those various books, which are deduced
- from the Vėda, must be well understood by
- that man, who feeks a distinct knowledge of
- all his duties:
- 106. 'He alone comprehends the fystem of
- duties religious and civil, who can reason, by
- 'rules of logic agreeable to the Véda, on the
- 'general heads of that system as revealed by
- the holy fages.
 - 107. 'These rules of conduct, which lead to
- ' fupreme bliss, have been exactly and compre-
- henfively declared: the more fecret learning
- ' of this Mánava Sástra shall now be disclosed.
- 108. ⁴ IF it be asked, how the law shall be
- 'ascertained, when particular cases are not
- 'comprised under any of the general rules, the
- 'answer is this: "That, which well instructed
- " Bráhmens propound, shall be held incontestible
- " law."
- 109. 'Well instructed Brahmens are they,
- who can adduce ocular proof from the scrip-
- ' ture itself, having studied, as the law ordains,
- 'the Védas and their extended branches, or
- 'Vėdángas, Mimánsà, Nyáya, Dhermasástra,
- 'Puránas:
- 110. 'A point of law, before not expressly re-'vealed, which shall be decided by an assembly
- 'of ten such virtuous Bráhmens under one chief,

- ' or, if ten be not procurable, of three such un-
- der one president, let no man controvert.
 - 111. 'The affembly of ten under a chief
- either the king himself or a judge appointed by
- ' him, must consist of three, each of them pecu-
- ' liarly conversant with one of the three Vėdas,
- of a fourth skilled in the Nyáya, and a fifth
- ' in the Mimánsa philosophy; of a sixth, who
- ' has particularly studied the NiruEta; a seventh,
- who has applied himself most assiduously to
- the Dhermasástra; and of three universal scho-
- ' lars, who are in the three first orders.
 - 112. 'One, who has chiefly studied the Rig-
- ' vêda, a fecond, who principally knows the
- ' Yajush, and a third best acquainted with the
- ' Sáman, are the assembly of three under a head,
- who may remove all doubts both in law and
- cafuistry.
- 113. Even the decision of one priest, if
- " more cannot be affembled, who perfectly knows
- the principles of the Védas, must be considered
- ' as law of the highest authority; not the opinion
- of myriads, who have no facred knowledge.
 - 114. 'Many thousands of Brabmens cannot
- form a legal affembly for the decision of con-
- telts, if they have not performed the duties of
 - a regular studentship, are unacquainted with
 - fcriptural texts, and subsist only by the name
 - of their facerdotal class.

- 115. 'The fin of that man, to whom dunces, 'pervaded by the quality of darkness, propound 'the law, of which they are themselves ignorant, shall pass, increased a hundredsold, to 'the wretches who propound it.
- 116. 'This comprehensive system of duties, 'the chief cause of ultimate selicity, has been 'declared to you; and the *Brahmen*, who never 'departs from it, shall attain a superiour state 'above.
- 117. 'Thus did the allwise Menu, who possesses extensive dominion, and blazes with heavenly splendour, disclose to me, from his benevolence to mankind, this transcendant system of law, which must be kept devoutly concealed from persons unsit to receive it.
- 118. 'LET every Bråhmen with fixed attention confider all nature, both visible and invifible, as existing in the divine spirit; for, when he contemplates the boundless universe existing in the divine spirit, he cannot give his heart to iniquity:
- 119. 'The divine spirit alone is the whole 'assemblage of gods; all worlds are seated in 'the divine spirit, and the divine spirit no doubt 'produces by a chain of causes and effects consistent with free will, the connected series of acts 'performed by imbodied souls.
 - 120. 'He may contemplate the fubtil ether

- in the cavities of his body; the air in his
- ' muscular motion and sensitive nerves; the su-
- ' preme folar and igneous light, in his digestive
- ' heat and his vifual organs; in his corporeal
- fluids, water; in the terrene parts of his fa-
- brick, earth;
- 121. 'In his heart, the moon; in his audi-
- tory nerves, the guardians of eight regions;
- in his progressive motion, VISHNU; in his
- muscular force, HARA; in his organs of
- 'speech, Agni; in excretion, MITRA; in pro-
- creation, BRAHMA':
 - 122. But he must consider the supreme
- omnipresent intelligence as the sovereign lord
- of them all, by whose energy alone they exist; a
- ' spirit, by no means the object of any sense, which
- can only be conceived by a mind wholly ab-
- ' stracted from matter, and as it were flumbering;
- but which for the purpose of assisting his medi-
- tation, he may imagine more subtil than the
- finest conceivable essence, and more bright
- ' than the purest gold,
- 123. Him some adore as transcendently present in elementary fire; others, in MENU.
- colord of creatures, or an immediate agent in the
- creation; some, as more distinctly present in
- 'INDRA, regent of the clouds and the atmosphere;
- others, in pure air; others, as the most High
- · Eternal Spirit.

- five elemental forms, causes them by the gradations of birth, growth, and dissolution, to revolve in this world, until they deserve beatifude, like the wheels of a car.
- 125. 'Thus the man, who perceives in his 'own foul the supreme soul present in all creatures, acquires equanimity toward them all, 'and shall be absorbed at last in the highest estable, 'fence, even that of the Almighty himself.'
- 126. HERE ended the facred instructor; and every twiceborn man, who, attentively reading this *Mánava Sástra* promulgated by Bhrigu, shall become habitually virtuous, will attain the beatitude which he seeks.

GENERAL NOTE.

THE learned Hindus are unanimously of opinion, that many laws enacted by Menu, their oldest reputed legislator, were confined to the three first ages of the world, and have no force in the present age, in which a sew of them are certainly obsolete; and they ground their opinion on the following texts, which are collected in a work entitled Mandana ratna pradipa:

I. CRATU: In the Cali age a fon must not be begotten on a widow by the brother of the deceased husband; nor must a damsel, once given away in marriage, be given a second time; nor must a bull be offered in a facrifice; nor must a waterpot be carried by a student in theology.

II. VRIHASPATI: I. Appointments of kinfmen to beget children on widows, or married women, when the husbands are deceased or impotent, are mentioned by the sage Menu, but forbidden by himself with a view to the order of the four ages: no fuch act can be legally done in this age by any others than the busband.

- 2. In the first and second ages men were endued with true piety and sound knowledge; so they were in the third age; but in the fourth, a diminution of their moral and intellectual powers was ordained by their Creator:
- 3. Thus were fons of many different forts made by ancient fages, but fuch cannot now be adopted by men destitute of those eminent powers.
- III. PARA'SARA: 1.- A man, who has held intercourse with a deadly sinner, must abandon his country in the first age; he must leave his town, in the second; his family, in the third age; but in the sourth he needs only desert the offender.
- 2. In the first age, he is degraded by mere conversation with a degraded man; in the second, by touching him; in the third, by receiving food from him; but in the fourth, the sinner alone bears his guilt.
- IV. NA'RADA: The procreation of a fon by a brother of the decenfed, the flaughter of cattle in the entertainment of a guest, the repast on fleshmeat at funeral obsequies, and the order of a hermit are forbidden or obsolete in the fourth age.
 - V. A'ditya purána: 1. What was a duty in the

first age must not in all cases be done in the fourth; since, in the Cali yuga, both men and women are addicted to sin:

- 2. Such are a studentship continued for a very long time, and the necessity of carrying a waterpot, marriage with a paternal kinswoman, or with a near maternal relation, and the sacrifice of a bull,
- 3. Or of a man, or of a horse: and all spirituous liquor must in the Cali age be avoided by twiceborn men; so must a second gift of a married young woman, whose busband bas died before consummation, and the larger portion of an eldest brother, and procreation on a brother's widow or wife.
- VI. Smriti: 1. The appointment of a man to beget a fon on the widow of his brother; the gift of a young married woman to another bridegroom, if her hufband should die while she remains a virgin;
 - 2. The marriage of twiceborn men with damfels not of the same class; the slaughter, in a religious war, of *Bráhmens*, who are assailants with intent to kill;
- 3. Any intercourse with a twiceborn man, who has passed the sea in a ship, even though he have performed an expiation: performances of sacrifices for all sorts of men; and the necessity of carrying a waterpot;

- 4. Walking on a pilgrimage till the pilgrim die; and the flaughter of a bull at a facrifice; the acceptance of spirituous liquor, even at the ceremony called Sautrámani;
- 5. Receiving what has been licked off, at an oblation to fire, from the pot of clarified butter; entrance into the third order, or that of a hermit, though ordained for the first ages;
- 6. The diminution of crimes in proportion to the religious acts and facred knowledge of the offenders; the rule of expiation for a Bráhmen extending to death;
- 7. The fin of holding any intercourse with sinners; the secret expiation of any great crimes except thest; the slaughter of cattle in honour of eminent guests or of ancestors;
- 8. The filiation of any but a fon legally begotten or given in adoption by bis parents; the desertion of a lawful wife for any offence less than actual adultery:
- 9. These parts of ancient law were abrogated by wise legislators, as the cases arose at the beginning of the Cali age, with an intent of securing mankind from evil.

On the preceding texts it must be remarked, that none of them, except that of VRIHASPATI, are cited by Culluca, who never seems to have considered any other laws of Menu as restrained to the three first ages; that the Smriti,

or facred code, is quoted without the name of the legislator; and that the prohibition, in any age, of felf-defence, even against Bráhmens, is repugnant to a text of Sumantu, to the precept and example of Crishna himself, according to the Mabábbárat, and even to a sentence in the Veda, by which every man is commanded to defend his own life from all violent aggreffors.

SIR,

THE Institutes of Hindu Law have been very correctly printed, and the whole impression has just been sent to the Governor and Council. who will not fail to transmit copies for the King's library, for yourfelf, and for the Direc-If I had obtained his Majesty's leave to refign my office, nothing would now keep me here, but the Digest of Indian Laws, consisting of nine large volumes, two of which remain to be collated and studied with the learned Brahmen, who assists me: he is old and infirm; but, should he be able to attend me another year, or two years at the very utmost, the whole work will be finished, and I shall copy it during my voyage, if the King shall graciously permit me to leave India.

I, therefore, intreat you, Sir, to lay before his Majesty, my humble supplication for his gracious permission to resign my judgeship in the year 1795, or (if the Digest should not then be completed) in 1796; it being my anxious wish to pass the remainder of my life in studious retirement, though devoted, as I ever have been,

to the service of my King and my Country, and of that recorded Constitution, which is the basis of our national glory and felicity.

I have the honour to be, Sir,
your very obedient
humble Servant.

The Right Hon. Henry Dundas, Esq.

THE

MAHOMEDAN LAW

01

SUCCESSION

TO

THE PROPERTY OF INTESTATES.

IN

ARABICK,

ENGRAVED ON COPPER PLATES

FROM ,

AN ANCIENT MANUSCRIPT:

WITH

A VERBAL TRANSLATION, AND EXPLANATORY NOTES.

PREFACE.

NOTHING more feems necessary, in order to explain the object of the following work, than barely to cite the late statute concerning the administration of justice in BENGAL; by the feventeenth section of which it is enacted. " That " the Supreme Court of Judicature at Fort Wil-" liam shall have full power to hear and deter-" mine all manner of actions and fuits against "the inhabitants of Calcutta, provided that "their inberitance and succession to lands, rents, " and goods, and all matters of contract and "dealing between party and party, shall be "determined, in the case of Mahomedans, by "the laws and usages of MAHOMEDANS, and, "where only one of the parties shall be a Ma-"homedan, by the laws and usages of the de-"fendant:" by the twenty-first section, the provincial courts of Adálet, or Justice, are expressly recognised, and the powers of the governor and council, as the Sedr Adálct, in determining civil

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causes on appeals from those courts, are fully established in conformity to the old *Mogul* constitution.

But it may naturally be asked, how the judges of the Supreme Court, the provincial councils and council general, in *India*, or the great court of appeal in this kingdom, can justly exercise their several powers in suits between *Mahomedan* parties, without being at all acquainted with the law, by which they are bound to decide. Perpetual references to native lawyers must always be inconvenient and precarious; since the solidity of their answers must depend on their integrity, as well as their learning; and at best, if they be neither influenced nor ignorant, the court will not in truth *bear and determine* the cause, but merely pronounce judgement on the report of other men.

For these reasons it appears indubitable, that a knowledge of Mahomedan jurisprudence (I say nothing here of the Hindú learning,) and consequently of the languages used by Mahomedan writers, are essential to a complete administration of justice in our Asiatick territories; a knowledge I mean, though not equal to that of the MUFTI at Constantinople, yet sufficient for the purpose of keeping a check over the native counsellors, of understanding and examining their opinion, and of rejecting or adopting it, as

it may be opposed or supported by their books of allowed authority, to which they should con-fantly refer.

A considerable number of those books have been brought to England by the curious in different ages, and are now reposited in our Academical libraries: in the Bodleian, especially, we have many treatises and dissertations in Arabick on wills, inberitances, contracts, and other important heads; particularly in the fine collection made at Aleppo by the learned Pocock, from one of whose most valuable manuscripts (n. 33.) this little work has been traced through transparent paper, and engraved with such accuracy, that the plates must have equal authority in Asia with the original pages, which are near sive hundred years old.

The author, a native of Alrahaba, in Mesos potamia, was himself an IMAM; and his decifions are, on that account, considered as binding by the sect of Ali, which the Indian, as well
as the Persian, Mahomedans profess; but IBNO'LMOTAKANNA informs us, that he drew his
knowledge from the sountain head, and has epitomised the system of Zaid, who was recommended by Mahomed himself as the surest interpreter of his laws, and who had been implicitly sollowed by Shafiel, the first writer on
Mahomedan jurisprudence, in the eighth cen-

tury of our era, and composer of the Oful, or Principles of law, with other tracts highly valued by the learned of his religion and country.

Hence it is certain, that the Bigyato'l bahit b may be cited, as a book of authority, in all the Musleman courts; and the European reader must not be furprised, to see such a work written in a kind of loose metre, and even in rhyme: a lawtract in verse conveys, indeed, rather a ludicrous idea, fince poetry belongs to imagination, which law, whose province is pure reason, wholly excludes; but verse, as numberless instances prove, is not always poetry; and a regular measure is so considerable an aid to the memory, that, if the metrical abridgement of COKE's Reports were more accurate, and the couplets a little smother, every student should be advised to get it by heart. I may add, without enlarging upon the Agathyrs and the Turdetani, who, as we are told by Aristotle and Strabo, had laws in verse of the remotest antiquity, that the Alco-RAN itself, the great fource of Mahomedan law, is composed in sentences not only modulated with art, but often exactly rhymed; fo that in Asia this apology would have been needless. Verbal translations are generally naked and infipid, wholly destroying all the neatness and beauty of the original, yet retaining fo much of the foreign idiom and manner, as to appear

always uncouth, often ridiculous; but elegance, on a subject so delicate as law, must be facrificed without mercy to exactness; and for this reason I have rendered the Arabian treatise, line for line, and word for word, with a sidelity almost religiously scrupulous.

As it was never my intention to compose a persect work upon the law of inheritances among the *Mahomedans*, it cannot be reasonably expected, that I should subjoin a commentary, or presix a long discourse: very sew marginal notes were thought necessary; but, if the brevity of the original should make parts of it rather obscure, the *British* lawyers in *India*, for whose use chiefly this production was designed, will easily obtain a clear explanation both of the language and matter from native interpreters.

The fourth chapter of the Alcoran may throw light, if any be wanted, on the doctrine of the forudh or portions; and, as to the arithmetical part, it feems of little consequence, as our rules of three, and those for the reduction of fractions, are common and familiar to all.

The present publication will answer, I conceive, another purpose by no means unimportant; as it will habituate the student of eastern languages to the reading of old Arabian manuscripts; but, lest the hand-writing of the very learned Saad Al Sivás, for that was the name

of the transcriber, should perplex beginners, I have printed the whole tract, for their sake, in Roman letters, distinguishing every consonant and long vowel (the short ones are too vague and indeterminate) by a character invariably appropriated to it; so as to give every full sound its own specifick symbol; an advantage, which hardly any alphabet has, but which all ought to have.

Bigyah'o 'lbáhhithi ân jumali 'lmowárithi nadh'mo 'líhaíkhi álímámi álâálimi mowáffiki 'ldeíni ábeí âbdillahi mohhammedi 'bni âleí íbni 'lhhofaíni álrahhabiyyi álmārúfi bi 'bni 'l motakannah'i rahhamaho állaho taâálaí.

Bismi 'llahi álrahhmani álrahheimi wabihi nestaêino.

[1]

awwalo má nestaftihho 'lmekála bidhicri hhamdi rabbina taaala fálhhamdo lillahi álaí má ánámá hhamdán bihi nejlúá âni 'lâini 'lâmá thomma áls alwah o bado walfalamo âlaí nebiyyin' deínoho álíslamo mohhammedin' khátimi rusli rabbihi waálihi min bâdihi wasahhbihi wanesalo 'llaha liná 'líaánah'a feimá tawakhkhainá min álihánaha ân medh-hebi 'límámi zaídi 'lfaradh'ei ídh cána dháca min áhammi 'lgaradh'i îlmán' biánna 'lîlmo áúfá má foêi' feíhi waáúlá má leho 'lábdo doêí waánna hadhá 'lilma makhs'ús'on' bimá kad sháža feshi inda culli 'lûlemá waánna zaídání khusís a lá mahhálah bimá hhabáho s'áhhibo 'lrifálah min kaúlihi feí fadh'lihi monabbehá

áfradh'acom zaidon wanáheica behá facána áúlaí be-íttibáî 'ltábiî lá fiyyamá wakad nahháho 'líháfiêi faháca feíhi álkaúla bi'leíjázi mobarraán' min kas'mah'i 'lálgázi áíbábo meíráthi 'lwaraí theláthah cullon yofeído rabbaho 'lwiráthah wahaí nicáhhon' waweláon' wanafab má bâdahonna lilmawáreíthi fabab.

[2]

wayamnaô 'lshakhs'a min álmeiráthi wáhhidah'on' min îlalin' theláthi rikkon' wakatlon' waákhtiláfo deíni faáfham falaísa 'lshacco cályakeini wálwárithúno feí 'lrijáli âsharah álmáwahom márúfah'on' mulhtaharah álíbno wa'bno 'líbni mahmá nazalá wa'lábo wa'ljeddo leho wai'n âlá wálákho min áyyi 'ljeháti cáná kad ánzela 'llaho bihi 'lkoráná wábno 'lákhi 'lmodleí 'laíhi bi'lábi fásmá mekálán' laísa bi'lmucadhdhabi wa' lâmmo wábno 'lâmmi min ábeíhi fáshcor ledheí 'leíjázi wáltanbeíhi wálzaújo wálmôtiko dhú 'lwelái fajumlah'o 'ldhucuri hawolai wálwáritháto cullohinna febő lam yâth'i ónthei gairahonna 'líherô

binton' wabinto 'bnin' waómmon' mushsikah wajaddah'on' wazaújah'on' wamôtikah walakhto min áyyi 'ljeháti cánat sahadhihi îddatohá kad bánat wáâlam bianna 'lírtha naúâáni homá sardh'on' watâs eíbon' âlaí ma kosimá sálfardho feí nas s'i 'lcitábi sittah lá fardh'o feí 'lirthi siwáhá bittah nis fon' warubôn' thomma nis so 'lrubî wálthultho wálsudso binas si 'lsherî wálthulthani wahomá áltemámo sáhhfadh' facullo hhásidh in' imámo

[3]

fálnis fo fardh o khamíah in' áfrádi álzaújo wálónthaí min áláúládi wabinto 'libni înda fakdi 'lbinti wálákhto fei medh-hebi culli mufteí wabâdahá 'lákhto 'llati min álábi inda ánfirádihinna min moás s'ibi wálrubò fardha 'lzaúji ín cána maáh min waladi 'lzaújah i men kad menaâh wahú leculli zaújah in áú áctherá mâ âdami 'láúladi feimá kadderá wálthomno lilzaújah i wálzaújáti má âlbeneína áú mâ álbenáti áú mâa áúládi 'lbeneíni fáâlemeí wábek le-ítkári 'ldurúfi wáslemeí waálthúltháni lilbenáti jemâá

mà záda an wáhhidah'i fasemaá
wahúa cadháca lebenáti 'líbni
fásham mekáleí fahma s'áseí 'ldhihni
wahúa liákhtaíni semá yezeído
kadh'aí bihi 'láhhráro wálabeído
hadhá ídhá cunna liómmi waábi
áú liábi fáamel bihadhá tos'ibi
wálthultho fardh'o 'lómmi hhaítho lá weled
wela mina 'lákhwah'i jemô waaded
cáthnaíni áú thintaíni áú theláthi
hocmo 'ldhucúri feíhi cálínáthi
wai'n yecun zaújon' waómon' waábo
fathultho 'lbákíyo lehá morattabo
wahacadhai mâ zaújah'in' fas'áidá
felá tecun mina 'lûlúmi káîdá

[4]

wálthultho liláthnaíni áú thintaíni min weledi 'lómmi bigaíri maíni wahacadhaí ín catharúá farádúá fema lehom feímá fiwáho zádo watastawaí 'línátho wáldhucúro feíhi camá kad áúdh'ahho 'lmesth'úro wálsudso fardh'o febâh'in' mina 'lâded ábon' waómmon' thomma binto'bni wajedd wálókhto binto 'lábi thomma 'ljeddah waweledo 'lómmi temámo 'liddah fálábo yestahhikkoho mâa 'lweled wahacadhaí 'lómmo betenzeíli 'ls'emed

wahú lehá áydhán maa 'láthnaíni min íkhwah'i 'lmaíti fakis hadhaíni wáljeddo mithlo 'lábi înda fakdihi feí jeza má yes'eiboho wameddihi illá ídhá cána honáca íkhwah licaúnahom feí 'lkurbi wahú áswah wahhucmohim wahhucmoho feyáteí mocammela 'Ibayána feí 'lhháláti wabinto 'líbni tákhodh álfudfa ídhá cánat mâá 'lbinti mithálá yahhtadhaí wahacadhaí 'lókhto mâa 'lókhti 'llataí biálábawaíni yá ókhayyo ádlata fain tesáwaí nesebo 'ljeddáti wacunna cullahonna wáritháti fálfudío bainahonna biálfawiyyah feí 'lkismah'i 'lâádilah'i 'lsherîyyah wacullo men ádlat bigaíri wárithi femá lehá hhadh"dh"on' mina 'lmawarithi.

[5]

wataskotho 'lbôdaí bidháti 'lkurbi fei 'lmedh-hebi 'láúlaí fakol lei hhasbeí wakad tenáhat kismah'o 'lforúdh'i bigaíri íshcáli welá gomúdh'i wahhokka án neshraâ fei 'ltâs'eíbi biculli kaúlin' mújizin' mus'eíbi facullo men áhhraza culla 'lmáli mina 'lkarábáti áú álmawáleí áú cána má yasdh'olo bâda 'lfardh'i leh fahú ákhú 'lâs'úbah'i 'lmosadh'dh'aleh

cálábi wáljeddi wajeddi 'ljeddi wálíbni înda kurbihi wálbôdi wálakhi wábni 'lákhi wáláâmámi wálfayyidi 'lmôtiki dheí 'línâámi wahacadhai benúohom jemeiâán' facun lemá ádhcoroho femejáán' wamá ledheí 'lbôdi mâa 'lkareíbi fei 'lirthi min hhadh' dh' in' wela nes'eibi wálákho wálammo liómmin' waábi áúlaí mina 'lmodleí bithathri 'lnasabi wa'libno wálákho mâa 'lináthi yoâs sibinahinna fei 'lmeiráthi walaísa feí 'lnisái th'urrán' as'abah illá 'llataí mennat bi îtki 'lrakabah wálákhawáto in yecun benáto fahonna bâdahonna âs'abáto wa'ljeddo mahhjúbon' âni 'lmeíráthi bi'lábi feí áhhwálihi 'ltheláthi wahacadhaí 'bno 'líbni bi'líbni felá tabig âni 'lhhacmi 'lfahheihhi mâdilá

[6]

wataíkoth'o 'ljeddáto min culli jiheh bi 'lómmi fáhhfadh"-ho wakis má áíhbeheh wataíkoth'o 'líkhwah'o bi'lbeneíná wabi'lábi 'ládnaí camá ruweíná áú bibeneí 'lbeneína hhaítho cánúá fiyyáni feíhi 'ljemâ wa'lwahhdáno wayaf dh'olo'bno 'lómmi bi'lískáth'i bi'ljeddi fáhhfadh"-ho âlaí îhhtiyáth'i

wahi 'lbenáti wabenáti 'líbni facun bihhifdh"i 'lîlmi jiddán' môneí thomma benáto 'líbni yeskoth'na metaí hháza 'lbenáto álthulthaína yá fetaí illá ídhá ás's abahonna áldhacaro min welidi 'líbni âlaí má dhacarúá wabâdahonna 'lákhawáto 'llátaí yodleína bi'lkurbi min áljiháti ídhá ákhádna fardh'áhonna wáfiyá áskath na áúláda 'lábi 'lbawáciyá wai n yecun ákho lehonna hhádh'irán' áas'abahonna bathínán' wadh''ahirán' walaifa ibno'lakhi bi'lmoas's'abi men mithlaho áú faúkaho feí 'lnafabi wai'n tajid zaúján' waommán' wárithá wai khwah'an' lilommi hházúá 'lthulothá waákhwah'an' áydh'án' liómmi waábi waástugrika 'lmálo bifardh'i 'lnos'obi fájálahomo cullohomo liómmi waáhhsib ábáhom hhajarán' fei 'lyammi wáksim álaí 'líkhwah'i thultha 'ltaricah wahadhihi 'lmefelah'o 'lmufhtaracah

[7]

wálána nebdá bi'lladhaí áradná fei 'ljeddi wa'líkhwah'i ídh waâdná faálik nahhaú má ákúlo 'lmifmaâá wájmâ hhawáfheí 'lcelamáti ájmaâá wáâlem biánna 'ljeddo dhú áhhwáli

ónbeica ânhonna âlai 'ltawálei fakáfimo 'líkhwah'i feíhonna ídhá lam yaôdi 'lkasmo âlashi bi'ládhai fatárah'an' yákhodho thulthán' cámilán' in cána bi'lkifinah'i ânho názilán' ín lam yecun feihim dhawú fihámi fákna biáydh áhheí ani ístifhámi watárah'an' yakhodho thultha 'lbákeí báda dhaweí 'lforudh'i wa'lárzaki hadhá ídhá má ádh'-hhati 'lmokáfamah tenkos'ho âni dháci bi'lmezáhhamah watárah'an' yákhodho fudía 'lmáli walaisa anho nazilan' bihhali wahau mâa 'lináthi înda 'lkafmi mithlo ákhin' fei sahmihi wa'lhhocmi wáhhfeb beneí 'lábi ledaí 'lìdádi wárfodh' beneí 'lómmi môa 'lájdádi wáhhcom álaí 'líkhwah'i báda 'láddi hhocmaca feihim înda fakdi 'ljeddi wálókhto lá fardh o mâa 'ljeddi lehá feima âlá meselah'an' cammalehá zaújon' waómmon' walromá temámohá fáálem fakhairo ómmah in állámohá tôrafo yá s'áhhi bi'lácdariyyah wahei bián tahhfadh o-há hhariyyah

[8]

fayofradh'o 'lnis fo lehá wa'lfudfo leh hhataí tâúli bi'lforúdh i 'lmojmeleh thomma yaûúdáni ílaí 'lmokáfameh camá madh'aí fábhfadh"-ho wáshcor nádh"imeh wai'n torid marifah'a 'lhhifabi letentahaí feihi ilai 'ls'awábi watarifo 'lkismah'a wa'ltafs'eila watâlim áls'ahheihha wa'los'úlá fástakhriji 'lós'úla feí 'lmesayili walá tecun ân hhifdh"ihá bidháhili wahaí idhá fos's'ila feihá 'lkaúlo thelethah'on' yedkholo feihá 'lâúlo wabadahá árbaah'on' temámo lá aúla várúhá welá inthilámo falfudfo min fittah'i ás-homin' terá wálthultho wa'lrubô min áthnaí âshará wálthumno in dh'omma ilaihi 'lfudío faásíloho 'ls'ádiko feíhi 'lhhadfo árbaah'on' yatbaôhá îshrúná yarifohá 'lhhulábo ájmaûúná fahadhihi 'lthelethah'o 'lós'úlo in caththorat forúdh'ohá taûúlo fatablogo 'lfittah'o âkda 'lâshareh feí s'úrah'in' marúfah'in' mustath'areh watalhhako 'llataí teleíhá fei 'láthar fei 'lâúli áfrádán' befebâh'i âfhar wa'lâdado 'lthálitho kad yaûúlo bithumnihi fáâmel bimá ákúlo wa'lnis fo wa'lbakei awi'lnis fani ás lohomá fei hucmihom áthnáni

wa'lthultho min the ethah'in' yecuno wa'lrubô min árbaâh'in' mefnúno wa'lthumno in cána famin themániyah fahadhihi hai 'lós'úlo 'lthániyah lá yedkholo 'lâúlo alaíhá fáâlemi thomma ásloca 'ltás'-hheihi feihá wáksimi fai'n tecun min ás lihá tas ihhhho fatarco tath'weili 'lhhifábi ribhho fáâth'i cullán' fahmaho min ás'lhi mocammilán' aú âáyilán' min âúlihi wai n terai 'lsiháma laisa tankasim âlaí dhawei 'Imeiráthi fátha má rufim wáthlob th'areika 'líkhtis'ári fei 'lâmal bi'ldh'arbi wa'lwafki yojánibca 'lzelel wárdod ílaí 'lwafki 'lladhaí yowáfiko wádh'ribho fei 'lás'li waánta 'lhhádiko ' ín cána jinfán' wáhhidán' áú áctherá fahhfadh" wadâ ánca 'ljidála wa'lmirá wai'n terai 'lcathra âlai áinási faïnnahá fei 'lhucmi înda 'lnáfi tohhs'aro fei árbaâh'in' áksámi yarifohá 'lmáhiro fei 'láhhcámi momáthilon' min badiho monálibo wabadaho mowafikon' mos'ahhibo wa'lrábiô 'lmobáyino 'lmokhálifo yonbeica an tafs'eilihinna 'laarifo fakhodh mina 'lmomáthilaini wáhhidá

wakhodh mina 'lmonásibaíni 'lzáyidá wakhodh jemesa 'ladadi 'lmobáyini wadh'ribho feí 'lthánes welá todáhini

[10]

wádh'rib jemeíâ 'lwafki feí 'lmowáfiki wásloc bidháca ánhaja 'lth'aráyiki wádh'ribho fei 'lás'li 'lladhaí taás's'ilá waáhhsí má ándh'amma wamá tahhas's'alá waáksimho fa'lkasma idhá s'ahheihho yarifoho laajemo wa'lfaseihho fahadhihi mina 'lhhisabi jumalo yáteí álaí mithálihinna 'lâmalo min gaíri tath'weilin' welá 'âtisáfi fákná bimá feihinna fahú cáfi wai'n yemut ákharo kabla 'lkismah fahhakkiki 'lſihámi wáârif kiſmah wájál leho mesalah'an' ókhraí lemá kad bayyana 'ltafs'eila feimá koddimá wándh or fain wáfakati 'llihámo fakhodh hodeíta wafkohá temámo wádhíribho áú jemeiâhá feí 'lsábikah ín lam yecun baínahomá mowáfakah fálás-homo 'lókhraí fafeí 'lfihámi todhírebo áu fei wafkihá temámi wacullo sahmin' fei jemeiî 'lthániyah yodh rebo áú feí waf kihá alaniyah fahadhihi th'areikah'o 'lmonáfakhah fárka bihá rutbah'a fadh'h fhámikhah

wai'n yecun fei mustahhakki 'lmáli khonthaín' s'ahheihhon bayyana 'líshcáli fáksim âlaí 'lákalli wa'lyekeini tahhdh''a bihakki 'lkismah'i 'lmobeini wahacadhaí hucmo dhawáti 'lhhamli yobnaí âlaí 'lyekeini wa'lákalli

[11]

wai'n yemut kaúmon' bihadmin' áú garak áú hhádithin' âmma 'ljemeiâ ca'lhharak walam yecun yôlemo hhálo 'lſábiki falá yowarrath náfikon' min náfiki taôddohom caïnnahom ájánibo wahacadhaí 'lráyyo 'lfadeído 'ls'áyibo wakad átaí 'lkaúlo álaí má sheirrá min kismah'i 'lmeiráthi ca yebeiná álaí th'areiki 'lramzi wa'lishárah molakhkhas'án biáújezi 'lîbárah fa'lhhamdo lillahi âlaí 'ltemámi hhamdán' catheirán' tomma fei 'ldawámi wanasalo 'lâfwa ârti 'ltaks'eiri wakhaira má námolo fei 'lmes'eiri wagafra má cána mina 'ldhonúbí wasatra má cána mina 'lôyúbi waáfdh'alo 'ls'alwah'i wa'ltafleimi âlaí 'lnebiyyi 'lmus'th'afaí 'lcereími mohhammedin' khairi 'lanami 'laakibi waálihi 'lgurri dhaweí 'lmenákibi was ahhbibi 'láfádh'ili 'lábrári

álsífwahí 'lámáthili 'lákhyári wahhaíboná 'llaho wanîma 'lcáfeí dhú 'lîzzi wa'lkodrah'i wa'lálth'áfi

tummat wa'lhhamdo lillahi
rabbi 'lâálemeíni was'alwátoho
wafelámoho âlaí fayyidiná
mohhammedin' álnebiyyi 'lómmiyi
waâlaí álihi was'ahhbihi
álth'ayyibeini álth'ahereíni
laílah'o 'ljemaâh liárbaâi liyáli
khalaúna min shewáli sinnah
áthneí âshari wasebâ máyih'i
yetheki bi'llahi taâálaí
fakhro 'lsábikáneí
âfá 'llaho ânho.

THE DESIRED OBJECT OF THE INQUIRER CONCERNING ALL THE RULES OF INHERITANCE;

Composed by the learned Shaikh, the Imam

Mowaffiko'ddein, father of Abdalla,

Mohammed, son of Ali, son of Hosain,

Al Rahabi, commonly called Ibno'l

Motakanna. May God be merciful to him!

بغيث الباحث عن جرابوارت الطرا النهاد المؤور البلا الطرا النهد والإمارا العام الدون المدين الدون الدون

This&Plates 12,34,5,67,8,9,10.11, to follow each other in Vol 6, page 26

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فَرْضُحُ شُرُ النَّدُ و الرَّوْحُ وُ^ا لاُ وبِنْنُ لِلهِ بِعِندُ فَيْ رِأُ لِمِنْتِ وَاللَّخْتُ فِي فَهِ لَعِيرٍ و الني مرالا*ت عندا بعلام هر*ً فُونَا الْمُؤْمِرُهُ الْرُالُونُ لَرْدُوجَهِ إِوَّا حُسْراهُ عِنْدُمُوا لَمْ وَلَا ﴿ فِيمُ الْ في وللروجة والزُّوجاتِ مع البُنبِينُ ومُع البُنك البُنبِرُ فاعْلِم وَابنَ لِإِنْقا كِأَا والتلغا وللتنات حمينا ما لا دَعرواجب وطن كُزا كر لهُمَا بِ الإبْرِ فَالْعُمُ مُفَا ختئر فيمَا يُزيلُ فَصُرُ لِهِ اللَّهِ ورلاب دي ڪُوراند گورونيه ڪالهنا وائع فغران البافي لها مُحرُ ننگ تنبيرل ونبئت أرو ملات مَعْ زَوْجِهِ نَصُا عِدًا فَلَانَكُرُ وَمِزُ الْعِلْوُمْ فَاعِـكُمْ

4

4

L

لكرالع رُفُ إِياضًا جَ بِاللهُ كُدُّ رِبَّهُ دِهِ بِأَلْ تَعْفَظُهُا

الأالمع شكة كامضكونا الْعُولُ أَلْكُنَّا ضِيرًا لَيْهِ السُّلِّسُ فَأَصْلِهُ الصَّ فرالعت رم قصول وَتَلَكُورَالَّهُ عَلَيْهُ فِي لِا مُنْ وَالْمُولِ الْعَنُولِ فَرَادُّا بِهُ مِنْ مَعَمَّ والعَدُذُالِثَالِثُ قَدْ يُعُولُ بِتَمْنِيهِ فَاعْبُرِلَّمَا أَفَوْلُ والعَدُذُالِثَالِثُ قَدْ يُعُولُ بِتَمْنِيهِ فَاعْبُرِلَمَا أَفَوْلُ والنِصْفُ والبافِلُ وِالنِصْفَا رِلَصَّلَهُمْ فِي خَسْجِهِمَا ثَنَا ا عهرا نناب

 \mathcal{G}

الزائساأا المكتر لَّذِنَ الْمَاذِورِ وَا صَرِيْدُ فِي الْمُصَ دِمُ الْهُمَا بِنَ لِيُ الْحُالِفُ مُنْسِيَّكُ عِنْ نَفْعُ **ۻڒ؆**ۯٳڶؽٲ

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1.

بِعُهَا فِي السَّايِقَةِ إِنْ لَوْنَكُنُ بَيْنُهُمُ الْمُؤْفِكُمُ

العاقب وآله الفرّ (و) المنا محاتقا وعفائكه شوباستعالى In the name of God, the Clement, the Merciful; and from Him we seek assistance.

[1]

FIRST, we open the discourse With pronouncing the praise of our Lord most High: Praise then to GOD for what he hath bestowed, Praise, by which we remove blindness from the sight! Next, benediction afterwards and salutation To the Prophet, whose religion is the ISLA'M, MOHAMMED, seal of his Lord's messengers, And his family, after him, and his friends! And let us pray GOD for his aid to us In what we have proposed to explain From the system of the Imam, ZAID ALFARADHI *, (Since this is among the noblest of purposes) By learning; for learning is the most deserving of efforts In it, and the worthiest vocation of the pious; And this branch of knowledge peculiarly belongs to what - Has been openly declared among all the learned; And ZAID has unquestionably a just title To what the lord of the mission conferred on him, By pronouncing his excellence, clearly saying, "ZAID will teach you the law:" O glorious encomium! He, therefore, best deserves to be followed by the student, Especially since SHAFIEI takes him for a guide. This then is his doctrine epitomised

Faradh'éi, a man skilled in the faráyidh', or sacred ordinances contained in the Alcoran.

Free from a particle of ambiguity.

The causes of inheritance among men are three;

(The possessor of any one has the advantage of succession)

And they are wedlock, collateral relation, and descent:

There is not besides them a single cause of inheritance.

[2]

And any one of three incapacities Excludes a person from the succession; Servitude, and homicide, and a difference of faith: Understand then; since doubt is not like certainty. And those, who inherit among males, are ten; Their names are known, and every where mentioned: The son, and the son's son, however they descend, And the father, and his father, in the ascending line; And the brother, on whichever side he stands, Since GOD caused the KORAN to descend in his favour: And the son of a brother related by the same father, (Hear now the discourse containing no falsehood) And the paternal uncle, and such uncle's son, (Be thankful to him, who explains concisely and clearly) And the husband, and the emancipater nearly connected; And all the males, who inherit, are these. And all the inheriting females are seven, (To no woman, but them, does the law give that title) The daughter, and the son's daughter, and the tender mother.

And the grandmother, and the wife, and the emancipatress, And the sister, on whichever side she stands:

And this their number thus appears.

And know, that inheritance is of two sorts, which are
'The share, and the heirship* of what is distributable.

The share, and the HEIRSHIP * of what is distributable. Now the shares, by the declaration of the book, are six: (Besides them is no share in the inheritance)

^{*} Pronounced in India, ferz and daba. See the last words of the report by the Mahomedan doctors in the Paina cause.

A moiety, and a fourth; next, half a fourth,

And a third, and a sixth, as the law declares,

And two thirds; and these are the whole.

Remember then; for "Every one, who remembers, is
an IMAM*."

[3]

A moiety then is the share of five persons,

The husband, and the female child,
And the daughter of a son, on failure of daughters,
And the whole sister, by the opinion of every MUFTI,
And, after her, the sister, who has the same father;
This when they stand alone without any HEIR.
And a fourth is the share of the husband, if there be with

And this is for every wife, or more than one
On failure of children, as it is ordained.
And the eighth is for the wife, or the wives,
Together with sons or with daughters †,
Or with children of sons: learn then,
And remain firm in venerating study, and prosper.
And two thirds are for the daughters all together,
When there are more than one; (hear attentively)
And the same portion is for the daughters of a son:
(Comprehend my discourse with clear discernment)
This also is for two sisters, and for what exceeds that number;

The ingenuous and the pious have thus decided:
This, whether they be by the father and the mother,
Or bythe father only. (Act by this rule; thou wilt be right)
And the third is the mother's share, when there is no child,

^{*} A saying, I believe, of Mahomed: he meaned a rememberer of his oral precepts. Hence the name of Hafidh, or Hafis, was assumed by many illustrious persons, and, among them, by the celebrated poet.

[†] See the answer of Mohammed Kárun to the thirteenth question proposed to him in the Patna cause.

Nor any assemblage or number of brethren,
As two brothers, or two sisters, or three;
The rule in this case regards males as well as females.
And, if there be a husband, and a mother, and a father,
A third of what remains is allotted to her;
And so with a wife: (advance then,
And be not seated apart from the sciences.)

[4]

And a third is for two males or two females

Of the mother's children, without deceit;

And so, if there be more, and they seek their allotment,

There is no provision for them in what exceeds that share,

And females and males are held equal

In this distribution, as the written law declares.

And a sixth is the share of seven in number,

The father, and the mother, then the son's daughter,

and the grandfather,

And the sister, daughter of the father, next the grandmother,

And the mother's child: the number is complete.

And the father has a right to it with the children,
And so the mother, by the revelation of the Eternal:
And the same is for her with two
Of the dead man's brothers: give those two a just allotment.
And the grandfather is like the father, on his death,
In the distribution of what accrues to him and relieves him,
Except when there are brothers living,
Since they are preferable to him in proximity*;
And their due and his due shall be introduced
With a full explanation in the different cases.
And the son's daughter takes a sixth, when
She is with a daughter, alike in descent,

[•] The margin has minho for mahi. From this verse it appears, that the degrees of consanguinity are computed by the Mahomedans in the same manner as by our common lawyers.

And thus a sister with a sister, who Is related, O my brother, by the same father. And, if the relation of the grandmothers be equal, Both of them are called to the succession; And a sixth is divided between them equally By the just and the legal mode of partition. And every female, who claims through one not inheriting, Has herself no portion of the inheritance.

[5]

And the distant kinswoman is excluded by the near By the better opinions: (say now to me, "Enough.") And here ends the distribution of the SHARES. Without perplexity or intricacy: And it is just, that we propound the law of HEIRSHIP With every sentence concise and exact. Now every one, who appropriates all the estate, Among the near descendants or relations, Or who takes what remains after the portions. He is distinguished by the title of HEIR*, As the father, and the grandfather, and his father, And the son, in a near and a remote degree, And the brother, and the brother's son, and the uncles, And the master, who generously manumitted his slave. And thus their sons, all of them: (Be attentive then to what I pronounce). And there is not to the distant, with the near, kinsman Any share or portion in the inheritance. And the brother and the uncle by mother and father Are preferred to those descended by the half blood. And the son and the brother with females Have the heirship over them in the estate:

[•] See A Narrative of the Proceedings in the Patna Cause, p. 11. Note b. The Arabick verb as s'aba primarily signifies to collect and bind together the branches of a tree: hence the secondary sense, to constitute the heir and head of a family.

And there is not among women any heiress Except her, who kindly freed the enslaved neck. And the sisters, if there be daughters, Take the residue after their portions. And the grandfather is precluded from inheriting By the father in all his three cases; And thus the grandson by the son: (do not then Turn aside, in deviation from the clear rules).

[6]

And the grandmothers on each side are excluded

By the mother: (remember this rule, and decide conformably)

And brothers are excluded by sons And by the nearest progenitor, as we are taught, Or by sons' sons, when there are any; A number and one are in this respect alike. And the mother's son remains in exclusion By the grandfather (remember this with care) And by the daughters, and the son's daughters: (Be very assiduous in committing knowledge to memory) Besides, the son's daughters are excluded, when The daughters take two thirds, O young man, Except when a male has the heirship over them Of the son's children, by what they assert: And, after them, the sisters, who Descend in proximity from both sides, When they take their complete portions, Exclude the weeping daughters of the dead father: And, if they have a brother present, He has the heirship over them, in private and publick, And the brother's son is not the heir over Whoever is equal to, or above, him in descent. And, if thou find a husband and a mother inheriting, And brothers by the mother, they take each a third; And so if there be brothers by the mother and the father, And the whole estate is comprised in the allotment of shares, Place them all to the side of the mother,

And consider their father as a rock in the sea,

And divide among the brethren a third of the estate left,

And this is the case of mushtaraca, or parcenary.

[7]

And now we will enter upon what we desire

Concerning the grandfather and the brothers, as we promised.

Incline then thine ear to what I shall say,
And collect at once the whole purport of my words;
And know, that the grandfather has different cases;
I will inform thee of them successively:
And he has a share with the brothers in them, when
The division redounds not to any loss upon him.
And sometimes he takes an entire third,
If there be in the distribution any descendants from him,
And there be not among them any entitled to shares,
(Be content with my explanation without questions)
And sometimes he takes a third of the remainder
After those, who have portions and provisions;
This, when the dividend is become
Too diminished for the other share by the press of
claimants.

And sometimes he takes a sixth of the property,
And there is no descendant from him in that case;
And he, with females in the division, is
Like the brother in his share and his right.
And reckon the father's children in the number,
(And leave the mother's children with the grandfathers)
And, after that number, give to the brethren
Thy just allotment among them on failure of the grandfather.

And the sister has no share with the grandfather In what exceeds the case already concluded; The consort and the mother, and these two are all of them, (Know then, for the best of the sect is he who knows best)
Are called, O friend, the acdariyyah *;
And they deserve to be remembered by thee.

[8]

Half then is given to her, and a sixth to him; Until there is a remainder after the entire shares. Then they return to the distribution As before-mentioned: (recollect it, and thank the author) And, if thou desire a knowledge of computation, Thou wilt by its means attain the right proceeding: And thou wilt understand divisions and analysis; And wilt be acquainted with integers and fractions; Extract then the roots in solving problems +. And be not remiss in committing them to memory; Now they, when the discourse about them is precise, Are three, to which a remainder belongs, And, after them, four complete divisors, To which no remainder belongs, nor any fraction ‡. Now the sixth, thou wilt see, is from six portions, And the third and the fourth from twelve; And if to an eighth a sixth be added, The new root, concerning which the calculation is just, Becomes four, which twenty follow, As arithmeticians universally know &. And these three roots. If the shares be many, leave a remainder. And let six come to the connexion of ten In the known table commonly delineated ||-

The Arabian lexicographers give this name to the husband or wife, the mother, the grandfather, and the whole sister; possibly, because the rules of succession are a little disturbed in favour of them.

[†] By ail, or root, he must mean the denominator of a fraction.

[?] He, probably, considers the whole estate as twelve, which has four divisors, besides unit.

[§] In our notation (which the Asiaticks, if they are wise, will adopt), $\frac{1}{4} + \frac{1}{4} = \frac{1}{3}$.

Il This passage I do not understand, not knowing the table to which

And let that follow, which succeeds it in the series, In the excess, by distinct progressions, to seventeen; And the third number leaves a remainder Of its eighth part: (proceed then, as I direct) And half and what remains, or the two halves, Their root, in the rule concerning them, is two.

[9]

And the third comes obviously from three;
And the fourth is formed from four;
And the eighth, if it be required, is from eight;
And these are the second roots,
To which no remainder belongs: know this;
Then pursue the method of verifying it, and distribute;
And, if thou hast verified the root,
The end of lengthened computation is clear gain.
Give then to each person his share, from his root,
Complete, or broken from its remainder.
And, if thou see that the shares cannot be distributed
To the partakers of the inheritance, follow what is prescribed,

And seek the way of compendiousness in the work

By multiplication and proportion: this will remove error

from thee,

And restore to the whole quantity what agrees with it,
And multiply it by the root, and be thou vigilant;
Whether there be one denomination or more,
Rememberwell, and dismiss from thee doubt and difficulty:
And, if thou see multiplicity in the kinds,
Then they, by the rule among men,
Are numerically ranged in four terms,
The skilful accountant will know them by the rules;
The similar term, after it the proportional,

it refers. The sangurary table, which Wallis exhibits in the seventh chapter of his Algebra, is commonly used in Asia for multiplication and division. See Chardin, vol. III. p. 155.

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And, after that, the concordant accompanying,
And the fourth is the discordant separated;
(The intelligent man will inform thee of their distinctions)
Take then from the similars one,
And take from the proportionals the rest,
And take the entire number of discordants,
And multiply them by the second term; and be not deceived.

[10]

And, mix the whole quantity with the concordant, And pursue by it the plainest of ways; And multiply it into the root, which thou hast investigated. And compute what is the sum, and what it amounts to; And divide it; and, if the division be just, The illiterate and the eloquent man will equally know it *: And this is the whole of the computation, (The work thus proceeds in similar cases) Without prolixity or digression; Be satisfied then with what it contains; for it is sufficient, And if one person die before the distribution, Make the shares just, and know his proper division; And state for him a fresh question, as it Has been distinctly explained, in what precedes: And consider; and, if the shares agree, Take them; thou art right; the quantity is complete; And mix it, or all of them, into the preceding, If there be not an agreement between them,

[•] The preceding verses contain an awkward rule of practice; but it hence appears, that Chardin was mistaken, when he asserted, that neither the Indians nor Persians of his time were at all acquainted with the c mmon practical rules: see his chapter on the Persian Arithmetick.

⁺ It can only be of use, as an artificial memory, to those who already know the rules, but is insufficient for the teaching of them. These two or three pages are very enigmatical; but I should not despair of explaining them, if I had leisure to read a few arithmetical books of the Arab. (1 Persians.

And the new shares into the former shares.

Are blended, or into the entire quantity;

And every share into the aggregate of the second

Is mixed, or into the whole quantity, manifestly:

And this is the method of monásakhah*;

Mount then by it the lofty degrees of excellence.

And, if there be among the claimants of the estate

A real hermaphrodite, removing all doubts,

Distribute to the less evident and to the certain;

Thou wilt allot with justice the clear portion;

And this is the rule of pregnant women,

Which is founded on the certain, and the less evident.

[11]

And, if many kinsmen die by ruin or drowning,
Or a calamity overwhelming all, as fire,
And the case of the survivor be not known,
And one deceased cannot be heir to another deceased,
Reckon them all, as if they were strangers;
And this is the sound and true determination.
And now the discourse has come to what we desired
Concerning the distribution of estates, so that it is made
clear,

By way of short hint and allusion,
Explained in an abbreviation of the sense.
Praise then to God in perfection,
Praise, abundant, complete in eternity;
And let us ask forgiveness for our defects,
And the best of what we hope in the place aspired to,
And pardon for what is passed of our sins,
And a covering for what is passed of our faults;
And the fairest of salutations and benisons

The grammarians, translated by Golius, thus explain the word to resold or monusaldiah: "Mors et successio continua hæredum, quæ fit integrâ manente et indivisa hæreditate;" but the last words convey no adequate idea of the thing.

On the propher, the pure, the illustrious,

MOHAMMED, the best of created beings, the last of prophets,

And on his family, bright with glorious qualities,

And his companions, the excellent, the noble,

The spotless, the exalted, the beneficent!

And our sufficient help is GoD! O all-sufficient!

Endued with greatness, and with power, and with clemency!

The work is ended. Praise be to God, The ruler of worlds! and his blessing And peace on our lord MOHAMMED, the Unlettered Prophet, And on his family and his companions, The excellent, the unblemished! On Friday night, one of the four nights at the close of Shewal in the year seven hundred and twelve *

The Transcriber, surnamed

FAKHRO'L SA'BIKA'NI

(or, Excelling his Predecessors)

confides in GOD Most High:

May GOD forgive his sins!

♥ ¥. €. 1319.

AL SIRAJIYYAH:

OR,

THE MOHAMMEDAN LAW OF

INHERITANCE:

WITH

A COMMENTARY,

BX

SIR WILLIAM JONES.

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PREFACE.

THE two Mufelman authors, whom I now introduce to my countrymen in India, are Shaikh SIRA'JU'DDI'N, a native of Sejávend, and Sayyad SHARI'F, who was born at Jurjan in Khwarezm near the mouth of the Oxus, and is said to have died, at the age of feventy-fix years, in the city of Shiraz: their compositions have equal authority in all the Mobammedan courts, which follow the fystem of ABU' HANTFAH, with those of Littleton and Coke in the courts at Westminster; and there is, indeed, a wonderful analogy between the works of the old Arabian and English lawyers, and between those of their feveral commentators; with this difference in favour of our own country, that Lit-TLETON is always too clear to need a gloss, and with this difference in favour of the Arabs, that the fole object of SHARI'F was to explain and illustrate his text, without an ostentatious dis-

play of his own erudition; but, when it is admitted, that a defire of extreme brevity has often made the Sirájiyyah obscure, the reader should in candour allow, that every author must appear to great disadvantage in a literal translation, especially when his own idiom differs totally from that of his translator, when his terms of art must be rendered by new words, which use alone can make easy, and when the system. which he unfolds to his countrymen, has no wefemblance to any other, that the world ever knew. In the Sharlfiyyah (for that is the popular title of the Arabian comment) we find little or no obscurity; and, if there be a fault in the book, it is a scrupulous minuteness of explanation, and a needless anxiety to remove every little cloud, which the reader himself might disperse by the slightest exertion of his intellect. Both works were translated into Perfian by the order of Mr. HASTINGS; and the translation, which bears the name of Maulavi MUHAMMED KA'SIM, must appear excellent, and would be really useful, to such as had not access to the Arabick originals; but the text and comment are blended without any difcrimination, and both are so intermixed with the notes of the translator himself, that it is often impossible to separate what is fixed law from what is merely his own opinion: he has

also erred (though it be certainly a pardonable errour) on the side of clearness, and has made his work so tediously perspicuous, that it sills, inclusively of a turgid and slowery dedication, about six hundred pages, and a faithful version of it in *English* would occupy a very large volume.

If the pains, which have been taken to render my own work as complete as possible, be meafused by the fize of it, they must be thought very inconfiderable; but in truth no greater pains could have been taken with any work; and it would have been a far easier task to have dictated or written a verbal translation of the two comments on my text, than to have made a careful felection of all that is important in them; for which purpose I perused each of them three times with the utmost attention, and have condensed in little more than fifty short pages the substance of them both, without any fuperfluous passage, that I should wish to be retrenched, and with as much perspicuity as I was able to give, in fo fhort a compass, to a system in some parts rather abstruse: lest men of business, for whom the book is intended. should be alarmed at first fight by the magnitude of it, I have omitted all the minute criticism, various readings, and curious Arabian literature; most of the anecdotes concerning old

lawyers, and all their fubtil controversies with the arguments on both fides; together with the demonstrations of arithmetical rules and the very long processes, after the prolix method of the Arabs, in words instead of figures. Practical utility being my ultimate object in this work, I had nothing to do with literary curiofities, how agreeable soever they might have been in their proper places; but, in order to attain that object by a full explanation of every thing useful in my text, I was under a necessity of retaining the Arabian phraseology both in law and arithmetick, and must request the English reader to difmis from his mind, while he studies the Sirájiyyab, those appropriated senses, in which many of our words, as heir, inheritance, root, and the like, are used in our own systems. One Arabick word I was at a loss to translate precifely in our language without circumlocution: the chief problem, in the distribution of estates among Muselman heirs, is to find the least number, by which an estate must be divided, so that all the shares and the residue may be legally distributed without a fraction: this they call integration; but, if I could have hazarded fuch a word in English, the frequent repetition of it would have been extremely harsh; and I have generally called it arrangement or verification, which are popular senses of the Arabick verbal noun';

but the number fought, or, to use the Arabian expression, the integrant of the case, I have usually named the divisor of the estate.

It will be seen in the Sirájiyyah, that the system of ZAID, though in part exploded by ABW HANIFAR, had very powerful supporters, and its author is always mentioned in terms of refpect: it is the system, which I published at London above ten years ago; and I am not furprised, that, without a native affistant or even a marginal gloss, I could not then interpret the many technical words, which no dictionary explains, except in their popular fenses; but, though my literal version of the tract by ALMU-TAKANNA seems for pages together like a string of enigmas, yet the following work makes every fentence in it perfectly clear; and the original, which was engraved from a very old manuscript, appears to be a lively and elegant epitome of the law of inheritance according to ZMID, but manifestly designed to assist the memory of young students, who were to get it by heart, when they had learned the rules from some longer treatife, or from the mouths of their preceptors. This may be no improper place to inform the reader, that, although ABU HANFFAH be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shown to ABU YU'sur and the lawyer Munammen, that, when they both dissent from their master, the Muselman judge is at liberty to adopt either of the two decisions, which may seem to him the more consonant to reason, and sounded on the better authority.

I am strongly disposed to believe, that no possible question could occur on the Mohammedan law of succession, which might not be rapidly and correctly answered by the help of this work; but it would be easy to confirm or invalidate my opinion by the following method. Let one capital letter, or more, if necessary, répresent each of the sharers, residuaries, and distant heirs; and let those letters be the initials of the feveral words, in aid of the memory. but so chosen (as without difficulty they may be) that all may be different; let them be placed in alphabetical order, and connected by the fign of addition; let an enumeration be then made, by the known rule, of all the possible cases, in which they can occur, two and two, three and three, and so forth; let them accordingly be arranged in tables from the lowest number to the highest; and let the share or allotment of each be fet above the letter. in the place of an exponent. If the questionthen were proposed, in what manner the property of HINDA must be distributed among her daughter, her sifter by the same father only, and the daughter of her son, the table of the third

class would exhibit this formula D + DF = + DS 1; or, if AMRU had left his wife, two daughters, and both his parents, the formula in the fourth table would be 2 D $\frac{16}{12}$ + F $\frac{1}{12}$ + M $\frac{1}{12}$ + W ; where the denominator of the index would be the integrant, as the Arabs call it, of the case, and the numerator would point out the feveral allotments: thus might we construct a set of tables, mathematically accurate, in which the legal distribution, in every possible case, might be seen in a moment without thought and even without learning; and such a blind facility, though not very confistent with the dignity of science, would certainly be convenient in practice. We might also arrange the whole in a fynthetical method (of all the most luminous and satisfactory) by beginning with the fentences of the Koran, as with indubitable axioms, followed by the genuine oral maxims of MUHAMMED; by subjoining the points, on which all the learned have at length agreed, and by concluding with cases deduced from those three sources of juridical knowledge, to which there should be constant references by numbers in the manner of geometricians: this method I propose to adopt in the Digest, from which I have separated the Sirájiyyah, because it seemed worthy of being exhibited entire, and may be considered as Institutes of Arabian Law on the important title, mentioned by the British legislature, of inheritance and succession to lands, nents, and goods.

. Unless I am greatly deceived, the work, now presented to the public, decides the question, which has been started, whether, by the Mogul constitution, the savereign be not the sole proprietor of all the land in his empire, which he or his predecessors have not granted to a subject, and his beirs; for nothing can be more certain, than that land, rents, and goods are, in the language of all Mohammedan lawyers, property alike alienable and inheritable; and so far is the sovereign from having any right of property in the goods or lands of his people, that even escheats are never appropriated to his use, but fall into a fund for the relief of the poor. SHARIF expressly mentions fields and bouses as inheritable and alienable property: he fays, that a bouse, on which there is a lien, shall not be fold to defray even funeral expenses; that, if a man dig a well in bis own field, and another man perish by falling into it, he incurs no guilt; but, if he had trespassed on the field of another man, and had been the occasion of death, he must pay the price of blood; that buildings and trees pass by a fale of land, though not conversely; and he always expresses what we call property by an emphatical word implying dominion. Such dominion, fays he, may be acquired by the act of parties, as in the case of contracts, or, by the act of

law, as in the case of descents; and, having obferved, that freedom is the civil existence and life of a man, but flavery, his death and annihilation, he adds, because freedom establishes his right of property, which chiefly distinguishes man from other animals and from things inanimate; so that he would have considered subjects without property, (which, as he fays in another place, comprises every thing that a man may fell, or give, or leave for his beirs) as mere flaves without civil life: yet SHARIF was beloved and rewarded by the very conqueror, from whom the imperial house of Dehli boasted of their descent. The Kordn allots to certain kindred of the deceased specifick shares of what he left, without a syllable in the book, that intimates a shade of distinction between realty and personalty; there is therefore no such distinction, for interpreters must make none, where the law has not distinguished: as to MUHAMMED, he fays in positive words, that if a man leave either property, or rights, they go to his heirs; and SHARIF adds. that an heir succeeds to his ancestor's estate with an absolute right of ownership, right of possession, and power of alienation. Now I am fully persuaded, that no Muselman prince, in any age or country, would have harboured a thought of controverting these authorities. Had the doctrine lately broached been suggested to the ferocious, but politick and religious,

OMAR, he would in his best mood have asked his counsellor sternly, whether he imagined himself wifer than God and his Prophet, and, in one of his passionate sallies, would have spurned him as a blasphemer from his presence, had he been even his dearest friend or his ablest general: the placid and benevolent ALI would have given a harsh rebuke to such an adviser; and Aurangzi's himself, the bloodiest of asfassins and the most avaricious of men, would not have adopted and proclaimed fuch an opinion, whatever his courtiers and flaves might have said, in their zeal to aggrandize their master, to a foreign physician and philosopher, who too hastily believed them, and ascribed to fuch a fystem all the desolation, of which he had been a witness. Conquest could have made no difference; for, either the law of the conquering nation was established in India, or that of the conquered was suffered to remain: if the first, the Koran and the dista of MUHAM-MED were fountains, too facred to be violated. both of public and private law; if the second, there is an end of the debate: for the old Hindus most assuredly were absolute proprietors of their land, though they called their fovereigns Lords of the Earth; as they gave the title of Gods on Earth to their Brahmens, whom they punished, nevertheless, for theft with all due severity. Should it be urged, that, although as

Indian prince may have no right, in his executive capacity, to the land of his subjects, yet, as the sole legislative power, he is above control; I answer firmly, that Indian princes never had, nor pretended to have, an unlimited legislative authority, but were always under the control of laws believed to be divine, with which they never claimed any power of dispensing.

I am happy in an opportunity of advancing these arguments against a doctrine, which I think unjust, unfounded, and big with ruin; for, in the course of nine years, I have seen enough of these provinces and of their inhabitants, to be convinced, that, if we hope to make our government a bleffing to them and a durable benefit to ourselves, we must realize our hope, not by wringing for the present the largest posfible revenue from our Afatick subjects, but by taking no more of their wealth than the publick exigencies, and their own fecurity, may actually require; not by diminishing the interest, which landlords must naturally take in their own foil, but by augmenting it to the utmost, and giving them affurance, that it will descend to their heirs: when their laws of property, which they literally hold facred, shall in practice be secured to them; when the land-tax shall be so moderate, that they cannot have a colourable pretence to rack their tenants, and when they shall have a well grounded confidence, that the proportion of it will never be raised, except for a time on some great emergence, which may endanger all they poffefs; when either the performance of every legal contract shall be enforced, or a certain and adequate compensation be given for the breach of it; when no wrong shall remain unredressed, and when redress shall be obtained at little expense, and with all the speed, that may be confistent with necessary deliberation; then will the population and resources of Bengal and Bahar continually increase, and our nation will have the glory of conferring happiness on confiderably more than twenty-four millions (which is at least the present number) of their native inhabitants, whose cheerful industry will enrich their benefactors, and whose firm attachment will fecure the permanence of our dominion.

AL SIRAJIYYAH

THE

INTRODUCTION.

IN THE NAME OF THE MOST MERCI-FUL GOD!

PRAISE be to GOD, the Lord of all worlds; the praise of those who give Him thanks! And His blessing on the best of created beings, MU-HAMMED, and his excellent family! The Prophet of GOD (on whom be his blessing and peace!) said: "Learn the laws of inheritance, "and teach them to the people; for they are "one half of useful knowledge." Our learned in the law (to whom GOD be merciful!) say: "There belong to the property of "a person deceased four successive duties to "be performed by the magistrate: first, his sune-"ral ceremony and burial without supersluity "of expense, yet without desiciency; next, the

"discharge of his just debts from the whole of " his remaining effects; then the payment of "his legacies out of a third of what remains " after his debts are paid; and, lastly, the distri-66 bution of the refidue among his fuccessors, ac-" cording to the Divine Book, to the Traditions, " and to the Assent of the Learned." begin with the persons entitled to shares, who are fuch as have each a specifick share allotted to them in the book of Almighty GOD; then they proceed to the refiduary heirs by relation, and they are all fuch as take what remains of the inheritance, after those who are entitled to shares; and, if there be only residuaries, they take the whole property: next to residuaries for special cause, as the master of an enfranchised flave and his male refiduary heirs; then they return to those entitled to shares according to their respective rights of consanguinity; then to the more distant kindred; then to the successor by contract; then to him who was acknowledged as a kinfman through another, fo as not to prove his confanguinity, provided the deceased persisted in that acknowledgement even till he died; then to the person, to whom the whole property was left by will; and laftly to the publick treasury.

On Impediments to Succession.

IMPEDIMENTS to succession are four; 1, servitude, whether it be perfect or imperfect; 2, homicide, whether punishable by retaliation, or expiable; 3, difference of religion; and 4, difference of country, either actual, as between an alien enemy and an alien tributary; or qualified, as between a fugitive and a tributary, or between two fugitive enemies from two different states: now a state differs from another by having different forces and sovereigns, there being no community of protection between them.

On the Doctrine of Shares, and the Persons entitled to them.

THE furud, or shares, appointed in the book of Almighty GOD, are six: a moiety, a quarter, an eighth, two thirds, one third, and a sixth, fome formed by doubling, and fome by halving. Now those entitled to these shares are twelve persons; four males, who are the father and the true grandfather or other male ancestor, how high soever in the paternal line, the brother by the same mother, and the husband; and eight

females, who are the wife, and the daughter, and the fon's daughter, or other female defcendant how low foever, the fifter by one father and mother, the fifter by the father's side, and the sister by the mother's side, the mother, and the true grandmother, that is, the who is related to the deceased without the intervention of a false grandfather. (A false male ancestor is, where a female ancestor intervenes in the line of ascent.) The father takes in three cases; 1, an absolute share, which is a fixth, and that with the fon, or fon's fon, how low foever; 2, a legal share, and a residuary portion also; and that with a daughter, or a fon's daughter, how low foever in the degree of descent; 3, he has a simple residuary title, on failure of children and son's children, or other low descendants. The true grandfather has the same interest with the father, except in four cases, which we will mention presently, if it please GOD; but the grandfather is excluded by the father, if be be living; fince the father is the mean of confanguinity between the grandfather and the deceafed. The mother's children also take in three cases: a sixth is the share of one only; a third, of two, or of more: males and females have an equal division and right; but the mother's children are excluded by children of the deceased and by son's children,

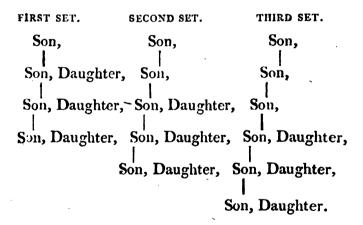
how low foever, as well as by the father and the grandfather; as the learned agree. The husband takes in two cases; half, on failure of children, and son's children, and a fourth, with children or son's children, how low soever they descend.

On Women.

Wives take in two cases; a fourth goes to one or more on failure of children, and fon's children how low foever; and an eighth with children, or fon's children, in any degree of descent. Daughters begotten by the deceased take in three cases: half goes to one only, and two thirds to two or more; and, if there be a fon, the male has the fhare of two females, and he makes them residuaries. The son's daughters are like the daughters begotten by the deceased; and they may be in fix cases: half goes to one only, and two thirds to two or more, on failure of daughters begotten by the deceafed; with a fingle daughter of the deceased, they have a fixth, completing (with the daughter's balf), two thirds; but, with two daughters of the deceased, they have no share of the inheritance, unless there be, in an equal degree with, or in a lower degree than, them, a boy, who makes

them residuaries. As to the remainder between them, the male has the portion of two semales; and all of the son's daughters are excluded by the son himself.

If a man leave three son's daughters, some of them in lower degrees than others, and three daughters of the son of another son, some of them in lower degrees than others, and three daughters of the son's son of another son, some of them in lower degrees than others, as in the sollowing table, this is called the case of tashbib.



Here the eldest of the first line has none equal in degree with her; the middle one of the first line is equalled in degree by the eldest of the second; and the youngest of the first line is equalled by the middle one of the second, and by the eldest of the third line; the youngest

of the second line is equalled by the middle one of the third line, and the youngest of the third set has no equal in degree.—When thou hast comprehended this, then we say: the eldest of the first line has a moiety; the middle one of the first line has a fixth together with her equal in degree to make up two thirds; and those in lower degrees never take any thing, unless there be a son with them, who makes them residuaries, both her who is equal to him in degree, and her who is above him; but who is not entitled to a share: those below him are excluded.

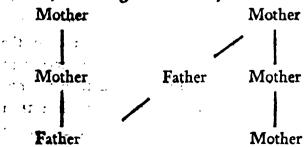
Sifters by the same father and mother may be in five cases: half goes to one alone; two thirds to two or more; and, if there be brothers by the same father and mother, the male has the portion of two semales; and the semales become residuaries through him by reason of their equality in the degree of relation to the deceased; and they take the residue, when they are with daughters, or with son's daughters, by the saying of Him, on whom be blessing and peace! "Make sisters, with daughters, residuaries."

Sifters by the same father only are like sifters by the same father and mother, and may be in seven cases: half goes to one, and two thirds to two or more on failure of sisters by the same father and mother; and with one sister by the same father and mother, they have a sixth, as the complement of two thirds; but they have no inheritance with two sisters by the same father and mother, unless there be with them a brother by the same father, who makes them residuaries; and then the residue is distributed among them by the sacred rule "to the make "what is equal to the share of two semales." The sixth case is, where they are residuaries with daughters or with son's daughters, as we have before stated it.

Brothers and sisters by the same father and mother, and by the same father only, are all excluded by the son and the son's son, in how low a degree soever, and by the father also, as it is agreed among the learned, and even by the grandfather according to ABU HANIFAH, on whom be the mercy of ALMIGHTY GOD! And those of the half-blood are also excluded by the brothers of the whole blood.

The mother takes in three cases: a fixth with a child, or a son's child, even in the lowest degree, or with two brothers and sisters or more, by whichever side they are related; and a third of the whole on failure of those just-mentioned; and a third of the residue after the share of the husband or wise; and this in two cases, either when there are the husband and both parents, or the wise and both parents: if there be a

grandfather instead of a father, then the mother takes a third of the whole property, though not by the opinion of ABU YUSUF, on whom be GOD's mercy! for he fays, that in this case also she has only a third of the residue. The grandmother has a fixth, whether she be by the father or by the mother, whether alone or with more, if they be true grandmothers and equal in degree; but they are all excluded by the mother, and the paternal female ancestors also by the father; and in like manner, by the grandfather, except the father's mother, even in the highest degree; for she takes with the grandfather, fince she is not related through him. The nearest grandmother, or female ancestor, on either fide, excludes the more distant grandmother, on whichever fide she be; whether the nearer grandmother be entitled to a share of the inheritance, or be herself excluded. When a grandmother has but one relation, as the father's mother's mother, and another has two fuch relations, or more, as the mother's mother's mother, who is also the father's father's mother, according to this table,



then a fixth is divided between them, according to ABU YUSUF, in moieties, respect being had to their persons; but, according to MU-HAMMED (on whom be GOD's mercy!) in thirds, respect being had to the sides.

On Residuaries.

RESIDUARIES by relation to the deteased are three: the residuary in his own right, the residuary in another's right, and the residuary together with another. Now the residuary in his own right is every male, in whose line of relation to the deceased no female enters; and of this fort there are four classes; the offspring of the deceased, and his root; and the offspring of his father and of his nearest grandfather, a preference being given, I mean a preference in the right of inheritance, according to proximity of degree. The offspring of the deceafed are his fons first; then their fons, in how low a degree soever: then comes his root, or his father; then his paternal grandfather, and their paternal grandfathers, how high foever; then the offspring of his father, or his brothers; then their fons, how low foever; and then the offfpring of his grandfather, or his uncles: then their fons, how low foever. Then the strength

of confanguinity prevails: I mean, he, who has two relations is preferable to him, who has only one relation, whether it be male or female, according to the faying of Him, on whom be peace! "Surely, kinfmen by the same father " and mother shall inherit before kinsmen by " the same father only:" thus a brother by the fame father and mother is preferred to a brother by the father only, and a fifter by the same father and mother, if the become a residuary with the daughter, is preferred to a brother by the father only; and the fon of a brother by the fame father and mother is preferred to the fon of a brother by the same father only; and the rule is the same in regard to the paternal uncles of the deceased; and, after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grandfather.

The residuaries in another's right are sour semales; namely, those whose shares are half and two thirds, and who become residuaries in right of their brothers, as we have before mentioned in their different cases; but she who has no share among semales, and whose brother is the heir, doth not become a residuary in his right; as in the case of a paternal uncle and a paternal aunt.

As to residuaries together with others: such is every female who becomes a residuary with

another female; as a fifter with a daughter, as we have mentioned before. The last residuary is the master of a freedman, and then his residuary heirs, in the order before stated; according to the faying of Him, on whom be bleffing and peace! "The master bears a relation like "that of confanguinity;" but females have nothing among the heirs of a manumittor, according to the faying of Him, on whom be bleffing and peace! "Women have nothing " from their relation to freedmen, except when "they have themselves manumitted a slave; or " their freedman has manumitted one, or they " have fold a manumission to a slave, or their " vendee has fold it to his flave, or they have " promised manumission after their death, or " their promisee has promised it after his death, " or unless their freedman or freedman's freed-"man draw a relation to them."

If the freedman leave the father and son of his manumittor, then a fixth of the right over the property of the freedman vests in the father, and the residue in the son, according to ABU YUSUF; but, according to both ABU HANIFAH and MUHAMMED, the whole right wests in the son; and, if a son and a grandfather of the manumittor be lest, the whole right over the freedman goes to the son, as all the learned agree. When a man possesses as his slave a

kiniman in a prohibited degree, he manumita him, and his right vests in him; as if there be three daughters, the youngest of whom has twenty dinars, and the eldest, thirty; and they two buy their father for fifty dinars; and afterwards their father die leaving some property; then two thirds of it are divided in thirds among them, as their legal shares, and the residue goes in fifths to the two who bought their father; three sists to the eldest and two sists to the youngest; which may be settled by dividing the whole into forty-sive parts.

On Exclusion.

Exclusion is of two forts: 1. Imperfect, or an exclusion from one share, and an admission to another; and this takes place in respect of sive persons, the husband or wise, the mother, the son's daughter, and the sister by the same father; and an explanation of it has preceded. 2. Perfect exclusion: there are two sets of persons having a claim to the inheritance: one of which sets is not excluded entirely in any case; and they are six persons, the son, the father, the husband, the daughter, the mother, and the wise; but the other set inherit in one case and in another case

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are excluded. This is grounded on two principles; one of which is, that "whoever is related " to the deceased through any person, shall not "inherit, while that person is living;" as a fon's fon, with the fon; except the mother's children, for the inherit with her; fince the has no title to the whole inheritance: the fecond principle is, " that the nearest of blood must take," and who the nearest is, we have explained in the chapter on refiduaries. A person incapable of inheriting doth not exclude any one, at least in our opinion; but, according to IBNU MASUUD (may GOD be gracious to him!) he excludes imperfectly; as an infidel, a murderer, and a flave. A person excluded may, as all the learned agree, exclude others; as, if there be two brothers or fifters or more, on which ever fide they are, they do not inherit with the father of the deceased, yet they drive the mother from a third to a fixth.

On the Divisors of Shares.

Know, that the fix shares mentioned in the book of Almighty GOD are of two sorts: of the first are a moiety, a fourth, and an eighth; and of the second sort are two thirds, a third, and a sixth, as the fractions are halved and

Now, when any of these shares ocdoubled. cur in cases singly, the divisor for each share is that number which gives it its name (except half, which is from two), as a fourth denominated from four, an eighth from eight, and a third from three: when they occur by two or three, and are of the same fort, then each integral number is the proper divisor to produce its fraction, and also to produce the double of that fraction, and the double of that, as fix produces a fixth, and likewise a third, and two thirds; but, when half, which is from the first fort, is mixed with all of the fecond fort or with fome of them, then the division of the estate must be by fix; when a fourth is mixed with all of the fecond fort or with some of them, then the divifion must be into twelve; and when an eighth is mixed with all of the second fort, or with some of them, then it must be into four and twenty parts.

On the Increase.

Aul, or increase, is, when some fraction remains above the regular divisor, or when the divisor is too small to admit one share. Know, that the whole number of divisors is seven, sour

of which have no increase, namely, two, three, four, and eight; and three of them have an increase. The divisor, six, is, therefore, increased by the áid to ten, either by odd, or by even, numbers; twelve is raifed to seventeen by odd, not by even, numbers; and twenty-four is raised to twenty-seven by one increase only; as in the case, called Mimberiyya (or a case aufwered by ALI when he was in the pulpit), which was this, " A man left a wife, two daughters, and both his parents." After this there can be no increase, except according to IBN MASUUD (may GOD be gracious to him!) for, in his opinion, the divifor twentyfour may be raised to thirty-one; as if a man leave a wife, his mother, two fifters by the same parents, two fifters by the same mother only, and a fon rendered incapable of inheriting.

On the Equality, Proportion, Agreement, and Difference of two Numbers.

THE temáthul of two numbers is the equality of one to the other; the tedákhul is, when the smaller of two numbers exactly measures the larger, or exhausts it; or we call it tedákhul, when the larger of two numbers is divided ex-

actly by the smaller; or we may define it thus, when the larger exceeds the fmaller by one number or more equal to it, or equal to the larger; or it is, when the smaller is an aliquot part of the larger, as three of nine. The tawáfuk, or agreement, of two numbers is, where the smaller does not exactly measure the larger, but a third number measures them both. as eight and twenty, each of which is measured by four, and they agree in a fourth; fince the number measuring them is the denominator of a fraction common to both. The tabayun of two numbers is, when no third number whatever measures the two discordant numbers, as nine and ten. Now the way of knowing the agreement or disagreement between two different quantities is, that the greater be diminished by the smaller quantity on both sides, once or oftener, until they agree in one point; and if they agree in unit only, there is no numerical agreement between them; but, if they agree in any number, then they are (faid to be) mutawasik in a fraction, of which that number is the denominator; if two, in half; if three, in a third; if four, in a quarter; and so on, as far as ten; and, above ten, they agree in a fraction; I mean, if the number be eleven, the fraction of eleven, and, if it be fifteen, by the fraction of fifteen. Pay attention to this rule.

On Arrangement.

In arranging cases there is need of seven principles; three, between the shares and the persons, and four between persons and persons. Of the three principles the first is, that, if the portions of all the classes be divided among them without a fraction, there is no need of multiplication, as if a man leave both parents and two daughters. The second is, that, if the portions of one class be fractional, yet there be an agreement between their portions and their persons, then the measure of the number of persons, whose shares are broken, must be multiplied by the root of the case, and its increase, if it be an increased case, as if a man leave both parents and ten daughters, or a woman leave a husband, both parents, and fix daughters. The third principle is, that, if their portions leave a fraction, and there be no agreement between those portions and the persons, then the whole number of the persons, whose shares are broken, must be multiplied into the root of the case, as if a woman leave her husband and five fisters by the same father and mother. Of the four other principles the first is, that, when there is a fractional division between two classes or more, but an equality between the numbers

of the persons, then the rule is, that one of the numbers be multiplied into the root of the case: as if there be fix daughters, and three grandmothers, and three paternal uncles. The fecond is, when some of the numbers equally measure the others; then the rule is, that the greater number be multiplied into the root of the case: as, if a man leave four wives and three grandmothers and twelve paternal uncles. The third is, when some of the numbers are mutawafik, or composit, with others; then the rule is, that the measure of the first of the numbers be multiplied into the whole of the second, and the product into the measure of the third, if the product of the third be mutawafik, or, if not, into the whole of the third, and then into the fourth, and so on, in the same manner; after which the product must be multiplied into the root of the case: as, if a man leave four wives, eighteen daughters, fifteen female ancestors, and fix paternal uncles. The fourth principle is, when the numbers are mutabayan, or not agreeing one with another; and then the rule is, that the first of the numbers be multiplied into the whole of the fecond, and the product multiplied by the whole of the third, and that product into the whole of the fourth, and the last product into the root of the case; as, if a

man leave two wives, fix female ancestors, ten daughters, and seven paternal uncles.

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WHEN thou defirest to know the share of each class by arrangement, multiply what each class has from the root of the case by what thou hast already multiplied into the root of the case, and the product is the share of that class; and, if thou defirest to know the share of each individual in that class by arrangement, divide what each class has from the principle of the case by the number of the persons in it, then multiply the quotient into the multiplicand, and the product will be the share of each individual in that class. Another method is, to divide the multiplied number by whichever class thou thinkest proper, then to multiply the quotient into the share of that set, by which thou hast divided the multiplied number, and the product will be the share of each individual in that set. Another method is by the way of proportion, which is the clearest; and it is, that a proportion be ascertained for the share of each class from the root of the case to the number of perfons one by one, and that, according to such proportion from the multiplied number, a share be given to each individual of that class,

On the Division of the Property left among Heirs and among Creditors.

IF there be a disagreement between the property left and the number arising from the arrangement, then multiply the portion of each heir, according to that arrangement, into the aggregate of the property, and divide the product by the number of the arrangement, but, when there is an agreement between the arrangement and the property left, then multiply the portion of each heir, according to the arrangement into the measure of the property, and divide the product by the measure of the number arifing from the arrangement: the quo tient is the portion of that heir in both methods. This rule is in order to know the portion of each individual among the heirs; but, in order to know the portion of each class of them, multiply what each class has, according to the root of the case, into the measure of the property left, then divide the product by the meafure of the case, if there be an agreement between the property left and the case; but, if there be a disagreement between them, then multiply into the whole of the property lest, and divide the product by the whole number arising from the verification of the case; and the quotient will be the portion of that class in both methods. Now, as to the payment of debts, the debts of all the creditors stand in the place of the arranging number.

On Subtraction.

When any one agrees to take a part of the property left, subtract his share from the number arising by the proof, and divide the remainder of the property by the portions of those who remain; as if a woman leave her husband, her mother, and a paternal uncle: now suppose that the husband agrees to take what was in his power of his bridal gift to the wise; this is deducted from among the heirs: then what remains is divided between the mother and the uncle in thirds, according to their legal shares; and thus there will be two parts for the mother, and one for the uncle.

On the Return.

THE return is the converse of the increase; and it takes place in what remains above the shares of those entitled to them, when there is no legal claimant of it: this furplus is returned to the sharers according to their rights, except the husband or the wise; and this is the opinion of all the Prophet's companions, as ÂLI and his followers, may GOD be gracious to them! And our masters (to whom GOD be merciful!) have assented to it: ZAID, the son of THA'-BIT says, that the surplus doth not revert, but goes to the publick treasury; and to this opinion have assented URWAH and ALZUHRI' and MA'LIC and ALSHA'FII, may GOD be merciful to them!

Now the cases on this head are in sour divisions: the first of them is, when there is in the case but one sort of kinsmen, to whom a return must be made, and none of those who are not entitled to a return: then settle the case according to the number of persons; as, when the deceased has left two daughters, or two sisters, or two semale ancestors; settle it, therefore, by two. The second is, when there are joined in the case two or three sorts of those, to whom a return must be made, without any of those, to

whom there is no return: then fettle the cafe according to their shares; I mean by two, if there be two fixths in the case; or by three, when there are a third and a fixth in it; or by four, when there are a moiety and a fixth in it; or by five, when there are in it two thirds and a fixth, or half and two fixths, or half and a third. The third is, when in the first case, there is any one to whom no return can be made: then give the share of him or her, to whom there is no return, according to the lowest denominator, and if the residue exactly quadrate with the number of persons, who are entitled to a return, it is well; as if there be a husband and three daughters; but, if they do not agree, then multiply the measure of the number of the persons, if there be an agreement between the number of persons and the residue, into the denominator of the shares of those, to whom no return is to be made: as if there be a husband, and fix daughters; if not, multiply the whole number of the persons into the denominator of the share of those, to whom there is no return; and the product will fet the case right. The fourth is, when, in the second case, there are any to whom no return is made: then divide what remains from the denominator of the share of him or them, who have no return, by the case of those, to whom a return must be made, and, if the remainder quadrate, it is well; and this is in one form; that is, when a fourth goes to the wives, and the refidue is distributed in thirds among those entitled to a return; as if there be a wife, and a grandmother, and two fifters by the mother's fide: but, if it do not quadrate, then multiply the whole case of those, who are entitled to a return, into the denominator of the share of him or her, who is not entitled to it; and the product will be the denominator of the shares of both classes; as if there be four wives, and nine daughters, and fix female ancestors: then multiply the shares of those, to whom no return must be made, into the case of those, who are entitled to a return, and the shares of those, to whom a return is to be made, into what remains of the denominator of the share of those, who are not entitled to a return. If there be a fraction in some, adjust the case by the beforementioned principles.

On the Division of the Paternal Grandfather.

ABUBECR the Just (on whom be the grace of GOD!) and those, who followed him, among the companions of the Prophet, say, "the bre-

" thren of the whole blood and the brethren by " the father's fide inherit not with the grand-" father:" this is also the decision of ABU HANIFA (on whom be GOD's mercy!) and judgments are given conformably to it. ZAID the fon of THABIT, indeed, afferts, that they do inherit with the grandfather, and of this opinion are both ABU YUSUF and MUHAM-MED, as well as MÁLIC and ALSHAFII. According to ZAID, the fon of THABIT (on whom be GOD's mercy!) the grandfather, with brothers or fifters of the whole blood and by the father's fide, takes the best in two cases, from the mukásamah, or division, and from a third of the whole estate. The meaning of mukásamah is, that the grandsather is placed in the division as one of the brethren, and the brethren of the half blood enter into the divifion with those of the whole blood, to the prejudice of the grandfather; but, when the grandfather has received his allotment, then the half blood are removed from the rest, as if disinherited, and receive nothing; and the residue goes to the brethren of the whole blood; except when among those of the whole blood there is a fingle fifter, who receives her legal share, I mean the whole after the grandfather's allotment: then, if any thing remains, it goes to the half blood; if not, they have nothing;

and this is the case, when a man leaves a grandfather, a fifter by the same father and mother, and two fifters by the same father only: in this case there remains to those sisters a tenth of the estate, and the correct denominator is twenty; but, if there be, in the preceding case, one fister by the same father only, nothing remains for her; and if one, entitled to a legal share, be mixed with them, then, after he has received his share, the grandfather has the best in three 'arrangements; either the division, when a woman leaves her husband, a grandfather, and a brother; or a third of the refidue is given, when a man leaves a grandfather, a grandmother, and two brothers, and a fifter by the same sather and mother. Or a fixth of the whole estate is given, when a man leaves a grandfather and a grandmother, a daughter, and two brothers; and, when a third of the residue is better from the grandfather, and the relidue has not a complete third, multiply the denominator of the third into the root of the case. If a woman leave a grandfather, her husband, a daughter, her mother, and a fister by the same father and mother, or by the same father only, then a fixth is best for the grandfather, and the root of the case is raised to thirteen, and the fifter has nothing. Know, that ZAID, the fon of THABIT (on whom be GOD's grace!) has

not placed the fifter by the fame father and mother, or by the same father, as entitled to a share with the grandfather, except in the case, named acdariyyah, and that is, the husband, the mother, a grandfather, and a fifter by the same father and mother, or by the same father only; in which case the husband ought to have a moiety; the mother, a third; the grandfather, a fixth; and the fifter, a moiety; then the grandfather annexes his share to that of the fister. and, a division is made between them by the rule "a male has the portion of two females;" and this is, because the division is best for the grandfather. The root is regularly fix, but is increased to nine; and a correct distribution is made by twenty-feven. The case is called acdarlyyab, because it occurred on the death of a woman belonging to the tribe of ACDAR. If, instead of the fister, there be a brother or two fisters, there is no increase, nor is that case an acdariyyah.

On Succession to Vested Interests.

If some of the shares become vested inheritances before the distribution, as if a woman kave her husband, a daughter, and her mother,

and the husband die, before the estate can be distributed, leaving a wife and both his parents, if then the daughter die leaving two fons, a daughter, and a maternal grandmother, and then the grandmother die leaving her husband and two brothers, the principle in this event is, that the case of the first deceased be arranged, and that the allotment of each heir be confidered as delivered according to that arrangement; that, next, the case of the second deceased be arranged, and that a comparison be made between what was in his hands, or vefted in interest, from the first arrangement, and between the second arrangement, in three fituations; and if, on account of equality, what is in his hands from the first arrangement quadrate with the second arrangement, then there is no need of multiplication; but, if it be not right, then see whether there be an agreement between the two, and multiply the measure of the second arrangement into the whole of the first arrangement; and, if there be a disagreement between them, then multiply the whole of the second arrangement into the whole of the first arrangement, and the product will be the denominator of both cases. The allotments of the heirs of the first deceased must be multiplied into the former multiplicand, I mean into the second arrangement or into its measure; and the allotments VOL. VI.

of the heirs of the second deceased must be multiplied into the whole of what was in his hands, or into its measure; and, if a third or a fourth die, put the second product in the place of the first arrangement, and the third case in the place of the second, in working; and thus in the case of a fourth and a fifth, and so on to infinity.

On Distant Kindred.

A DISTANT kinfman is every relation, who is neither a sharer nor a residuary. The generality of the Prophet's companions repeat a tradition concerning the inheritance of distant kinsmen; and, according to this, our masters and their followers (may GOD be merciful to them!) have decided; but ZAID, the fon of THABIT (on whom be GOD's grace!) fays: "there is no inheritance for the distant kin-"dred, but the property undisposed of is placed " in the publick treasury;" and with him agree MÁLIC and ALSHAFII, on whom be GOD's mercy! Now these distant kindred are of four classes: the first class is descended from the deceased; and they are the daughter's children, and the children of the fon's daughters. The fecond fort are they, from whom the deceased descend; and they are the excluded grand-

fathers and the excluded grandmothers. The third fort are descended from the parents of the deceased; and they are the fister's children and the brother's daughters, and the fons of brothers by the same mother only. The fourth fort are descended from the two grandfathers and two grandmothers of the deceased; and they are, paternal aunts, and uncles by the same mother only, and maternal uncles and aunts. These, and all who are related to the deceased through them, are among the distant kindred. ABU SULAIMAN reports from MUHAM-MED the fon of ALHASAN, who reported from ABU HANIFAH (on whom be GOD's mercy!) that the second fort are the nearest of the four forts, how high foever they afcend; then the first, how low soever they descend; then the third, how low foever; and lastly, the fourth, how distant soever their degree: but ABU YU-SUF and ALHASAN the fon of ZIYAD, report from ABU HANIFAH (on whom be the mercy of GOD!) that the nearest of the four forts is the first, then the second, then the third, then the fourth, like the order of the residuaries; and this is taken as a rule for decision. According to both ABU YUSUF and MU-HAMMED, the third fort has a preference over the maternal grandfather.

On the First Class.

THE best entitled of them to the succession is the nearest of them in degree to the deceased; as the daughter's daughter, who is preferred to the daughter of the fon's daughter; and, if the claimants are equal in degree, then the child of an heir is preferred to the child of a distant relation; as the daughter of a fon's daughter is preferred to the fon of a daughter's daughter; but, if their degrees be equal, and there be not among them the child of an heir, or, if all of them be the children of heirs, then, according to ABU YUSUF (may GOD be merciful to him!) and ALHASAN, fon of ZIYAD, the persons of the branches are considered, and the property is distributed among them equally, whether the condition of the roots, as male or female, agree or disagree; but MUHAMMED (on whom be GOD's mercy!) confiders the perfons of the branches, if the fex of the roots agree, in which respect he concurs with the other two; and he considers the persons of the roots, if their fexes be different, and he gives to the branches the inheritance of the roots, in oppontion to the two lawyers. For inflance, when a man leaves a daughter's fon, and a daughter's daughter, then, according to ABU YUSUF and ALHASAN, the property is distributed between them, by the rule " the male has the portion of

"two females," their persons being considered; and, according to MUHAMMED, in the fame manner; because the sexes of the roots agree: and, if a man leave the daughter of a daughter's fon, and the fon of a daughter's daughter, then, according to the two first mentioned lawyers, the property is divided in thirds between the branches, by confidering the persons, two thirds of it being given to the male, and one third to the female; but, according to MUHAMMED (on whom be GOD's mercy!) the property is divided between the roots, I mean those in the second rank, in thirds, two thirds going to the daughter of the daughter's fon, namely, the allotment of her father, and one third of it to the fon of the daughter's daughter, namely, the share of his mother. Thus, according to MUHAMMED (to whom GOD be merciful!) when the children of the daughters are different in fex, the property is divided according to the first rank that differs among the roots; then the males are arranged in one class, and the females in another class, after the division, and what goes to the males is collected and distributed according to the highest difference that occurs among their children, and, in the same manner, what goes to the females; and thus the operation is continued to the end according to this scheme:

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S	S	.S	D	·D	D	D	D	D	D	D	$\overline{\mathbf{D}}$
								D			
								D			
D	D	D	$ \mathbf{S} $	D	D	S	S	S	D	D	D
D	S.	D	D	D	$ \mathbf{D} $	S	D	D	S	D	D
D	D	D	D	D	S	D	\mathbf{D}	S	D	S	L

Thus MUHAMMED (to whom GOD be merciful!) takes the fex from the root at the time of the distribution, and the number from the branches; as, if a man leave two sons of a daughter's daughter's daughter, and a daughter of a daughter's daughter's son, and two daughters of a daughter's son's daughter, in this form:

The Deceased,

Daughter	Daughter	Daughter		
Son	Daughter	Daughter		
Daughter	Son	Daughter		
Two Daughters	Daughter	Two Sons,		

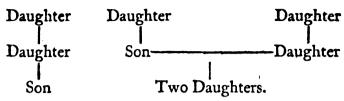
In this case according to ABU YUSUF (on whom be GOD's mercy!) the property is divided among the branches in seven parts, by considering their persons; but, according to MU-HAMMED (to whom GOD be merciful!) the property is distributed according to the highest difference of sex, I mean in the second rank, in sevenths, by the number of branches in the roots; and, according to him, four sevenths of it go to the daughters of the daughter's son's daughter; since that is the share of their grand-

father, and three sevenths of it, which are the allotment of the two daughters, are divided between their two children. I mean those in the third rank, in moieties; one moiety to the daughter of the daughter's daughter's fon, which is the share of her father, and the other moiety to the two fons of the daughter's daughter's daughter, being the share of their mother: the correct divisor of the property is, in this case, twenty-eight. The opinion of MUHAMMED (on whom be GOD's mercy!) is the more generally received of the two traditions from ABU HANIFAH (to whom GOD be merciful!) in all decisions concerning the distant kindred; and this was the first opinion of ABU YUSUF; then he departed from it, and said that the roots were by no means to be confidered.

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OUR learned lawyers (on whom be the mercy of GOD!) confider the different sides in succession; except that ABU YUSUF (may GOD be merciful to him!) considers the sides in the persons of the branches, and MUHAMMED (on whom be GOD's mercy!) considers the sides in the roots; as, when a man leaves two daughters of a daughter's daughter, who are also the two daughters of a daughter's son, and the son of a daughter's daughter, according to this scheme:

The Deceased.



In this case, according to ABU YUSUF, the property is divided among them in thirds, and then the deceased is considered as if he had lest four daughters and a son; two thirds of it, therefore, go to the two daughters, and one third to the son: but, according to MUHAMMED (to whom GOD be merciful!) the estate is divided among them in twenty-eight parts, to the two daughters twenty-two shares (sixteen in right of their father and six shares in right of their mother) and to the son six shares in right of his mother.

On the Second Class.

HE among them, who is preferred in the fuccession, is the nearest of them to the deceased, on which side soever he stands; and, in the case of equality in the degrees of proximity, then he, who is related to the deceased through an heir, is preferred by the opinion of ABU SUHAIL, furnamed ALFERAIDI, of ABU FUDAIL ALKHASSAF, and of ALI, the son of ISAI ALBASRI; but, no preference is given to him according to ABU SULAIMAN ALJURJANI. and ABU ALI AL BAIHATHI ALBUSTI. If their degrees be equal, and there be none among them, who is related through an heir, or, if all of them be related through an heir, then, if the fex of those, through whom they are related, agree, and their relation be on the same fide, the distribution is according to their perfons, but if the fex of those, to whom they are related, be different, the property is distributed according to the first rank that differs in sex, as in the first class; and, if their relation differ, then two thirds go to those on the father's fide, that being the share of the father, and one third goes to those on the mother's fide, that being the share of the mother: then what has been allotted to each fet is distributed among them, as if their relation were the same.

On the Third Class.

THE rule concerning them is the same with that concerning the first class; I mean, that he is preferred in the succession, who is nearest to the deceased: and, if they be equal in relation, then the child of a residuary is preferred to the child of a more distant kinsman; as, if a man leave the daughter of a brother's son, and the son of a sister's daughter, both of them by the same

father and mother, or by the same father, or one of them by the same father and mother, and the other by the same father only: in this case the whole estate goes to the daughter of the brother's fon, because she is the child of a residuary; and, if it be by the same mother only, distribution is made between them by the rule, " A male has " the share of two females," and, by the opinion of ABU YUSUF (to whom GOD be merciful!) in thirds, according to the persons, but, by that of MUHAMMED (may GOD be merciful to him!) in moieties according to the roots; and, if they be equal in proximity, and there be no child of a refiduary among them, or if all of them be children of residuaries, or if some of them be children of residuaries, and some of them children of those entitled to shares, and their relation differ, then ABU YUSUF (to whom GOD be merciful!) considers the strongest in consanguinity; but MUHAMMED (may GOD be merciful to him!) divides the property among the brothers and fifters in moieties, confidering as well the number of the branches, as the fides in the roots; and what has been allotted to each fet is distributed among their branches, as in the first class: thus, if a man leave the daughter of the daughter of a fifter by the same father and mother, she is preferred to the son of the daughter of a brother by the same father only, according to ABU YUSUF (to whom GOD be marciful!) by reason of the strength of relation; but, according to MUHAMMED (may God be merciful to him!) the property is divided between them both in moieties by consideration of the roots. So, when a man leaves three daughters of different brothers, and three sons and three daughters of different sisters, as in this figure:

The Deceased,

Sister_Sister_Brother_Brother_Brother

by the fame

Mother-Father-Father-Mother-Father-Father

and Mother

and Mother

Son Son Son Daughter Daughter Daughter Daughter Daughter Daughter.

In this case, according to ABU YUSUF, the property is divided among the branches of the whole blood, then among the branches by the same father, then among the branches by the same mother, according to the rule, "the male has the allotment of two semales," in sourths, by considering the persons; but, according to MUHAMMED (to whom GOD be merciful!) a third of the estate is divided equally among the branches by the same mother, in

thirds, by confidering the equality of their roots in the division of the parents, and the remainder among the branches of the whole blood in moieties, by confidering in the roots the number of the branches; one half to the daughter of the brother, the portion of the father, and the other between the children of the fifter, the male having the allotment of two females, by confidering the persons; and the estate is correctly divided by nine. If a man leave three daughters of different brothers' sons, in this manner:

The Deceased.

Daughter — Daughter — Daughter

of a Son of a Brother by the fame

Father and Mother — Father — Mother all the property goes to the daughter of the fon of the brother by the same father and mother, by the unanimous opinion of the learned, since she is the child of a residuary, and hath also the strength of consanguinity.

On the Fourth Class.

THE rule as to them is, that, when there is only one of them, he has a right to the whole property, fince there is none to obstruct him;

and, when there are several, and the sides of their relation are the same, as paternal aunts and paternal uncles by the fame mother with the father, or maternal uncles and aunts, then the stronger of them in confanguinity is preferred, by the general affent; I mean, they, who are related by father and mother, are preferred to those, who are related by the father only, and they, who are related by the father, are preferred to those, who are related by the mother only, whether they be males or females; and, if there be males and females, and their relation be equal, then the male has the allotment of two females: as, if there be a paternal uncle and aunt both by one mother, or a maternal uncle and aunt, both by the same father and mother, or by the same father, or by the same mother only: and if the fides of their confanguinity be different, then no regard is shown to the strength of relation; as, if there be a paternal aunt by the same father and mother, and a maternal aunt by the same mother, or a maternal aunt by the same father and mother, and a paternal aunt by the fame mother only, then two thirds go to the kindred of the father, for they are the father's allotment, and one third to the kindred of the mother, for that is the mother's allotment; then what is allotted to each set is divided among them, as if the place of their confanguinity were the same.

On their Children, and the Rules concerning them.

THE rule as to them is like the rule concerning the first class; I mean, that the best entitled of them to the succession is the nearest of them to the deceased on whichever side he is related; and, if they be equal in relation, and the place of their confanguinity be the same, then he, who has the strength of blood, is preferred, by the general affent; and, if they be equal in degree and in blood, and the place of their confanguinity be the same, then the child of a residuary is preferred to whoever is not fuch; as, if a man leave the daughter of a paternal uncle, and the fon of a paternal aunt, both of them by the same father and mother, or by the same father, all the property goes to the daughter of the paternal uncle; and, if one of them be by the same father and mother, and the other by the same father only, then all the estate goes to the claimant, who has the strength of confanguinity, according to the clearer tradition; and this by analogy to the maternal aunt by the same father, for though she be the child of a distant kinsman, yet she is preferred, by the strength of consanguinity, to the maternal aunt by the same mother only, though she be the child of an heir; fince the weight which prevails by itself, that

is, the strength of confanguinity, is greater than the weight by another, which is the descent from an heir. Some of them (the learned) fay, that the whole estate goes to the daughter of the paternal uncle by the same father, since she is the daughter of a refiduary; and, if they be equal in degree, yet the place of their relation differ, they have no regard shown to the strength of confanguinity, nor to the descent from a residuary, according to the clearer tradition; by analogy to the paternal aunt by the same father and mother, for though she have two bloods, and be the child of an heir on both sides, and her mother be entitled to a legal share, yet she is not preferred to the maternal aunt by the fame father; but two thirds go to whoever is related by the father; and their regard is shown to the ftrength of blood; then to the descent from a refiduary; and one third goes to whoever is related by the mother, and there too regard is shown to strength of confanguinity: then, according to ABU YUSUF (may GOD be merciful to him!) what belongs to each fet is divided among the persons of their branches, with attention to the number of sides in the branches; and, according to MUHAMMED (may GOD be merciful to him!) the property is distributed by the first line, that differs, with attention to the number of the branches and of the fides in

the roots, as in the first class; then this rule is applied to the sides of the paternal uncles of his parents and their maternal uncles; then to their children; then to the side of the paternal uncles of the parents of his parents, and to their maternal uncles; then to their children, as in the case of residuaries.

On Hermaphrodites.

To the hermaphrodite, whose sex is quite doubtful, is allotted the smaller of two shares, I mean the worse of two conditions, according to ABU HANI'FAH (may GOD be merciful to him!) and his friends, and this is the doctrine of the generality of the Prophet's companions (may GOD be gracious to them!) and conformable to it are decisions given; as, when a man leaves a fon, and a daughter, and an hermaphrodite, then the hermaphrodite has the share of a daughter, fince that is ascertained: and, according to AAMIR ALSHABI (and this is the opinion of IBNU ÂBBÁS, may GOD be gracious to them both!) the hermaphrodite has a moiety of the two shares in the controversy; but the two great lawyers differ in putting in practice the doctrine of ALSHABI: for ABU YUSUF fays, that the fon has one share, and the daughter half a

share, and the hermaphrodite three fourths of a share, fince the hermaphrodite would be entitled to a share, if he were a male, and to half a share, if he were a female, and this is fettled by his taking half the fum of the two portions; or, we may fay, he takes the moiety which is ascertained, together with half the moiety which is disputed, so that there come to him three fourths of a share; for he (ABU YUSUF) pays attention to the legal share and to the increase, and he verifies the case by nine: or, we may say, the son has two shares, and the daughter one share, and the hermaphrodite a moiety of the two allotments, and that is a share and half a share. HAMMED (may GOD be merciful to him!) fays, that the hermaphrodite would take two fifths of the estate, if he were a male, and a fourth of the estate, if he were a female, and that he takes a moiety of the two allotments, and that will give him one fifth and an eighth by attention to both fexes; and the case is rectified by forty; fince that is the product of one of the numbers in the two cases, which is four, multi-'plied into the other, which is five, and that product multiplied by two (which is the number of the) cases; and then he, who takes any thing by five, has it multiplied into four, and he, who takes any thing by four, bas it multiplied into VOL. VI.

five; so that thirteen shares go to the hermaphrodite, and eighteen to the son, and nine to the daughter.

On Pregnancy.

THE longest time of pregnancy is two years, according to ABU HANIFAH (may GOD be merciful to him!) and his companions; and according to LAITH, the fon of SAD ALFAHMI (may GOD be merciful to him!) three years; and, according to ALSHAFII (may GOD be merciful to him!) four years: but according to ALZUHRI (may GOD be merciful to him!) feven years: and the shortest time for it is fix months. There is referved for the child in the womb, according to ABU HANIFAH (may GOD be merciful to him!) the portion of four fons, or the portion of four daughters, whichever of the two is most; and there is given to the rest of the heirs the smallest of the portions; but, according to MUHAMMED (may GOD be merciful to him!) there is referved the portion of three fons or of three daughters, whichever of the two is most: LAITH, son of SAD, (may GOD be gracious to him!) reports this opinion from him; but, by another report, there is reserved the portion of two sons; and one of

the two opinions is that of ABU YUSUF (may GOD be merciful to him!) as HISHAM reports it from him; but ALKHAS'S'A'F reports from ABU YUSUF (may GOD be merciful to him!) that there should be reserved the share of one fon or of one daughter; and, according to this, decisions are made; and security must be taken, according to his opinion. And, if the pregnancy was by the deceased, and the widow produce a child at the full time of the longest period allowed for pregnancy, or within it, and the woman hath not confessed her having broken her legal term of abstinence, that child shall inherit, and others may inherit from him; but, if she produce a child after the longest time of gestation, he shall not inherit, nor shall others inherit from him: and if the pregnancy was from another man than the deceased, and she, the kinfwoman, produce a child in fix months or less, he shall inherit; but, if she produce the child after the least period of gestation, he shall not inherit.

Now the way of knowing the life of the child at the time of its birth, is, that there be found in him that, by which life is proved; as a voice, or fneezing, or weeping, or fmiling, or moving a limb; and, if the fmallest part of the child come out, and he then die, he shall not inherit; but if the greater part of him come out, and then he die, he shall inherit: and, if he come out straight (or with bis bead first) then his breast is considered; I mean, if his whole breast come out, he shall inherit; but if he come out inverted (or with his feet first) then his navel is considered.

The chief rule in arranging cases on pregnancy is, that the case be arranged by two suppositions, I mean by supposing, that the child in the womb is a male, and by supposing, that it is a female: then, compare the arrangement of both cases; and, if the numbers agree, multiply the measure of one of the two into the whole of the other; and, if they disagree, then multiply the whole of one of the two into the whole of the other, and the product will be the arranger of the case: then multiply the allotment of him, who would have fomething from the case, which supposes a male, into that of the case, which supposes a female, or into its measure: and then that of him, who takes on the suppofition of a female, into the case of the male, or into its measure, as we have directed concerning the hermaphrodite; then examine the two products of that multiplication; and whether of the two is the less, that shall be given to fuch an heir: and the difference between them must be reserved from the allotment of that

heir; and, when the child appears, if he be entitled to the whole of what has been referved. it is well; but, if he be entitled to a part, let him take that part, and let the remainder be distributed among the other heirs, and let there be given to each of those heirs what was referved from his allotment: as, when a man has left a daughter and both his parents, and a wife pregnant, then the case is rectified by twenty-four on the supposition, that the child in the womb is a male, and by twenty-seven on the supposition, that it is a female: now between the two numbers of the arrangement there is an agreement in a third; and when the meafure of one of the two is multiplied into the whole of the other, the product amounts to two hundred and fixteen, and by that number is the case verified; and, on the supposition of its male fex, the wife takes twenty-seven shares, and each of the two parents, thirty-fix; but, on the supposition of its female sex, the wife has twenty-four, and each of the parents, thirty-two; and twenty-four are given to the wife, and three shares from her allotment are reserved; and from the allotment of each of the parents are referved four shares: and thirteen shares are given to the daughter; fince the part referved in her right is the allotment of four fons, according to ABU HANIFAH (may GOD be

merciful to him!) and when the fons are four, then her allotment is one share and four ninths of a share out of four-and-twenty multiplied into nine, and that makes thirteen shares; and this belongs to her, and the residue is reserved, which amounts to an hundred and fifteen shares. If the widow bring forth one daughter or more, then all the part referved goes to the daughters; and, if the bring forth one fon or more, then must be given to the widow and both parents what was referved from their shares; and what remains must be divided among the children: and, if she bring forth a dead child, then must be given to the widow and both parents what was referved from their shares, and to the daughter a complete moiety, that is, ninetyfive shares more, and the remainder, which is nine shares, to the father, since he is the residuary.

On a Lost Person.

A LOST person is considered as living in regard to his estate; so that no one can inherit from him; and his estate is reserved, until his death can be ascertained; or the term for a presumption of it has passed over: now the traditionary opinions differ concerning that term; for, by the clearer tradition, "when, not one of his equals in age remains, judgement may

"be given of his death;" but HASAN, the fon of ZIYAD, reports from ABU HANIFAH (may GOD be merciful to him!) that the term is an hundred and twenty years from the day on which he was born; and MUHAMMED fays, an hundred and ten years; and ABU YUSUF says, an hundred and five years; and fome of them, the learned, fay, ninety years; and according to that opinion are decisions made. Some of the learned in the law fay, that the estate of a lost person must be reserved for the final regulation of the Imam, and the judgement suspended as to the right of another person, so that his share from the estate of his ancestors must be kept, as in the case of pregnancy; and, when the term is elapsed, and judgement given of his death, then his estate goes to his heirs, who are to be found, according to the judgement on his decease; and, what was referved on his account from the estate of his ancestor, is restored to the heir of his ancestor, from whose estate that share was reserved; since the lost person is dead as to the estate of another.

The principle in arranging cases concerning a lost person is, that the case be arranged on a supposition of his life, and then arranged on a supposition of his death; and the rest of the operation is what we have mentioned in the chapter of pregnancy.

On an Apostate.

WHEN an apostate from the faith has died naturally, or been killed, or passed into a hostile country, and the Kadi has given judgement on his passage thither, then what he had acquired, at the time of his being a believer, goes to his heirs, who are believers; and what he has gained fince the time of the apostasy is placed in the publick treasury, according to ABU HANÍ-FAH (may GOD be merciful to him!) but, according to the two lawyers (ABU YUSUF) and MUHAMMED) both the acquisitions go to his believing heirs; and, according to AL-SHÁFIÎ (may GOD be merciful to him!) both the acquisitions are placed in the publick treafury; and what he gained after his arrival in the hostile country, that is conficated by the general confent; and all the property of a female apostate goes to her heirs, 'who are believers, without diversity of opinion among our masters, to whom God be merciful! but an apostate shall not inherit from any one, neither from a believer nor from an apostate like himfelf, and so a female apostate shall not inherit from any one; except when the people of a whole district become apostates altogether, for then they inherit reciprocally.

On a Captive.

THE rule concerning a captive is like the rule of other believers in regard to inheritance, as long as he has not departed from the faith; but, if he has departed from the faith, then the rule concerning him is the rule concerning an apostate; but, if his apostasy be not known, nor his life nor his death, then the rule concerning him is the rule concerning a lost person.

On Persons drowned, or burned, or overwhelmed in Ruins.

WHEN a company of persons die, and it is not known which of them died first, they are considered, as if they had died at the same moment; and the estate of each of them goes to his heirs, who are living; and some of the deceased shall not inherit from others: this is the approved opinion. But ALI and IBNU MASUUD say, according to one of the traditions from them, that some of them shall inherit from others, except in what each of them has inherited from the companion of his sate.

COMMENTARY

THE SIRÁJIYYAH.

IN our administration of justice to Mohammedans according to their own laws, it will be of no use to inquire, what their legislator meant by declaring, that the law of inheritances constituted one half of juridical knowledge*: if he intended any thing more than a strong affertion of its importance, he probably had in contemplation the two general modes of acquiring property, contracts and succession, or the agreement of parties and the operation of law; and this explanation of the phrase, which had occurred to me on my first perusal of it, is also suggested by Sayyad SHARIF, together with a more fanciful interpretation, which Máulavi KASIM has adopted, that, life and death being incident to our probationary state in this world, and the

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law of fuccession manifestly relating to the dead, it is properly opposed to all other laws, which pre-cribe the duties and ascertain the rights of the living; but we merely take notice of the sentence, that no part of the Sirájíyyab may be unexplained, and proceed to the four acts, which, on the decease of a Mohammedan, are to be successively personned by the magistrate, or under his authority.

I. A regard to public decency and convenience, as well as to publick religion and health, feems in all nations to require, that the bodies of deceased persons be removed out of fight, with all due speed and solemnity, at a moderate expense to be defrayed, even before the payment of their just debts, out of the property left by them, on which no legal claim, from hypothecation or otherwise, had previously attached: but the Muselman lawyers, who admit, that the funeral charges must in the first place be defrayed, affign a very whimfical reason for fuch a priority; because, they say, the windingsheet and other clothes of the dead are analogous to fuitable apparel worn by the living, and confequently should not be liable to the claims of a creditor. The legal expenses of burying a Mohammedan are very moderate, both in the number and value of the clothes, in which the deceased is to be wrapped: as more than three pieces of

cloth for a man, or than five pieces for a woman, would be held a prodigal superfluity, and less than those, a niggardly deficiency, of expense, so, if the funeral clothes of AMRU or HINDA were dearer than the vesture usually worn by them, when alive, it would be a culpable excess; and if cheaper, a blameable defect; but, if in fact they had been used to wear one fort of apparel on folemn festivals, another in visiting their friends, and a third, in their own houses, the value of their visiting dress must regulate that of their burial, and either extreme would be too prodigal or too parfimonious. Should their debts, indeed, cover the whole of their property, the legal expense of the funeral must be reduced to the sufficient expense, as it is called; that is, to two pieces of cloth for AMRU and to three for HINDA: the names, dimensions, and uses of all the cloths used in funerals, both for men and for women, are enumerated in Persian by Maulavi KASIM; but it would be useless to mention them; and it feems only necessary to add on this article, that if deceased persons leave no property whatever, or none without a special lien on it, the funeral expenses must be paid by such of their relations, as would have been compellable by law to maintain them, when living; and, if there be no fuch relations, by the publick treafury, in which there is always an ample fund arifing from forfeitures and escheats.

II. After the burial, all the just debts of the deceased must be paid out of his remaining affets, as far as they extend; and, if there be many creditors, they must be satisfied in equal proportion, except that a debt of bealth, to use the Arabian phrase, must be discharged before a debt of sickness; that is, a debt contracted or acknowledged, while the party was of found understanding and body, is preferred, when legally proved, to one acknowledged in fickness, but of which no other evidence is produced. A religious vow, or promise of a charitable donation, as an atonement for fin, constitutes a debt in conscience only; and the sum thus promised must be paid out of a third part of the assets, after the legal creditors have been fatisfied, provided that it was bequeathed by will; but, if no will was made, the temporal estate shall not be charged with a mere debt of religion.

III. The legacies of a Muselman, to the prejudice of his heirs, must not exceed a third part of the property left by him, and remaining after the discharge of his debts: over a third of such residue he has absolute power; and his legatee shall receive it immediately, whether a specifick thing or certain sum of money, or only a fractional part of his estate, was be-

queathed. This is the opinion of SHARIF; though a distinction, which the text by no means implies, has been taken between a determinate and an indeterminate legacy.

- IV. We come now to the distribution of his estate, remaining after the payment of debts and legacies, among his beirs (for so we may call them, although real and personal property are undistinguished in the laws of the Arabs) according to certain rules derived from three sources, the Korán, the genuine system of oral traditions from the legislator, and those opinions in which the learned and orthodox have generally concurred *: the order, and proportions, in which the property of AMRU or HINDA must be distributed, constitute the principal subject of the work, which we have undertaken to explain.
- 1. The first class of beirs are they, who may be called *sharers*, because a certain *share* of the estate is expressly allotted to each of them in the *Korán*, and particularly in the *fourth* chapter of it.
- 2. Next come they, who may be distinguished by the name of residuaries, because they take the residue after the shares have been duly distributed; and they are of two sorts, residu-

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aries by consanguinity and residuaries for special cause, the former of whom are preserred in the order of succession; the latter are the masters or mistresses of enfranchised slaves, or their male residuary heirs. If no sharers be living, the residuaries take the whole; but, if there be sharers by consanguinity and no residuaries, a farther portion of the inheritance reverts to them, though never to the widower or to the widow, while any heirs by blood are alive.

- 3. On failure of the two preceding classes, the distribution is made among those next of kin, who are neither sharers nor residuaries: they may be called the distant kindred.
- 4. Should none of the distant kindred be living and capable of inheriting, the estate goes (unless there be a widow or a widower, who is first entitled to a share) to him, who may be called the successor by contract; and of that succession it is necessary to give an example: if Amru, a man of an unknown descent, say to Zaid, "Thou art my kinsman, and shalt be "my successor after my death, paying for me any sine and ransom, to which I may become "liable," and Zaid accept the condition, it is a valid contract by the Arabian law; and, if Zaid also be a man whose descent is unknown, and make the same proposal to Amru, who likewise accepts it, the contract is mutual and

fimilar, and they are fuccessors by contract reciprocally.

- 5. If no such agreement had been made, but if AMRU in his life time had acknowledged ZAID, a man of an unknown pedigree, to be his brother or his uncle, that is, to be related to him by his father or by his grandfather, though in truth he had no such relation, and the bare acknowledgment of AMRU cannot be admitted as a proof of it, yet, if AMRU die without retracting his declaration, ZAID is called the acknowledged kinsman by a common ancestor, and stands in the fifth class of successors, but takes the estate before the general divise.
- 6. Last of all comes the person, to whom the deceased had lest the whole of his property by a will duly made and proved; for, though the law secures to his heirs of the five preceding classes two thirds of his estate, yet it so far respects his dominion, while he lived, over his own property, and his will as to the disposal of it after his decease, that it will rather give effect to an intention not strictly conformable to law (for the Korán seems to allow pious bequests only), than suffer his estate to escheat; which must be the consequence of his dying without a representative. All such escheats to the sovereign go towards a fund for charitable uses; and according to the system of ZAID, the son of THA-

BIT, which has been shortly explained in a former publication, that fund, if it be regularly established, is entitled to the whole estate on failure of residuary heirs, without any return to the sharers, and to the entire exclusion of the four last classes; but this doctrine seems quite exploded.

BEFORE we proceed to the law of *sbares*, it is proper to take notice of the four impediments to fuccession; which are slavery, homicide, difference of religion, and difference of country, or of allegiance; the last of which disabilities relates only to such as are not *Mufelmans*.

1. Slavery, by the Mobammedan law, is either' perfect and absolute, as when the slave and all, that he can possess, are wholly at the disposal of his master, or imperfect and privileged, as when the master has promised the slave his freedom on his paying a certain sum of money by easy instalments, or, without any payment, after the death of the master: a female slave, who has borne a child to her master, is also privileged; but in both sorts of slavery, as long as it continues, the slave can acquire no property, and consequently cannot inherit. The Arabian custom of allowing a slave to cultivate a piece of land, or set up a trade, on his own account, so that he may work out his manu-

mission by prudence and industry, and by degrees pay the price of his freedom, may suggest an excellent mode of enfranchising the black slaves in our plantations, with great advantage to our country and without loss to their proprietors.

2. Homicide is either with malice prepense and punishable with death, or without proof of malice, and expiable by redeeming a Muselman flave, or by fasting two entire months, and by paying the price of blood; or, thirdly, it is accidental, for which an expiation is necessary. Malicious bomicide, or murder (for, by the best opinions, the Arabian law on this head nearly resembles our own) is committed, when a human creature is unjustly killed with a weapon, or any dangerous instrument likely to occasion death, as with a sharp stick or a large stone. or with fire, which has the effect, says KA'SIM, of the most dangerous instrument, and, by parity of reason, with poison or by drowning; but those two modes of killing are not specified by him; and there is a strange diversity of opinion concerning them: killing without proof of malice is, when death enfues from a beating or blow with a flight wand, a thin whip, or a fmall pebble, or with any thing not ordinarily dangerous: accidental death is, when it was neither defigned nor could have been prevented

by ordinary care, as if Amru were to shoot an arrow at a wild beast, and the arrow by accident were to kill ZAID, or if MAZIN were to fall from his terrace upon Zuhair and kill him by his fall; in which cases the slayer would not be permitted to inherit from the flain. If, however, a man were to dig a pit, or fix a large stone, on the field of another, and the owner of the field were to be killed by falling at night into the pit, or running against the stone, the doer of the illegal act, which was the primary occasion (but not the cause) of the death, must pay the price of blood, but would not, it feems, be disabled from succeeding to the property of the deceased, whom he could not in strictness be said to have killed.

- 3. An unbeliever shall never be heir to a believer, nor conversely; but infidel subjects may inherit from infidels.
- 4. The difference between two states or countries consists in the difference of sovereigns, by whom protection is given to their respective subjects, and to whom allegiance is respectively due from them: this difference is particularly marked between a country governed by a Mohammedan power and a country ruled by a prince of any other religion; for they are always, virtually at least, in a state of warfare, the first being called by lawyers the seat of peace,

and the second, the feat of bostility. A difference of country, therefore, which excludes from the right of inheriting, is either actual and unqualified, as when an alien enemy resides in the feat of bostility, or when an alien has chosen his domicil in the feat of peace, and pays the tribute exacted from infidels, in which cafe the tributary shall not be heir to the alien enemy dying abroad, nor conversely, because each of them owed a separate allegiance; or the difference is qualified*, as when a fugitive enemy feeks quarter, and obtains a temporary refidence in the feat of peace, or when two alien enemies are fugitives from two different hostile countries: now, although the tributary and the fugitive actually live in the same kingdom, yet, fince the fugitive continues a subject of the hostile power, he remains, as it were, under a different government, and there is no mutual right of succession between him and the tributary; nor, by fimilarity of reason, between two fugitives, who leave two distinct hostile governments, and obtain quarter for a time in the land of believers, but without any intention of making it their constant abode.

IF none of these four incapacities preclude the heirs of Amru from the legal succession to his estate, which we will suppose already sold and

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reduced to money of one denomination, the magistrate, or his officer, must proceed to the distribution of the shares; and, as they are a moiety, a fourth, an eighth, two thirds, one third, and a sixth, of the aggregate sum, it will be convenient at first to consider that sum as consisting of twenty-four equal parts, so that the shares will be, in whole numbers, twelve, six, three, sixteen, eight, and four.

THE sharers are twelve persons, four males and eight females; but, before we specify their respective allotments, it is necessary to premise that a grandfather and a grandmother, according to the Arabian idiom, fignify a male, and a female, ancestor in any degree; that a true grandfather is he, between whom and the deceased no female ancestor intervened; that a false grandfather is, where the paternal line of ascent was broken by the intervention of a female; and that a grandmother also is called true, when no false grandfather intervened between her and the deceased: in short, the only true line of ancestry, according to the Arabs, is an uninterrupted succession of paternal forefathers. male sharers then are the father, the true grandfather, the brother by the same mother only, and the widower: the females are the widow, the daughter, the female issue of the son, the sister of the whole blood, the fifter by the same father only,

the fifter by the same mother only, the mother herself, and the true grandmother.

We begin with the males in the order of the shares before enumerated; and, I. The father of AMRU or HINDA takes * a fixth absolutely, though a son of the deceased be living, or any male descendant, who claims wholly through males; but, if there be no fuch male descendant, he becomes a refiduary beir; and, if there be only a daughter of the deceased, or a female descendant from the son, he first has his legal share, or a fixth, and, when her share also has been allotted, he claims the residue. 2. The true grandfather is excluded from any share by the living father, through whom alone the grandfather bore a relation to the deceased; and, although a fimilar reason might afterwards be applied to the mother, and operate to the exclusion of her children, yet the father has the additional strength of a double title, both as a sbarer and a refiduary: but, if the father also be dead, bis father, or true paternal ancestor, has exactly the same interest, except in four cases, which will be presently mentioned. 3. A fingle half-brother, by the same mother only, takes a fixth, and two or more such halfbrothers, a third; provided that the deceased

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left neither children, nor male issue of a son, nor a father, nor a true grandfather; by any of whom the brothers by the same mother are excluded; and this article brings us necessarily to one class of female sharers; for, in this instance, there is no distinction of sex; both brothers and sisters by the same mother only having an equal right and an equal share in the distribution. 4. A moiety of HINDA's estate, if she die without children, or the issue of a deceased son, goes to her widower AMRU, who, if she leave such issue, has no more than a fourth.

As examples of the father's rights, let us Suppose Amru to have died worth two thoufand four hundred pieces of gold, leaving his father ZAID, and either a fon or a fon's fon, OMAR: in this case the four hundred pieces are the share of ZAID, and OMAR takes the remaining two thousand; but, if AMRU leave only his father ZAID and either a daughter, or fon's daughter, LAILA, the father is first entitled to the four hundred pieces, or fixth part; and, after LAILA has received twelve hundred, or a moiety of the estate (which, as we shall see, is her share in this case), he takes, as residuary, the eight hundred pieces, which remains; fo that the property of AMRU is equally divided between them. Should no relation be left but ZAID the father, and LEBID the brother, of the

deceased, LEBID is excluded; and the whole estate goes to ZAID. If, in the three preceding cases, the paternal grandfather SALIM had been left instead of ZAID, his rights would have been precifely the fame; and the only difference between ZAID and SALIM will appear from the four following examples. The paternal grandmother would be excluded by ZAID her son, but not by his father, her husband, SALIM. 2. If AMRU or HINDA leave a father ZAID, a mother SOLMA, and a widow ZAINEB, or widower HARETH, the mother takes a third part of what remains after ZAINEB or HARETH has received the legal share: but, if SALIM be substituted for ZAID, she would have a right to a third of the whole affets, according to the prevailing opinion, although ABU YUSUF thought her entitled, even in that case, to no more than a third of the remainder. 3. The brothers of the whole blood, and those by the same father only, are excluded from the inheritance by ZAID the father, but not by the grandfather SALIM, as the best lawyers agree, diffenting on this point from their master Abu Hanifah. 4. If Amru had manumitted his flave YASMIN, and died, leaving his father ZAID and a son OMAR, a fixth part

of the right of succession to Ya'smin would have vested, according to Ab'u Yu'suf, in Zaid, but, if the paternal grandfather Sa'lim had been lest instead of the father, the whole interest would have vested in the son; in this case that illustrious lawyer ultimately dissented from his master and from his fellow-student Muhammed, who were both very justly of opinion, that, whether Zaid or Sa'lim were alive on the death of the manumittor, the whole right of succession to the manumittee vested in Omar.

Let us proceed to the shares of the females: and 1. If AMRU die without children, and without any iffue of a deceafed fon, his widow HINDA must receive a fourth of his affets; but her share is an eighth only *, if any such issue be living: should he leave more widows than one, they take equal parts of such fourth or eighth; so that the legal share of the widower is always in a double ratio to that of the widow or widows: as, if HINDA die worth twentyfour thousand zecchins, her surviving husband AMRU must be entitled either to twelve or to fix thousand; and if AMRU die with the same estate, his widow HINDA must have either six or three thousand for her sole share; or, if ZAINEB and ABLA had also been legally married to Amru, the three widows must receive

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'either two or one thousand zecchins each, as the case may happen. 2. One daughter takes a moiety, and two or more daughters have two thirds, of their father's estate; but, if the deceased left a fon, the rule, expressed in the Koran, is this: "to one male give the portion of two "females;" and the daughters in that case are not properly sharers, but residuary beirs with the fon, their part of the inheritance being always in a subduple ratio to his part. Thus, if AMRU die worth twenty-four thousand pieces of gold, his only child FATIMA takes twelve thousand as her share; but, if she have three fisters, Azza, Latifa, and Zubaida, two thirds of the assets, or sixteen thousand pieces, are equally divided between the four girls; and if there be a fon OMAR, he must receive, in the first case, fixteen thousand, while FA'TIMA has eight; and, in the second, eight thousand, while she and her sisters take each four thoufand, pieces. 3. If OMAR had died before his father, leaving female issue, and his father had then died without any daughter of his own, the daughters of OMAR would have had precisely the same shares, to which those of Amru himfelf would have been entitled; but, had FA'TI-MA been living, she would have taken half the estate, or twelve thousand pieces of gold, and 3 fixth only, or four thousand, the complement of two thirds or fixteen thousand, would have

been equally distributed among her nieces. Had FA'TIMA and AZZA been at that time alive, they would have taken their legal share, to the exclusion of their brother's female issue, unless the right of that issue had been sustained by a male in an equal, or a lower degree, who would have made them refiduaries, " the male " taking, by the rule, the portion of females;" but a male in a higher degree would not have given them that advantage; and, if OMAR himself had survived, his daughters would have been wholly excluded. The fix cases, therefore, or different fituations, of the female issue of OMAR may be thus recapitulated: 1. A fingle female takes a moiety. 2. Two or more have two thirds. 2. A male in the same, or a lower, degree than themselves, gives them a refiduary right in a subduple ratio to his own. 4. With a daughter of AMRU, who is entitled to half, they would have only a fixth, to make up the regular share of the semale issue. 5. They are excluded, if AMRU left more daughters than one, but no male issue in any equal, or a lower, degree. 6. A fon also of AMRU wholly excludes them. In the three first cases, their legal claims correspond with those of daughters: but in the three last their rights are weaker, because they are in a remoter degree from the deceased.

The pedigree exhibited in the text* is called by the Arabs the tashbib, because, in their opinion, it sharpens the understanding, and captivates the fancy as much as the composition of an elegant love-poem, which the word literally fignifies; but, without adopting fo wild a metaphor, we may truly fay, that it is very perspicuous, and that no comment, after what has been premised, could render it clearer. An example, however, will show more distinctly than an abstract rule, in what manner an estate is divisible, when a male descendant gives a refiduary title to a female in the same, or in a higher, degree. Call the only furviving male descendant OMAR, and suppose him to be the brother of AMINA, who stands lowest in the first set of semales: here the highest female in that set must receive a moiety of the affets; the next below her takes a fixth together with the highest of the second set, as the complement of two thirds; and the refidue must be divided into five portions, of which OMAR claims two and each of the females in the same degree, one; but the three femalesbelow them are excluded. If OMAR be thebrother of ZARI'FA, whom we suppose the lowest of the middle set, the remaining third of the estate must be distributed in sevenths,

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because there are five females, three in a higher, and two in an equal, degree with OMAR, who must always have a double portion; and, if he be the brother of UNAIZA, the lowest female of the third fet (who, on the former supposition, would have been excluded), there will be fix female refiduaries entitled to portions with OMAR, but in a fubduple ratio; fo that, if AMRU died worth twenty-four thousand ducats, the daughter of his fon takes twelve thoufand of them; the two daughters of his fons' fons receive each two thousand; and, the residue being eight, OMAR is entitled also to two thousand ducats, while UNAIZA and the five women, who remain, have each one thousand, which they owe to the fortunate existence of OMAR. 4.* The rights of fifters by the fame father and mother, and (5.) those of sisters by the fame father only, are explained in the text with fufficient clearness, but it is proper to obferve, that the fifth case of the first class is comprised in the seventh case of the second; and that (6.) the fifters by the fame mother have been mentioned in a former section. There will be no use in repeating the ingenious arguments of IBNU ABBAS in support of his dissent on many points from other old lawyers, nor the

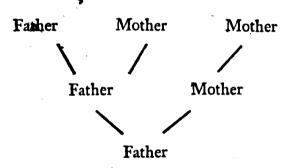
^{*} Page 219.

folid answers, which have been given to his objections; but a story, told by SHARIF, may here be repeated, because it conveys an idea of the traditionary Arabian law, and shows from what fources our excellent author derived his doctrine: HUDHAIL used to relate, that ABU Musa, being confulted on the distribution of an heritage among a daughter, a fon's daughter, and a sister, answered, the first must have a moiety; the second a fixth; and the third, " what remains; but " Confult IBNU MASUUD, " added he, and apprize me of his answer:" when IBNU MASUUD, was confulted, he faid. that he was present, when MUHAMMED himfelf gave the same decision; and, when that answer was reported to ABU MUSA, he said, " you must put no questions to me, as long as "that illustrious lawyer remains with you." 7. * Although the different rights of the mother in different cases be very clearly explained, yet her title to a third of the residue may be illustrated by two examples: first, if ADHRA leave only her husband WAMIK, her mother SOADA, and her father MAZIN, half of her estate goes to WAMIK, a third of the other half, or a fixth of the whole, to SôADA, and the remainder to

* Page 220.

MAZIN; but, fecondly, if WAMIK leave only his wife ADHRA, his mother ZAINEB and his father LEBID, the widow takes a quarter of his property, while ZAINEB has a third, and LEBID two thirds, of the remaining three quarters.

8. In giving an example of the division between two great grandmothers *, we may anticipate in some degree the arithmetical part of the work, which will be found extremely clear and ingenious. The pedigree exhibited by SHARIF is in this form:



Now the paternal grandmother's mother, and the mother of the paternal grandfather, are together entitled to a fixth, and the paternal grandfather's father to the residue, of the estate, which ought, by the general rule, to be divided into fix parts, because fix is the denominator of the share; but, to avoid a fraction, we must

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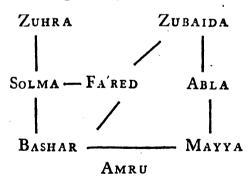
observe the proportion of one, or the sixth part, to two, or the number of persons entitled to it; and, since one and two are prime to each other, we must multiply two into fix, and the product is the number of parts into which the property must be divided; so that of twelve cows or horses the great grandfather will have ten, and each of the great grandmothers, one.

The great grandfathers are called ancestors in the fecond, and their fathers, ancestors in the tbird, degree, and so forth; and it must be remarked that in these tables the number of female ancestors, who inherit with the males, is equal to the number of such degrees: thus in the following,

there are three great great grandmothers, and the estate must be divided into eighteen parts, because one and three are prime to each other. We suppose in both pedigrees, that the highest line only are lest by the deceased AMRU; for, by the text, the nearest female ancestor excludes the more distant; and, if he leave his father Zuhair, and his paternal grandmother AZZA, with LAILA his maternal grandmother's mother,

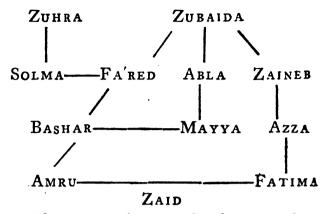
ZUHAIR takes the whole inheritance; for he excludes AZZA, and she, being nearer in degree, excludes LAILA.

Let us conclude the subject with a case put by Sharif in illustration of the pedigree in the text: ZUBAIDA gave her daughter's daughter Mayya in marriage to her son's son Bashar, and the young pair had a son Amru, who acquired an estate, and died: now Zubaida was both paternal and maternal great grandmother of Amru, and had, therefore, a double relation to him; but another woman, named Zuhra, had married her daughter Solma to Fared, who was the son of Zubaida, brother of Abla, and father of Bashar; so that Zuhra was Amru's paternal grandmother's mother, and had only a single relation; as it will appear by the following arrangement of the family:



The case of a *triple* relation will be no less evident from the following pedigree:

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For, if AMRU, whom in the former case we supposed to be dead without issue, had lived and married his cousin FATIMA, by whom he had a son ZAID, who died leaving property, ZUBAIDA would have a triple relation to the deceased; first, as his maternal great grandmother's mother; secondly, as his paternal grandmother's grandmother; and thirdly, as the mother of his paternal great grandfather; but ZUHRA has only a single relation to ZAID, as grandmother of his paternal grandfather BASHAR.

In both these cases a fixth of the assets is divided equally between the two semale ancestors, by the opinion of Abu Yusuf, and, according to one authority, by that of his great master also; but his sellow-student Muhammed (whose arguments, and the answers to them, it is needless to add) contended, that

ZUBAIDA would be entitled in the first case to two-thirds, and in the second, to three-fourths, of that sixth part, according to the number of modes, in which she was related to AMRU or ZAID.

No comment could add perspicuity to the chapter on refiduary beirs *, until we come to the cases of inheritance from enfranchised flaves +, where a short elucidation of the text appears necessary. If AMRU enfranchise NER-GIS, and die, leaving a fon BECR, and a daughter LAILA; then, on the death of NERGIS without refiduary heirs by blood, his property goes wholly to BECR, and LAILA, by the traditionary rule, takes nothing; but, suppose LAILA herself to manumit her black slave, Susen, who then purchases a slave Misc, and gives him freedom; and suppose Susen first, and Misc afterwards, to die without residuary heirs, in this case the estate of Misc goes to LAILA; nor would there be any difference, if the two manumiffions had been conditioned to pay a certain fum of money at a certain time. The case of a manumission promised on the death of the mistress, has rather more difficulty; but an example will make it clear: LAILA promifes NERGIS, that, on her death, he shall

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be free; but, by the persuasion of a Christian friend, the renounces her faith, and feeks refuge in a hostile country: now a believer cannot be the flave of an infidel; and the Mohammedan judge pronounces accordingly, that NER-GIS has gained his freedom; but LAILA, repenting of her apostasy, returns to her native country and her former belief; after which NERGIS dies without heirs: LAILA succeede as refiduary to her promifee, as she would have fucceeded to a flave of NERGIS purchased after the decision of the judge, if a similar promise of manumission at his death had been made by the master; and if that second promisee had died without heirs after her repentance and return. Should CAFUR, a flave of LAILA, marry, with her consent, MERJANA, the freedwoman of AMRU, the fon of that couple would be born free, because, in respect of freedom or flavery, a child has the condition of its mother, and he bears a relation to AMRU her manumittor; but should LAILA give CAFUR his freedom, he would draw that relation from AMRU, through himself, to LAILA, so that she would fucceed to the fon of CAFUR and MERJANA. if he died after his parents and without other heirs of the first or second class: the case would be fimilar, if CAFUR being enfranchifed, had

bought a flave Misc, and given him in marriage to the freedwoman of ZAID; for, if the iffue of that marriage had been a fon, born free, but with a relation to ZAID, and if CAFUR had then given Misc his liberty, he would have drawn from ZAID the relation of his freedman's child, and transferred it, through himself, to LAILA his former mistress. This doctrine of a relation (as the Arabs call it) first vested through the mother and then devested through the father, is founded on a decision of OTHMAN in the case of Zubair and RAFI.

We had occasion before, to mention the difference (according to ABU YUSUF) between the father, and the grandfather, of the manumittor in regard to their succession, with his son, to the property of a freedman; nor can any thing of moment be added here; but it will be proper to explain at large the concluding case in the chapter of residuaries, which proves, that the relation of enfranchisement may arise by the act of law as well as by the act of the party. Let it be premised, that marriage is prohibited between kindred of two classes; first, between all those in ascending or descending lines of consanguinity, who are called near; fecondly, between brothers and fifters, and their issue, or between nephews or nieces and aunts or uncles, paternal

or maternal, who are called intermediate; but, between those of the third, or distant, class, as the first or other cousins, there is no prohibition: now, if AMRU or HINDA purchase a kinfwoman or kinfman within either of the probibited degrees, the flave becomes instantly free, and a right of succession vests in the purchasor, though the mastership began and ended in one moment. Call the three daughters of HARETH a flave, ZUBAIDA, SAFIYA, AMINA, who derived freedom from their mother, and two of whom, the first and third, purchase Ha-RETH for fifty pieces of gold: he becomes in that instant free; and, if he die leaving property, two thirds of it go to his three daughters as their legal shares, and the residue belongs to the two, who procured him liberty; three fifths of it to ZUBAIDA, who contributed her thirty, and two fifths to AMINA, who added her twen-To arrange the distribution without fractions, begin with three, the denominator of the legal share: now two, its numerator, is prime to the number of sharers; and one is prime also to five, the number of residuary portions; but thirty and twenty are composed to one another, fince ten measures thirty by three and twenty by two; and five, the fum of those tenths. may be considered as standing in the place of the

number of residuaries: again, five and three are prime to each other, and their product is fifteen, which, being multiplied into three, the firstmentioned denominator, produces forty-five, the number of equal parcels, into which HARETH's estate must be divided; so that thirty, or two thirds, may be distributed in tens to the three daughters, and fifteen or the residue, in threes to the two, who redeemed their father; ZUBAIDA taking in all nineteen, AMINA fixteen, and SA-FIYA, only ten, portions of the inheritance. This is the calculation of SHARIF, and the grounds of it will presently appear; but the operation might have been shortened thus: multiply the denominator of the legal share into the number of sharers, and then multiply the product into the denominator of the residuary portions.

The chapter of exclusion* is very perspicuous; but the case of an unbelieving heir having really occurred in the time of Ali, we may insert it as a monument of early Arabian jurisprudence. Solma had embraced the new faith, and died, leaving her husband, and two brothers by the same mother, who were all three believers, with a sin, who continued an insidel: on a dispute concerning the inheritance, Ali and Zaid

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gave a moiety to the widower, confidering the fon as actually dead, a third to the half-brothers, and the rest to such of the residuaries as believed in the Korán; while IBNU'L MASUUD infifted, that the fon was dead as to the right of inheriting, but alive as to the power of excluding, and thought that he drove the widower from a moiety to a fourth part only of SOLMA's estate; but the former opinion has prevailed, and in a curious book (for which there must have been abundant materials) entitled The Diffenfions of the Learned, it is admitted, that, by universal assent, if AMRU leave a father, who is either a flave or an infidel, and a paternal grandfather, who is both free and a believer, the father is confidered as dead in law to all purposes, and the grandfather is heir to AMRU.

We come now to the Arabian method of afcertaining the smallest number of parcels, into which an estate can be divided, so as to avoid fractions in the legal distribution of it: that number we call the denominator, or devisor, of the estate, though the Arabick word mean literally the place of coming out; and the problem is easily solved by the following rules: if the two numbers in question be prime, multiply one of them into the other; if they be composit to each other, multiply the measure of one into the second, and the product will be the number

fought. The whole fection * is as clear as it could be made in a verbal translation; and it would be superfluous to add examples of all the cases, which must occur to every one, who has attentively perused the preceding parts of the work.

A case, which arose in the reign of OMAR, has given occasion to some debate †: LAILA died, leaving only AMRU her husband, HINDA her mother, and ABLA her fifter of the whole blood. Now the hufband and fifter were each entitled to a moiety, and the mother, to a third, of LAILA's property, which, by the rule then established, could be divided into fix parts only; but ABBAS, a companion of MUHAMMED, being confulted by the Caliph, proposed, that the regular divifor should be so increased, that of eight parts AMRU and ABLA might each take three, and HINDA two. The fon of ABBAS, whose opinions were always rather ingenious than folid, was present at the decision; but, fearing the bad temper of the Caliph, suppressed at that time his own fentiments: he thought, that the fifter, having (as we have feen) a weaker right, should bear the loss, because, where different rights concur, the weakest invariably yields; and he said, that if an arithmetician

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could number the fands, yet he could never make two halves and a third equal to a whole; but his opinion has never been adopted, because, although the fifter may in some cases be removed into a distinct class of heirs, yet, with a husband and a mother of the deceased, her share is fixed by positive law, and she cannot by any means be deprived of it; so that the shares of all the claimants must be diminished in exact proportion; for instance, if the property had been twenty-four pieces of gold, the mother would claim eight, and each of the other heirs, twelve; now those claims cannot all be fatisfied, but eight is to twelve, as fix to nine, which will be the respective shares, according to the decifion of ABBAS.

Examples of the divisor six increased to seven and to nine, or of twelve to thirteen, sisteen, and seventeen, would appear equally ingenious, but would swell this commentary to an immoderate size: there are two decisions, however, deserving particular notice, because they were made in real causes, and have been universally approved.

ZUBAIDA left her husband ADNAN, with two sisters of the whole blood, two sisters by the same mother only, and the mother herself; whose legal shares, in order as they are mentioned, were a moiety, two thirds, a third, and a sixth: it was impossible, therefore, to distribute them out of

thirty pieces, for instance, divided into fix equal parcels; but the judge, named SHURAIH, divided the whole estate into ten parcels, each confifting of three pieces, and allotted them to the claimants in the proportion of their shares; that is, to the husband, three parcels, to the fifters of the whole blood, four; to the half-fifters, two; and to the mother, one; affuring ADNAN, who at first complained of the judgement, that OMAR had made a fimilar decision; and this case acquired celebrity among the Arabs by the name of Shuraihiyya. The next case, which was answered at once by ALI, while he was haranguing the people in the mimbar, or pulpit, at CUFA, is fully stated in the text: the share of the widow was, regularly, an eighth; that of the daughters, two thirds; and that of each parent, a fixth, all which cannot be distributed out of twenty-four parcels; but All pronounced, that the property of the deceased should be divided into twenty-seven equal parts, of which the widow should have three; the daughters fixteen; and the two parents, eight. It is recorded, that, when the person, who consulted ALI, was much diffatisfied with his answer, and asked whether the widow was not legally entitled to an eighth, the Caliph faid rapidly, " it is become a ninth," and proceeded in his harangue with his usual eloquence.

The arithmetical part of the Sirájiyya * is very fimple, and may be found in the first pages of all our elementary books; but the difference of the Arabian idiom occasions a little obscurity. The chapter on primes and measures is founded on a simple analysis: when two numbers are compared, they are either equal or unequal; if unequal, either the smaller is an aliquot part of the greater, or they have a common measure, which must either be unit alone, or some number, which the Arabs define a multitude composed of units. When the greatest common measure is found by the rule, they consider the two numbers as agreeing in a fraction, which has that common measure for its denominator and unit for its numerator; but the nature of the Arabick language makes it impossible to express in a fingle word the fractions less than a tenth: thus twenty-seven and twenty-four agree, as they express it, in a third; and a third of each number is called its wafk, or measure, as nine of twenty-seven, and eight of twenty-four. After this explanation of the word, which is translated the measure, there will be no difficulty in the following cases.

I. † AMRU leaves only his father and mother and ten daughters: now, by the rule, his estate

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should be divided into fix parts, because the share of each parent is a fixth, and that of all the daughters two thirds; but four parts cannot be distributed, without a fraction, among text persons; for which reason we must multiply five, which is the measure of ten, into fix, which is the first number of parcels, and the product thirty is the number of lots, into which the property of Amru must in fact be divided; each of his parents taking five lots, and each of his daughters two.

II. HINDA leaves her husband, both her parents, and six daughters; whose legal shares are a fourth, two sixths, and two thirds, of the inheritance: now the regular denominator of the lots would be twelve, but it is raised to sisteen; and since eight parcels cannot be distributed equally among six daughters, the measure of six, or three, is multiplied by sisteen; so that of forty-sive lots nine may go to the husband, twelve to the parents, and twenty-four to the daughters, in exact proportion to their first distributive shares.

It will be very eafy to apply the remaining rules to all the other examples given by SIRAj'UDDIN*; but fince, in the two last cases, which are not likely to occur, the inheritance

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must be divided into 4320 and 5040 parcels, the calculation, after the Arabian mode, in words at length, would be insufferably tedious, and the reader may make it in figures with little or no trouble. The latter of those two cases * is, however, subjoined; because it will fully explain the fection, in which no examples are given. SAAD leaves two wives, fix female ancestors, capable of inheriting together, ten daughters, and feven paternal uncles, whose shares of twenty-four (the root, as they call it, of this case) are three, four, fixteen, and one; for the uncles can only take what the others leave. Now by observing the primes and measures, and working according to the rule, we come to 210, which must be multiplied by twenty-four, and the product gives the smallest number of parcels, into which SAAD's estate can be duly divided: the products of that multiplicand (210) by 3, 4, 16, give 630, 840, 3360, which are the allotments of the wives, female ancestors, and daughters; and the allotment of each sharer appears at once from the following proportions:

Persons.		First Shares.			MULTIPLICAND.		SHARES OF BACH.
2	:	3	3	:	210	:	531.
6	:	4	:	:	210	:	140.
10	:	16	:	:	210	:	336.

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The last act of the Muselman judge is to make an actual division of the state *; and we will suppose that LAILA, in the case answered by by ABBAS, had left ZAINEB and ABLA, two fifters of the whole blood, with AMRU, her husband, and HINDA, her mother; and that her property amounted only to twenty-five gold mobrs: now the root of the case is increased, as we have seen, from six to eight, which is prime to twenty-five; and the products of two, the share of each sister, of three, the share of the husband, and of one, the share of the mother, multiplied by the number of gold mobrs, are 50, 75, and 25, which, divided by eight, give the following shares: to each fister, 6 mohrs, 4 rupees; to Amru, 9 m. 6 r.; to HINDA, 3 m. 2 r. Had LAILA's estate been fifty gold mobrs, the distribution would have been thus:

		M.	R.
ZAINEB,	•	12,	8.
Abla,		12,	8.
Amru,	•	18,	12.
HINDA,		6,	4.

It feems needless to give examples of the simple rules for ascertaining the dividends of each class; but the passage concerning creditors,

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at the close of the chapter, is made obscure by extreme brevity, and requires a short illustration. Suppose the affets of AMRU to be nine pieces of gold; his debts, five pieces to SAAD, and ten to AHMED; here the aggregate of the debts, fifteen, is composit to nine, and their measures are sive, and three; so that, by the rule before-mentioned of distribution among beirs, AHMED will receive fix, and SAAD, three pieces; but, had the debtor left thirteen, which would have been prime to the amount of both debts, then fifteen, standing in the place of the verification, as they call it, must be the devisor of the feveral products, arising from the multiplication of ten and five into thirteen, and the quotients 82 and 41 will be the respective dividends of AHMED and SAAD.

The practice of fubtraction * arose from the case of Abdur'rahman and his sour wives, decided in the reign of Othman; and the section concerning it will be made clear by a suller explanation of the example in the text. We have seen, that the widower is entitled to a moiety, the mother to a third, and the uncle, to the residue; so that, if Laila's estate be divided into six parcels, the distribution may be made without a fraction: but if the widower agree to

^{*} Page 234.

keep the mahr, or nuptial present to his wife, which he had never actually paid, instead of his three fixths of the whole, the remainder, after deducting the mahr, must be divided into three parts, of which the mother will have two, and the uncle one. So, if the mother agree to take a jewel, or other specifick thing, in lieu of her two fixtbs; or the uncle, a flave or a carriage, in the place of his fixth part, the remainder, which would be four parts in the first case, and five in the second, must go to the other claimants in proportion to their shares. Again; if AMRU leave his mother FATIMA, two fifters by the fame mother, LATIFA and SOLMA, and the fon of a paternal uncle, SELIM; here also the inheritance must be divided, by the rule, into fix parts: now, if the deceafed left a female flave and thirty gold mohrs, and, if SOLMA confented to keep the flave instead of her legal share, or a fixth, the remainder of the property must then be divided into five parcels, fix gold mohrs in each, of which FATIMA and LATIFA must receive each one parcel, and SELIM, the three parcels, which remain. It is obvious, that, if the first calculation were made, in the preceding cases, on a supposition, that the taker of the specifick thing was dead or incapable of inheriting, there would be either a defect or an ex-

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cess in some of the allotments to the other claimants.

There is no difficulty in the chapter on the return*, except what arises from the Arabick idiom, to which the reader is probably by this time habituated; but it is necessary to remark, that, although, by the letter of the Korán and the strict rules of law, no return can be made to the widower or widow, yet an equitable practice has prevailed, in modern times, of returning to them on failure of sharers by blood and of distant kindred. The last case in the chapter can rarely occur; and the refult of the calculation (which fills ten pages in the Persian work of Maulaví KASIM) is, that, of 1440 parcels, the four widows take $(36 \times 5 =)$ 180; the nine daughters $(36 \times 28 =)$ 1008; and the fix female ancestors (36×7=) 252; so that 45 parts go to each widow, 112 to each daughter, and 42 to each female ancestor.

• The rights of the paternal grandfather have been more disputed than any other point of Arabian law; no fewer than feventy contradictory decisions having been made concerning them in the reign of OMAR; but the dispute is now settled among the Sunnis according to the opinion of Abu Hanifa; and the chapter on

^{*} Page 235-237.

division seems to have been inserted merely from respect to ABU YUSUF and MUHAMMED, who diffented on this point from their master *: it is one of the clearest chapters in the Sirájiyyab, and will be useful to us, if the question should arise in a family of Shiahs, who follow, no doubt, the opinions of ALI and ZAID. The case called acdariyya, which was decided by the fon of THABIT, and has acquired fuch celebrity in Irák, that it is distinguished among the lawyers of that country by the epithet of algharra, or the luminous, is a perspicuous example of the grandfather's division in a double ratio with the fifter: the conjecture, formerly hazarded by myself, that it was named acdariyya, because the rules of inheritance are disturbed by it in favour of the grandfather, had occurred, I fee, to some Arabs, and is mentioned by SHARIF without disapprobation.

It will be necessary to illustrate by examples the chapter on fuccession to vested hereditary interests †: and, first, we may suppose, that Zaid had two wives, named Zaines and Latifa, and that Zaines died possessed of separate property, leaving her husband, her mother Zuhra, and Hinda, her daughter by her former husband: now the legal shares, in order as the

^{*} Page 237-240.

[†] Page 240-242.

sharers are named, would be a fourth, a fixth, and a moiety; so that regularly the estate should be divided into twelve parts, but it is here divided into four, because there must be a return to ZUHRA and HINDA, in the proportion of their shares, that is as one to three; but, when ZAID has taken his fourth, the three fourths, which remain, cannot be distributed in that proportion; and, fince three and four are prime to each other, we therefore multiply four, considered as the number of persons entitled to a return, into four, the denominator of the hufband's share, and the square number answers the purpose of integral distribution; for of fixteen parcels ZAID will be entitled to four, ZUH-RA to three, and HINDA to nine.

Suppose next, that ZAID himself dies, before any distribution actually made, leaving only LATIFA before-mentioned, his mother BASIRA, and his father ABID: here four parts of the former inheritance having vested in him, the distribution is easy; one part going to LATIFA, as her fourth, one also to BASIRA, as her third of the residue, and two parts to ABID; in exact proportion to their several claims on his own estate.

Thirdly, suppose HINDA to die before any actual distribution, leaving the before-named

ZUHRA, her grandmother, ZUBAIDA her daughter, and two fons, HA'TIF and BASHAR: now she had a vested interest in nine parts out of the fixteen, and, her own estate being divisible into fix parts, we observe, that nine and fix are composit to each other, or agree, as the Arabian phrase is, in a third; so that a third of six, or two, must be multiplied into sixteen, and the product thirty-two will be the denominator for both cases; for of thirty-two parts nine will vest in Zuhra (six as mother to Zaineb. and three as grandmother to HINDA), twelve in the two fons, three in ZUBAIDA, and eight in ZAID's representatives; fince, to ascertain the share of each individual, the just-mentioned shares out of sixteen must be multiplied by two, and those out of fix, by three, which is here called the measure of HINDA's vested interest.

Let us fourthly suppose, that ZUHRA also dies before any distribution, leaving her husband CAAB, and two brothers CALIB and TARIF. Now her own estate is arranged by four, the husband taking a moiety, and each of the residuaries one fourth; but four and nine are prime to each other; and four, therefore, multiplied by thirty-two, produces an hundred and twenty-eight, the denominator of both cases: we must then multiply by four the shares out of thirty-two, and by nine the shares out of four,

and the products will be lots of the feveral claimants; eight parcels going to LATIFA, fixteen to ABID, eight to BASIRA, forty-eight in moieties to HATIF and BASHAR, twelve to ZUBAIDA, eighteen to CAAB, and eighteen in moieties to CALIB and TARIF.

We need only add, that, although the conclusion of the chapter before us be obscured by its extreme conciseness, yet it plainly means, that, "when any number of heirs die suc"cessively before the distribution, if the shares
"vested in the last deceased do not quadrate
"with the arrangement of his own estate, we
"must consider all those, who died before him,
"as one deceased beir, and himself as the second,
"and then work by the preceding rules;" to
give more examples would be very easy, but
the reader would find them insupportably tedious.

All controversies on the claims of the next of kin, who are neither sharers nor residuaries, are now at an end *; for it seems to be settled, that they succeed according to the order prescribed in our text.

I. On the first class of distant kindred the doctrine of Abu Yusur has far more simplicity

^{*} Page 242, 243.

than that of MUHAMMED, in which there is an appearance of intricacy; but an attentive reader will find no difficulty in the case reduced to the form of a table, in which the lowest of the fix ranks are supposed to be the claimants of AMRU's estate *: he will see, that ABU YUSUF would divide that estate into fifteen parts, giving one to each of the female, and two, by the rule in the Koràn, to each of the male, descendants; but that MUHAMMED would arrange it in fixty parcels, twenty-four of which would go to the representatives of the three sons, and thirty-six to those of the nine daughters; due regard being paid to the double portion of the male descendants, so as to bring the shares of the twelve claimants to the following order from the left hand, twelve, eight, four; nine, three, fix; fix, two, four; three, two, one. The correctness of this method has, it feems, obtained it a preference over that of ABU YUSUF, whose practice, however, is followed, on account of its facility. in Bokhára and some other places; although of the two different traditions from ABU HANIFA, that reported by MUHAMMED be the more publickly known and the more generally believed.

The reader would be unnecessarily fatigued,

^{*} Page 244, 245.

if we were to exhibit every step of the arithmetical process, by which the estate of Amru must be distributed, according to the opinion of Muhammed, between his great grandson by semales only, and his two great grandsaughters, who have the advantage of a male in the line of descent *; nor does the section concerning the difference of sides require elucidation.

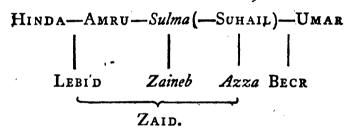
II. On the fecond class, or the grandfathers and grandmothers, who are excluded from shares, we need only fum up the doctrine of our author in the words of SHARIF:-". The degrees " in this case are either equal or unequal; if " unequal, the nearer is preferred; if equal, the " preference is given to the person claiming "through a sharer; if there be an equality in " that respect, the sides must be the same or dif-" ferent; if different, the distribution must be " made in thirds, the paternal fide having a " double allotment; if the same, the sexes of the "roots, or ancestors, must agree, or not; if "they agree, the estate must be distributed ac-" cording to the persons of the branches, or " claimants; if not, according to the first rank "that differs, as in the preceding class †."

III. There feems no difficulty in the chapter ‡ on the third class of distant kindred; but

^{*} Page 247, 248. + Page 249. 1 Page 250.

it must be remarked, that although the brothers and sisters by the same mother only take equally, according to the Koràn, without any distinction of sex, yet that exception to the general rule by no means extends to the issue of such brothers and sisters.

IV. Although the claims of uncles and aunts, in three cases, be clearly explained in the text*, yet it may not be improper to subjoin an example from the commentary of Maulavi KA-sim, which the following pedigree will make more intelligible than his dry state of the case:



AMRU, having had by HINDA a fon, named LEBID, married SULMA, by whom he had a daughter, named ZAINEB: after AMRU's death, SULMA married SUHAIL, to whom she produced AZZA, and after his death, she married UMAR, by whom she became the mother of BECR: now ZAID was the son of LEBID and AZZA; and he died, leaving no heirs but

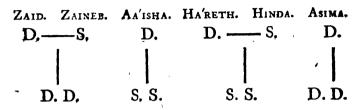
^{*} Page 253.

BECR the brother, by the same mother, of his mother AZZA, and ZAINEB, who was his paternal aunt by the same father AMRU, and his maternal aunt by the same mother SULMA. In this case, the property of ZAID must be divided into nine parcels, of which the paternal aunt will have two thirds; and the remaining third will go to the maternal uncle and aunt in the ratio of two to one; so that ZAINEB, in her two characters, will be entitled to seven ninths.

There feems no necessity to expatiate on the children of uncles and aunts, or on the coufins, as we should call them, in different degrees *; because the text will be sufficiently perspicuous to those, who perfectly understand the preceding fections: but, fince a curious case is put by SHARIF, I am unwilling to suppress it; especially as it will throw light on the whole subject before us. The father of AMRU had a brother, ZAID, and two fifters, ZAINEB and AAISHA, by the fame father only: his mother also had a brother, HARETH, and two fifters by the same father, named HINDA and ASIMA: first, his father and mother died; then, all his uncles and aunts, leaving the following issue: ZAID left two daughter's daughters, who were also the daughters of ZAINEB's fons; AISHA, two fons

^{*} Page 255.

of her daughter; HARETH, two daughter's fons, who were also the sons of the son of HINDA; and ASIMA, two daughter's daughters; as in this pedigree:



Amru himself afterwards died, with no heirs but the grandchildren of his uncles and aunts: In this case ABU YUSUF would have divided the inheritance into thirty parts; twenty for the paternal side; that is, five for each of the sons, and as many for each of the daughters, who have a double relation; and ten for the maternal fide, or four for each of the fons, who are doubly related, and one for each of the daughters: but MOHAMMED, having divided AMRU's estate into thirty-six allotments, would have given twenty-four to the paternal, and twelve to the maternal fide; that is, fix to each of ZAID's granddaughters, as fuch, and four to each of them, as granddaughters of ZAINEB; two to each of AAISHA's grandsons; three to each grandfon of HARETH, as fuch; and two more to each of them, as grandfons of HINDA;

while one thirty-sixth part would have gone to each of Asima's female descendants. The reason of these different distributions will appear from what has preceded; but the arithmetical processes would fill many pages, and would be thought, I am persuaded, unnecessarily prolix.

On the chapter concerning hermaphrodites*, I shall make no particular observation; since monstrous births are, I trust, extremely rare in all countries, and the fubject is too shocking to be discussed without actual necessity; nor will it answer, I imagine, any useful purpose to relate the old Arabian stories, and strange opinions of some lawyers, concerning the longest possible time of gestation +; which is now limited, on the authority of AAISHA, one of MOHAMMED's wives, to two years; and, though the Muselmans have traditionary accounts of three, four, or even five children produced at one birth, yet the practice, we find, is to referve the share of one son; or that of one daughter, if, on supposition of her birth, the sum referved would be larger ‡. The practice of reservation for the unborn child is well explained by the case in the text, to which we may now proceed, fince the rest of the chapter needs no illustration; unless it be necessary to inform

^{*} Page 256. + Page 258. 1 Page 259, 260.

the reader, that a widow ought by law to abflain for a certain time after her husband's death, from the careffes of any other man; and, if she freely confess that she has not abstained, it cannot be certain, that her husband was the father of a child born more than fix months after his death. Let us then suppose AMRU to die, leaving a daughter ZAINEB, his mother ASUMA, his father LEBID, and his wife HIN-DA enseint*. So that, if a male child be born, AMRU's estate ought regularly to be divided into twenty-four parts, but, on the birth of a female, into twenty-seven; because, in the first case, the shares are an eighth, for the widow, and a fixth for each of the parents; but, in the fecond, besides the shares just mentioned, the daughters would have two-thirds between them, and it would be the case of Mimberiyya†. Now three is the common measure of twenty-four and twenty-seven, and the several measures of those numbers are eight and nine, either of which, multiplied into the other whole number, gives two hundred and fixteen for the product; and that, according to what has preceded, is the number of shares into which the inheritance must be actually divided. In the first case HINDA would have twenty-feven shares; LEBID

Page 227, 228.

^{*} Page 260.

and Asuma, each thirty-six; the posthumous fon feventy-eight, and ZAINEB, his fister, thirtynine; but, in the fecond, the widow would have twenty-four; and each of the parents, thirty-two; while the posthumous daughter and her fifter would divide the remainder between them, each taking fixty-four shares. Should four posthumous sons be born, ninety-nine shares would go to the widow and both parents; while the remainder would be divided among the children by the rule before mentioned, ZAINEB receiving thirteen parts, and each of her brothers twenty-six; but, in the case of a miscarriage, the daughter would be entitled to a bundred and eight parts, or a moiety of the whole estate, and the nine parts remaining would go to LEBID as residuary heir.

The time, at which an absent person is prefumed in law to be dead, has varied, we see, in different ages*; but the modern practice I understand to be this: if Zaid has been so long absent, that no man can tell whether he be dead or alive, and if seventy years have elapsed from the day of his birth, he is presumed to be dead, as to bis own property, from the end of that term, but, as to his hereditary claims on the property of another, from the day of his absence;

^{*} Page 262.

fo that, in the first case, no person, dying within the feventy years, could have inherited any part of bis estate; nor, in the second, could he inherit from any one, who died after the day, when he first was missed. Though the arrangement of an inheritance, on which an abfent person may have a claim, be fufficiently clear from what has just preceded, yet a feigned case in illustration of it will not, perhaps, be thought wholly fuperflu-If HINDA then die at Mursbedabad, leaving AMRU her husband, with two fisters of the whole blood, NA'DIRA and SACI'NA, all refiding in that city, and a whole brother ZAID, who has long been absent and unheard of, we must confider what effect his life or his death would have on the inheritance: if he be dead, AMRU must have a moiety of the estate, and the sisters two thirds between them; and, if he be living, the widower will still have a right to his half, but ZAID will take twice as much as either of the fifters. Now, on the first supposition, the affets of HINDA must be divided, as we have shown, into seven shares, of which AMRU must have three, and each of the fifters, two; but, on the fecond, into eight parts, four of which go to the husband, and two to the brother, while NA'DIRA and SACI'NA can only have one a piece; so that the widower has an interest in supposing ZAID alive, and the fisters, in supposing him dead: fifty-fix, therefore, or the

product of feven and eight, which are prime to one another, is the number of shares, into which the estate must be divided; twenty-four of them being delivered to AMRU, and seven to each of the females, as the least shares to which they can in either event be feverally entitled; if ZAID then return to the city, four shares more go to AMRU, and fourteen are the right of the brother; but, if his death be proved, or prefumed by lapse of time, the eighteen reserved shares must be divided equally between SACI'NA and NA'DIRA, to complete their two sevenths, which the law gives, in that case, to each of them. The Persian commentator has added three cases, in one of which the two first divisors of the asfets are composit to each other; but the operation in all of them is too easy to require an example.

In the sections concerning apostates and prifoners of war*, there seems to be no obscurity; but it is proper to add, that, as the law is now settled, the heirs of an apostate, who were in being at the time of his death, are entitled to their legal shares, whether they were born before or after his apostasy; though a husband or wife cannot succeed to an apostate, because a change of religion is an immediate dissolution of the marriage.

^{*} Page 264.

We are now come to the concluding fection, which cannot be better illustrated than by two feigned cases from the Persian and Arabian com-I. ZAID and his daughter ABLA were at sea in the same ship, together with BASHAR, his brother's fon, and his great nephew AMRU, fon of BASHAR: the ship was lost, and all, who were in it, perished; so that which of them first died, could never be clearly ascertained. Now AMRU left behind him a wife and a daughter; and ABLA had an only fon: in this case, by the opinion of ABU HANIFAH and his followers, the four drowned persons are supposed to have perished in the same instant, and their several estates go to their surviving heirs respectively, according to the rules, which have been already explained; but by one of two traditions from ALI, the affets of ZAID being equally divided, and ABLA being fupposed to have outlived her father, the fon takes one moiety in her right, while the other moiety is conceived at first to have vested in BASHAR, and then in AMRU, between whose widow and daughter it is distributable according to law. 2. Ka'sım and his younger half-brother HASAN were drowned in the same boat, each leaving a mother, a daughter, and a patron, by whom each of them had been manumitted: then, if each of them left ninety pieces of gold on shore, the pro-

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perty of each must be severally distributed, according to the Hanifeans; the daughter of each taking balf, or forty-five pieces; the mother a sixth, or sisteen, and the manumittor, as residuary, the thirty pieces which remain; but according to Ali, the younger brother Hasan being sirst considered as the survivor, that residue vests in him, and is then distributed, in the just mentioned ratio; balf of it, or sisteen, going to his daughter; a sixth, or sive pieces, to his mother; and ten, the residue, to his patron; next, Ka'sim being supposed to have survived, the same rule is applied to him; so that the daughter of each takes on the whole sixty; the mother, twenty; and the manumittor, ten pieces of gold.

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ماً توامعًا فَهَالُ كُلِّ وَاحِد مِنْهُمْ لِوَرَثَتَهِ الْأُحْيَاءِ وَ لَا يَرَهِ

بَعْضُ الْأُ مُواتِ مِنْ بَعْضٍ هٰذَا هُوَ الْمُخْتَارُو قَالَ عَلِي

وَ ابْنُ مُسَعُود فِي إِحْدَى الرِّوَايَنَيْنِ عَنْهُما بَعْضُ فَي الرِّوَايِنَيْنِ عَنْهَا بَعْضُ فَي الرَّوَايِنَيْنِ عَنْهَا بَعْضُ فَي عَرْثُ مِنْ صَاحِ يَرِثُ مِنْ بَعْضِ اللَّا فِيْهَاوِرِثَ كُلِّ وَاحِد مِنْهُمْ مِنْ صَاحِ يَرِثُ مِنْ بَعْضِ اللَّا فِيْهَاوِرِثَ كُلِّ وَاحِد مِنْهُمْ مِنْ صَاحِ يَرَثُ مِنْ الْقَرَائُضُ السِّرِ اجِيَّةٌ بِعَوْن اللَّهِ تَعَالَى

بُونَدِي بِالْإِجْهَاعِوَ كَسِبِ الْهِرِ تَدَةِ جَهِيعًا لُورَثَتِهَا الْهِسْلِمِينَ الْهُولِينَ الْمُسْلِمِينَ اللّهِ وَامّا الْهِرَتَدُ فَلَابِرِثَ اللّهِ وَامّا الْهِرَتَدُ فَلَابِرِثَ اللّهِ وَأَمّا الْهِرَتَدُ فَلَابِرَتُ اللّهِ وَأَمّا الْهِرَتَدُ فَلَا اللّهِ وَلَا مِنْ مُرْتَدٌ مِثْلُهُ وَكَالِمَ الْهُرْتَدُةُ وَكُذَلِكَ الْهِرْتَدُةُ وَاللّهُ اللّهُ وَاللّهُ اللّهُ وَاللّهُ اللّهُ وَاللّهُ اللّهُ اللّهُ وَاللّهُ اللّهُ الللّهُ اللّهُ الللللّهُ اللّهُ اللللللّهُ اللّهُ الللللّهُ الللللّهُ اللللللللللّهُ اللّهُ اللّهُ

بأبُ الْأَسْيُر

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نَصْلُ فِي الغُرْتَيَ و ٱلْحَرْتَي وَالْهَدْ مَي

لَهُ اللَّهُ اللَّ

من ماله لأن اله فقود ميت في مال غيره الأصل في تُضْعِمُ وَ مَاللَّهُ اللَّهُ اللَّهُ عَلَى تَعْدِيرِ حَياتَة تُر

مَّاذَكُرْ نَانِي الْحَهْلِ

فَصُلُّ نِي الْهُرْتُدّ

إِذَاماتَ الْهُرَّتُ أُوْتَنَلَ أُوْلِحَ فَ بِدَارِ الْحَرْبِ وَحَكُمُ الْقَاضِي الْمُحُوْقِهِ نَهَا الْحَوْقِهِ نَهَا الْحَوْقِهِ نَهَا الْحَنْسَبَهُ فِي حَالِ السَّلَامِهِ فَهُولُورَ ثَنَهِ الْهُسُلِيْنُ وَمَا اكْتَسَبَهُ فِي حَالِ الرِّدَّةِ يُوْضَعُ فِي بَيْتِ الْهَالِ عِنْدُ وَمَا اكْتَسَبَهُ فِي بَيْتِ الْهَالِ عِنْدُ وَمَا الْكَسْبَانِ جَهِيْعًا لِوَرَثَةِ الْهُ الْكَسْبَانِ جَهِيْعًا لِوَرَثَةً الْهُسُلِيِيْنَ وَعِنْدُ الشَّافِعِيِّ رَحِهُ اللَّهُ الْكَسْبَانِ جَهِيْعًا لِوَرَثَةً الْهُسُلِيِيْنَ وَعِنْدُ الشَّافِعِيِّ رَحِهُ اللَّهُ اللَّهُ الْكَسْبَانِ يُوضَعَانِ الْهُسُلِيِيْنَ وَعِنْدُ الشَّافِعِيِّ رَحِهُ اللَّهُ اللَّهُ الْكَسْبَانِ يَوْضَعَانِ

فِي بِيَّتِ الْهَالِ وَماَ اكْتَسَبُهُ بَعْدَ اللَّحَوْقِ بِدَارِ الْحَرْبِ

مَرْهُ دِيْهُ مِنْ مَرْهُ هُدِي دُمِّ مُرْدَدُ مِنْ مُرْدِي مِنْ مُرْدِينَ مِنْ مُرْدُونِينَ مِنْ مُرْدِينَ مُ المح موته اوبهضي عليهِ الهدة واختلَغْتِ الرِّوايات في تلك لُدَّةِ نَغْيِ ظَاهِرِ الرِّ وَايَةِ أَنَّهُ إِذَا لَمْ يَبْتَ أَحَدٌ مِنْ أَثْرَانه عَمْ بَهُوْتِمُورَوَي الْحَسَن بِن زِيادٍ عَن أَبَيْ عَنِيغَةَ رَحِهَ اللَّهِ عَمْ بَهُوْتِمُورَوَي الْحَسَن بِن زِيادٍ عَن أَبَيْ عَنِيغَةَ رَحِهَ اللَّه نَّ تِلْكَ الْهِدَّةِ مايَةً وَعِشْرُونَ سَنَةً مِنْ يُومُ ولَدِ فِيهِ وَقَالَ عهدماية وعشر سنين وقال أبويوسف ماية وخهس سنين تَالَ بَعْضُهُمْ تِسْعُونَ سَنَةً وَعَلَيهُ الغَّنُوي وَ قَالَ بَعْضُهُمْ الْ الْمُغْقُود مُوتُوفُ إلي اجْتَهَاد الْإِمامِ وَمُوتُوف الْحَكَم ي حَتِّ غَيْرِهِ حَتَّى يُوتَّفُ نَصِيْبُهُ مِنْ مالِ مُوْرِثِهِ كَهَانِي عُهُلِ فَاذَا مُضَتَ الْهِدَّةِ وَ حُكِمَ بَهُوْ تِهِ فَهَالَهُ لُورَ ثَنَّهُ روده من عند الحكم بهوته وماكان مؤقوفًا لأجله من ؞ ؞ؙؗؗؗڡؙۅؚڒؿڡؽۯۜڐٳڵۑۅؘۘٳڔؿ؞ۅڒؿڡٳڷۜۮؚؽۅۛؾٚڣۜۮ۬ڸػؘٳڵؠۘۅٛۊۅ[ٛ]

سُهُبًا لَأَنَّ الْهَوْتُونَ فِي خَقِّهَا نَصِيْبُ أَرْبَعَةِ بَنِيْنَ عِنْ أبيحنيفة رحهه الله وإذاكان البنون أربعة ننصيبهاس وَأَرْبَعَةُ أَتْسَاع سَهْمِ مِنْ أَرْبَعَةُ وَعَشْرِينَ مَضْرُوبٌ فَي تَسْعَةً فَهُ ثَلَاثَةَعَشَرَسَهُما نَهِيَ لَهَاوَ الْبَاتِي مَّوْتُوفٌ وَهُوَمَايَةُوخُهُ عَشْرَسُهُما فَانٍ وَلَدُتْ بِنَتَّا وَاحِدَةً أُواكِثُرُ فَجَهِيعِ الْهُوتُونِ للْبَنَات وَإِنْ وَلَدَتْ ابِنَا وَاحدًا أُواكَثَرَ فِيعْطَي للْهَرْأَةُ وَالْأَبُونِ مَّاكَانَ مَوْتُوْفًا مِنْ نَصَيْبِهِمْ وَمَابِغَيَ يُقْسَمُ بَيْنَ ٱلْأَوْلَا وَانْ وَلَدَتْ مَيَّتًا نَيْعُطَي للْهَرْأَة واللَّابُويْن مَّاكَانَ مَوْتُوْنَاه نَصيبهمْ وَللْبنْت إِلَي تَهَام ٱلنَصْف فَهُوَخَهْسَةٌ وَتَسْعُونَ سُهُ وَ الْبَاتِي للنَّبِ وَهُو تَسْعَةُ أَمْهُمْ لَأَنَّهُ عَصَبَةٌ بَابُ الْهَغْقُود

ٱلْهَغْقُونُ حَيِّ نِيْ مَالَمَحَتَّي لاَيرِثُ مِنْهُ أَحَدُّ وَيُوتَّغُ مَالِمُحَةً

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حِدٍ مِنَ الْوَرْتَةَ مَاكَانَ مَوْتُوفًا مِنْ نَصِيبِهِ كَهَ إِذَا تَرَكَ بِنْتَا أَبُويْنِ وَامْرِأَةً حَامِلَةً فَالْمِسْبَلَةُ مِنْ أَرْبَعَةٍ وَعِشْرِيْنَ عَلَيُ نَعْبِراًنَ الْحَهْلَ فَكُرُومِنَ سَبْعَةً وَعِشْرِينَ عَلَي تَعْدِيرانَهُ تي وبين عددي تصحيح المستلتين توانف بالثلث إِذَاصْرِبَوْنَقُ اَحَدِهِ مَا فِي جَمِيعِ الْأَخْرِصَارَ الْحَاصِلُ مَأْتَيْنِ سَّةَ عَشَرِسَهُمَّا وَمَّهُمَا تَصَحُّ الْمُسْئَلَةُ وَعَلَيَ تَعْدَيْرِ ذَكُورَتِهِ لْمَرْأَةِ سَبْعَةٌ وَعَشِّرُوْنَ وَلَكِّلِ وَاحِدٍ مِنَ الْأَبَوَيْنِ سِتَّةٌ يُلَاثُونَ وَعَلَى تَعْدِيْرِ الْأَنُوثَةِ لِلْهَرْأَةِ أَرْبَعَةٌ وَعِشْرُونَ وَلِكُلِّ احد منَ الْأَبُويْنِ إِنَّنَانِ وَ ثَلَاثُونَ فَيُعْطَي لِلْهُرَأَةَ أَرْبَعَةٌ عِشْرُونَ وَيُوتَعُفَ مِنْ نَصِيبِهَا ثَلَاثَةُ أَسْهِمٍ وَيُوتَعُفِ مِنْ نَصِيبٍ إِلْ وَلَحِدِمِنَ الْأَبُونِينِ أَرْبَعَةُ أَسْمٍ وَيَعْطَى لِلْبِنْتِ ثَلَاثَقَعَشَر

قَدُ طُبِعَ هُذَا الْكِتَّابُ الْهُسَهَى بِالْغَرَائِضِ السِّرَاجِ بِدَارِ الْأَمَارَةِ بَلْدَةِ كَاكَتَّةِ الْهَكْمِيَّةُ وَ ذُلِكَ بِأَهُ مِنَ وِلْيَمْ يُونُس الَّذِي هُو أَحَدُ حُكَامِ الْهَكُمَةِ الْعَالِيَّ السُلْطَانِيَّةُ فِي سَنَةِ أَلْفِ وَمِايَّنَيْنِ وَواحِدٍ مِنَ الْهُجَرَةِ النَّبُويَّ

N.B. The Arabic sheets must be placed according to the signatures (from the path hand to the left) so as to begin where an English book would end, and to end that would begin. To follow page 322, vol. vi.

تَشْحِيحِ الحِتَابِ

الصّحيح السّعيم					
أَوْأَحُدُهُمَا أُوأَحُدُهُمَا .	•	•	•	•	IA.
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تَصْحِیْجِ الْحِتَابِ وَرَاّتِ، الْسَّعِیْمِ السَّعِیْمِ الْسَّعِیْمِ الْاَنَاثُ الْاِنَاثُ الْاَنَاثُ الْاَنَاثُ إبْنَيْ بِنْتِ بِنْتِ إبْنَيْنِ بِنْتُ بِنْتُ بِنْتُ بِنْتُ ابْنُ ابْنُ بِنْتُ بِنْتُ ابْنُ ابْنُ بِنْتُ ابْنُ ابْنُ بِنْتُ ابْنُ الْبُنْ ابْنُ ابْنُ ابْنُ ابْنُ ابْنُ ابْنُ ابْنُ الْبُ

٠٠٠. بِنْتَيُ بِنْتِ ابْنِ بِنْتٍ ، بِنْتَيْنِ بِنْتُ ابْنُ بِنْتَ

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الحَهُلُ ذَكْرُوعَلَي تَعْدِيرِ انْدَانْتِي ثُمَّ تَنظرِبِينَ تَصْحِيمُ الْهَسْنَٰكَتَيْنَ فَانْ تَوَانَعًا فَاضْرِبْ وَنْتَ إِحْلِيهُمَا فِيْ جَيْلٍ الْأَخْرَي وَإِنْ تَبَايَنَا فَاضْرِبُ كُلَّ إِحْدِيهُ هَا فِيَّ جَهِيْعِ الْأَخْرَي فالحاصِل تُصْحِيم الهسنلةِ ثم أضِرب نِصيب من كان لهشبي مِنْ مَسْنَلَةِ ذُورَتِهِ فِي مَسْنَلَةِ انُوثَتِهِ أُوفِي وَفِعُهَاثُمُّ مَنْ كُانَ لَهُ شَيْئِ مِنْ مَسْنَلَةُ أَنُوتُتِهِ نِي مَسْنَلَة كَاكُورِتِهِ أَوْ فِي وَنْقِهَا وَ كَمَانَكُمْ نَافِي الْحَنْثَي ثُمَّ انْظَرِفِي الْحَاصِلَيْنِ مِنْ الْصَرْبِ أَيُّهُا أَتَلَّ يُعْطَي لِذَلِكَ الْوَارِثِ وَالْغَضْلُ بَيْنَهُا مَوْقُونُ مِنْ نَصِيْبِ ذَٰلِكَ الْوَارِثِ فَاءِذَا ظَهَرَ الْحَهْلُ فَإِنْ كَانَ مُسْتَحِقًا لِجَرِيْعِ الْهُوتُوفِ نَبِهَا وَإِنْكَانَ مُسْتَحَقًّا لِلْبَعْضَ نَيَأُذُهُ ذَٰلِكَ الْبَعْضَ وَالْبَاتِيْ مَغْسُومٌ بِيْنَ الْوَرَثَةِ فَيُعْطَي لِكُلِّ

وِلُمْ تَكُنِ الْهِرَأَةُ أَتَرَتُ بِإِنْقِضَاءُ العِدَّةِيرِثُ وَيُورَثُ عَنْهُ وَإِنْ جَاءَتْ بِالْوَلَدِ لِأَكْثَرَ مِنْ أَكْثَرُ مِنَّةَ الْحَيْلِ لَا يَرَثُ وَلَا يُورَثُ عنه إِن كَانَ الْحَهْلُ مِن غَيْرِه وَجَاءَ تَبِالُولَدُ لَسَنَّةَ أَسْهِرِ أُو أَتَّلَ بَرِثُ وَ إِنْ جَاءَتُ بِالْوَلَدِ لِأَكْثَرَ مِنْ أَتَّلِّ مِنْ الْحَمْلِ لَايَرِثُ وَطَرِيْقُ مَعْرِفَة حَيْوة الْحَبْلِ وَقْثَ الْوَلَادة أَنْ يُوْجَدَ ود روه رو الحيوة كصوت أو عطاس أوبكاء أو ضحك أو لَحْرِيكِ عَضْوِفَانٍ خَرَجَ أَتَكَ الْوَلَدِ ثُمَّ مَاتَ لاَيْرِثُو إِنْ خَرَجَ المردد دي مَاتَ يَرِث فَإِن خَرَجَ الولْد مستَقِيهًا فَالْهِعْتَبْر ساده اعني إذا خرج صدره كله يرث وإن خرج متكوساً المعتبر سرته الاصل في تصحيح مسايل الحهل ان السنلة على تقديرين اعني علي تقديران

ؚڛڹؽڹۘۅؘعِنْدَالشَّا نعِيِّ رَحِهُهُ اللَّهُ أَرْبَعُ سِنْيْنَ وَعِنْذُ الزَّهْرِ؟ رَحِهُ الله سبع سِنين و أَتُلَّهُ اسِنَّهُ أَمْدٍ وَيُوتَعَ لِلْحُمْ عِنْدَأَبِيْ حَنِيْغَةَ رِحَهُ اللَّهُ نَصِيْبُ أَرْبَعَة بَنِيْنَ أَوْنَصِيْبُ أَرْدِ بَنَاتٍ أَيُّهُمَا أَكْثَرُ وَيَعْطَي لِبَعِيَّةِ الْوَرَثَةِ ٱقَلَّ الْأَنْصِبَاءِ وَعِنْ مُحَمَّدٌ رَحِهُ اللَّه يُوتَّفُ نَصِيبُ ثَلَاثَةِ بَنِينَ أَوْ ثَلَاثِ بِنَادٍ أَيُّهُمَا أَكْثُرُ رَوَا مُعْنَهُ لَيْتُ ابْنُ سَعْدِ رَضِيَ اللَّهُ عَنْهُ وَفِي رِوَابُ لْخُرِي نَصِيْبُ ابْنَيْنِ وَإِحْدَى الرِّوَايَتَيْنِ عَنْ أَبِي يُوسُهُ رَحِهِ اللَّهُ رَوَاهُ عَنْهُ هِ شَامُ وَرَوَيَ الْخَصَافَ عَن ابِي يُوسِهُ. رَحِهِ اللَّهُ رَوَاهُ عَنْهُ هِشَامُ وَرَوَيَ الْخَصَافَ عَن ابِي يُوسِهُ رَحِهَ اللَّهُ أَنَّهُ يُوتَّفُ نَصِيْبُ ابْنِ وَاحِدٍ أُوبِّنتٍ وَاحِدَةٍ وَعَلَيْ الْغَتُوكِ وَيُوخَذُ الْكَغِيلُ عَلَى قَوْلِمُوانَ كَانَ الْحَهُلُ مِ الهيت وَجَاتُ بِالْوَلَدِ لِنَهَامِ أَكْثَرُ مِنَّةَ الْحَمْلِ أَوْ أَتَلَّ مِنْ

اللهُ اللهُ اللهُ الْحُدُالِحُنْثَي خُهْسِي الْهَالِ إِن كُانَ ذَكَرًا رِرْبْعُ الْهَالِ إِنْ كَانَ أَنْتَنِي فَيَأْخُذُ نِصْفَ النَّصِيبَيْنِ وَذَٰلِكَ مُسْ وَ ثَهِنَ بِاعْتِبَارِ الْحَالَيْنِ وَ تَصِعُ مِنْ اَرْبَعِيْنَ وَهُوَ لْهُ مَنْ مُرْبِ أَحُدِ الْهُ سُلْلَتِينِ وَ اهِيَ الْأَرْ بَعَةُ لِي اللَّخْرِي وَهِيَ الْخَهْسَةُ ثُمَّ الْهَبْلُغُ فِي الْحَالَتَيْنِ فَهُنَّ الله المُهُمِي مِنَ الْخَهْ سَقِفَهُ صُرُوبٌ فِي الْأَرْبَعَةِ وَمَن كَانَ لَهُ َنَّهُ مِنْ الْأَرْبِعَةَ فَهُضْرُوبٌ فِي الْخَهْسَة فَصَارَ لِلْخَنْتَيِ الْأَنَّةُ عَشَرَ وَ لِلْإِبِنَ ثُهَانِيَّةً عَشَرَ وَ لِلْبِنْتِ تِسْعَةً أَسْهُم بَابٌ نِي الْحَمْلِ عُنْدِدً الْعَمْلِ سَنتَانِ عِنْدُ ابِي حَنيْنَةً رَحِهَ اللَّهُ الله عَلَيْ مِن سَعْدِ الْغَهِيِّ رَحِهُ الله عَلَاث

رَّضِيَّ اللَّهُ عَنْهُمْ وَعُلِيْهُ الغَنْوَي كَهَا إِذَاتَر كَ إِبْنَا وَبِنْتَا وَخُنْتًى اللَّهُ فَالْكُونَا عَلَيْ الْمُعْدِينَ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللهُ وَهُو َ وَوْلَ أَبِنَ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا لِلْحَنْثَي نَهِنَّا الَّنْصِيْبَيْنِ بِالْهِنَا زَعَةِوا خَتَلَغَانِي تَخْرِيجٍ قَوْلِ الشَّعْبِي قَالَ اَبُويُوسُفَ لِلْإِنِ سَهُمْ وَلِلْبِنْتِ نَصِفَ سَهُمْ وَلِلْخِنْتَى ثَلَاثًا ارباع سَهُم لَأِنَّ الْخُنْثَي يَسْتَحِفُّ سَهًّا إِنْ كَانَ ذَكِّرًا نَصْفُ انْ كَانَأَ نَتْنِي وَهَٰذَامْتَيَقَنَّ فِي أَخَذَ نَصْفَ مَجْهُوع النَّصِيْبَيْنِ أَوْ نَعُولُ يَأْخُذُ النِّصْفَ الْهُتَيَعَّنِ مَعَ نَصْفِ النَّصَفِ الْإِنَّنَازَعِ فِيهِ فَصَارَ لَهُ ثَلَاثَةُ ارْباعِ سَهْمٍ لَأَنَّهُ يعَنَّبُرُ السهم والعول وتصحمن تسعة أونقول للإبن سهان وللبنتا سَهُمْ وَالْمُحْنَثَي نَصِفُ النَّصِيْبَيْنِ وَهُوَسُهُمْ وَنَصِّفُ سَهِمُوثَالًا

ب لٰڪن الثِّلْثَيْن لِهُنْ يَدْلِي بِقُرَابِةُ الْأَبِ فَيَعْتَبُرُونِيهِمْ قُوَّةً عَرَابَة ثُمَّ وَلَكُ الْعَصَبَةِ وَالتَّلْثُ لِهَنْ يَدُلِي بِغَرَابِةَ الْأَمِّوبِعُتَبُرُ يُهُمْ تُوَّةً الْقَرَابِةَ ثُمَّ عِنْدَ آبِيْ يُوسُفَ رَحِهُ اللَّهُ مَااَصَابَ عُلَّ فَرِيتُ يُغْسَمُ عَلَي أَبْدَانِ فُرُوْعِهِمْ مَعَاعْتِبَارِ عَدُد لَجِهَاتِ فِي الْغُرُوعِ وَعِنْدُ مُحَمَّدٍ رَحِهُ اللَّهُ يَعْسُمُ الْهَال الْي أُوِّلِ بَطْنِ اخْتَلَفَ مَعَ اعْتِبَا رِعْدُدِ الْغُرُوْعِ وَالْجِمَّاتِ ي الأُمول كَهَانِي الصَّنْف الأوَّل ثمَّ ينتَقَلُ هٰذَا كَحُمُّ الْيَ جُهِمْ عُهُوْمَة أَبُويْهُو خُووْلتها أَمَّ إلى أَوْلادهمْ ثُمَّ إلى جَهَتْعُومُة بُوَيْ أَبُوَيِهُ وَخُووْلِتَهِمَا ثُمَّ إِلَيَ أَوْلًا دِهِمْ كَبَافِي الْعَصّباتِ بَابِ الْخِنْثَي رُدُّهُ مَا الْمُشْكِلِ اَتَّلُ النَّصِيبِينِ أَعني أَسُو. الْحَالَتينِ الْحَالَتينِ إِنْدَابِي حَنِيغَةَ رَحِهُ اللَّهُ وَأَصْحَابِهِ وَهُو تُولَ عَامَّةِ الصَّحَابِةُ

الْعَمِّ وَإِبْنِ الْعَهَّةِ كِلاَهُا لِأَبِ وَأَمِّ اَوْلِابٍ الْهَالَ كُلهُ لِبِنْدِ الْعَمِّ وَإِنْ كَانَ أَحَدُ هُمَا لَأَبٍ وَأُمِّ وَالْأَخْرِلَابِ كَانَ الْهَالُلَّا لِمَنْ كَانَتْ لَهُ قُوَّةً الْغَرَابَةِ فِيْ ظَاهِرِ الرِّواَيَةَ قَيَاسًا عَلَي خَالَةٍ لِأَبٍ مَعَكُونِهَا وَلَدُذِي الرَّحِمِ تَكُونُ هِيَ أَوْلَي لِعُوَّةَ الْقَرَابِةَ مِنَ الْخَالَةِ لِلْمِّمَعَ كَوْنِهِ اوَلَدُ الْوَارِثِ لِأَنَّ التَّرْجِيمُ بِهُعنَّي فِيدُوهُو تُوَةَ الْقَرَابَةِ اَوْلِيَ مِنَ الْتَرْجِيحِ فَيِ غَيْرِهُوْ الْإِذَلا عِبَالْوَارِثِ وَقَالَ بَعْضُهُمْ الْبَالُ كُلَّهُ لِبِنْتِ الْعَمِّ لَلْإِلَّا وَّلَكَ الْعَصَبَةِ وَإِنِ اسْتَوَوْ انِي الْقُرْبِ وَلِكُنِ اخْتَلَفَ حَيِّزْتَرَابَةٍ لَااعْنَبَارَهُنَا لِقُوَّةِ الْقَرَابَةَ وَلَالِوَكِ الْعَصَبَةِ فِي ظَاهِرِ الرَّوَالْإِ وَيَاسًاعَلَي عَهَ اللَّهِ وَأَمْ مَعَ كَوْنِهِا ذَاتَ الْقَرَابَتَيْنِ وَوَلَدَ الْوَارِكِ مِنَ الْجِهِ تَيْنِ وَأُمُّهَا ذَاتُ فَرْضٍ لَيْسَتْ هِيَ بِأُولِي مِنَ الْغَالَمْ

إِ وَأَمْ أُولَابٍ الوَلَامِ فَإِنْ كَانَ حَيْرِ قَرَابِتِهِمْ مَحْتَلِفًا فَلاَّ لْهُ إِلِقُوَّةِ الغُرَابِةَ كَعَهَ قَلْبٍ وَأَمْ وَخَا لَةِ لِلَّمْ أَوْخَالَةٍ لَأَبِّ وَأَمْ عُهَةٍ لِأَمْ فَالثُّلُثَانِ لِعَرَابِةَالْأَبِ وَهُوَ نَصِيْبُ ٱلْأَبِوَالثُّلْثُ مُرَابَةِ الْكُمْ وَهُوَنَصِيْبُ الْأُمْ ثُمَّ مَااصَابَ كُلَّ فَرِيْقٍ يُقْسَمُ بَيْنَهُمْ بَالُواتَّحَدَ حَيِّزَقَرَابَتِهُمْ

نَصْلُ نِي أُولادِهِمْ وَأَنْكَامِهِمْ

اللهُ عَلَيْهِمْ كَالْحَكْمِ نِي الصِّنْفِ الْأَوْلِ أَعَنِي أَوْلاهُمْ لْإِيْرَاثِ أَتْرَبُهُمْ الِّي الْهَيِّتِ مِنْ أَيِّ حِهَةٍ كَانَ وَإِنِ اسْتُووْا ي القربِ وَكَانَ حَيِّرْقَرَابِيَهِمْ مُتَّحِدًانَهَنْ كَانَ لَهُ قُوة الرَّابَةِ فَهُوَأُوْلِيَ بِالْإِجْهَاعِ وَإِنِ اسْتَوَوْنِي الْقُرْبِ وَالْقُرَابِ قُوكَانَ الْزُقْرُابِيْهِمْ مُنْتَحِدًا فُولُدالْعُصَبِةِ أُولِيَ مِهِنْ لَايكُون كُبِنْت

نَصْلُ نِي الصِّنْف الربع

ٱلْحَكْمُ نَيْهِمُ أَنَّهُ إِذَاانْغَرَدُ وَاحِدُسْنِهُمْ إِسْتَحَقُّ الْهَالَ كُلَّمْ لِعَدَ مِالْهُزَاحِمِ وَإِذَا اجْتَهَعُواوكَانَ حَيِّرْ قَرَا بِتَهِم مُثَّحِماً كَالْعَبَاتِ وَالْأَعْبَامِ لَلْمِأُو الْأَخْوَالِ وَالْخَالَاتِ فَالْأَقُوي مِنْ أَوْلَي بِالْإِجْهَاعِ أَعْنِي مَنْ كَانَ لَأَبِ وَأَمِّ أَوْلِي مِهَّنْ كَاهُ لَأِبِ وَمَنْ كَانَ لِأَبِ أَوْلِيَ مِهَنْ كَانَ لِلْمِ ذُوْرًا كَانُواْأُوْلَا وَإِنْ كَانُوانْ كُورًا وَانَّاثًا واَسْتُوتْ قَرَابَتُهُمْ فَللَّكَعَرِمِثْلُمْ حَظِّاالْأَنْتَيْنِ كَعَمِّ وَعَهَ يَّ كِلَا هُهَالِّمِّ أَوْخَالِ وَخَالَةُ كَلَاهُمُ

الله الله الله المحتلابوام المحتلاب المحتلام المحتلام المحتلام المحتلاب ال نْدَابِيْ يُوْسُفَ يَعْسُمُ كُلَّ الْهَالِ بَيْنَ فُرُوْعِ بِنِّي الْأَعْيَانِ ثُمَّ لْنَ نُرُوْعِ بِنَى الْعُلَاَّتِ ثُمَّ بَيْنَ نُرُوْعِ بِنِّي الْأَخْياَفِ لِللَّاكِرِ تُلْحَظَّا لَأَنْتُيينِ ٱرْبَاعاً بِاعْتِباً رِالْإِبْدَانِ وَعِنْدُ مُحَمَّدٍ رَحِهُ لَّشَيْغُسَمُ ثُلُثُ الْهَالِ بَيْنَ فُرُوْعِ بَنِي لَأَخْيَافِ عَلَي التَّسُويَة لْلَا ثَا بِاعِتْبَارِ اسْتِواَ ِأَصُولِهِمْ فِيْ قِسْهَةِ الْأَبَاءِ واَلْنَاقِيْ بِيَنَ رُوْعِ بَنيِ الْأَعْيَانِ أَنْصَافًا بِاعْتِبَارِعَدَهِ الْغُرِّوْعِ ني الْأَصُوْلِ اللهُ لِبِنتُ الْأَخِ نَصِيْبُ أَبِيْهَا وَالنَّصْفُ الْأَخَرُبَيْنَ وَلَدَي لْأُدْتِ لِلذَّكِرِمِيْثُلُ حَظِّ الْأَنْثَيَيْنِ بِاعْتبِا رِالْأَبْدَانِ وَتَصِيِّ اللهُ تِسْعَةٍ وَ لَوْ تِرَكَ ثَلاَثَ بِنَا تِ بِنَي إِنْ قِهْمَنُفِرِ قِيْنَ المنه الصُّورة بِاعْتَبِارِلْأَصُولِ وَإِنِ اسْتَووانِي الْقُرْبِ وَلَيْسَ فِيْهِمْ وَلَدُعَمِّهِ أَوْكَانَ كُلُّهِمْ أَوْلَادُ الْعُصَبَاتِ أَوْكَانَ بَعْضُهُمْ أَوْلَادُ الْعُصَبَارِ وَبَعْضُهُمْ أُولَانُ أَصْحَابِ الْغَرَابِضِ وَاخْتَلَغَتْ تَرَابَتُهُ نَابِويوسَفَ رَحِهُ اللَّهِ يَعْتَبِرِ الْاَتُوي وَمُحَمَّدٌ رَحِهُ اللَّهِ يَعْسِ فَابِويوسِفَ رَحِهُ اللَّهِ يَعْتَبِرِ الْاَتُوي وَمُحَمَّدٌ رَحِهُ اللَّهِ يَعْسِ ٱلْهَالَ عَلَي الْإِخْوَةِ وَالْأَخُواَتِ نِصْغَيْنِ مَعَ اعْتَبَارِعَكَ الْنُورِ وَالْجِهَاتِ فِي الْأُمُولِ فَهَاأَمَابَ كَلَّ فَرِيقٌ يَقْسَم بَينَ فَرُومِ كَمَّافِي الصَّنْفِ ٱلْأَوَّلِ كَبِّنْتُ بِنْتِ الْأَخْتِ لِأَبٍ وَأَمَّ إَوْلِيَ مِنْ ابنُ بنْتِ الْأَنِ لِأَبِ عِنْدَ أَبِيْ يُوسُفَ رَحِمِهُ اللَّهُ لِغُوَّةِ الْغَرَابَةِ وَعِنْدُ مَحَمَّدُ رَحِهُ اللَّه يَعْسَمُ الْهالَ بِينَهُما نصغينُ باعْتِبار الْأُسُولِ كَهَا إِذاتَرَكَ ثَلَاثَ بَناتِ اِخْوَةٍ مُتَغَرِّ قِيْنَ وَثَلَاثً بَنيْنَ وَثَلَاثَ بَنَاتِ أَخُواتِ مُتَنَعَرِ قَاتِ بِهِذِهِ الصَّوْرِةَ

لَولَ وإَنِ اخْتَلَغَتْ قَرَابَتُهُمْ فَالثَّلْثَانِ لِقَرَابُةِ الْأَبِوَهُونَصِيْبُ لَأَبِ وَالثَّلْثَانِ لِقَرَابَةِ الْأَمِّ وَهُو نَصِيْبُ الْأَمِّرُمُّ مَا أَصَابَ كَلَّ لَبِ وَالثَّلُثُ لَتُ لِعَرَابِةِ الْأَمِّ وَهُو نَصِيْبُ الْأَمِّرُمُّ مَا أَصَابَ كَلَّ رَبِيْ مِنْ يَعْسَمُ بِيَنَهُمْ كَهَالُواتَّكُدَتْ قَرَابَتُهُمْ فَي الصِّنْفِ الثَّالِثِ فَصْلٌ فِي الصِّنْفِ الثَّالِثِ

لَّهُ مُ نِيْهِمْ كَالْحَكْمِ فِي الصِّنَفُ الْاَوْلِ أَعْنَيْ اَوْلَاهُمْ الْهُولِ أَعْنَيْ اَوْلَاهُمْ الْهُيْرَاثِ أَثْرَبِهُمْ الْمِي الْهِيَّةِ وَأَنِ اسْتَوَوْانِي الْقُرْبِ فَوَلَدُ الْمُعْبَةِ اَوْلَيْ مِنْ وَلَدِذَ وِي الْأَرْحَامِ كَبِنَتْ ابْنِ أَبْ وَابْنِ الْمُعْبَةِ اَوْلَيْ مِنْ وَلَدِذَ وِي الْأَرْحَامِ كَبِنَتْ ابْنِ أَنْ وَابْنِ الْمُعْبَةِ اللَّهُ الْوَالَةُ الْقَالَةُ لَا اللَّهُ اللَّهُ اللَّهُ الْمُؤْلِدُ وَاللَّهُ الْحُوالَةُ الْمُ اللَّهُ الْمُؤْلِدُ وَاللَّهُ الْمُؤْلِدُ وَاللَّهُ اللَّهُ الْمُؤْلِدُ وَاللَّهُ الْمُؤْلِدُ وَاللَّهُ الْمُؤْلِدُ اللَّهُ الْمُؤْلِدُ وَاللَّهُ الْمُؤْلِدُ وَاللَّهُ الْمُؤْلِدُ الْمُؤْلِدُ اللَّهُ الْمُؤْلِدُ اللَّهُ الْمُؤْلِدُ اللَّهُ الْمُؤْلِدُ الْمُؤْلِدُ اللَّهُ الْمُؤْلِدُ الْمُؤْلِدُ الْمُؤْلِدُ الْمُؤْلِدُ الْمُؤْلِدُ الْمُؤْلِدُ الْمُؤْلِدُ الْمُؤْلِدُ اللَّهُ الْمُؤْلِدُ وَالْمُؤْلِدُ الْمُؤْلِدُ الْمُؤْلِدُ وَالْمُؤْلِدُ الْمُولِدُ الْمُؤْلِدُ الْمُؤْ

نَصْلٌ نِي الصِّنْفِ النَّانِي

أَوْ لَاهُمْ بِالْبِيرَاثِ أَتْرَبْهُمْ إِلَى الْهَيْتِ مِنْ أَيِّ جِهَةٍ كَا وَعِنْدُ الْإِسْتُواْ ِ فِي دَرَجَاتِ الْقُرْبِ فَهَنْ كَانَّ يَدُ لِي إِلْمُ الْهَيِّتِ بِوَارِثٍ فَهُوَ أَوْ لَي عِنْدَ أَبِيْ سُهَيْلٍ الْغُرَ أَبْضِي أَبِي نَضَيْلٍ الْخَصَّافِ وَعَلَيِّ ابْنِ عِيْسِيَ الْبَصْرِيِّ وَلاَ تَنْفِيْد رد هُدَا أِنْ هُدُورَ مِنْ الْجُرْجَانِيَّ وَأَبِيْ عَلِي الْبَيْهِ تَعِي الْبَسْمِ فَي الْبَسْمِ وإن اسْتَوَتْ مَنَا زِلْهُمْ وَلَيْسَ فِيْهِمْ مَنْ يَدْلِي بِوَارِثِ اوْكَا و الدور و المراد و ا قَرَابَتُهُمْ فَالْعِسْمَةُعَلَى ٱبْدَانهِمْ وَإِنِ اخْتَلَفَتْ صِغَةُ مَنْ يَدُلُو بِهِمْ يُغْسَمُ الْهَالُ عَلَي أُوَّلِ بِطَنْ اخْتَكَفَ كَهَا فِي السِّنْهُ

عَهَّدُّ رَحِهَ اللَّهُ يعَتْبُرُ الْجِهَاتَ فِي الْأُصُولِ كُهَا إِنَّا تُرَكَّ لَيْ الْأُصُولِ كُهَا إِنَّا تُرَكَ لَمُ الْمُنْ بِنَتْ وَهُهَا أَيْضًا بِنْتَا ابْنِ بِنَتْ وَابْنَ بِنَتْ بِنَتْ بِنَتْ الْبِنِ بِنَتْ وَابْنَ بِنَتْ بِنَتْ الْبِنِ بِنَتْ وَابْنَ بِنَتْ بِنَتْ الْبِنِ بِنَتْ وَابْنَ بِنَتْ بِنَتْ الْبِنِ الْمُنْ وَابْنَ بِنَتْ الْبُنِ الْمُنْ وَالْمُنْ الْبُنِ الْبُنْ الْبُنِ اللّهُ وَالْمُ الشّورَة

نَّتُ بِنْتُ بِنْتُ بِنْتُ بِنْتُ بِنْتُ بِنَّتُ بِنَّتُ بِنِّتُ بِنِ بَنْتُ بِ بَنْتُ بِ بَنْتُ بِ بَنْتُ بِ

نُدَأَبِي يُوسُفَ الْهَالُ بَيْنَهُمْ أَثْلَاثًا وحِصَارً الْوِيَّتُ كَأَنَّهُ تَرَكُ

إِبْعُ بِنَاتٍ وَ أَبِنًا فِيكُونَ ثُلْثَاء لِلْبِنْتَيْنِ وَثُلْتُه لِلْإِبْنِ وَعُنْدُ

عَهْدٍ رَحِهُ اللَّهُ الْهَالُ بَينَهُمْ عَلَى ثَهَانِيةٍ وَعِشْرِينَ سَهُ

لْبِنْتَيْنِ اثْنَانِ وَعِشْرُوْنَ سَهُمَّا سِتَّةَ عَشَرَمِنْ تَبَلِ أَبِيهِمَا

سَّةَ أَسْهِم مِنْ قَبَلِ أُمِّهِمَا وَلِلْإِبْنِ سِتَّةَ أَسْهِم مِنْ قِبَلِ أَمْمِ

إِبْنِ الْبِنْتِ إِنْهِيَ نَصِيْبُ جَدِّهِمَا وَتَلَاثَةًأَ شَبَاعِهِ وَهُ نَصِيْبُ الْبِنْتَيْنِ يُغْسَمُ عَلَي وَلِكَيْبِهَا اعْنْبِي فِي الْبَطْر الثَّالِثِ انْصَاناَ نِصِغْهُ لِبِنِتِ ابْنِ بِنتِ الْبِنْتِ نَصِيرُ ٱبِيْهَاوَ النِّصْفُ الْأَخَرُلِا بُنْيٌ بِنْتِ بِنَتِّ الْبِنِتِ نَصِيْبُ أَيْهِ وَ تَصَحِّمِنَ ثَهَانِيةً وعِشْرِينَ وَتَولَ مُحَمِيَّ رَحِهُ اللهَ السِّ الرَّوَايَتَيْنَ عَنِ الْبَيْحَنِيْغَةَ رَحِهُ اللَّهُ فِي جَهِيْعِ اَكْلَا ذَوِي الْأَرْحَامِ وَهُوَ تَوْلُ اَبِيْ يُوسُفَ الْأَوَّلُ ثُمَّ رَجَعَ نَتَالًا لاعِبْرَةَ لِلْأُصُولِ أَلْبَتَّةَ

عَلَهَا وَنَا رَحِهُم اللَّه يَعْتَبِرُونَ الْجِهَاتَ فِي التَّوْرِيثِ غَيْراً الْجِهَاتَ فِي التَّوْرِيثِ غَيْراً الْجَهَاتَ فِي النَّوْرِيثِ غَيْراً الْجَهَاتَ فِي الْبَدَانِ الْغَرُوعِ الْمَانِ الْغُرُوعِ الْجَهَاتَ فِي الْبَدَانِ الْغُرُوعِ الْجَهَاتَ فِي الْبَدَانِ الْغُرُوعِ الْجَهَاتَ فِي الْبَدَانِ الْغُرُوعِ الْمَانِ الْغُرُوعِ الْجَهَاتَ فِي الْبَدَانِ الْغُرُوعِ الْجَهَاتَ فِي الْبَدَانِ الْغُرُوعِ اللَّهِ اللَّهِ اللَّهُ اللَّهِ اللَّهُ الللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُو

عَذٰلِكَ مُحَهَّدٌ رَحِهَ اللَّه يَأْخُذُ الصِّغَةَ مِنَ الْأُصْلِ حَالةً قَسُهَ وَالْعُدُولِ عَلَا اللَّه يَأْخُذُ الصِّغَةَ مِنَ الْأُصْلِ حَالةً قَسْهَةً وَالْعَدَدَ مِنَ الْغُرُوعِ كَهَا إِذَا تركَ ابنَي بِنْتِ بِنْتِ بِنْتِ بِنْتِ بِنْتِ بِنْتِ وَبنَتَي بِنْتِ ابنَ بِنْتٍ بِهٰذِهِ الصَّوْرَةِ فَتَوْبِنْتِ إِبْنَ ابنَ بِنْتِ بِهٰذِهِ الصَّوْرَةِ فَي الْمُعْرَدِةِ السَّوْبِنْتِ الْمَالِي بنْتِ النَّا الْمَالِي الْمُعْلِيةِ الصَّوْرَةِ الصَّوْرَةِ الصَّوْرَةِ الصَّوْرَةِ الصَّوْرَةِ السَّوْرَةِ السَاسَةِ السَاسَاسِ السَاسَاسُ السَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسُ السَاسَاسُ السَاسَ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسَاسُ السَاسُ

بنْتُ ، نت بنْتُ بنْتُ ابْنَ ژ نت بنُتُ ٳڹٛڹ ڊ ء نت بِنْتِ بنتين اللهُ أَبِي يُوسُفَ رَحَهِ أَلَكُهُ يَعْسَمُ الْهَالَ بَيْنَ الْغُرُوعِ اسْبَاعًا الْعَبَارِ اَبْدَانِهِمْ وَعِنْدَ مُحَهَّدٍ رَحِهُ اللَّه يَعْسَمُ الْهَالَ عَلَيَ للهِ الْحَلَافِ أَعْنِي فِي الْبَطْنِ الثَّانِي أَسْبَاعًا بِاعْتِبَارِ لَكُ الْغُرُوعِ فِي الْأُصُولِ فِعَنْكَ الْرَبَعَةُ أَسْبَاعِهِ لِبِنْتَيْ بِنْتِ

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_			1				1	i .			إِنْتُ
بن	بنت	بنث	بنت	بنث	بِنْتُ	بِنْتُ	بنت	بنتُ	بنَّتُ	بِنْتُ	بنت
أب	بِنْتُ	، بن ت	ابن	ابن	ابن	بِنْتُ	بِنْتُ	بنت	بِنْتُ	بِنْتُ	بِنْتُ
بن	بنت	بنت	ابن	بنث	بنت	ابن	ابْنَ	ٳۜڹڽؙ	بِنْتُ	بنتُ	بِنْتُ
بنه	اَبْنَ	بنث	بنت	بنث	بِنْتُ	اِبنَ	بنت	بِنْتُ	ابن و	بِنْثُ	بِنْتُ
				,							بنث

عْتَبِرِ أَبْدَانَ الْغُرُوْعِ إِنِ اتَّغَعَّتْ صِغَةُ الْأَصُولِ مُوَانِعًا لَهُمْ أَ يِعْتَبِرُأَبُكَانَ الْأُصُولِ إِنِ اخْتَلَغَتْ صِغَاتُهُمْ وَيُعْطِي الْغُرْفِيعَ مُرَاثَ الْأُصُولِ مُخَالِغًا لَهُ الْهَاكَا الْهَا تَرَكَ ابْنَ بِنْتٍ وَبِنْتَ بِنْتٍ سْدُهُهَا الْهَالَ بَيْنَهُهَا للَّذَكِرِ مِثْلُ جَطِّ الْأَنْثَيَيْنِ بِاعْتِبَارِ لْأَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحِهَ اللَّهُ كَذِٰلِكَ لَأِنَّ صِغَةِ الْأَصُولِ شَّنِتَةً وَلُوْتَرَكَ بِنْتَ ابْنِ بِنْتٍ وَابْنَ بِنْتِ بِنْتٍ عِنْدَهُمَ لْهَالْ بَيْنَ الْغُرُوْعِ اِثْلَاثًا بِاعْتَبَارِ الْأَبْدَانِ تُلْثُاء لِلْأَدْكِر ِ بِنَهِ لِلْاَنْثَى وَعَنِٰدَ مُخَمَّدٍ رَحَهِةَ اللَّهِ عَلَيْهِ الْهَالُ بَيْنَ وَثَلْتُهُ لِلْاَنْثَى وَعَنِٰدَ مُخَمَّدٍ رَحَهِةَ اللَّهِ عَلَيْهِ الْهَالُ بَيْنَ لْأُسُولِ أَعْنِيْ فِي الْبَطْنِ الثَّانِيُ اثْلَاتًا ثَلْثَاءٌ لِبِنْتِ ابْنِ لْبِنْتِ نَصِيْبُ أَبِيَّهَا وَتُلْتُنَّهُ لَإِبْنِ بِنْتِ الْبِنْتِ نَصِيْبُ أَمِّهِ

فَرْعِهِ وَ فَرْعِهِ أَوْلِيَ مِنْ أَصْلِهِ)

فَصْلُ فِي الصِّنْفِ الْأَوَّلِ

أَوْلَهُمْ بِالْهِيْرَاتِ أَتْرَبُّهُمْ إلِيَ الْهَيْتِ كَبِنْتِ الْبِنْتِ فَأَلَّهَا أَوْلِيَ مِنْ بِنْتِ بِنْتِ الْإِبِنِ وَإِنِ الْشَوَوْانِي الدَّرَجَة فَوَلَهُ اِلْوَارِثِ أَوْلِيَ مِنْ وَلِدَدُوِي الْأَرْحَامِ كَبِنْتِ بِنْتِ الْإِبرُ ٱوْلَى مِنِ ابِنْ بِنْتِ الْبِنْتِ وَإِنِ اسْتَوَتْ دَرَجَا تُهُمْ وَكُمْ يَكُوٰ فَيْهِمْ وَلَدُ الْوَارِثِ أَو كَانَ كُلُّهُمْ وَلَدَ الْوَارِثِ فَعَلْمُ أَبِي يُوسِفَ رِحْمُهُ اللَّهُ و ٱلْحَسَنِ بْنِ زِيادٍ يعتَبُر أَبِدَارٍ الْغُرُوْعِ وَ يُغْسَمُ الْهَالُ عَلَيْهِمْ سَوَاءٌ تَّغَعْثُ صِغَةً الْأَسُوا فِي الذِّكُورَةِ وِ الْأَنْوَتَةِ أَوِ اِخْتَلَغَتْ وَ مُحَمَّدٌ رَحِهُ اللَّ

تَمِي إِلَى جُدَّي الْهَيِّتِ أَوْجَدَّتُنُهُ وَهِي الْعَهَّاتُ وَالْأَعْهَام إِ وَالْأَخْوَالُ وَالْحَالَاتُ فَهُولًا وَكُلُّ مَنْ يَدُلِي إِلَي الْهُيِّتِ مُ مِنْ ذِوَي الْارْحَامِ رُوي أَبُو سَلَيْهَانَ عَنْ مَحَهُدٍ ابْنِ لْحُسَنِ عَنْ أَبَيْحَنِيغَةَ رَحِهُمُ اللَّهُ إِنَّ أَتْرَبُ الْأَصْنَافِ لْسِنْفُ الثَّانِي وَإِنْ عَلَوْا ثُمَّ الْأَوَّلُ وَإِنْ سَغَلُوْ ثُمَّ الثَّالِثُ ، روه به الرابع وإن بعد واوروي أبويوسف والحسن نَ زِبادَ عَنَ أَبْيَحَنِيغَةُ رَحِهُ اللَّهُ أَنَّ أَتَّرِبُ الْأَصْنَافِ لْزَلُ ثُمْ الثَّانِيُ ثُمَّ الثَّالِثُ ثُمَّ الَّرابِعُ كُثَرِنْيِبُ الْعَصَبَاتِ الْهُوَالْبَأْخُونُ لَلْغَنْتُوي وَعِنْدَ هُهَا الصِّنْفُ الثَّالِثُ مُعَدُّمُ لي الجَدِّابِ الْأَمِ لِأَنَّ عِنْدَ هُاكُلُّ واَحِدٍ مِنْهُم أُولِي مِنْ

بآب دُوِي الْأَرْحَامِ

وَنُوالرِّحِمِ هُوكُلِّ قَرِيْبٍ لَيْسَ بِذِي سَهْمٍ وَلاَعَصَبِة كَانَتْ عَامَّةُ الصَّحَابَةِ بَرَوْنَ تَوْرِيْثَ ذَوِي ٱلْأَرْحَامِوَبِهِ قَالَ أَصْحَابُنَا وَمَنْ تَابَعَهُمْ رَحَهُمْ اللَّهُ تَعَالِيَ وَقَالَ زَيْدُبْنُ ثَابِتَ رضِي اللَّهُ عَنْهُ لا مِيْرَاثَ لِلْدُوِي ٱلْأَرْحَامِ وَيُوْضَعُ الْهَالُ فِي بَيْتِ الْهَالِ وَبِهِ قَالَ مَالِكَ وَالشَّا فِعِيُّ رَحِهُهَا اللَّهُ تَعَالَي وَكُوِي الْأَرْحَامِ أَصْنَافُ أَرْبَعَةُ الصِّنْفُ الْأَوَّلُ ينَتْهِي إِلَي الْهَيِّتِ وَهُمْ أَوْلَا لُهُ الْبِنَاتِ وَأَوْ لَا نُعِبَاتِ الْإِبْنِ وَالِصَّنْفُ الثَّانِي يَنْتَمِي إليْمِ الْهَيْتُ وَهُمُ الْأَجْدَادُ السَّاقطُونَ وَالْجَدَّاتِ السَّاقطُاتِ وَ الصِّنْفُ الثَّالِثُ يَنْتَهِي إِلَيَ أَبُوِيَ الْهَيْتِ وَهُمْ أَوْلَالُهُ الْأَخُواتِ وَبِنَاتُ الْإِخْوَةِ وَ بِنُوا ٱلإِخْوَةِ لِلَّمِ وَ الصِّنْفُ الَّرابِعُ

الها الله الله ما فِي يَدِهِ مِنَ التَّصْحِيْحِ الْأُولِ عَلَي التَّصْحِيْحِ الثَّانِي فَلاَحَاجَةَ إِلَى الضَّرْبِ وِإِنْ لَمْ يَسْتَعِمْ فَانْظُرْ إِنْ كَانَ بينها موانقة فاشرب ونق التُشحيح الثّاني في جميع التُسْحَيْعِ اللَّوْلِ وَإِنْ كَانَ بَينَهما سَاينة فاضرب كل التَّشْحِيْمِ الثَّانِي فِي كُلِّ التَّصْحِيْمِ الأُولِ فالهبلغ مخرج ٱلْهَشَلَتَيْنِ فَسِهَامُ وَرِثَةَ الْهَيِّتِ الْأَوَّلِ يُضْرَبُ فِي الْهَضْرُوبِ أَنْ إِنْ التَّصْحِيْحِ الثَّانِي أُونِي وَنَقِهِ وَسِهِامُورَثَةِ الهَيْتِ الثَّانِيْ يَضْرَبُ نِي كُلِّ مانِيْ يكِهِ أَوْنِيْ وَ نُقِه وَانْ ماتَ تَالِثُ أَوْرَابِعٌ فَاجْعَلِ الْهَبْلَغَ الثَّانِيَ مَعَّامَ الْأَوَّلِ وَالثَّالِثَ مُقَامَ الثَّانِيْ فِي الْعَهَلِ ثُمَّ فِي الَّرَابِعِ وَالْخَامِسِ كَذَلِكَ الي غيرالنهاية وَتَعُولُ إِلَى تَسْعَةٍ وَتَصِحِّ مِنْ سَبْعَةٍ وعَشْرِينَ إِنَّهَا سَبِيتُ الْحَكَرِيَّةَ لَا اللهَ اللهَ عَلَى الْمَرَاةَ مِنْ بَنِي أَكْدَرُ وَلَوْكَانَ أَكْدَرِيَّةً فَي الْمَرَاةَ مِنْ بَنِي أَكْدَرِيَّةً فَي الْمَرَاةَ مِنْ بَنِي أَكْدَرِيَّةً مَكَانَ اللَّخَتِ أَخْ أَوْ أَخْتَانِ فَلَا عَوْلَ وَ لَا أَكْدَرِيَّةً

بأب الهناسخة

وَ لَوْصَارَ بَعْضُ الْأَ نُصِبَا إِمِيْراَتًا تَبْلَ الْقَسْمَةَ كَزُوْجٍ وَ بِنْتِ وَأَمْ فَهَاتَ الزُّوجِ قَبْلُ الْقِسْهَةِ عَنِ الْمَرَأَةِ وَأَبُوينِ ثُمَّ مَاتَتَ الْبِنْتُ عَنْ ابِنَيْنِ وَبِنْتِ وَجَدّة تمَّ ماتَتِ الْجَدّة عَنْ زُوعٍ مؤرره مؤود و أو تصحيح مسنلة الهيت الاول وتعطي واخوين الاصل فيدان تصحيح مسنلة الهيت الاول وتعطي سهام كُلَّ وَارِثِ مِنْ هَذَ النَّصْحِيجِ ثُمَّ تُصَحِّحٍ مِسْلَةً الهيتِ الثّانيِ وَتنظرُبين مَانيِي يده من التَّصحيحِ الأولِّ وبين التَّصْحِيْمِ الثَّانِي إِلَي ثَلَا ثَةِ أَحُوالٍ فَإِنِ اسْتَعَامَ بِسَبَهِ

بُوالْمُوالْمَالسدس جَهِيْعِ الْهَالِ كَجَدُّوجَدَّةٍ وَبِنْتٍ وَاَحْوَينِ إِذَا كَانَ ثُلْثُ الْبَاتِي خَيْراً للْجَدّ وَلَيْسَ لِلْبَاتِي ثُلْثُ لحيم فاضرب مخرج الثّلث في أصل الهسنّلة فإن تركّت نْذًا وَزَوْجًا وَبِنْتًا وَأَمًّا وَأَخْتَالًابِ وَأَمِّ أَوْلَابٍ فَالسَّدُسُ خَيْرٌ لَجُدِّ وَتَعُولُ الْهُسْئَلَةُ إِلَى ثَلَا ثَةً عَشَرَ وَلَاشَيُّ لِلْلَّحْتِ اعْلَمْ أَنَّ زَيْدَ بْنَ تَابِتِ رَضِيَ اللَّهُ عَنْهُ لَا يُجْعَلَ الْأَخْتَ إِ وَأَمْ أُولاً مِاحِبَةَ فَرْضِ مَعَ إِلْجَدّ الْآنِي الْهُسُنَّلَةِ الْنَهِ بِيَّةُ وَهِيَ زَوْجُ وَأَمَّ وَجَدَّوَ أَخْتُ لِأَبِ وَأَمِّ أَوْلِابٍ لِلزَّوْجِ الله والله والمناف والمناف والمناف والمناف النافي المناف ا يَفُمُّ الْجَدِّ نَصِيبَهُ إِلَى نَصِيبِ الْآخَتِ فَيَعْسَهُانِ لِلذَّكِرِ لُحْظِّا لَانْتَيَنَ لِأَنَّ الْهَا سَهَةَ خَيْرً لِلْجَدِّ أَصْلَهَا مِنْ سِتَةٍ

بَنُو الْعَلَّاتِ يَدُ خُلُونَ نِي الْقِسْهَةِ مَعَ بَنِني ٱلْأَعْيَانِ إِضْرَارًا للْجَدِّ فَإِذَا أَخَذَ الْجَدِّ نَصِيبَه فَبَنُو الْعَلَّاتِ يَخْرِجُونَ مِنَ الْبَيْنِ خَايِبِيْنَ بِغَيْرِ شَيًّ وَٱلْبَا تِيْ لِبَنِي الْأَعْيَانِ إِلَّا إِنَّا كَانَتْ مِنْ بَنِي ٱلَا غَيَانِ أَخْتُ وَاحِدَةً اَخَلَتْ نَرْضَهَا أَعْنِي الْكُلُّ بِعَدُ نَصِيْبِ الْجَدِّ فَإِنْ بِعَي شَيُّ نَلْبَنِي الْعَلَّاتِ وِ اللَّا نَالَّا شَيُّ لَهُمْ وَ ذَٰلِكَ كَجَدٍ وَأَخْتٍ لِأَبٍوَأُمِّوَ أَخْتَيْنِ لِأَبِ فَبَقِيَ لِلْأَخْتَيْنِ لَأَنِ عُشُرِ الْهَالِ وَ تَصحِّ مِنْ عِشْرِينَ وَلُوكَانَتْ فِيْ هِٰذِهِ ٱلْهُسَبِلَةِ أَخْتُ لَإِبِ لَمْ يَبَعْثَ لَهَاشِيُّ وَإِنَّا خَتَلَطَهِمْ نُوسَهُم فَلْكَجَدِّ هُمَا أَنْصُلُ ٱلْأَ مُوْرِ الثَّالَاثَةِ بَعْدَ فَرْضِ ذَي سَهْمٍ أَمَّاا لَهُ قَاسَهُمْ كَزُوْمٍ وَجَدِّ وَأَخْ وَأَمَّا ثُلْثُ مَا يَبْقَي كَجَدِّ وَجَدَّةٍ وَأَخُويْنِ وَأَثْمَا

سَ لَا يُرِدُ عَلَيهِ فَاءِنِ انْكَسَرَ عَلَي البَعْضِ صَحِّحِ لَهُ سَبِّلَةً بِالْأَصُولِ الْهُدُكُورَة

باب مُقاسَةِ الْجَدِ

الَ ٱبُوبُكُرِ الصَّدْيَةِ رَضِيَ اللَّهُ عَنْهُ وَ مَنْ تَابَعَهُ مِنَ لََّكَابِة بَنُوا الْأَعْيَانِ وَبَنُو الْعَلَّاتِ لاَ يُرِثُونَ مَعَ الْجَدِّوَهَٰذَا وْلُ أَبِيْ حَنِيْغَةَ رَحِهَهُ اللَّهُ وَبِهِ يَغْتَى وَقَالَ زَيْدٌ بْنُ ثَابِتٍ رُثُونَ مَعَ الْجَدِّ وَ هُوَ تُولُهُمَا وَتُولُ مَالِكِ وَ الشَّانَعِي جِهُمُ اللَّهُ تَعَالَي وَعِنْدَ زَيدُ بِنُ ثَابِتٍ رَحْمَةٌ اللَّهِ تَعَالَي لَيْهُ لِلْجَدِّ مُعَ بَنِي الْأَعْيَانِ وَالْعَلَّاتِ أَنْصَلَ الْأَمْرِيْنِ نَ الْهُ قَاسَهَة وَ منْ ثَلْثِ جَمِيعٌ الْهَالِ وَ تَغْسِيْرُ الْهُ قَاسَهَة الْجُعَلَ الْجَدِّ فِي الْقِسْهَةِ كَاحَدٍ مِنَ ٱلْإِخْوَةِ وَ

عَدُور وَسِهِمْ فِي مَخْرَجَ فِرضِ مَنْ لَا يُرِدُّ عَلَيْهِ فَالْمِبْلُغُ مِنْهَا تَصِيِّ الْهُسَلَةُ وَالرَّابِعِ أَنْ يَكُونَ مَعَ الثَّانِي مَنْ لَا يَرِدُ عَلَيْهُ فَاتْسِمْ مَا بِعَيِي مِنْ مَخْرَجٍ فَرْضٍ مَنْ لَا يُرَدُّ عَلَيْهُ عَلَي مَسَّيَلةِ مَنْ يُرَدُّ عَلَيْهِ فِإِنِ اسْتَعَامَ الْبَاتِيْ فَبِهَا وَ هَذَانِيْ صُوْرَةٍ وَ احِدَةٍ وَهِيَ أَنْ يَكُونَ لِلَّرْوُجِاتِ الرِّبعُ وَيَكُونَ الْبَاقِيُ بَيْنَ أَهْلِ الرَّدِّأَ إُلْاَبًا كَزَوْجَةٍ وَجَدَّةٍ وَأَخْتَيْنِ لِلْمِ وَإِنْ لَمْ يَسْتَقِم فَاضْرِبْ جَرِيكُ مَسْبَلَةَ مَنْ يُرَدُّ عَلَيْهِ نِيْ مَخْرَجِ فَرْضِ مَنْ لَا يُرَدُّ عَلَيْهِ فَالْهَبِلَغِ مَخْرَجَ فَرُوضٍ الْغَرِيْغَيْنِ كَأَرْبِعَ زَوجَاتٍ وَ ثِسْعِ بِنَاتٍ وَسِتِّ جَدَّاتٍ ثُمَّ اضْرِبٌ سِهَامَ مَنْ لَا يُوَدُّ عَلَيْهِ فِي مَسْئِلَةٍ مَنْ يُودُّ عَلَيْهِ وَسِهَامَ كُلِّ مَنْ يُرَدُّ عَلَيْهِ نَيِهَا بَعْنِي مِنْ مَخْرَجِ فَرْضٍ زِالْتَّانِي إِذَا اجْتَهَعَ فِي ٱلْهَسَبِّلَةِ جِنسَانِ أَوْثُلَاثَةَ أَجْنَاسٍ مَّنْ يُرَدُّ عَلَيِهُ عِنْدَ عَنَمِ مَنْ لَايُرَّدُّ عَلَيْهِ فَاجْعَلِ الْهَسْئِلَةُ سْ سِهَا مِهِمْ أَعِنْيَ مِنْ إِثْنَيْنِ إِنْكَانَ فِي ٱلْهَسْبَلَةِ سُدُسَانِ أُوسُ ثَلَاثَة إِذَا كَانَ فِيهَا ثُلْثٌ و سُدُسٌ أَوْسَنُ أَرْبَعَة لَاكَانَ فِيْهَانْصِفَ وَسُنُسُ أَوْمِنْ كُهُسَةً إِذَا كَانَ فَيْهَا لْلَّانِ وَّسُدِّسٌ أَوْنَصْفٌ وَسُدُسَانِ أَوْنَصْفٌ وَثُلَّثْ وَالتَّالِثُ لَّ يَكُونَ مَعَ الْأُوَّلِ مَنْ لَا يُرَدُّ عَلَيْهِ فَاعْطِفَرْضَ مَنْ لَا يُرَدُّ للهُ مِنْ أَتَلِ مَخَارِجِهِ فَأَنِ اسْتَقَامَ الْبَاقِي عَلَي رُوِس سُيرَةٌ عَلَيْهِ فَبِهَا كَزُوجٍ وَتَلَاثِ بِنَاتٍ وَإِنْ لَمْ يَسْتَعْمِ فَاضْرِبْ رِنْكُ رُوسِهم فِي مَخْرَجٍ فَرْضِ مَنْ لَا يُرَدُّ عَلَيْهِ أَنْ وَانْكَ رَزُسُهُ الْبَاتِيْ حَنَرُوْجٍ وَسِتِّ بَنَاتٍ وَ إِلَّا فَاضُرِب كُلَّ

بَابُ الَّرِدِّ ٱلرِدِّضِدُ الْعَوْلِ

وَ هُوِنَيها نَصَلَ عَنْ فَرِضٌ نَوْدِي الغَرُوضِ وَلَا مُسْتَحِتَّ لَهُ يُرَدُّ ذَلِكَ عَلَي دُوِي الْغُرُوضِ بِعَدْرِ حُغُوْتِهِمْ إِلَّا عَلَي الزَّوجِينِ وَهُو قُولُ عَامَّةِ الصَّحَا بِةَ كَعَلِيَّ وَمَنْ تَا بَعَهُ رَضِيَ اللَّهُ عَنْهِ وَبِهِ أَخَذَ أَصْحَا بِنَا رَحِهُمُ اللَّهُ وَقَالَ زَيْهُ بْنُ ثَابِتَ لَا يُرَدُّ الْغَا ضِلُّ بَلْ هُوَ لِبَيْتِ الْهَالِ وَ بِهِ أَخَذَ عُرْوَةً وَ الزَّهِرْي وَ مَالَكَ وَ الشَّانِعِيِّ رَحِهَهُمُ اللَّهُ تَعَالَى الْهُسْبَلَةِ جِنْسٌ وَ احِدٌ مِهَّنْ يُوَدَّ عَلَيْهِ عِنْدَعَدَمِ مَنْ لَا يُرَدَّ عُلَيهُ فَاجْعَلِ ٱلْهَسْلَلَةَ مِنْ رُوِّسِهِمْ كَهَاإِذَا تَرَكَ ٱلْهَيِّتُ بِنْتَيْنِ أَوْ أَخْتَيْنِ أَوْجَدَّتِينَ فَاجْعَلِ ٱلْهَسْبَلَةُ مِنْ اتِّبْيِّنِ

الْيَنْهُا مَبَايَنَةُ فَاضْرِبُ فِي حُلِّ التَّرِكِرُثُمَّ اتْسِمِ الْحَاصِلُ الْيَهُا مَبَايَنَةُ فَاضْرِبُ فِي حُلِّ التَّرِكِرُثُمَّ اتْسِمِ الْحَامِلُ الْكَيْنِ مَلَيْ الْهَالِيَ الْمَارِجَ نَصِيبَ ذَلَكَ الْعَرِيْتِ فِي الْوَجْهَيْنِ وَ أَمَّافِيْ تَضَاءِ الثَّيْوُنِ فَدُيْنَ الْفَرِيْتِ فِي الْوَجْهَيْنِ وَ أَمَّافِيْ تَضَاءِ الثَّيْوُنِ فَدُيْنَ الْفَرِيْمِ فَي الْوَجْهَيْنِ وَ أَمَّافِيْ تَضَاءِ الثَّيْوُنِ فَدُيْنَ الْفَرِيْمِ فَي الْوَجْهَيْنِ وَ أَمَّافِيْ تَضَاءِ الثَّيْوُنِ فَدُيْنَ اللَّهُ التَّصْحِيمِ فَلَا عَرِيم بَهْ ذَلِهَ التَّصْحِيمِ فَلَا عَرِيم بَهْ ذَلِهَ التَّصْحِيمِ فَي الْمُعْلَى اللَّهُ اللَّهُ الْعَلَى الْعَلَى الْعَلَيْنِ اللَّهُ الْعَلَى الْعَلَيْمِ اللَّهُ الْعَلَيْنِ اللَّهُ الْعَلَيْنِ اللَّهُ الْعَلَيْنِ اللَّهُ اللَّهُ الْعَلَيْنَ اللَّهُ الْعَلَيْمِ الْمَالِقُولُ الْعَلَيْمِ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ الْعَلَى الْمَالِقُولُ اللَّهُ اللَّهُ اللَّهُ الْعَلَيْمُ اللَّهُ اللَّهُ الْعَلَيْمُ اللَّهُ الْعَلَيْمُ اللَّهُ اللَّهُ الْعَلَيْمُ الْمُ الْمُ الْعَلَيْمُ اللَّهُ اللَّهُ اللَّهُ الْعَلَيْمُ الْمُ الْمُ اللَّهُ الْمُ الْعَلَيْمُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ الْمُ الْمُ الْمُ الْعَلَى الْمُ الْمُ الْمُ اللَّهُ اللَّهُ الْمُ الْمُ الْمُ الْمُهُمُ الْمُ الْمُ الْمُ الْمُ اللَّهُ الْمُ اللَّهُ الْمُ الْمُلْمُ الْمُ الْمُلْمُ الْمُلْمُ الْمُلْمِ الْمُ الْمُلْمُ الْمُ الْمُ الْمُلْمُ الْمُلْمُ الْمُلْمُ الْمُلْمُ الْمُلْمُ الْمُلْمُ الْمُلْمُ الْمُلْمُ الْمُ الْمُلْمُ الْمُلْم

نَصْلُ نِي النَّخَارِج

نَ مَالَحَ عَلَي شَيْ مِنَ التَّرِكِة فَاطُرُحْ سِهَا مَهُ مِنَ التَّرِكِة فَاطُرُحْ سِهَا مَهُ مِنَ التَّرِكِة عَلَي سِهَامِ الْبَاقِينَ التَّرِكَةِ عَلَي سِهَامِ الْبَاقِينَ كَنُوجٍ وَأَمْ وَعَمْ فَصَالَحَ الزَّوْجَ عَلَي بَاقِي نَاتِي فَمِتَّهِ للَّزُوجَةِ فَصَالَحَ الزَّوْجَ عَلَي بَاقِي فَمِتَّهِ للَّزُوجَةِ فَالَحَ الزَّوْجَ عَلَي بَاقِي فَمِتَّهِ للَّزُوجَةِ فَنَالَحُ الزَّوْجَ عَلَي بَاقِي التَّرِكَةِ بينَ الْهَهُمِ وَخَرَّحَ مِنَ الْبَيْنِ فَيَقَسَمُ بَاقِي التَّرِكَةِ بينَ الْهَهُمِ وَخَرَّحَ مِنَ الْبَيْنِ فَيَقَسَمُ بَاقِي التَّرِكَةِ بينَ

لْمْ وَ الْعَمِّ أَثْلَاثاً بِغَدْرِ سَمِّا مِهِمَا وَح يَكُون سَهْهَانِ للْأُمِّوَ لَكُمْ وَ الْعَمِّ

نَصُلِّ فَيْ قِسْهُ لِلَّهِ كَاتِ بَيْنَ الْوَرَثَةِ وَ الْغَرَمَا إِ انِكَانَ بِينَ التِّركةِ وِالتَّصْحِيْجِ مَبَاينةَ فَاضْرِب مِمَامَ كُلَّ وَارِثِ مِنِ النَّصْحِيْحِ فِي جَمِيعِ التَّركة ثمَّ أَتْسِمِ الْهُبَانِعَ عَلَي التَّصْحِيْمُ وَ إِنَّا كَانَ بَيْنَ التَّصْحِيْمِ وَ التَّرِكَةِ مُوا نَقَةً فَاضْرِبْ شَهِامٌ كُلُّ واَرِثٍ مِن التَّصْحِيْحِ فِي وَفَقِ التَّرِكَةِ نه و وروي المروية التصييم فالخارج نصيب فالكا النُوْاَرِثُ نَيْ الْوَجْهَيْنِ هَٰذَا انَّهَا هُوَ لِهَغْرِفَةِ نَصَيْبٍ كُلِّ فَنُونَ مِنَ الْوَرَثَةِ وَ أَمَا ٓ لِعَرْفَةِ نَصِيبٌ كُلِّ فِرَيَّتُ مِنْهُمْ فَاضِرْبُ مَّاكُانَ لِكُلِّ فَرِيثٍ مِنْ أَصلِ الْهُسَبِّلَةِ فِي وَنْقِ التَّركِة ثُمَّ أُمِّسِم ٱلْهُبَلَغ ٱلْحَاصِلَ عَلَي وَنْقِ الْبُسْبِّلَةُ إِنْكَانَ بَيْنَ التَّرِكَةِ وَ الْبَسْبِلَةِ مُوَانَعَةٌ وَ إِنْكَانَ

إِذَا أَرُدْتَ أَنْ تَعْرِفَ نَصِيْبٌ كُلِّ وَاحِدٍ مِنْ أَحَادِ ذَٰلِكَ لْفِرِيْقِ مِنَ الْتَصْحِيْحِ فَاتْسِمْ مَاكَانَ لَكِلِّ فِرِيْقٍ مِنْ سُلِ الْهُسَبِلَةَ عَلَى عَدَدَ رُوِّسِهِم ثُمَّ اضْرِبِ الْخَارِجِ فِي لْهُ صُرُوبِ فَالْحَاصِلِ نَصِيْبُ كُلَّ وَاحِدٍ مِنْ أَحَادٍ ذَٰلِكَ لْفُرِيْقِ وَوَجْهُ آخَران تَقْسِمَ الْهَضْرُوبَ عَلَى أَي شِبْتُ مُ تَفْرِبِ الْخَارِجَ فِي نَصِيْبِ الْغَرِيْفِ الَّذِي قَسَهْتَ الْمُضروب فَالْحَاصِلْ نَصِيب حُلَّ وَاحِد مِنْ أَحَادِ الكَ الْغَرِيثِ وَوَجَهُ أَخَرُو هُوَ طَرِيْتُ النِّسَبَةِ وَهُو الْأُوسَى الْوَأَنْ يُنْسَبَ سِهَامُ كُلِّ فَرِيتُ مِنْ أَصْلِ الْمُسْبِّلَةِ الْمِي لَهُ رُوِّ سِهِمْ مُفْرَدًا ثُمَّ يَعْطَى بِهِثْلِ تِلْكَ الْنَسْبَةِ مِنَ بَهْرُوْبِ لِكُلِّ وَ احِدٍ مِنْ أَحَادِ ذَٰلِكَ الْغَرِيقِ الْهَبْلَغْ فِي أَصْلِ الْهُسْنَلَةِ كَأَرْبَعِ زُوجَاتٍ وَثُهَانِي عَشَرَةَ بِنَا وَخَهِسَ عَشَرَةً جَدَّةً وَسِتَةً أَعْهَامٍ وَالرَّابِعِ أَنْ تَكُونَ الْأَعْدَارُ متبايِنةً لَا يُوافِق بَعضها بَعضًا فالحكم فيها أَن يضرب أحا الْأَغْدَا دِ نِيْ جَمِيْعِ الثَّانِيْ ثُمَّ يُضْرَبُ مَا بَلِغَ فِيْ جَمِيْا الثَّا لِتِ ثُمَّ مَا بَلَغَ فِي جَهِيْعِ الَّرابِعِ ثُمَّ يُضْرَبُ مَا اجْتَهَا فِيْ أَصْلِ الْهُسْنَكَةِ كَامْرَ أَتَيْنِ وَسِتِّ جَدَّاتٍ وَعَشَرَة بَنَالٍ وَ سَبُعَةِ أَعْهَامٍ ء فَصْلُ وَإِذَا اردت أَن تَعْرِفَ نَصِيبَ كُلَّ فِرِيقٍ مِنَ التَّصْعِيمُ فَاضْرِبْهَاكَانَ لِكُلِّ فَرِيْقٍ مِنْ أَصْلِ الْهَسْنَلَةِ فِيْهَاصَرَبْنَا نيْ أَمْلُ الْهَسُلَةِ نَهَا حَمَلَ كَانَ نَصِيْبُ ذَٰلِكَ الْقِرِيْفِا

لْهُلِ الْهُسْلَةَ كَنَوْجٍ وَخَهْسِ أَخُواَتٍ لَأَبٍ وَ أَمَّ الْأَرْبَعَةُ أَحُدُهَا أَنْ يَكُونَ الْكُسْرِ عَلَي طَأَنْعَتَيْنِ أَوْ أَكْثَرَ وَلَكِنْ يْنَ اعْدَادِ رُوِّسِهِمْ مَهُا تَلَةً فَالْكُكُمْ فِيهَا أَنْ يَصْرَبَ احَدُ لَّقُدَادِ فِي أَصْلِ الْهَسْئَلَةِ مِثْلُ سِتِّ بَنَاتٍ وَثَلْثِ جَدَّاتٍ تُلَاثَة اَعْهَامٍ واَلثَّانِي أَنْ يَكُونَ بَعْضَ الْأَعْدَادِ نِيْ بَعْضِهِ نَدُ اخِلًا فَالْحَكُمْ فِيهَا أَنْ يَضْرَبَ أَكْتُرُ الْأَعْدَادِ فِي لْلِ الْهَسْنَٰلَةِ كَأَرْبِعَ زَوْجَاتٍ وَ تُلَاثِ جَدَّاتٍ وَ اثْنَي شُرِعَها وَ النَّالِثِ أَنْ يُوانِفَ يَعَضُ الْأَعْدَادِ بَعْضًا فَالْحَكُم هُا أَنْ يُضْرَبَ وَنْقُ أَحَدِ الْأَعْدَادِ فِيْ جَهِيْعِ الثَّانِيُ ثُمَّ بَلَغَ نِيْ وَ نُتِ الثَّالِثِ إِنْ وَانَقَ الْهَبْلَغَ الثَّالِثَ وَإِلاَّ لُبُلُغُ نِيْ جَمِيْعِ الثَّالِثِ ثُمَّ نِي الرَّابِعِ كُذٰلِكَ ثُمَّ يَضُرُبُ

باب التَّصْحِيْحِ

يحتاج فِي تَصْحِيْحِ الْهُسَائِلِ الِّي سَبْعَة أَصُولٍ ثَلَاثَةُ مِنْهَا بَيْنَ السِّهَامِ وَالرُّوسِ وَأَرْبَعَةٌ مِنْهَا بَيْنَ الْرِؤْسِ وَ لَّرَؤْسِ أَلَّا الِثَّالَاثَةُ فَأَحَدُهُ إِنْ كَانَ سِهَامُ كُلِّ فِرِيتُ مُنْقَسِهَةً عَلَيْهِ بِلا كَسْرِ فَلَا حَاجَةَ إِلِيَ الضَّرْبِ كَابُّويْنِ وَبِنْتَيْنِ وَالثَانِيْ هُوَأَنْ ينَكْسِرَعَلَي طَايِغَةًواحِدَةٍ نَصِيْبُهُمْوْلَكِنْ بَيْنَ سِهامِمْ وَ مُرْؤُسِهِمْ مُوَانَعَةً فَيُضْرَبُ وَنْقُ عَكَدِ رُؤْسِ مِنَ أَنْكُسُمْ عَلَيْهِمِ السِّهَامُ فِي أَصْلِ الْهَسْلَةَ وَعَوْلِهَا إِنْ كَانَتْ عَالِمَا كَأَبَوَيْنِ وَعَشِر بَنَاتٍ أَوْنَرُوْجٍ وَ أَبُويَنْ وسَتِّ بِنَاتٍ و اَلتَّالِثُم أَنْ يَنْكُسِرَ سِهَامُهُمْ وَلايَكُونَ بَيْنَ سِهَامِهِمْ وَمْرَوِّسِهِمْ مُوَانَّتُهُ فَيُضْرَبُ حُكِّلٌ عَدَدِ مُرَوِّسٍ مَنِ ٱلْكَسَرَ عَلَيْهِم السِّهَامُ فِيْ

بَدَدَ الْعَادَّلَهُا مُخْرَجُ لِجِرْ الْوِنْفِ وَتَبَايْنَ الْعَدَدَيْنِ اللَّهِ الْعَدَدُينِ الْهَجْتَلِغَيْنِ مَعًا عَدُدُ تَالِثُ أَصَلًا النِّسْعةَمَعَ الْعَشِرَة وَطِرِينَكَ مَعْرِنةِ الْهُوَانَتَةِ وَالْهُبَايَنةِ بَيْنَ بِعِدَارَيْنِ لَهُ خَتَلِغَيْنِ أَنْ يَنْقَصَ مِنَ الْأَكْثِرِ بِإِغْدَارِ تُكِّ مِنَ الْخَالِبِيْنِ مَرَّةً أُوْمِرَارًا حَتَّي اتَّغَغَا نِي دَرَجَةٍ احِدَةٍ فَانِ اتَّفَقَانِيْ وَ احِدِ فِلْا وَنْقُ بُيْنَهُمَّا وَإِنِ اتَّفَعَانِيْ دُهِ فَهُا مُتَّوَا فِقَانِ فِي ذَٰلِكَ الْعَدَدِ فَغِي الْإِتَّنَيْنِ النَّصْفِ وَفِي الثَّلَاثَةِ بِالثِّلْبَ وَفِي ٱلْأَرْبَعَةِ بِالرِّبِعُ هُكَذَا لي الْعَشَرِة وِنَيْهَا و مَراً الْعُشَرَة بِتُوا نَقَانِ بِجُزْ إِلَّعَنْمِي نِيْ حَدَ عَشَرُ بِحُنْءٍ مِنْ أَحَدَ عَشَرَ وَ نِيْ خَبْسَةً عَشَرَ بِجُزْءٍ مِنْ مُسَة عَشَرِ فَاعْتَبِرْ هَدَا

كَامْرَأَةٍ وَأَمِّو أَخْتَيْنِ لِأَبِوامُ وَأَخْتَيْنِ لِلْمِّوابِيُّ مُحْرُودٍ بأَبُ مِعْرِفِةِ التَّهَاثُلِ وَ التَّدَاخُلِ وَ التَّوَانِقِ وَ التَّمَايُنِ بَيْنَ الْعَدَيدِينِ تُهَاثُلُ الْعَدَدَيْنِ كُونَ أَحَدِ هُهَا مُسَاوِيًا لَلْآخَمِ وَ تَدَاَّحُلُ ٱلْعَدَدَيْنِ أَنْ يُعِدِّ أَتَلَّهُمَا ٱلَّا كَتُرَّأَيْ يُغْنِي أَوْنَغُولُ تَكَاخَلُ الْعَكَكَيْنِ هُوَ أَنْ يَكُوْنَ اكَثْرَ الْعَدَدَيْنِ منقسٍ على الأقلِ قِسهة صحيحة أو نقول هوان زيدعلي الْأَتَّكِّ مِثْلُهُ أَوْ أَمْثَالُهُ فَيُسَاوِي الْأَكْتُرَ أَوْنَغُولٌ أَنْ يَكُونَ ٱلْأَتَالَّ جُزْ اَلْأَكْثِر مِثْلً ثَلَاثَةً وتَسْعَةٍ وَتَواَنُقُ الْعَدَدَيْنِ اَنْ لْأَيُعِدُّ أَتَلُهُمَا الْأَكْثَرُولَكِنْ يُعِدُّهُمَا عَدَدُّ ثَالِتٌ كَالثَّهَانِيَّ مَعُ الْعِشْرِيْنَ يُعِدُّهُمَا أَرْبُعَةً نَهُمَا مُتَوَانِعَانٍ بِالرَّبْعِ لَأَنَّ

بَابُ الْعَوْلِ

الْعُولُ أَنْ يَزُادُ عَلَي لَهَخْرَجِ شَيْ مَّنْ أَجْزَنْهُ الْإِا ضَأَتُ المخرج عن فرضٍ إعلم أنَّ مجهوع المُخارِج سِبعة اربعة سِنْهَالَا تَعُولُ وَهِيَ الْإِثْنَانِ وَ الثَّالَاثَةُ وَ الْا رْبَعَةُ وَ الثَّهَانِيَةُ وْتَلْتَةً مِنْهَا قَدْ تَعُولَ أَمَّا السَّنَّةُ قَتَعُولُ الِّي عَشْرِ وِتْراً أَوْشَفْعًا رِ أَمَّا اثْنَي عَشَرَ فَهِيَ تَعُولُ الِّي سَبْعَةَ عَشَرَوِ تُرًّا لاَ شَفْعًا وَأَمَّا أَرْبَعَةً وَعِشْرُونَ فَانِهَا تَعُولُ إِلَي سَبْعَةٍ وَعِشْرِينَ عُولًا وَاحِدًا نِي الْهَسْبَلَةِ ٱلهِنْبَرِيَّةِ وَهِيَ الْرَأَةَ وَ بِنْتَانِ وَ ٱبَوانِ رُ لَايْزَادُ عَلَى هٰذَا إِلَّا عِنْدُ ابْنِ مُسْعُودٍ رَضِيَ اللَّهُ عَنْهُ نَإِنَّ عِنْدَهُ تَعُولُ ٱرْبَعَةً وَعَشْرُوْنَ إِلَي إِحْدَي وَ ثَلْثِينَ فَإِذَا جَآءً نِي الْهَسَايِلِ مِنْ هٰذِهِ الْغُرُوضِ أَحَادُ أَحَادُ فَهُذَرَجِ كُلِّ فَرْضٍ سَبِيَّهُ إِلَّا الِّنصَفُ فَانَّهُ مِنَ الْإِثْنَيْنِ كَالِّرْبُعِ مِنْ أَرْبَعَةٍ وَالتُّهُنُّ مِنْ ثَهْإِنيَةٍ وَ الثُّلُثُ مِنْ ثَلَاثَةٍ وَإِذَا جَاءَ مَثْنَى ٱوْتُلَاثُ وَهُهَا مِنْ نَوْع وَ احِدٍ نَكُلُّ عُدُدٍ يَكُونَ مُخْرَجًا لِجِزْء فَذٰلِكَ الْعَدَدُ أَيْضًا مُخْرَجً لِضِعْفِ ذَٰلِكَ ٱلجُزْرِ وَ لَضِعْفِ ضِعْفِهِ كَالسِّتَّةِ هِيَ مَخْرَجٌ للسُّدسِ وَ لِضِعْفِهِ وَاذَا اخْتَلَطَ النَّصْفَ مِنَ الَّنْوْعِ الْأُوَّلِ بِكُلِّ النَّانِي أَوْ بِبِعَضْهِ نَهُو مَنْ سِنَّةٍ وَ إِذَا اخْتَلَطَ الرِّبْعُ بِكُلِّ الثَّانِي أَوْ ببِعْضِهِ نهَوْمِنْ اثْنِني عَشَرَوَ إِنَّا اخْتَلَطَ النَّهُنَّ بِكُلِّ النَّانِي أَوْ ببِعَضِهِ فهُوْ مَنْ ٱرْبَعَةَوْ عشرين

التَّرِ حُةِ وَالنَّانِي الْأَقْرَبُ فَالاَّ قَرْبُ حُها فَكَرْ نَا فِي الْقَوْمِ الْمُحْجُبُ عِنْدَ نَا وَعِنْدَ ابْنِ مَسْعُونِ الْعَصَبَاتِ وَالْمَحْجُبُ عَنْدَ نَا وَعِنْدَ ابْنِ مَسْعُونِ الْقَصَى اللَّهُ عَنْهُ يَحْجُبُ حَجْبَ النَّقْصَان كَا لَكَا فِر اللَّهَ عَنْهُ يَحْجُبُ حَجْبَ النَّقْصَان كَا لَكَا فِر اللَّهَ عَنْهُ يَحْجُبُ وَالْمَحْجُوبُ يَحْجُبُ بِا لِإِيقَاتِ اللَّهَ عَنْهُ الْإِنْ فَاعِدًا مِنْ أَيِّ جَهَةٍ وَالْأَخُواتِ فَصَاعِدًا مِنْ أَيِّ جَهَةٍ كَانَانَا فِي اللَّهُ مِنَ الْإِنْ مَعَ الْأَبِ لَكِنْ يَحْجَبَانِ الْأَمْ مِنَ اللَّهُ مِنَ اللَّهُ مِنَ اللَّهُ مِنَ اللَّهُ مِنَ اللَّهُ مِنَ اللَّهُ مِنَ اللَّهِ اللَّهِ لَكِنْ يَحْجَبَانِ الْأَمْ مِنَ اللَّهُ الللَّهُ اللَّه

باُبُ مُخَارِجِ الْغُرُ وضِ

اَعِلَمْ أَنَّ الْغُرُوْضَ السِّنَّةَ الْهَد كُورَةَ فِي حِنا بِاللَّهِ اللَّهِ اللَّهِ النَّهِ أَنَّ الْغُرُونَ وَ الْغُرِينَ وَ النَّالِي اللَّهِ وَ النَّهُ فَ وَ النَّالِي النَّالِي النَّالِي النَّالُينِ وَ النَّالِي النَّلُكُ وَ النَّالُينِ وَ النَّلُنُ وَ النَّلُونِ وَ النَّوْلُ اللَّهُ وَ السِّدِينِ اللَّهُ اللَّهُ وَ النَّهُ النَّهُ وَ النَّهُ وَاللَّهُ وَ النَّهُ النَّهُ وَ النَّهُ وَ النَّهُ وَ النَّهُ وَ النَّهُ وَ النَّالُونَ وَ النَّالُونُ وَ النَّالُونُ وَ النَّهُ وَاللَّهُ وَاللَّهُ النَّالُونُ وَ النَّالُونُ وَ النَّالُونِ وَ النَّالُونُ وَ النَّالَالْمُ الْمُؤْمِنُ الْمُنْ الْمُؤْمِنُ الْمُؤْمِنُ الْمُؤْمِنِ النَّالَ الْمُؤْمِنُ النَّالَةُ الْمُؤْمِنُ الْمُؤْمِنُ الْمُؤْمِنُ النَّالِيْمُ الْمُؤْمِنُ الْمُؤْمِنُ الْمُؤْمِنُ الْمُؤْمِنِ الْمُؤْمِنُ الْمُؤْمِنُ النَّالِيْمُ الْمُؤْمِنُ الْمُؤْمِنُ الْمُؤْمِنُ النَّالِمُ الْمُؤْمِنُ الْمُؤْمِنُ الْمُؤْمِنُ السُوالِيَالِمُ الْمُؤْمِنُ الْمُؤْمِنُ الْمُؤْمِنُ السِلْمُؤْمِنُ الْمُؤْمِنُ النَّالِمُ الْمُؤْمِنُ الْم

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باَبُ الحَجُبِ

أَكْجُب عَلَى نَوْعَيْنِ حَجْب نَعْصَانٍ وَهُوَحُجَبُ عَنْ الْ إِلَى سُهْمٍ وَذَٰلِكَ لِخَهْسَةِ نَغِر لِلزَّوْجَيْنِ وَٱلْأَمِّ وَبِنْتِ ٱلْأَبْرِ وَالْمَحْثُ لَأْبٍ وَتَدْ مَرَّبَياً نَهُ وَحَجْبُ حُرِمانٍ وَالُورَثَةُ فِهِ وَالْأَبُ وَالَّزِوْجُ وَالْبِنْتُ وَالْأُمِّ وَالزَّوْجَةُ وَفَرِيتُ بَرِثُوْ مِحالٍ وَيُحْجَبُونَ بِحَالٍ وَهٰذا مَبنُزِيٌّ عَلَي أَمْلَيْنِ أَهَا هَهًا هُوَانَ كُلَّ مَنْ يَدُلِي إِلَي الْمَيِّتِ بِشَخْصٍ لاَيْرِكُ مَا وُجُودِ ذَٰلَكَ الشَّخْصِ كَابْنِ الْإِبْنِ مَعَ الْإِبنِ سِوَلَمْ ٱوْلادالْأَمْ فَانَّهُمْ يَرِثُونَ مَعَهَا لِإنْعِدَامِ اسْتَكْعًا تَهَا جَمِيْنَا

إِلْكُتُكَ مَنْ اَعْتَغْنَ اوْكَا تُبْنَ أَوْكَا تِبَ مَنْ كَا تَبْنَ لْوُنَرْنَ اَوْدَبَّرَ مَنْ دَبَّرْنَ أَوْجَرَّوَلَا مَعْتَقْهِنَّ وَلَوْتَرَكَ أَبِا الْمُعْتِتِ وَابَنهُ سُدُسُ الوَلاَ لِلْأَبِ وَالْبَا قِي لِلْإِبْنِ اعِنْدَ هُمَا كُلُّهُ لِلْإِ بْنِ وَلَوْتَرَكَ ابْنَ الْهُعَنِّقِ وَجَدَّهُ إِلْوَلاَ أَنْكُمُ لِلْإِ بْنِ بِالْإِنِّعَاتِ وَمَنْ مَلَكَ ذَارَحِمٍ مَحْرَمُ اللهُ عَتَقَ عَلَيْهِ وَيِكُونَ وَلا أَهُ لَهُ كَثَلَاثِ بَنَاتٍ لِلصِّغْرَي شُرُوْنَ دِيْنَارًا وَلِلْكُبْرَي ثَلَا ثُوْنَ دِيْنَارًا فَاشْتَرَتَا أَبَا هُهَا لِّكُهُسِيْنَ ثُمَّمَاتَ الْأَبِّ وَتَرَكَ شَيْئًا مِنَ الْهَالِ فَالثَّلْقَانِ أُنَّهُنَّ أَثُلَاثًا بِالْغَرْضِ وَالْبَاقِيْ بَيْنَ مُشْتَرَتَي ِ ٱلَّابِ فْهَا سَا ثَلَا ثُنَّةً أَخْهَاسٍ للْكُبْرَي وَخُهْسَاهُ للصِّغْرَي، نُفِرِّ مِنْ خَيْسَةِ وَأَرْ بَعِيْنَ

الحُكْمُ فِي أَعْهَامِ الْهِيْتِ ثُمَّ فِي أَعْهَامِ أَبِيْهُ ثُمَّ فِي أَعْهَا جَدِّهِ أَمَّاالْعَصَبَةُ بِغَيْرِهِ فَأَرْ بَعْ مِنَ النِّسُوةِ وَهُنَّ الَّلَا تِهِ فَرْضُهُنَّ النَّصِٰفُ وَالثَّلْثَانِ يَصِرْنَ عَصَبَةً بِإِخُو تِهِ حَكَمُ ا ذُكُرُ نَا فِي حَالَاتِهِنَّ وَ مَنْ لَأَفْرْضَ لَهَا مِنَ الْإِنَارَ وَأَخُوْهَا عَصَبَةً لَاتَصِيْرُ عَصَبَةً بِأَ خِيْهَا كَا لُعَمِّ وَالْعَبَّ وَأَمَّاالْعَصَبَةُ مَعَغَيْرِهِ نَكُلُّ أَنْثَي تَصِيْرٌ عَصَبَهً مَعَ أَنْثَى أَخْرَي كَالْأَخْتِ مَعَ الْبِنْتِ كَهَاكَ كَرْناوَأَخِرِ ٱلْعَصَبَادِ مَوْلَي الْعِتَا قَةِ ثُمَّ عَصَبَتُهُ عَلَي التَّرْتِيْبِ الَّذِيْ ذَكُرْ لَعَوْلِهِ عَلَيْهِ الصَّلُوةَ وَالسَّلَامُ الْوَلَا لَكُهُمَّةٌ كُلُحَهَةِ النَّسَمِ وَلِلْشَيُّ لِلْإِ نَاثِ مِنْ وَرَثَةِ الْهُعْتِقِ لِعَوْ لِهِ عَلَيْهِ الصَّاهِ وَالَّسَلَامُ لَيْسَ للِنَّسَاءِ مِنَ الْوَ لَا ۚ شَيٌّ الَّإَ مَا اعْتَثْمُ

وأصله وجز أبيهِ وجز جَدٍّهِ الأقرب فالأقرب ير جَحون بِتُرْبِالدَّ زَجَةِ أَعْنِي بِهِ ٱوْلاَهُمْ بِا لَإِيْراَثِ جُزْرٌ الْهَيِّثِ أَيْ البَنُوْنَ ثُمَّ بَنُوْهُمْ وَانْ سَعَلُوا ثُمَّ آصُلُهُ آيِ الْأَبِثُمَّ الْجُدُّ أَبِ الْأَبِ وَانْ عَلَا ثُمَّ جُزْ أَبِيْدِ أَي اللَّا نُحَوِّ ثُمَّ بَنُوْ هُمْ وْإَنْ سَغَلُواْ ثُمَّجُزُ مُجَدِّهِ اي الْأَعْهَامِ ثُمَّ بَنُوْهُمْ وَانْ سَ**غَلُواْ** لَّمُ يُوَجَّحُوْنَ بِقُوَّةِ الْقَرَا بَةِ أَعْنِي بِهِ ذَالْقَرَا بَتَيْنِ أُولِي مِنْ ذِيْ تَرَا بِهَ وَاحِدَةٍ ذَكُرًا كَانَ أَوْأُ نَثْنِي لِتَوْلِهِ فَلَيهُ السَّلَامُ انَّ أَعْيَانَ بَنِي الْأَبِ وَالْآمِّ يَتُواَرَ ثُوْنَ دُوْنَ إِنِّي الْعَلَّاتِ كَالَّاحِ لِلَّابِ وَأَمِّ أَوْلَي مِنَ ٱللَّهَ لِلَّابِ وَٱللَّهُتُّ إِبِوَأَمْ إِذَاصَارَتْ عَصَبَةً مَعَ الْبِنْتِ آوْ لَي مِنَ الْأَمِلَابِ إِنْ الْأَنِ الْأَنِ وَأَمِّ أَوْلَي مِنَ ابْنِ الْأَخِلَابِ وَكَادَلِكَ

انْصاً فا بِإِ عُتِبارِ الْأَبْدَانِ وعِنْدَ مُحَمَّدٍ مَحْمَةُ اللهِ عَلَيْهِ

أَثْلَاثَابِا عُتبارِ الْجِهاَّتِ

بأب العُصَبات

الْعُصْبَاتُ النَّسَبِيَّةُ ثَلَا ثَةً عَصَبَةٌ بِنَغْسِهِ وَ عَصَبَةٌ بِغَيْرُوْ وَ عَصَبَةٌ مَعَ عَيْرُهِ أَمَّاالعُصَبَةُ بِنَغْسِهِ فَكُلِّ دُيَرِ لاَيَدُ خُلُّ فِيْ نِسْبِيْهِ إِلَى الْهِيَّ أَنْثَى وَهْيَ أَرْبَعَةُ اطَّنَاف خِيْرُ الهِيَّةِ

اِبُويِنِ أُورُوجَةً وَابُويِنِ وَلُوكَانَ مَكَانَ الْأَبِ جَدٌّ فَلْلًّا مّ لَّهُ جَهِيعُ الْهَالِ الْإَعِنْدَائِي يُوسِفَ رِحَهُ اللَّهُ فَإِنَّ لَهَا يُفا ثلث الباتِي وَلَلْجَدَّةِ السَّدِ سَ لِأَمِّ كَانَتَ اوْلَابِ الحِدَةً كَانَتَ اوَاكْتَرَ اذا كُنَّ ثَابِتَاتٍ مُتَكَانِياتٍ لَى الدَّرَ جَةِ وَيَشْغُطُنَ كُلُّهَتَّ بِالْأَمِّ وَالْأَبِو يَّاتَ اَيْضًا اللَّبِ وَكَذٰلِكَ بِالْجَدَّالِاَّامُ اللَّابِ وَإِنْ عَلَتْ فَانَّهَا تَرَثُ لَعُ الْجَدَّلْأَنَّهَا لَيْسَتْ مِنْ قِبلِهِ وَالْجَدَّةِ الْقُرْبِي مِنْ أَرِّيَ جِهِ كَانَت تَحجب الْجَدَّة البعدي مِن أي جِهٍ الله و أَبرْتَهُ كَانْتِ الْعَرْبِي أُوسِحَجُوبِةً وَاذَا كَانْتِ الْجَدَّةُ ذَاتَ قَرَانَةً وَاحَدَةِ كَأُمِّ أُمَّالًا بُ وَالْا خُرَي ذَاتَ نُر ابْنَيْن اوْاكْثَرَ كَأَمَّالْمَ الْأُمِّ وهَى أَيْضًا أُمَّ أَب الأَب هٰذه الصُّوُّ رَةَ

لِأَبِ وَإِمَّ وَلَهُنَّ السَّدُ سُ مَعَ ٱلَّا خُتِ لَا إِنَّ أَكُمِنَّا لِلثَّلْثَيْنِ وَلَايِرِ ثُنَ مَعَ اللَّا خُتَيْنِلَّابٍ و إِمْ ٓ اللَّالَّانُ يَكُونُ مُعَهِنَّ أَخَّ لِأَبٍّ فَيُعَصِّبهِنَّ وَيكُونَ الْباَتِيْ بَيْنَهُنَّ لِللَّاكِم مِثْلُ حَظِّالْأَنْتُيَيْنِ و السَّا دِسِمَّأَنَ يصَرْنَ عَصِبَةً مَعَ البُّنَاتِ أَوْ مَعَ بَنَاتِ الْإِبْنِ لِهَا ذَكَرْ نا وبَنَوُ الْأَعْيَانِ وَبَنُو الْعَلَّةِ كَلَّهُمْ يَشْقُظُوْنَ بِالْإِبْنِ وَابْنِ الْإِبْنِ وَانْ سَغَلَ وَبِالْأَبِ بِالْإِنَّفَاقِ وَبِالْجَدِّ عَنْدَأَبِي حَنْيُغَةَ رَحَهُ الله تَعَالَي وَيَشْقُطُ بِنُو الْعَلَاَّتِ اَيْضًا بِالْأَحِ لَأَبٍ وَأُمِّو اَمَّا لِلْأَمْ فَأَحُوالُ تُلَاتُ السُّدُسُ مَعَ الْولَدِ أُووْلَدِ الْإِبْنِ وِأَنْ سَغَلَ أُومَعُ الْإِ ثْنَيْنِ مِنَ الْإِخْوَةِ وَالْأَخَوَاتِ فَصَاعِدًا مِنْ أَيّ جِهَةٍ كَا وَثُلَثُ الْكُلِّ عِنْدَ عَدَمِ هُولاءِ الْهُذَكُورِينَ وَثَلْتُ مَابِقِي بَعْدنَوَ ضِ أَحَدِ الَّرِوْجَيْنِ وَذِلكَ نِيْ مَسْنلَتَيْنِ زَوْجُ

لَا وَ لِ ٱلنَّصْفُ وَلِلُو سُطَي مِنَ الْعَرِيقُ الْاُولِّ مَّعَ لَنْ يُوَ ازْ يُهَا السُّدُسُ تَكْمِلَةً لِلثِّلْتُلْثَيْنِ وَ لَا شُيِّ للسِّغْلَيَّا تِ اَصْلِاًالْآانْ يَكُوْنَ مَعَهُنَّ غَلَامٌ فَيُعَصِّبُهِنَّ أَنْ كَانْتُ إِحَذَا يِدٍ وَ مَنْ كَانْتُ فَوْقَهُ لِهَنْ لَمْيَكُنْ لَمْيَكُنْ لَهُ تَ شَهْمٍ وَ يَسْقُطُ مَنْ دُوْ نَهُ وَ أَمَّالِلْأَ خُوَاتِ لَابٍ وَأَمَّ الْحُوَالُ خَهْسُ ٱلنِّصْفُ للْوَاحِدَةِ وَالثَّلْقَانِ لِلْإِ ثَنَيْنِ اللَّهُ عَمَّا لَا خِلَامِ لَأَبٍ وَ إِمَّ لَلذَّ كَرِمِثُلَ خَطَّاللَّا نُثَيَيْنِ لَيُهْرِنَ بِهِ عَصَبَةً لِاسْتُوا مُهُم نِي الْقُرَا بِلَهُ إِلَى الْهُيِّتِ زُلْهَن الْبَاقِيْ مَعَ الْبَنَاتِ أُوبْنَاتِ الْإِبنِ لِقَوْلِهِ عَلَيْهِ الصَّلْوَةُ رُ السَّلَامُ إِجْعَلُوا الْأَخَوَاتِ مَعَ البُّنَاتِ عَصَبَةً و الْأَخَوَاتُ لْإِبٍ كَالْأَ خَوَاتِ لِأَبِواْمٍ وَ لَهُنَّ أَحْوَالٌ سَبْعُ النِّصْعَ النِّصْعَ لِلْوَاحِدَةِ وَ التَّلْقَانِ لِلْإِ تُنَيِّنِ فَصَا عِدًا عِنْدَ عَدَمِ ٱللَّهَ خَوَاتِ

اِبْنَ بِنْتُ اِبْنِ اَبْ ابْنَّ بِنْتُ إَبْنَ بِنْتُ قَنْبِ نُنْتُ اِبْنَ بِنْتُ اَبْنَ بِنْتُ ٱلْعُلْيَا مِنَ ٱلْعَرِيْتِ ٱللا وَ للليواز يَهَا آحَدُ وَالْوُسْطَيِ مِنَ الْغَرِيثِ الْأُوَّلِ تُوَازِيهَا الْعُلْيَامِنَ الْغَرِيثِ الثَّانِي الثَّانِي وَ السَّغْلَي مِنَ الْغَرِيَّ الْلَا وَ لِ تُوَا زِيْهَا ٱلُو سُطَى مِنَ الْغَرِيْتِ الثَّانِيُ وَ الْعُلْيَا مِنَ الْغَرِيْتُ الثَّالِدِ وَالسَّغْلَي مِنَ الْغَرِيتُ الثَّانِي تُوا زِيْهَا الْوَسْطَي مِنَ الْغَرِيْفِ الثَّالِثِ والشَّغُلي مِنَ الْغَرِيثُ الثَّالِثِ لَايُوَ ازِيْهَا أَحَدُ اذِاعَرَ نُتَهْذَا فَنَغُولَ لِلْعُلْيَا مِنَ الْغُرِيثُ

عَبَنَاتِ الصَّلْبِ وَلَهُنَّ أَخُوالٌ سِتُّ النِّضُغُ لِلْوَا حِدَةِ التُّلْتَانِ لُلْاَثَنْيِنِ نَصًا عِدًا عِنْدَ عَدَم بَنَا تِ الصَّلْب لِهُنَّ السَّدُسُ مَعَ ٱلواحِدَةِ الصَّلْبِيَّةِ تَكُمِلَةً لِلتَّلْتُلْثَيْنِ لْأِيرِثْنَ مَعَ الصَّلِبَيْتَينِ الَّإِانَ يَكُونَ بِحِذَابُهِنَّ أُواسْغَلَ نَهُنَّ غُلَامٌ فَيُعَصِّبُهِنَّ وَ الْبَا فِي بَيْنَهُنَّ لِلذَّ كُرِمِثُلُ عِظَالْأَنْتُيَيْنِ وَيَسْتُطُنَ كُلَّهِنَّ بِالْإِبْنِ وَلَوْتَرَكَ ثَلْثَ إِنَاتِ ابْنِي بَعْضُهُنَّ اَسْغَلُ مِنْ بِعَضٍ وَثَلَا ثَ بِنَاتِ ابْنِ أَنْ اَخُر بَعْضُهِنَّ أَسْغَلْ مِنْ بَعْضٍ وَ ثَلَا تَ بِناتِ أَبِي إِنْ ابْنِ آخَر بَعْضُهُنَّ أَسْفَلَ مِنْ بِعَضْ بَهِذَهِ الصَّوْرَة وتُسَمَّى مسَنَلَة التَّشْبيب مربية المرينة النفرية والغرية والغريثة الثّالث الله والغريثة الثّالث المريثة اِپْنَ اِبْنَ

لِلزَّوْ جَاتِ حَالَتَانِ الرَّبُعُ لِلْوَاحِدَةِ فَصَاعِدًا غُنَد عَلَهُ الْوَلَهِ وَ لَدَالْابِنِ وَإِنْ سَغَلَ وَ الثَّهْنُ مَعَ الْوَلَهِ أُووَلِدَالْإِبِنِ وَإِنْ سَغَلَ وَالثَّهْنُ مَعَ الْوَلَهِ أُووَلِدَالْإِبِنِ وَإِنْ سَغَلَ وَأَمَّالِبَنَاتِ الصَّلْبِ فَأَحْوَالُ تَلَهُ أُووَلِدَالْإِبِنِ وَإِنْ سَغَلَ وَأَمَّالِبَنَاتِ الصَّلْبِ فَأَحُوالُ تَلَهُ الْإِنْمَانُ اللَّهُ اللَّهُ اللَّهُ الْمَا اللَّهُ الْمُؤْمِنُ اللَّهُ الْمُؤْمِنِ اللَّهُ اللْمُؤْمِنِ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ الْمُؤْمِنِ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللْمُومُ اللْمُؤْمِنِ اللْمُؤْمِنِ الللْمُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللَّهُ اللْمُؤْمِنِ الللَّهُ اللَّهُ اللْمُؤْمِنِ اللْمُؤْمُ اللَّهُ اللْمُؤْمُ اللْمُؤْمُ اللَّهُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللَّهُ اللَّهُ الللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللَّهُ اللْمُؤْمُ اللْمُؤْمُ اللَّهُ الللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ الللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ اللْمُؤْمُ ال

الرا اربعة مِن الرجالِ وهم الأب والجدا الصّحيم وَٰإِنْ عَلَا وَٱلَّا خِلِّمَّوَالزَّرُوجُ وَتُهَان مِنَ النِّسَآءِ وُهُنَّ الزُّوْجَةُ وْالْبِنْتُ وَبِنْتُ الْإِبْنِ وَإِنْ سَغَلَتْ وَالْأَخْتُ لَاب وَامّ والاخت لأب والأخت لأموالام والجدة الشحيحة أُهِيَالَّتِي لَايَكُنُّ فَي نَسْبَتَهَا الِّيالُهِيَّت جَدُّّهُ فَاسْدُ مُّالِلاً بِ فَاحُوالٌ ثَلْتُ أَلْفَرْضُ الْهِطْلَقُ وَهُو السِّدُسُ وُلْكَ مُعَالَابِنَ اوَابِنَ الْأَبِنَ وَإِنْ سَغَلَ وَالغُرَضَ والتَّعْصِيْبُ مَعًاوَ لَكَ مَعَ الْإِبْنَةَ أُوابُنَة الْإِبن وَإِنْ سَغَلَتْ التعصيب المحض وَذَلَكَ عَنْدَعَدُم الْوَلَدَوَوَلَد الْإِبْن إِن سَعْلَ وَالْجَدَّ الصَّحِيْجِ كَالْأَبِ الَّا فِي أَرْبَعِ مَسَايَلِ سُنْذُ كُرِهَا إِنْشَاءَاللَّهُ تَعَالِي وَيَسْقَطَالِجَدُّ بِالْأَبِ اللَّبُ أَصْلٌ فِي تَرابَةُ لَجَدَّالِيَ الْهَيِّتِ وَأَمَّالِأُولَادِالْمِ

مُورًا عَلَى اتْرَارِهِ ثُمَّ ٱلْهُوْمَى لِمُبِجَهِمِعُ الْهَالِ ثُمَّ بَيْتُ الْهَالِ فَصْلُ فِي الْهُوا نِعِ مِنَ الْأُرِثُ ٱلْهَانِعُ مِنَ الْإِرْثِ ٱرْبَعَةُ الرِقِّ وَافِراً كَانَ أَوْنَاتِصًا وَالْقَتْلُ الَّذِيْ يَتَعَلَّتُ بِهِ وَجُوبُ الْقَصَاصِ اوِّ النَّكَفَّارَةِ وَاخْتِلَانُ الدِّيْنَيْنِ وَاْحْتِلانُ الدَّارَيْنِ الْمِلَّحِيْنَةً كَالْحُرْبِي وَالذِّمِيِّ أُوْحَكُمًا كَالْهُشَّا مَنِ وَالدِّ مِيِّ أُوالْحُرْ بِيِّينٍ مِنْ دَارَيَنِ مُخْتَلَغَيْن واَلَّهُ أَرِا نَّهَا تَخْتَلَف بِاخْتِلَا فِ الْهُنْعَةِ وَٱلْهِلَكَ لِانْقَطَاعِ الْعَصْهَةِ فَيْهَا بَيْنَهُمْ بأَبُ مَعْمِ نَهُ الْغُرِ وَ ضِ وَ مُسْتَحَقَّيْهَا ۗ ٱلْغُرُوْضُ الْهُقَدَّرَةُ فِيْ كَتَابِ اللَّهَ تَعَالَي سِّنَّةُ النِّصْفُ وَالرَّبُعُ وَالثُّهُنُّ وَالثُّلْثَانِ وَالَّثِلُثُ وَالُّسُسُ عَلَي التَّصْعِيفُ وَالتَّنْصِيْف وَأَصْحَابُ هٰذِ السِّهَامِ اثْنَيَ عَشَر

تُكْنَيْنه بِالْتَبْذِيرِ وَلَاتَغْتِيرِ ثُمَّ يَغْضِي دَيُونه مِنْ بَهِيْع مَابَعَيَ مِنْ مَالِهِ ثُمَّ تُنْغَذُ وَصَايَا اللهِ مِنْ ثُلْث مَا بَقِيَ بَعْدَالدَّيْنِ ثُمَّ يُغْسَمُ البَّاتِّي بَيْنَ وَرَثَتُه الْكِتَابِ وَالسَّنَةِ وَ ا جَهَاعِ الْأُمَّةِ فَيبِدَاءِ بِأَصْحَابِ لْنَرَايِضِ وَهُمُ الَّذِيْنَ لَهُمْ سَهَامٌ مُقَدَّرَةً فِي كَتَاب اللَّهِ تَعَالَي ثُمَّ بِالْعَصَبَاتِ مِنْ جَبِهَ النَّسَبِ وَالْعَصَبَةُ كُلُّ مَنْ يَأْخُذُ مِنَ التَّر كَة مَا أَبْقَتُهُ أَصْحاب الْغَرُ ايض وْ عَنْدَالْإِنْغُرَاد يَحُرُز جَهِيْعَ أَلْهَال ثُمَّ بِالْعَصَبَة مِنْ حَهُ السَّبَبِ وَهُوَمَوْلَي الْعِتَاتَةِ ثُمَّ عُصَبَتُهُ ثُمَّ الرَّكَّةِ عَلَي ذَوي الْغُرُونُ النَّسَبِيَّةِ بِعَدْرِ حُقُوْتِهُم تُمَّ دُوي لْأَرْحَامِ ثُمَّ مَوْلَي الْهُوَ الْأَة ثُمَّ الْهُقَرِّ لَهُ بِالنَّسَبِ عَلَي الْغَيدُ بِعَيْثُ لَمْ يَثْبَتْ نَسَبُهُ مِنْ ذَلِكَ الْعَيْرِ إِذَا مَاتَ الْهُفَرِّ

بياسالها

الْحَهْدُ لِلّٰهِ رَبِّ الْعُلَمِيْنَ حَهْدَ الشَّا كِرِيْنَ وَالصَّلُو السَّا كِرِيْنَ وَالصَّلُو عَلَيْ مَسُولُ اللَّهُ عَلَيْهِ وَسَلَّمَ تَعَلَّمُ وَالْهِ الطَّيِّبِيْنَ قَالَ مَسُولُ اللَّهُ عَلَيْهِ وَسَلَّمَ تَعَلَّمُ وَالْفَرايِضَ وَعَلِّهُ وَهَاالنَّا اللهُ عَلَيْهُ وَسَلَّمَ تَعَلَّمُ وَالْفَرايِضَ وَعَلِّهُ وَهَاالنَّا اللهُ عَلَيْهُ وَسَلَّمَ تَعَلَّمُ وَالْفَرايِضَ وَعَلِّهُ وَهَاالنَّا اللهُ عَلَيْهُ وَسَلَّمَ تَعَلَّمُ وَالْفَرايِضَ وَعَلِّهُ وَهَاالنَّا اللهُ يَتَعَلَّهُ فَانَّهَا نَصْعَ الْعَلْمِ قَالَ عُلَهَ أَوْنَا رَجَهِمُ اللّهُ يَتَعَلَّهُ فَاللّهُ يَتَعَلَّهُ وَاللّهُ يَتَعَلّقُهُ الْمَا لَيْهُ اللّهُ يَتَعَلّقُهُ اللّهُ اللّهُ اللّهُ يَتَعَلَّهُ وَاللّهُ اللّهُ الللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ اللّهُ الللّهُ اللللّهُ الللّهُ الللّهُ ا

VOL. VI.

A

ESSAY

03

THE LAW OF BAILMENTS.

In tutelis, societatibus, fiduciis, mandalis, rebus emptis-venditis, conductis-locatis, quibus vitæ societas continetur, magni est judicis statuere (præsertim
cùm in plerisque sint judicia contraria), quid quemque cuique præstare
oporteat.

Q. Schvola, apud Cic. de Offic. lib. III.

ESSAY

ON

THE LAW OF BAILMENTS.

HAVING lately had occasion to examine with fome attention the nature and properties of that contract, which lawyers call BAILMENT, or, A delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose, for which they were bailed, shall be answered, I could not but observe with furprise, that a title in our ENGLISH law, which feems the most generally interesting, should be the least generally understood, and the least precifely ascertained. Hundreds and thousands of men pass through life, without knowing, or caring to know, any of the numberless niceties, which attend our abstruse, though elegant, fystem of real property, and without being at all acquainted with that exquisite logick, on

which our rules of special pleading are founded; but there is hardly a man of any age or station, who does not every week and almost every day contract the obligations or acquire the rights of a birer or a letter to bire, of a borrower or a lender, of a depositary or a person depositing, of a commissioner or an employer, of a receiver or a giver, in pledge; and what can be more abfurd, as well as more dangerous, than frequently to be bound by duties, without knowing the nature or extent of them, and to enjoy rights, of which we have no just idea? Nor must it ever be forgotten, that the contracts above-mentioned are among the principal fprings and wheels of civil fociety; that, if a want of mutual confidence, or any other cause, were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces: prefervé them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable. It feems therefore aftonishing, that so important a branch of jurisprudence should have been so long and fo strangely unfettled in a great commercial country; and that, from the reign of ELIZABETH to the reign of ANNE, the doctrine of bailments should have produced more contradictions and confusion, more diversity of opinion and inconfistency of argument, than any

other part, perhaps, of juridical learning; at least, than any other part equally simple.

Such being the case, I could not help imagining, that a short and perspicuous discussion of this title, an exposition of all our ancient and modern decisions concerning it, an attempt to reconcile judgments apparently discordant, and to illustrate our laws by a comparison of them with those of other nations, together with an investigation of their true spirit and reason, would not be wholly unacceptable to the student of English law; especially as our excellent BLACKSTONE, who of all men was best able to throw the clearest light on this, as on every other, subject, has comprised the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may fafely pronounce the least satisfactory part of it; for he represents lending and letting to bire, which are bailments by his own definition, as contracts of a distinct species; he says nothing of employment by commission; he introduces the doctrine of a distress, which has an analogy to a pawn, but is not properly bailed; and, on the great question of responsibility for neglect, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words*. His commentaries are

^{* 2.} Comm. 452, 453, 454.

the most correct and beautiful outline, that ever was exhibited of any human science; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly foever it may be delineated, will make a geographer: if, indeed, all the titles, which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, Englishmen might hope at length to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work, which every lover of humanity and peace must anxioufly wish to see accomplished. The following effay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether defigned or involuntary, in the Commentaries on the Laws of ENGLAND.

I propose to begin with treating the subject analytically, and, having traced every part of it up to the first principles of natural reason, shall proceed bistorically, to show with what perfect harmony those principles are recognised and established by other nations, especially the ROMANS, as well as by our English courts, when their decisions are properly understood and clearly distinguished; after which I shall resume synthetically the whole learning of bailments, and expound such rules, as, in my humble appre-

hension, will prevent any farther perplexity on this interesting title, except in cases very peculiarly circumstanced.

From the obligation, contained in the definition of bailment, to restore the thing bailed at a certain time, it follows, that the bailee must keep it, and be responsible to the bailor, if it be lost or damaged; but, as the bounds of justice would in most cases be transgressed, if he were made answerable for the loss of it without bis fault, he can only be obliged to keep it with a degree of care proportioned to the nature of the bailment; and the investigation of this degree in every particular contract is the problem, which involves the principal difficulty.

There are infinite shades of care or diligence from the slightest momentary thought, or transient glance of attention, to the most vigilant anxiety and solicitude; but extremes in this case, as in most others, are inapplicable to practice: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care, which the greatest miser takes of his treasure, from every man, who borrows a book or a seal. The degrees then of care, for which we are seeking, must lie somewhere between these extremes;

and, by observing the different manners and characters of men, we may find a certain standard, which will greatly facilitate our inquiry; for, although fome are excessively careless, and others excessively vigilant, and some through life, others only at particular times, yet we may perceive, that the generality of rational men use nearly the same degree of diligence in the conduct of their own affairs; and this care, therefore, which every person of common prudence and capable of governing a family takes of bis own concerns, is a proper measure of that, which would uniformly be required in performing every contract, if there were not strong reasons for exacting in some of them a greater, and permitting in others a less, degree of attention. Here then we may fix a constant determinate point, on each fide of which there is a feries confifting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the cafe admits of indulgence or demands rigour: if the construction be favourable, a degree of care less than the standard will be sufficient; if rigorous, a degree more will be required; and, in the first case, the measure will be that care, which every man of common fense, though absent and inattentive, applies to his own affairs; in the fecond, the measure will be that

attention, which a man remarkably exact and thoughtful gives to the securing of his personal property.

The fixed mode or standard of diligence I shall (for want of an apter epithet) invariably call Ordinary; although that word is equivocal, and sometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried use of the word in one sense will prevent the least obscurity. The degrees on each side of the standard, being indeterminate, need not be distinguished by any precise denomination: the first may be called Less, and the second, MORE, THAN ORDINARY diligence.

Superlatives are exactly true in mathematicks; they approach to truth in abstract morality; but in practice and actual life they are commonly salse: they are often, indeed, used for mere intensives, as the Most diligent for very diligent; but this is a rhetorical figure; and, as rhetorick, like her sister poetry, delights in siction, her language ought never to be adopted in sober investigations of truth: for this reason I would reject from the present inquiry all such expressions as the utmost care, all possible, or all imaginable, diligence, and the like, which have been the cause of many errors in the code of ancient ROME, whence, as it will soon be demonstrated,

they have been introduced into our books even of high authority.

Just in the same manner, there are infinite shades of default or neglect, from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity: these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus the omission of that care, which every prudent man takes of his own property, is the determinate point of negligence, on each fide of which is a feries of variable modes of default infinitely diminishing, in proportion as their opposite modes of care infinitely. increase; for the want of extremely great care is an extremely little fault, and the want of the flightest attention is so considerable a fault, that it almost changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of trust-and a deviation from common honesty. This known, or fixed, point of negligence is therefore a mean between fraud and accident; and, as the increasing series continually approaches to the first extreme, without ever becoming precisely equal to it, until the last term melts into it or vanishes, so the decreasing feries continually approximates to the fecond extreme, and at length becomes nearer to it than any affignable difference: but the last terms being, as before, excluded, we must look within them for modes applicable to practice; and these we shall find to be the omissions of such care as a man of common sense, bowever inattentive, and of such as a very cautious and vigilant man, respectively take of their own possessions.

The constant, or fixed, mode of default I likewise call ORDINARY, not meaning by that epithet to diminish the culpability of it, but wanting a more apposite word, and intending to use this word uniformly in the same sense: of the two variable modes the first may be called GREATER, and the second, Less, THAN ORDINARY, or the first GROSS, and the other, SLIGHT neglect.

It is obvious, that a bailee of common honesty, if he also have common prudence, would not be more negligent than ordinary in keeping the thing bailed: such negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not less obvious, though less pertinent to the subject, that infinite degrees of fraud may be conceived increasing in a series from the term where gross nëglect ends, to a term, where positive crime begins; as crimes likewise proceed gradually from the lightest to the most atrocious; and, in the same manner, there are infinite degrees of accident from the limit of extremely slight ne-

glect to a force irreststible by any human power. Law, as a practical science, cannot take notice of melting lines, nice discriminations, and evanescent quantities; but it does not follow, that neglect, deceit, and accident, are to be considered as indivisible points, and that no degrees whatever on either side of the standard are admissible in legal disquisitions.

Having discovered the several modes of diligence, which may justly be demanded of contracting parties, let us inquire in what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them.

When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance; and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than ordinary diligence, and the bailee should be responsible for no more than ordinary neglect; but it is very different, both in reason and policy, when one only of the contracting parties derives advantage from the contract.

If the bailor only receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than good faith were exacted from such a person, that is, if he were to be made answerable for less than gross neglect, sew men after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.

On the other hand, when the bailee alone is benefited or accommodated by his contract, it is not only reasonable, that he, who receives the benefit, should bear the burden, but, if he were not obliged to be more than ordinarily careful, and bound to answer even for slight neglect, sew men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the mere advantage of another, and much convenience would consequently be lost in civil society.

This distinction is conformable not only to natural reason, but also, by a fair presumption, to the intention of the parties, which constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is expressed, the rule (as in devises) yields to it; and a bailee without benefit may, by a special undertaking, make himself liable for ordinary, or slight, neglect, or even for inevitable accident: hence, as an agreement, that a man may safely be dishonest, is repugnant to decency and morality, and, as no

man shall be presumed to bind himself against irresistible force, it is a just rule, that every bailee is responsible for fraud, even though the contrary be stipulated, but that no bailee is responsible for accident, unless it be most expressly so agreed.

The plain elements of natural law, on the subject of responsibility for neglect, having been traced by this short analysis, I come to the second, or bistorical, part of my essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the ROMANS and the ENGLISH.

Of all known laws the most ancient and venerable are those of the Jews; and among the Mosaick institutions we have some curious rules on the very subject before us; but, as they are not numerous enough to compose a system, it will be sufficient to interweave them as we go along, and explain them in their proper places: for a similar reason, I shall say nothing here of the Attick laws on this title, but shall proceed at once to that nation, by which the wisdom of Athens was eclipsed, and her glory extinguished.

The decisions of the old Roman lawyers, collected and arranged in the fixth century by the order of JUSTINIAN, have been for ages, and in fome degree still are, in bad odour among Englishmen: this is an honest prejudice, and flows from a laudable source; but a prejudice, most certainly, it is, and, like all others, may be carried to a culpable excess.

The constitution of ROME was originally excellent; but, when it was fettled, as historians write, by Augustus, or, in truer words, when that base dissembler and cold-blooded affassin C. Octavius gave law to millions of honester, wifer, and braver men than himself by the help of a profligate army and an abandoned fenate, the new form of government was in itself absurd and unnatural; and the lex regia, which concentrated in the prince all the powers of the state both executive and legislative, was a tyrannous ordinance, with the name only, not the nature, of a law*; had it even been voluntarily conceded, as it was in truth forcibly extorted, it could not have bound the fons of those who consented to it; for " a renunciation of personal rights, espe-" cially rights of the highest nature, can have "ino operation beyond the persons of those, who "renounce them." Yet, iniquitous and odious as the fettlement of the constitution was, UL-PIAN only spoke in conformity to it, when he faid that " the will of the prince had the force

* D. 1. 4. 1.

K."

" of law;" that is, as he afterwards explains himself, in the ROMAN empire; for he neither meaned, nor could be mad enough to mean, that the proposition was just or true as a general maxim. So congenial, however, was this rule or fentence, ill understood and worse applied, to the minds of our early NORMAN kings, that fome of them, according to Sir John Fortescue, " were not pleafed with their own laws, but ex-" erted themselves to introduce the civil laws " of Rome into the government of ENGLAND*;" and so hateful was it to our sturdy ancestors, that, if JOHN of SALISBURY be credited, "they burned " and tore all fuch books of civil and canon law " as fell into their hands; " but this was intemperate zeal; and it would have been sufficient to improbate the publick, or constitutional, maxims of the Roman imperial law, as abfurd in themfelves as well as inapplicable to our free government, without rejecting the whole system of private jurisprudence as incapable of answering even the purpose of illustration. Many positive institutions of the Romans are demonstrated by FORTESCUE, with great force, to be far surpassed in justice and sense by our own immemorial customs; and the rescripts of Severus or CARA-CALLA, which were laws, it seems, at Rome,

^{*} De Laud. Leg. Angl. c. 33. 34. + Seld. in Fort. c. 33.

have certainly no kind of authority at Westmin-ster; but, in questions of rational law, no cause can be affigned, why we should not shorten our own labour by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense, in one age, must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in ITALY and in ENGLAND, in the mind of a PAPINIAN and of a BLACKSTONE.

Without undertaking, therefore, in all in stances, to reconcile Nerva with Proculus, Labeo with Julian, and Gaius either with Celsus or with himself, I shall proceed to exhibit a summary of the Roman law on the subject of responsibility for neglect.

The two great fources, whence all the decifions of civilians in this matter must be derived, are two laws of ULPIAN; the first of which is taken from his work on Sabinus, and the second from his tract on the Edict: of both these laws I shall give a verbal translation according to my apprehension of their obvious meaning, and shall then state a very learned and interesting controversy concerning them, with the principal arguments on each side, as far as they tend to elucidate the question before us.

"Some contracts, fays the great writer on Sabinus,

"make the party responsible for DECEIT ONLY;

"some, for both DECEIT AND NEGLECT. No"thing more than responsibility for DECEIT is

"demanded in DEPOSITS and POSSESSION AT

"WILL; both DECEIT AND NEGLECT are in"bibited in COMMISSIONS, LENDING FOR

"USE, CUSTODY AFTER SALE, TAKING IN

"PLEDGE, HIRING; also in PORTIONS, GUAR"DIANSHIPS, VOLUNTARY WORK: (among
"these some require even more than ordinary

"DILIGENCE). PARTNERSHIP and UNDI"VIDED PROPERTY make the partner and joint"proprietor answerable for both DECEIT AND
"NEGLIGENCE*."

"In contracts, says the same author in his other work, we are sometimes responsible for DECEIT ALONE; sometimes, for NEGLECT ALSO; for DECEIT ONLY in DEPOSITS; because, since no benefit accrues to the depositary, he can justly be answerable for no more than DECEIT; but, if a REWARD happen to be given, then a responsibility for NEGLECT ALSO is required; or, if it be agreed

*Contractûs quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam. Dolum tantûm depositum et precarium; dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum; item dotisdatio, tutelæ, negotia gesta: (in his quidam et diligentiam). Societas et rerum communio et dolum et culpam recipit. D. 50. 17. 23.

"at the time of the contract, that the depositary "shall answer both for NEGLECT and for Accimination Dent: but, where A BENEFIT accrues to "BOTH parties, as in KEEPING A THING" SOLD, as in HIRING, as in PORTIONS, as in "PLEDGES, as in PARTNERSHIP, both DE-"CEIT AND NEGLECT make the party liable. "LENDING FOR USE, indeed, is for the most part BENEFICIAL to the BORROWER ONLY; and, for this reason, the better opinion is that of Q. Mucius, who thought, that He should be responsible not only for NEGLECT, but even for the omission of more than ordinary "DILIGENCE"."

One would scarce have believed it possible, that there could have been two opinions on laws so perspicuous and precise, composed by the same writer, who was indubitably the best expositor

* In contractibus interdum DOLUM SOLUM, interdum ET CULPAM, præstamus; DOLUM in DEPOSITO; nam, quia NULLA UTILITAS ejus versatur, apud quem deponitur, merito Dolus præstatur solus; nisi sortè et merces accessit, tunc enim, ut est et constitutum, etiam culpa exhibetur; aut, si hoc ab initio convenit, ut et culpam et periculum præstet is, penes quem deponitur: sed, ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa præstatur. Commodatum autem plerumque solam utilitatem continet ejus, cui commodatur; et ideò verior est Q. Mucii sententia existimantis et culpam præstandam et diligentiam. D. 13. 6. 5. 2.

of his own doctrine, and apparently written in illustration of each other; the first comprising the rule, and the second containing the reason of it: yet the fingle passage extracted from the book on SABINUS has had no fewer than twelve particular commentaries in Latin*, one or two in Greek+, and some in the modern languages of EUROPE, besides the general expositions of that important part of the digest, in which it is preferved. Most of these I have perused with more admiration of human fagacity and industry than either folid instruction or rational entertainment: for these authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art rather of clouding texts in themselves clear, than of elucidating passages, which have any obscurity in the words or the fense of them. CAMPANAS, indeed, who was both a lawyer and a poet, has turned the first law of Ulpian into Latin hexameters; and his authority, both in profe and verse, confirms the interpretation, which I have just given.

The chief causes of all this perplexity have been, first, the vague and indistinct manner in which the old *Roman* lawyers, even the most

^{*}BOCERUS, CAMPANUS, D'AVEZAN, DEL RIO, LE CONTE, RITTERSHUSIUS, GIPHANIUS, J. GODEFROI, and others.

[†] The scholium on Harmenopulus, 1. 6. tit. de Reg. Jur. n. 15. may be considered as a commentary on this law.

eminent, have written on the subject; secondly, the loose and equivocal sense of the words discretized and culpa; lastly and principally, the darkness of the parenthetical clause in his QUIDAM ET DILIGENTIAM, which has produced more doubt, as to its true reading and signification, than any sentence of equal length in any author Greek or Latin. Minute as the question concerning this clause may seem, and dry as it certainly is, a short examination of it appears absolutely necessary.

The vulgate editions of the pandects, and the manuscripts, from which they were printed, exhibit the reading above fet forth; and it has accordingly been adopted by CUJAS, P. FABER, LE CONTE, DONELLUS, and most others, as giving a fense both perspicuous in itself and confistent with the second law; but the FLORENTINE copy has quidem, and the copies, from which the Basilica were translated three centuries after JUSTINIAN, appear to have contained the same word, fince the Greeks have rendered it by a particle of fimilar import. This variation in a fingle letter makes a total alteration in the whole doctrine of ULPIAN; for, if it be agreed, that diligentia means, by a figure of speech, a more than ordinary degree of diligence, the common reading will imply, conformably with the fecond law before cited, that " some of the pre"ceding contracts demand that higher degree;" but the Florentine reading will denote, in contradiction to it, that "ALL of them require more "than ordinary exertions."

It is by no means my defign to depreciate the authority of the venerable manuscript preserved at Florence; for, although few civilians, I believe, agree with POLITIAN, in supposing it to be one of the originals, which were fent by Justinian himself to the principal towns of Italy*, yet it may possibly be the very book, which the Emperor LOTHARIUS II. is faid to have found at Amalfi about the year 1130, and gave to the citizens of PISA, from whom it was taken, near three hundred years after, by the Florentines, and has been kept by them with fuperstitious reverence †: be that as it may, the copy deferves the highest respect; but, if any proof be requisite, that it is no faultless transcript, we may observe, that, in the very law before us, accedunt is erroneously written for accidunt; and the whole phrase, indeed, in which that word occurs, is different from the copy used by the Greek interpreters, and conveys a meaning, as BOCERUS and others have remarked, not supportable by any principle or analogy.

Epist. x. 4. Miscell. cap. 41. See Gravina, lib. i. § 141.

⁺ Taurelli, Præf. ad Pand. Florent.

This, too, is indisputably clear; that the sentence in bis QUIDEM et diligentiam, is ungrammatical, and cannot be construed according to the interpretation, which fome contend for. What verb is understood? Recipiunt. What noun? Contractús. What then becomes of the words in bis, namely contractibus, unless in signify among? And, in that case, the difference between QUI-DEM and QUIDAM vanishes; for the clause may still import, that " AMONG the preceding con-" tracts (that is, in SOME of them), more than " usual diligence is exacted:" in this fense the Greek preposition seems to have been taken by the scholiast on HARMENOPULUS; and it may here be mentioned, that diligentia, in the nominative, appears in some old copies, as the Greeks have rendered it; but Accursius, Del Rio. and a few others, consider the word as implying no more than diligence in general, and distinguish it into various degrees applicable to the feveral contracts, which ULPIAN enumerates. We may add, that one or two interpreters thus explain the whole fentence, " in his contractibus qui-"dam jurisconsulti et diligentiam requirunt," but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply, that Ulpian was of a different opinion. As to the last conjecture, that only certain cases and circumstances are meaned by the word QUIDAM, it scarce de-

ferves to be repeated. On the whole, I strongly incline to prefer the vulgate reading, especially as it is not conjectural, but has the authority of manuscripts to support it; and the mistake of a letter might easily have been made by a transcriber, whom the prefaces, the epigram prefixed, and other circumstances, prove to have been, as Taurelli himself admits, a Greek .-Whatever, in short, be the genuine words of this much-controverted clause, I am persuaded, that it ought by no means to be strained into an inconfistency with the fecond law; and this has been the opinion of most foreign jurists from Azo and Alciat down to Heineccius and Huber: who, let their dissension be, on other points, ever so great, think alike in distinguishing three degrees of neglect, which we may term gross, ordinary, and flight, and in demanding responfibility for those degree's according to the rule before expounded.

The law then on this head, which prevailed in the ancient Raman empire, and still prevails in Germany, Spain, France, Italy, Holland, constituting, as it were, a part of the law of nations, is in substance what follows.

Gross neglect, lata culpa, or, as the Roman lawyers most accurately call it, dolo proxima, is in practice considered as equivalent to DOLUS, or FRAUD, itself; and consists, according to the best interpreters, in the amission of that care,

which even inattentive and thoughtless men never fail to take of their own property: this fault they justly hold a violation of good faith.

Ordinary neglect, levis culpa, is the want of that diligence, which the generality of mankind use in their own concerns; that is, of ordinary care.

Slight neglect, levissima culpa, is the omission of that care, which very attentive and vigilant persons take of their own goods, or, in other words, of very exact diligence.

Now, in order to ascertain the degree of neglect, for which a man, who has in his possession the goods of another, is made responsible by his contract, either express or implied, civilians establish three principles, which they deduce from the law of Ulpian on the Edict; and here it may be observed, that they frequently distinguish this law by the name of Si ut certo, and the other by that of Contractus*; as many poems and histories in ancient languages are denominated from their initial words.

First: In contracts, which are beneficial folely to the owner of the property holden by another,

^{*} Or 1. 5. § 2. ff. Commod. and 1. 23. ff. de reg. jur. Inflead of ff, which is a barbarous corruption of the initial letter of mardinlas, many write D, for Digeft, with more clearness and propriety.

no more is demanded of the holder than good faith, and he is consequently responsible for nothing less than gross neglect: this, therefore, is the general rule in DEPOSITS; but, in regard to COMMISSIONS, or, as foreigners call them, MANDATES, and the implied contract negotiorum gestorum, a certain care is requisite from the nature of the thing; and, as good faith itself demands, that such care be proportioned to the exigence of each particular case, the law presumes, that the mandatary or commissioner, and, by parity of reason, the negotiorum gestor, engaged at the time of contracting to use a degree of diligence adequate to the performance of the work undertaken*.

Secondly: In contracts reciprocally beneficial to both parties, as in those of sale, hiring, pledging, partnership, and the contract implied in joint-property, such care is exacted, as every prudent man commonly takes of bis own goods; and, by consequence, the vendor, the hirer, the taker in pledge, the partner, and the co-proprietor, are answerable for ordinary neglect.

Thirdly: In contracts, from which a benefit accrues only to him, who has the goods in his

^{*} Spondet diligentiam, say the Roman lawyers, gerende negotio parem.

custody, as in that of LENDING FOR USE, an extraordinary degree of care is demanded; and the borrower is, therefore, responsible for flight negligence.

This had been the learning generally, and almost unanimously, received and taught by the doctors of Roman law; and it is very remarkable, that even ANTOINE FAVRE, or Faber, who was famed for innovation and paradox, who published two ample volumes De Erroribus Interpretum, and whom GRAVINA justly calls the boldest of expositors and the keenest adversary of the practifers*, discovered no error in the common interpretation of two celebrated laws, which have so direct and so powerful an influence over focial life, and which he must repeatedly have considered: but the younger GODEFROI of Geneva, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him a regular commentary on the law Contractus, in which he boldly combats the fentiments of all his predecessors, and even of the ancient Romans, and endeavours to support a new system of his own.

He adopts, in the first place, the Florentine reading, of which the student, I hope, has

^{*} Orig. Jur. Civ. lib. i. § 183.

formed by this time a decided opinion from a preceding page of this essay.

He censures the rule comprised in the law Si ut certo as weak and fallacious, yet admits, that the rule, which He condemns, had the approbation and support of Modestinus, of Paulus, of Africanus, of Gaius, and of the great PAPINIAN himself; nor does he satisfactorily prove the fallaciousness, to which he objects, unless every rule be fallacious, to which there are some exceptions. He understands by DILIGENTIA that care, which a very attentive and vigilant man takes of his own property; and he demands this care in all the eight contracts, which immediately precede the disputed clause: in the two, which follow it, he requires no more than ordinary diligence. He admits, however, the three degrees of neglect above stated, and uses the common epithets levis and levishma; but, in order to reconcile his system with many laws, which evidently oppose it, he ascribes to the old lawyers the wildest mutability of opinion, and is even forced to contend, that ULPIAN himself must bave changed bis mind.

Since his work was not published, I believe, in his life-time, there may be reason to suspect, that he had not completely settled his own mind; and he concludes, indeed, with referring the decision of every case on this head to that most

dangerous and most tremendous power, the difcretion of the judge *.

The triple division of neglects had also been highly censured by some lawyers of reputation. Zasius had very justly remarked, that neglects differed in degree, but not in species; adding, "that he had no objection to use the words " levis and levisima, merely as terms of practice " adopted in courts, for the more easy distinction "between the different degrees of care ex-" acted in the performance of different con-"tracts +:" but Donellus, in opposition to his master Duaren, insisted that levis and levisfima differed in found only, not in sense; and attempted to prove his affertion triumphantly by a regular fyllogism; the minor proposition of which is raifed on the figurative and inaccurate manner, in which positives are often used for fuperlatives, and converfely, even by the best of the old Roman lawyers. True it is, that, in the law Contractus, the division appears to be

^{* &}quot;Ego certè hac in re censentibus accedo, vix quidquam "generaliùs definiri posse; remque hanc ad arbitrium judicis, "prout res est, referendam." p. 141.

⁺ ZAS. Singul. Resp. lib. i. cap. 2.

^{† &}quot;Quorum definitiones eædem funt, ea inter se sunt "eadem; levis autem culpæ et levissimæ una et eadem desi-"nitio est; utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. 7.

in species, when the first means actual fraud and malice, but in degree merely, when it denotes no more than gross neglect; and, in either case, the second branch, being capable of more and less, may be subdivided into ordinary and slight; a subdivision, which the law Si ut certo obviously requires: and thus are both laws perfectly reconciled.

We may apply the fame reasoning, changing what should be changed, to the triple division of diligence; for, when good faith is considered as implying at least the exertion of slight attention, the other branch, Care, is subdivisible into ordinary and extraordinary; which brings us back to the number of degrees already established both by the analysis and by authority.

Nevertheless, a system, in one part entirely new, was broached in the present century by an advocate in the parliament of Paris, who may, probably, be now living, and, possibly, in that professional station, to which his learning and acuteness justly entitle him. I speak of M. Le Brun, who published, not many years ago, an Essay on Responsibility for Neglets*, which he

^{*} Effai sur la Prestation des Fautes, à Paris, chez Saugrain, 1764.

had nearly finished, before he had seen the commentary of Godefroi, and, in all probability, without ever being acquainted with the opinion of Donellus.

This author sharply reproves the triple divifion of neglects, and feems to difregard the rule concerning a benefit arifing to both, or to one, of the contracting parties; yet he charges Godefroi with a want of due clearness in his ideas, and with a palpable misinterpretation of several laws. He reads in his quidem et diligentiam; and that with an air of triumph; infinuating, that quidAm was only an artful conjecture of Cujas and Le Conte, for the purpose of establishing their system; and he supports his own reading by the authority of the BASILICA; an authority, which, on another occasion, he depreciates. He derides the absurdity of permitting negligence in any contract, and urges, that fuch permission, as he calls it, is against express law: "now, " fays he, where a contract is beneficial to both " parties, the doctors permit flight negligence, " which, how flight foever, is still negligence, "and ought always to be inhibited." warmly contends, that the Roman laws, properly understood, admit only two degrees of diligence; one, measured by that, which a provident and attentive father of a family uses in his own concerns; another, by that care, which

the individual party, of whom it is required, is accustomed to take of his own possessions; and he, very ingeniously, substitutes a new rule in the place of that, which he rejects; namely, that, when the things in question are the SOLE property of the person, to whom they must be restored, the holder of them is obliged to keep them with the first degree of diligence; whence he decides, that a borrower and a birer are responsible for precisely the same neglect; that a vendor, who retains for a time the custody of the goods fold, is under the fame obligation, in respect of care, with a man, who undertakes to manage the affairs of another, either without his request, as a negotiorum gestor, or with it, as a mandatary: "but, fays he, when " the things are the JOINT property of the parties " contracting, no higher diligence can be required "than the fecond degree, or that, which the " acting party commonly uses in bis own affairs; " and it is fufficient, if he keep them, as he keeps " bis own." This he conceives to be the diftinction between the eight contracts, which precede, and the two, which follow, the words in bis quidem et diligentiam.

Throughout his work he displays no small sagacity and erudition, but speaks with too much considence of his own decisions, and with too much asperity or contempt of all other interpreters from BARTOLUS to VINNIUS.

At the time when this author wrote, the learned M. POTHIER was composing some of his admirable treatifes on all the different species of express, or implied, contracts; and here I feize with pleasure an opportunity of recommending those treatises to the English lawyer, exhorting him to read them again and again; for, if his great master LITTLETON has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will furely be delighted with works, in which all those advantages are combined, and the greatest portion of which is law at Westminster as well as at Orleans*: for my own part, I am fo charmed with them, that, if my undiffembled fondness for the study of jurisprudence were never to produce any greater benefit to the publick, than barely the introduction of POTHIER to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt, which every man, according to lord Coke, owes to bis profession.

To this venerable professor and judge, for he had sustained both characters with deserved applause, LE BRUN sent a copy of his little work;

^{*} Oeuvres de M. Pothier, à Paris, chez DEBURE: 28 volumes in duodecimo, or 6 in quarto. The illustrious author died in 1772.

and M. POTHIER honoured it with a short, but complete, answer in the form of a General Obfervation on his Treatifes*; declaring, at the fame time, that be would not enter into a literary contest, and apologizing for his fixed adherence to the ancient fystem, which he politely ascribes to the natural bias of an old man in favour of opinions formerly imbibed. This is the substance of his answer: "that he can discover no kind of ab-" furdity in the usual division of neglect and di-" ligence, nor in the rule, by which different de-"grees of them are applied to different con-" tracts; that to speak with strict propriety, " negligence is not permitted in any contract, " but a less rigorous construction prevails in some "than in others; that a birer, for instance, is " not confidered as negligent, when he takes the " fame care of the goods hired, which the ge-" nerality of mankind take of their own; that the letter to bire, who has his reward, must be " prefumed to have demanded at first no higher " degree of diligence, and cannot justly complain " of that inattention, which in another case might " have been culpable; for a lender, who has no "reward, may fairly exact from the borrower " that extraordinary degree of care, which a very

^{*} It is printed apart, in fourteen pages, at the end of his treatise on the Marriage-contrast.

" attentive person of his age and quality would " certainly have taken; that the diligence, which " the Individual party commonly uses in his "own affairs, cannot properly be the object of " judicial inquiry; for every trustee, administra-"tor, partner, or co-proprietor, must be pre-" fumed by the court, auditors, or commissioners, " before whom an account is taken, or a distri-"bution or partition made, to use in their own "concerns fuch diligence, as is commonly used "by all prudent men; that it is a violation of " good faith for any man to take less care of an-" other's property, which has been intrusted to him, " than of bis own; that, confequently, the author " of the new system demands no more of a " partner or a joint-owner than of a depositary, " who is bound to keep the goods deposited as " be keeps his own; which is directly repugnant " to the indisputable and undisputed sense of the " law Contractus."

I cannot learn whether M. LE BRUN ever published a reply, but am inclined to believe that his system has gained very little ground in *France*, and that the old interpretation continues universally admitted on the continent both by theorists and practisers.

Nothing material can be added to POTHIER'S argument, which, in my humble opinion, is unanswerable; but it may not be wholly useless to

fet down a few general remarks on the controverfy: particular observations might be multiplied without end.

The only essential difference between the systems of Goderroi and Le Brun relates to the two contracts, which follow the much-disputed clause; for the Swiss lawyer makes the partner and co-proprietor answerable for ordinary neglect, and the French advocate demands no more from them than common bonesty: now, in this respect, the error of the second system has been proved to demonstration; and the author of it himself confesses ingenuously, that the other part of it fails in the article of Marriage-portions*.

In regard to the division of neglect and care into three degrees or two, the dispute appears to be merely verbal; yet, even on this head, LE BRUN seems to be self-consuted: he begins with engaging to prove "that only two degrees of "fault are distinguished by the laws of Rome," and ends with drawing a conclusion, that they acknowledge but one degree: now, though this might be only a slip, yet the whole tenor of his book establishes two modes of diligence, the omissions of which are as many neglects; exclusively of gross neglect, which he likewise admits, for the culpa levissima only is that, which he repu-

^{*} See p. 71. note; and p. 126.

diates. It is true, that he gives no epithet or name to the omission of his fecond mode of care; and, had he searched for an epithet, he could have found no other than gross; which would have demonstrated the weakness of his whole system*.

The disquisition amounts, in fact, to this: from the barrenness or poverty, as Lucretius calls it, of the Latin language, the fingle word CULPA includes, as a generick term, various degrees or shades of fault, which are sometimes diftinguished by epithets, and sometimes left without any distinction; but the Greek, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law Contractus actually use the words patumia and a'μέλεια, which are by no means fynonymous, the former implying a certain easiness of mind or remissiness of attention, while the second imports a higher and more culpable degree of negligence+. This observation, indeed, seems to favour the system of Godefroi; but I lay no great

^{*} See pages 32. 73. 74. 149.

[†] Basilica, 2, 3, 23. See Demosth. 3 Phil. Reiske's edit. I. 112. 3. For levissima culpa, which occurs but once in the whole body of Roman law, ραθυμία seems the proper word in Greek; and it is actually so used in the Basilica, 60. 3. 5. where mention is made of the Aquilian law, in quâ, says ULPIAN, et kvissima culpa venit. D. 9. 2. 44.

ftress on the mere words of the translation, as I cannot persuade myself, that the Greek jurists under Basilius and Leo were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reasons, as, I hope, it has been proved, for rejecting all systems but that, which Pothier has recommended and illustrated.

I come now to the laws of our own country, in which the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail; and here I might proceed chronologically from the oldest Year-book or Treatise to the latest adjudged Case; but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every distinct species of bailment, observing at the same time, under each head, a kind of historical order. It must have occurred to the reader, that I might eafily have taken a wider field, and have extended my inquiry to every possible case, in which a man possesses for a time the goods of another; but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leifure, to leave the whole work unfinished: it will be sufficient to remark, that the rules are in general the same, by whatever means the goods are legally in the hands of

the possession, whether by delivery from the owner, which is a proper bailment, or from any other person, by finding*, or in consequence of some distinct contract.

Sir John Holt, whom every Englishman should mention with respect, and from whom no English lawyer should venture to dissent without extreme dissidence, has taken a comprehensive view of this whole subject in his judgment on a celebrated case, which shall soon be cited at length; but, highly as I venerate his deep learning and singular sagacity, I shall find myself constrained, in some sew instances, to differ from him, and shall be presumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the course of his argument.

His division of bailments into fix forts appears, in the first place, a little inaccurate; for, in truth, his fifth fort is no more than a branch of his third, and he might, with equal reason, have added a seventh, since the fifth is capable of another subdivision. I acknowledge, therefore, but five species of bailment; which I shall now enumerate and define, with all the

^{*} Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. 1 Leon. 224. 1 Cro. 219. Mulgrave and Ogden.

[†] Lord Raym. 912.

Latin names, one or two of which lord Holy has omitted. 1. DEPOSITUM, which is a naked bailment, without reward, of goods to be kept for the bailor. 2. MANDATUM, or commission; when the mandatary undertakes, without recompence, to do some act about the things bailed, or fimply to carry them; and hence Sir HENRY FINCH divides bailment into two forts, to keep, and to employ*. 3. COMMODATUM, or loan for use; when goods are bailed, without pay, to be used for a certain time by the bailee. PIGNORI ACCEPTUM; when a thing is bailed by a debtor to his creditor in pledge, or as a fecurity for the debt. 5. LOCATUM, or biring, which is always for a reward; and this bailment is either, 1. locatio rei, by which the hirer gains the temporary use of the thing; or, 2. locatio operis faciendi, when work and labour, or care and pains, are to be performed or bestowed on the thing delivered: or, 3. locatio operis mercium vebendarum, when goods are bailed for the purpose of being carried from place to place, either to a publick carrier, or to a private person.

I. The most ancient case, that I can find in our books, on the doctrine of Deposits (there were others, indeed, a few years earlier, which turned on points of pleading), was adjudged in

^{*} Law, b. 2. ch. 18.

the eighth of Edward II. and is abridged by FITZHERBERT*. It may be called Bonion's case, from the name of the plaintiff, and was, in substance, this: An action of detinue was brought for feals, plate, and jewels, and the defendant pleaded, "that the plaintiff had bailed "to him a chest to be kept, which chest was " locked; that the bailor himself took away the " key, without informing the bailee of the contents; "that robbers came in the NIGHT, broke open "the defendant's chamber, and carried off the 46 chest into the fields, where they forced the " lock, and took out the contents: that the defend-" ant was robbed at the same time of his own "goods." The plaintiff replied, "that the " jewels were delivered, in a chest not locked, to " be restored at the pleasure of the bailor," and on this, it is faid, iffue was joined.

Upon this case lord Holt observes, "that "he cannot see, why the bailer should not be charged with goods in a chest as well as with goods out of a chest; for," says he, "the bailer has as little power over them, as to any benefit that he might have from them, and as great power to defend them in one case as "in the other." The very learned judge was

^{*} Mayn. Edward II. 275. Fitz. Abr. tit. Detinue, 59. † Lord Raym. 914.

dissatisfied, we see, with Sir EDWARD COKE's reason, "that, when the jewels were locked up-" in a chest, the bailee was not, in fact, trusted "with them." Now there was a diversity of opinion, upon this very point, among the greatest lawyers of Rome; for "it was a question, "whether, if a box fealed up had been deposited, "the box only should be demanded in the ac-" tion, or the clothes, which it contained, should " also be specified; and TREBATIUS insists, that " the box only, not the particular contents of it, " must be sued for; unless the things were pre-" vicually shewn, and then deposited: but LABEO " afferts, that he, who deposits the box, deposits the " contents of it; and ought, therefore, to demand " the clothes themselves. What then, if the depo-" fitary was ignorant of the contents? It feems to " make no great difference, fince he took the " charge upon himfelf; and I am of opinion, " fays ULPIAN, that, although the box was " fealed up, yet an action may be brought for "what it contained †." This relates chiefly to the form of the libel; but, furely, cases may be put, in which the difference may be very material as to the defence. Diamonds, gold, and precious trinkets, ought, from their nature, to be kept with peculiar care under lock and key: it

^{* 4} Rep. 84. + D. 16. 3. 1. 41.

would, therefore, be gross negligence in a depofitary to leave such a deposit in an open antichamber, and ordinary neglect, at least, to let them remain on his table, where they might possibly tempt his fervants; but no man can proportion his care to the nature of things, without knowing them: perhaps, therefore, it would be no more than flight neglect, to leave out of a drawer a box or casket, which was neither known. nor could justly be suspected, to contain diamonds; and DOMAT, who prefers the opinion of TRE-BATIUS, decides, "that, in fuch a cafe, the de-" positary would only be obliged to restore the " casket, as it was delivered, without being re-" sponsible for the contents of it." I confess, however, that, anxiously as I wish on all occafions to fee authorities respected, and judgment holden facred, Bonion's case appears to me wholly incomprehenfible; for the defendant, instead of having been grossly negligent (which alone could have exposed him to an action), feems to have used at least ordinary diligence; and, after all, the loss was occasioned by a burglary, for which no bailee can be responsible without a very special undertaking. The plea, therefore, in this case was good, and the replication, idle; nor could I ever help suspecting a mistake in the last words alii qued non; although - RICHARD DE WINCHEDON, or whoever was the distinction, that, "if jewels be bailed to me, and "I put them into a casket, and thieves rob me of "them in the night-time, I am answerable; not, "if they be delivered to me in a chest sealed "up;" which could never have been law, for the next oldest case, in the book of Assis, contains the opinion of chief justice Thorre, that "a general bailee to keep is not responsible, "if the goods be stolen, without his gross ne"glect*;" and it appears, indeed, from FitzHERBERT, that the party was driven to this issue, "whether the goods were taken away by "robbers."

By the Mosaick institutions, "if a man deli"vered to his neighbour MONEY or STUFF to
"keep, and it was stolen out of his house, and the
"thief could not be found, the master of the
"house was to be brought before the judge, and
"to be discharged, if he could swear, that he
"had not put his band unto his neighbour's
"goods+," or, as the Roman author of the Lex
Des translates it, Nibil se nequiter gessife; but
a distinction seems to have been made between a

^{* 29.} Aff. 28. Bro. Abr. tit. Bailment, pl. 7.

⁺ Exod. xxii. 7, 8.

[‡] Lib. 10. De Deposito. This book is printed in the same volume with the Theodofian Code, Paris, 1586.

stealing by day and a stealing by night*; and " if CATTLE were bailed and stolen (by day, I "prefume), the person, who had the care of " them, was bound to make restitution to the "owner+;" for which the reason seems to be, that, when cattle are delivered to be kept, the bailee is rather a mandatary than a depositary, and is, consequently, obliged to use a degree of diligence adequate to the charge: now sheep can hardly be stolen in the day-time without some neglect of the shepherd; and we find that, when JACOB, who was, for a long time at least, a bailee of a different fort, as be had a reward, lost any of the beafts intrusted to his care, LABAN made him answer for them "whether stolen by "day or stolen by night 1."

Notwithstanding the high antiquity, as well as the manifest good sense, of the rule, a contrary doctrine was advanced by Sir Edward Coke, in his Reports, and afterwards deliberately inserted in his Commentary on LITTLETON, the great result of all his experience and learning; namely, "that a depositary is responsible, if the goods be stolen from him, unless he accept them specially to keep as bis own," whence he advises all depositaries to make such a spe-

^{*} Gen. xxxi. 39. + Exod. xxii. 12.

[‡] Gen. xxxi. 39.

cial acceptance*. This opinion, so repugnant to natural reason and the laws of all other nations, he grounded partly on some broken cases in the Year-books, mere conversations on the bench, or loose arguments at the bar; and partly on Southcote's case, which he has reported and which by no means warrants his deduction from it. As I humbly conceive that case to be law, though the doctrine of the learned reporter cannot in all points be maintained, I shall offer a few remarks on the pleadings in the cause, and the judgement given on them.

SOUTHCOTE declared in detinue, that he had delivered goods to Bennet, to be by bim safely kept: the defendant confessed such delivery, but pleaded in bar, that a certain person stole them out of his possession; the plaintist replied, protesting that he had not been robbed, that the person named in the plea was a servant of the defendant, and demanded judgement; which, on a general demurrer to the replication, he obtained. "The reason of the judgement, says lord "Coke, was, because the plaintist had delivered "the goods to be safely kept, and the defend-"ant had taken the charge of them upon him-"self, by accepting them on such a delivery." Had the reporter stopped here, I do not see

^{* 4} Rep. 83. b. 1 Inft. 89. 2. b.

what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit, which has occasioned so many reslections on the case itself; namely, "that to KEEP and to keep SAFELY are one and the same thing;" a notion which was denied to be law by the whole court in the time of chief justice Holt*.

It is far from my intent to speak in derogation of the great commentator on LITTLETON; since it may truly be afferted of him, as QUINTILIAN said of CICERO, that an admiration of bis works is a sure mark of some proficiency in the study of the law; but it must be allowed, that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them.

The pleader, who drew the replication in Southcote's case, must have entertained an idea, that the blame was greater, if a servant of the depositary stole the goods, than if a mere stranger had pursoined them; since the defendant ought to have been more on his guard against a person, who had so many opportunities of stealing; and it was his own fault, if he gave those opportunities to a man, of whose honesty he was not morally certain: the court, we find,

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^{*} Lord Raym. 911. margin.

rejected this distinction, and also held the replication informal, but agreed, that no advantage could betaken on a general demurrer of fuch informality, and gave judgement on the substantial badness of the plea*. If the plaintiff, inflead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, "that, although " a general bailee to keep be responsible for "GROSS neglect only, yet BENNET had, by a " special acceptance, made himself answerable "for ordinary neglect at least; that it was " ordinary neglect, to let the goods be stolen out " of his possession, and he had not averred, that "they were stolen without bis default; that he " ought to have put them into a safe place, ac-"cording to his undertaking, and have kept "the key of it himself; that the special bailee " was reduced to the class of a conductor operis, " or a workman for bire; and that a tailor, to "whom his employer has delivered lace for a " fuit of clothes, is bound, if the lace be ftolen, "to restore the value of it †." This reasoning

^{* 1} Cro. 815.

^{+ &}quot;Alia est furti ratio; id enim non casui, sed levi culpa, sermè ascribitur." Gothofr. Comm. in L. Contractus, p. 145. See D. 17. 2. 52. 3. where says the annotator, "Adversus latrones parum prodest custodia; adversus furem prodeste potest, si quis advigilet." See also Poth. Contrat de Louage, n. 429. and Contrat de Pret à usage, n. 53. So, by justice Cot-

would not have been just, if the bailee had pleaded, as in Bonion's case, that he had been robbed by violence, for no degree of care can in general prevent an open robbery: impetus prædonum, says Ulpian, à nullo præstantur.

Mr. Justice Powell, speaking of South-COTE's case, which he denies to be law, admits that, " if a man does undertake specially to keep " goods safely, that is a warranty, and will " oblige the bailee to keep them fafely against " perils, where he has a remedy over, but not "against those where he has no remedy over "." One is unwilling to suppose, that this learned judge had not read lord Coke's report with attention; yet the case, which he puts, is precisely that which he opposes, for BENNET did undertake "to keep the goods SAFELY;" and, with fubmission, the degree of care demanded, not the remedy over, is the true measure of the obligation; for the bailee might have his appeal of robbery, yet he is not bound to keep the goods against robbers without a most express agreement+. This, I apprehend, is all that was meaned by St. GERMAN, when he fays, " that,

tesmore, "Si jeo grante byens a un home a garder a mon oeps, "s si les byens per son mesgarde sont embles, il sera charge a moy de mesmes les byens, mez s'il soit robbe de mesmes les byens, "il est excusable per le ley." 10 Hen. VI. 21.

^{*} Ld. Raym. 912. † 2 Sho. pl. 166.

"if a man bave nothing for keeping the goods bailed, and promise, at the time of the delivery, to restore them safe at his peril, he is not resulting from the casualties;" but the rule extracted from this passage, "that a special active ceptance to keep safely will not charge the bailee against the acts of wrongdoers;" to which purport Hobart also and Croke are cited, is too general, and must be confined to acts of violence.

I cannot leave this point, without remarking, that a tenant at will, whose interest, when he has it rentfree, the Romans called PRECARIUM, stands in a situation exactly parallel to that of a depofitary; for, although the contract be for bis benefit, and, in some instances, for bis benefit only, yet he has an interest in the land till the will is determined, " and, our law adds, it is the folly of " the leffor, if he do not restrain him by a special " condition:" thence it was adjudged, in the Countess of Shrewsbury's case, "that an action " will not lie againt a tenant at will generally, if "the house be burned through his neglect;" but, fays justice Powell, " had the action been " founded on a special undertaking, as that, in " confideration that the leffor would let him live

^{*} Doct. and Stud. dial. 2. chap. 38.

⁺ Com. 135. Ld. Raym. 915.

^{1 5} Rep. 13. b.

"in the house, he would deliver it up in as good "repair as it then was in, such an action would "have been maintainable.*"

It being then established, that a bailee of the first fort is answerable only for a fraud, or for gross neglect, which is considered as evidence of it, and not for fuch ordinary inattentions as may be compatible with good faith, if the depositary be himself a careless and inattentive man; a question may arise, whether, if proof be given, that he is, in truth, very thoughtful and vigilant in bis own concerns, he is not bound to restitution, if the deposit be lost through his neglect, either ordinary or flight; and it feems eafy to support the affirmative: fince in this case the measure of diligence is that, which the bailee uses in his own It must however be confessed, that the character of the individual depositary can hardly be an object of judicial discussion: if he be flightly or even ordinarily negligent in keeping the goods deposited, the favourable presumption is, that he is equally neglectful of his own property; but this presumption, like all others, may be repelled; and, if it be proved, for instance, that, his house being on fire, he saved his own goods, and, having time and power to fave also those deposited, suffered them to be burned, he

^{*} Ld. Raym. 911.

shall restore the worth of them to the owner*. If, indeed, he have time to fave only one of two chefts, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value, and the other be full of much more precious goods, as fine linen or filks; in which case he ought to fave the more valuable cheft, and has a right to claim indemnification from the depositor for the loss of his own. Still farther; if he commit even a gross neglect in regard to his own goods as well as those bailed, by which both are lost or damaged, he cannot be faid to have violated good faith, and the bailor must impute to his own folly the confidence which he reposed in fo improvident and thoughtless a person+.

To this principle, that a depositary is answerable only for gross negligence, there are some exceptions.

First, as in Southcote's case, where the bailee, by a *special* agreement, has engaged to answer for less: "Si quid nominatim convenit," says the *Roman* lawyer, "vel plus vel minus in singulis "contractibus, hoc servabitur quod initiò con"venit; legem enim contractui dedit;" but the

^{*} Ротн. Contrat de Dépôt, n. 29. Stiernh. de Jure Sueon, l. 2. с. 5.

⁺ Bract. 99. b. Justin. Inst. 1. 3. tit. 15.

[‡] L. Contractus, 23. D. de reg. jur.

opinion of Celsus, that an agreement to dispense with deceit is void, as being contrary to good morals and decency, has the affent both of Ulpian and our English courts*.

Secondly; when a man spontaneously and officiously proposes to keep the goods of another, be may prevent the owner from intrusting them with a person of more approved vigilance; for which reason be takes upon bimself, according to Julian, the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties.

Where things are deposited through necessity on any sudden emergence, as a fire or a shipwreck, M. Le Brun insists, "that the depositary must "answer for less than gross neglect, how careless "foever he may be in his own affairs; since the "preceding remark, that a man, who reposes confidence in an improvident person, must impute "any loss to his own folly, is inapplicable to a "case, where the deposit was not optional; and "the law ceases with the reason of it;" but that is not the only reason; and, though it is an additional missortune, for a man in extreme haste and deep distress to light upon a stupid or inat-

^{*} Doct. and Stud. dial. 2. chap. 38.

⁺ D. 16. 31 1. 35.

[.] De la Prestation des Fautes, p. 77.

tentive depositary, yet I can hardly persuade myfelf, that more than persect good faith is demanded in this case, although a violation of that faith be certainly more criminal than in other cases, and was therefore punished at Rome by a forseiture of the double value of the goods deposited.

In these circumstances, however, a benevolent offer of keeping another's property for a time would not, I think, bring the case within Julian's rule before-mentioned, so as to make the person offering answerable for flight, or even ordinary, negligence; and my opinion is consirmed by the authority of Labeo, who requires no more than good faith of a negotiorum gestor, when "affectione coactus, ne bona mea distrahantur, "negotiis se meis obtulerit."

Thirdly; when the bailee, improperly called a depositary, either directly demands and receives a reward for bis care, or takes the charge of goods in consequence of some lucrative contract, he becomes answerable for ordinary neglect; since, in truth, he is in both cases a conductor operis, and lets out his mental labour at a just price: thus, when clothes are left with a man, who is paid for the use of his bath, or a trunk with an inn-keeper or his servants, or with a ferryman, the bailees are as much bound to indemnify the owners if the goods be lost or damaged through

their want of ordinary circumspection, as if they were to receive a stipulated recompense for their attention and pains; but of this more fully, when we come to the article of biring.

Fourthly; when the bailee alone receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower, until the event happens, because the owner, perhaps, is likely to be absent at the time, such a depositary must answer even for flight negligence; and this bailment, indeed, is rather a loan than a deposit, in whatever light it may be confidered by the parties. Suppose, for example, that Charles, intending to appear at a masked ball expected to be given on a future night, requests George to lend him a dress and jewels for that purpose, and that George, being obliged to go immediately into the country, defires Charles to keep the dress till his return, and, if the ball be given in the mean time, to wear it; this feems to be a regular loan, although the original purpose of borrowing be future and contingent.

Since, therefore, the two last cases are not, in strict propriety, deposits, the exceptions to the general rule are reduced to two only; and the second of them, I conceive, will not be rejected by the English lawyer, although I recollect no de-

cision or dictum exactly conformable to the opinion of Julian.

Clearly as the obligation to restore a deposit shows from the nature and definition of this contract, yet, in the reign of ELIZABETH, when it had been adjudged, consistently with common sense and common honesty, "that an action on the case lay against a man, who had not persifted his promise of redelivering, or delivering over, things bailed to him," that judgement was reversed; and, in the sixth year of JAMES, judgement for the plaintiss was arrested in a case exactly similar*: it is no wonder, that the profession grumbled, as lord Holt says, at so absurd a reversal; which was itself most justly reversed a few years after, and the first decision solemnly established.

Among the other curious remains of Attick law, which philologers have collected, very little relates to the contracts, which are the subject of this essay; but I remember to have read of Demosthenes, that he was advocate for a person, with whom three men had deposited some valuable utensil, of which they were joint-owners; and the depositary had delivered it to one of them, of whose knavery he had no suspicion;

^{*} Yelv. 4. 50. 128.

^{† 2} Cro. 667. Wheatly and Low.

upon which the other two brought an action, but were nonfuited on their own evidence, that there was a third bailor, whom they had not joined in the fuit; for, the truth not being proved, Demosthenes infifted, that his client could not legally restore the deposit, unless all three proprietors were ready to receive it; and this doctrine was good at Rome as well as at Athens, when the thing deposited was in its nature incapable of partition: it is also law, I apprehend, in Westminster-hall*.

The obligation to return a deposit faithfully was, in very early times, holden sacred by the Greeks, as we learn from the story of GLAUCUS, who, on consulting the oracle, received this answer "that it was criminal even to barbour a "thought of with-holding deposited goods from the owners, who claimed them;" and a fine application of this universal law is made by an Arabian poet contemporary with JUSTINIAN, who remarks, "that life and wealth are only "deposited with us by our creator, and, like all "other deposits, must in due time be restored."

II. Employment by COMMISSION was also known to our ancient lawyers; and BRACTON, the best writer of them all, expresses it by the Roman

^{*} D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4.

⁺ Herod. VI. 86. Juv. Sat. XIII. 199.

word, Mandatum; now, as the very effence of this contract is the gratuitous performance of it by the bailee, and as the term commission is also pretty generally applied to bailees, who receive bire or compensation for their attention and trouble, I shall not scruple to adopt the word MANDATE as appropriated in a limited sense to the species of bailment now before us; nor will any confusion arise from the common acceptation of the word in the fense of a judicial command or precept, which is in truth only a fecondary and inaccurate usage of it. The great distinction then between one fort of mandate and a deposit is, that the former lies in fefance, and the latter, fimply in custody: whence, as we have already intimated, a difference often arises between the degrees of care demanded in the one contract and in the other; for, the mandatary being considered as having engaged himself, to use a degree of diligence and attention adequate to the performance of bis undertaking, the omission of fuch diligence may be, according to the nature of the business, either ordinary, or flight, neglect; although a bailee of this species ought regularly to be answerable only for a violation of good faith. This is the common doctrine taken from the law of ULPIAN; but there seems, in reality, to be no exception in the prefent case from the general rule; for, fince good faith itself

obliges every man to perform bis actual engagements, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to do any thing, how minute foever, by which his employer may fuftain damage, nor omit any thing, however inconfiderable, which the nature of the act requires*: nor will a want of ability to perform the contract be any defence for the contracting party; for, though the law exacts no impossible things, yet it may justly require, that every man shall know his own strength, before he undertakes to do an act, and that, if he delude another by false pretentions to skill, he shall be responsible for any injury, that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almost needless to add, that a mandatary, as well as a depositary, may bind himself by a special agreement to be answerable even for cafualties; but that neither the one nor the other can exempt himself by any stipulation from responsibility for fraud, or, its equivalent, gross neglect.

^{*} Lord Raym. 910.

A distinction seems very early to have been made in our law between the nonfesance, and the misfesance, of a conductor operis, and, by equal reason, of a mandatary; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, bad not built it, the court gave judgment of nonfuit; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable*. However, in a subsequent reign, when a fimilar action was commenced against one WATKINS for not building a mill according to his undertaking, there was a long conversation between the judges and the bar, which chief justice BABINGTON at length interrupted by ordering the defendant's counsel either to plead or to demur; but serjeant ROLF chose to plead specially, and issue was taken on a difcharge of the agreement. + Justice MARTIN objected to the action, because no tort was alledged; and he perfifted warmly in his opinion,

^{*} Yearb. 11. Hen. IV. 33.

⁺ Yearb. 3. Hen. VI. 36. b. 37. 2. Stath. Abr. tit. Accions fur le cas, pl. 20.

which seems not wholly irreconcilable to that of his two brethren; for in the cases, which they put, a special injury was supposed to be occasioned by the non-performance of the contract.

Authority and reason both convince me, that MARTIN, into whose opinion the reporter recommends an inquiry, was wrong in his objection, if he meaned, as justice Cokain and the chief justice seem to have understood him, that no such action would lie for nonsesance, even though special damage had been stated. His argument was, that the action before them sounded in covenant merely, and required a specialty to support it; but that, if the covenant had been changed into a tort, a good writ of trespass on the case might have been maintained: he gave, indeed, an example of missesance, but did not controvert the instances, which were given by the other judges.

It was not alledged in either of the cases just cited, that the defendant was to receive pay for the session of his work; but, since both defendants were described as astually in trade, it was not perhaps intended, that they were to work for nothing: I cannot however persuade myself, that there would have been any difference, had the promises been purely gratuitous, and had a special injury been caused by the breach of them. Suppose, for instance, that Robert's corn-fields are sur-

rounded by a ditch or trench, in which the water from a certain spring used to have a free course, but which has of late been obstructed by foil and rubbish; and that, Robert informing his neighbour Henry of his intention speedily to clear the ditch, Henry offers and undertakes immediately to remove the obstruction and repair the banks without reward, he having business of the same kind to perform on his own grounds: if, in this case, Henry neglect to do the work undertaken, "and the water, not having its na-" tural course, overslow the fields of Robert and " spoil his corn," may not Robert maintain his action on the case? Most assuredly; and so in a thousand instances of proper bailments, that might be supposed; where a just reliance on the promife of the defendant prevented the plaintiff from employing another person, and was consequently the cause of the loss, which he fustained*; for it is, as it ought to be, a general rule, that, for every dammim injurid datum, an action of fome fort, which it is the province of the pleader to advise, may be maintained; and, although the gratuitous performance of an act be a benefit conferred, yet, according to the just maxim of PAULUS, Adjuvari nos, non decipi, beneficio oportet+: but the special da-

^{*} Yearb. 19. Hen. VI. 49.

⁺ D. 13. 6. 17. 3.

mage, not the assumption, is the cause of this action; and, if notice be given by the mandatary, before any damage incurred, and while another person may be employed, that he cannot perform the work, no process of law can enforce the performance of it.

A case in Brook, made complete from the Year-book, to which he refers, seems directly in point; for, by chief justice Fineux, it had been adjudged, that, "if a man assume to build a "house for me by a certain day, and do not "build it, and I suffer damage by his nonfesance, "I shall have an action on the case, as well as if "he had done it amiss:" but it is possible, that Fineux might suppose a consideration, though none be mentioned*.

Actions on this contract are, indeed, very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble without compensation; but, whether the case really happened, or the reward, which has actually been stipulated, was omitted in the declaration, the question, "whether a man was responsible for damage to certain goods occasioned by his negligence in performing a GRATUITOUS promise," came before the court, in which lord Holt presided, so lately as the second year of queen Anne; and

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^{*} Bro. Abr. tit. Action sur le Case, 72.

a point, which the first elements of the Roman law have so fully decided, that no court of judicature on the continent would suffer it to be debated, was thought in England to deserve, what it certainly received, very great consideration*.

The case was this: BERNARD had assumed without pay safely to remove several casks of brandy from one cellar, and lay them down safely in another, but managed them so negligently, that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff Coggs, a motion was made in arrest of judgement on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have any recompense for bis pains, nor that he was a common porter: but the court were unanimously of opinion, that the action lay; and, as it was thought a matter of great consequence, each of the judges delivered his opinion separately.

The chief justice, as it has before been intimated, pronounced a clear, methodical, elaborate argument; in which he distinguished bailments into fx forts, and gave a history of the principal authorities concerning each of them.

^{*} Ld. Raym. 909—920. 1 Salk. 26. Com. 133. Farr. 13. 131. 528.

⁺ P. 361.

This argument is justly represented by my learned friend, the annotator on the First Institute, as "a most masterly view of the whole subject of "bailment*;" and, if my little work be considered merely as a commentary on it, the student may perhaps think, that my time and attention have not been unusefully bestowed.

For the decision of the principal case, it would have been sufficient, I imagine, to insist, that the point was not new, but had already been determined; that the writ in the REGISTER, called, in the strange dialect of our forefathers, De pipa vini cariandá+, was not similar, but identical; for, had the reward been the effence of the action, it must have been inserted in the writ, and nothing would have been left for the declaration but the stating of the day, the year, and other circumstances; of which RASTELL exhibits a complete example in a writ and declaration for negligently and improvidently planting a quickfet bedge, which the defendant had promifed to raise, without any consideration alledged; and isfue was joined on a traverse of the negligence.

^{*} Hargr. Co. Litt. 89. b. n. 3. The profession must lament the necessary suspension of this valuable work.

⁺ Reg. Orig. 110. a. see also 110. b. De equo insirmo sanando, and De columbari reparando.

and improvidence*. How any answer could have been given to these authorities, I am at a loss even to conceive: but, although it is needless to prove the same thing twice, yet other authorities, equally unanswerable, were adduced by the court, and supported with reasons no less cogent; for nothing, faid Mr. Justice Powell emphatically, is law, that is not reason; a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete; for, fince the reason of TITIUS may, and frequently does, differ from the reason of SEPTIMIUS, no man, who is not a lawyer, would ever know how to act, and no man, who is a lawyer, would in many instances know what to advice, unless courts were bound by authority, as firmly as the pagan deities were supposed to be bound by the decrees of fate.

Now the reason affigned by the learned judge for the cases in the Register and Year-books, which were the same with Coggs and Bernard, namely, "that the party's special assumption and undertaking obliged him so to do "the thing, that the bailor came to no damage by his neglect," seems to intimate, that the omission of the words salvo et secure would have made a difference in this case, as in that of a deposit; but I humbly contend, that those words are implied,

^{*} Rast. Entr. 13. b.

by the nature of a contract which lies in fefance, agreeably to the distinction with which I began this article. As judgement, indeed, was to be given on the record merely, it was unnecessary, and might have been improper, to have extended the proposition beyond the point then before the court; but I cannot think, that the narrowness of the propolition in this instance affects the general doctrine, which I have prefumed to lay down; and, in the strong case of the shepherd, who had a flock to keep, which he suffered through negligence to be drowned, neither a reward nor a special undertaking are stated*: that case, in the opinion of justice Townsend, depended upon the distinction between a bargain executed and executory; but I cannot doubt the relevancy of an action in the fecond case, as well as the first, whenever actual damage is occasioned by the nonfesance+.

There feems little necessity after this, to mention the case of POWTUARY and WALTON, the reason of which applies directly to the present subject; and, though it may be objected that the desendant was stated as a farrier, and must be

^{*} Yearb. 2 Hen. VII. 11.

[†] Stath. Abr. tit. Accions fur le cas, pl. 11. By justice Passon, is si un ferrour face covenant ove moy de ferrer mon chival,

[&]quot; jeo die qe sil ne ferra mon chival, uncore jeo averai accion

[&]quot; jeo die qe iil ne ferra mon chival, uncore jeo averai accion

[&]quot; fur mon cas, qar en son default paraventure mon chival est

prefumed to have acted in bis trade, yet chief justice Rolle intimates no such presumption; but says expressly, that "an action on the case "lies upon this matter, without alledging any confideration: for the negligence is the cause of action, and not the assumption."

A bailment without reward to carry from place to place is very different from a mandate to perform a work; and, there being nothing to take it out of the general rule, I cannot conceive that the bailee is responsible for less than gross neglect, unless there be a special acceptance: for instance, if Stephen desire Philip to carry a diamond-ring from Bristol to a person in London, and he put it with bank-notes of bis own into a letter-case, out of which it is stolen at an inn, or feized by a robber on the road, Philip shall not be answerable for it; although a very careful, or perhaps a commonly prudent, man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but, if he were to secrete bis own notes with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaife, I think he would be bound, in case of a loss by stealth or robbery, to restore the value of it to Stephen: every thing, therefore, that has been expounded

^{* 1} Ro. Abr. 19.

in the preceding article concerning deposits, may be applied exactly to this fort of bailment, which may be confidered as a subdivision of the second species.

Since we have nothing in these cases analogous to the judgements of insamy, which were often pronounced at Rome and Athens, it is hardly necessary to add, what appears from the speech of Cicero for S. Roscius of Ameria, that "the "ancient Romans considered a mandatary as insamous, if he broke his engagement, not only "by actual fraud, but even by more than ordimary negligence*."

As to exceptions from the rule concerning the degree of neglect, for which a mandatary is refponsible, almost all, that has been advanced before in the article of deposits, in regard to a special convention, a voluntary offer, and an interest accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an absent person, and without bis knowledge, is the negotiorum gestor of the civilians, and the obligation resulting from

[&]quot; In privatis rebus, si quis rem mandatam non modo ma" litiofius gestisset, sui quæstûs aut commodi causa, verùmetiam
" negligentius, eum majores summum admissse dedecus existi" mabant: itaque mandati constitutum est judicium, non minus
" tùrpe quam furti." Pro S. Rosc. p. 116. Glasg.

his implied contract has been incidentally mentioned in a preceding page.

III. On the third species of bailment, which is one of the most usual and most convenient in civil fociety, little remains to be observed; because our own, and the Roman, law are on this head perfectly coincident. I call it, after the French lawyers, loan for use, to distinguish it from their loan for consumption, or the MUTUUM of the Romans; by which is understood the lending of money, wine, corn, and other things, that may be valued by number, weight, or meafure, and are to be restored only in equal value or quantity*: this latter contract, which, according to St. GERMAN, is most properly called a loan, does not belong to the present subject; but it may be right to remark, that, as the specifick things are not to be returned, the absolute pro-

^{*} Doct. and Stud. dial. 2. ch. 38. Bract. 99. a. b. In Ld. Raym. 916. where this passage from Bracton is cited by the chief justice, mutuam is printed for commodatam; but what then can be made of the words ad IPSAM restituendam? There is certainly some mistake in the passage, which must be very ancient, for the oldest MS. that I have seen, is conformable to Tottel's edition. I suspect the omission of a whole line after the word precium, where the manuscript has a full point; and possibly the sentence omitted may be thus supplied from Justinian, whom Bracton copied: "At is, qui mutuum accepit, obligatus remanet," si forte incendio, &c. Inst. 3. 12. 2.

perty of them is transferred to the borrower, who must bear the loss of them, if they be deftroyed by wreck, pillage, fire, or other inevitable misfortune. Very different is the nature of the bailment in question; for a horse, a chariot, a book, a greyhound, or a fowling-piece. which are lent for the use of the bailee, ought to be redelivered specifically; and the owner must abide the loss, if they perish through any accident, which a very careful and vigilant man could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is construed rigorously, and, although flight, makes him liable to indemnify the lender; nor will his incapacity to exert more than ordinary attention avail him on the ground of an impossibility, " which the law, fays the rule, never de-"mands;" for that maxim relates merely to things absolutely impossible; and it was not only very possible, but very expedient, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the quality, as well as age, of the borrower, he must be supposed to have demanded no higher care, than that of which such a person was capable; as, if Paul lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection, which he would expect from a riding-master or an officer of dragoons*.

From the rule, that a borrower is answerable for flight neglect, compared with the distinction before made between simple theft and robbery+, it follows, that, if the borrowed goods be stolen out of his possession by any person whatever, he must pay the worth of them to the lender, unless he prove, that they were purloined notwithstanding his extraordinary care. The example, given by JULIAN, is the first and best that occurs: Caius borrows a filver ewer of Titius, and afterwards delivers it, that it may be fafely restored, to a bearer of fuch approved fidelity and wariness, that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by scoundrels, who contrive to fteal it, Caius appears to be wholly blameless, and Titius has suffered damnum sine injuria. It seems hardly necessary to add, that the same care, which the bailee is bound to take of the principal thing bailed, must be extended to such accessory things, as belong to it, and were delivered with it: thus a man, who borrows a watch, is responsible for flight neglect of the chain and seals.

Although the laws of Rome, with which those

^{*} Dumoulin, tract. De eo quod interess, n. 185.

[†] See p. 370. and note†.

of England in this respect agree, most expressly decide, that a borrower, using more than ordinary diligence, shall not be chargeable, if there be a force which he cannot resist, yet Pufen-DORF employs much idle reasoning, which I am not idle enough to transcribe, in support of a new opinion; namely, "that the borrower ought to " indemnify the lender, if the goods leniche de-" stroyed by fire, shipwreck, or other inevitable accident, and without bis fault, unless bis own so perish with them:" for example, if Paul lend William a horse worth thirty guineas to ride from Oxford to London, and William be attacked on a heath in that road by highwaymen, who kill or feize the horfe, he is obliged, according to Pufendorf and his annotator, to pay thirty guineas to Paul. The justice and good sense of the contrary decision are evinced beyond a doubt by M. POTHIER, who makes a distinction between those cases, where the loan was the occafion merely of damage to the lender, who might in the mean time have sustained a loss from other accidents, and those, where the loan was the fole efficient cause of his damaget; as if Paul, having lent his horse, should be forced in the interval by some pressing business to bire an-

^{*} D. 44. 7. 1. 4. Ld. Raym. 916.

[†] Poth. Prêt à Usage, n. 55. Puf. with Borbeyrac's notes, B. 5. C. 4. § 6.

other for himself; in this case the borrower ought, indeed, to pay for the hired horse, unless the lender had voluntarily submitted to bear the inconvenience caused by the loan; for, in this sense and in this instance, a benefit conserved should not he injurious to the benefactor. As to a condition presumed to be imposed by the lender, that he would not abide by any loss occasioned by the lending, it seems the wildest and most unreasonable of presumptions: if Paul really intended to impose such a condition, he should have declared his mind; and I persuade myself, that William would have declined a favour so hardly obtained.

Had the borrower, indeed, been imprudent enough to leave the high road and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unseasonable hour, and had the horse, in either case, been taken from him or killed, he must have indemnissed the owner; for irresssible force is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case, cited by St. German from the Summa Kosella, where a loan must be meaned, though the word depositum be erroneously used*; and it is there decided, that, if the borrower of a horse will im-

^{*} Dod. and Stud. where before cited.

prudently ride by a ruinous bouse in manifest danger of falling, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but that, if the house were in good condition and fell by the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger, reason, if William, instead of coming to London, for which purpose the horse was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes responsible for any accident, that may befall the horse in his journey to Bath, or after the expiration of the week*.

Thus, if Charles, in a case before put, wear the masked habit and jewels of George at the ball, for which they were borrowed, and be robbed of them in his return home at the usual time and by the usual way, he cannot be compelled to pay George the value of them; but it would be otherwise, if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by Gaius in the digest, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper in the metropolis, and he carry them into the country, there can be no doubt of his ob-

^{*} Ld. Raym. 915.

ligation to indemnify the lender, if the plate be lost by accident however irresistible.

There are other cases, in which a borrower is chargeable for inevitable mischance, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. example, if the house of Caius be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the filver ewer. which he had borrowed of Titius, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would confequently have been preferred, had he been owner of them both: even if his urn be the more precious, he must either leave it, and bring away the borrowed vessel, or pay Titius the value of that, which he has lost; unless the alarm was fo fudden, and the fire fo violent, that no deliberation or felection could be justly expected, and Caius had time only to fnatch up the first utenfil, that presented itself.

Since openness and honesty are the soul of contracts, and since "a suppression of truth is often "as culpable as an express falsehood," I accede to the opinion of M. Pothier, that, if a soldier were to borrow a horse of his friend for a battle expected to be fought the next morning, and were to conceal from him, that his own borse was as sit for the service, and if the horse, so bor-

rowed, were flain in the engagement, the lender ought to be imdemnified; for probably the diffimulation of the borrower induced him to lend the horse; but, had the soldier openly and frankly acknowledged, that be was unwilling to expose bis own borse, since, in case of a loss, he was unable to purchase another, and his friend, nevertheless, had generously lent him one, the lender would have run, as in other instances, the risk of the day.

If the bailee, to use the Roman expression, be IN MORA, that is, if a legal demand have been made by the bailor, he must answer for any cafualty that happens after the demand; unless in cases, where it may be strongly presumed, that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or unless the bailee have legally tendered the thing, and the bailor have put himself in mord by resulting to accept it: this rule extends of course to every species of bailment.

"Whether, in case of a valued loan, or, where the goods lent are estimated at a certain price, the borrower must be considered as bound in all events to restore either the things lent or the value of them," is a question, upon which the civilians are as much divided, as they are upon the celebrated clause in the law Contractus: five or six commentators of high reputation enter

the lifts against as many of equal fame, and each fide displays great ingenuity and address in this juridical tournament. D'AVEZAN supports the affirmative; and POTHIER, the negative; but the fecond opinion feems the more reasonable. The word PERICULUM, used by ULPIAN, is in itself equivocal: it means bazard in general, proceeding either from accident or from neglect; and in this latter fense it appears to have been taken by the Roman lawyer in the passage, which gave birth to the dispute. But, whatever be the true interpretation of that passage, I cannot satisfy myfelf, that, either in the Customary Provinces of FRANCE, or in ENGLAND, a borrower can be chargeable for all events without his confent unequivocally given: if William, indeed, had faid to Paul alternatively, "I promise, on my return to " Oxford, either to restore your horse or to pay " you thirty guineas," he must in all events have performed one part of this disjunctive obligation*; but, if Paul had only faid, "the horse, "which I lend you for this journey, is fairly "worth thirty guineas," no more could be implied from those words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that extraordinary diligence, which the nature of the contract required.

^{*} Palm. 651.

Besides the general exception to the rule concerning the degrees of neglect, namely, Si quid convenit vel plus vel minus, another is, where goods are lent for a use, in which the lender has a common interest with the borrower: in this case, as in other bailments reciprocally advantageous, the bailee can be responsible for no more than ordinary negligence; as, if Stephen and Philip invite some common friends to an entertainment prepared at their joint expence, for which purpose Philip lends a fervice of plate to his companion, who undertakes the whole management of the feast, Stephen is obliged only to take ordinary care of the plate; but this, in truth, is rather the innominate contract do ut facias, than a proper loan.

Agreeably to this principle, it must be decided, that, if goods be lent for the fole advantage of the lender, the borrower is answerable for gross neglect only; as, if a passionate lover of musick were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; but here again, the bailment is not so much a loan, as a mandate; and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument without any malice or very culpable negligence, he would not be bound to indemnify the amateur, as he was not in want of the instrument,

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and had no particular defire to use it. If, indeed, a poor artist, having lost or spoiled his violin or slute, be much distressed by this loss, and a brother-musician obligingly, though voluntarily, offer to lend him his own, I cannot agree with Despenses, a learned advocate of Montpellier and writer on Roman law, that the player may be less careful of it than any other borrower: on the contrary, he is bound, in conscience at least, to raise his attention even to a higher degree; and his negligence ought to be construed with rigour.

By the law of Moses, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the absence, or the presence, of the owner; for, says the divine legislator, "if a "man borrow aught of his neighbour, and it be "hurt or die, the owner thereof not being with it, "he shall surely make it good; but, if the owner "thereof be with it, he shall not make it good*:" now it is by no means certain, that the original word signifies the owner, for it may signify the possessor, and the law may import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but, if it was intended, that the borrower should always.

^{*} Exod. xxii. 14, 15.

answer for casualties, except in the case, which must rarely happen, of the owner's presence, this exception seems to prove, that no casualties were meaned, but such as extraordinary care might have prevented; for I cannot see, what difference could be made by the presence of the owner, if the force, productive of the injury, were wholly irresistible, or the accident inevitable.

An old Athenian law is preserved by DE-MOSTHENES, from which little can be gathered on account of its generality and the use of an ambiguous word*; it is understood by PETIT as relating to guardians, mandataries, and commissioners; and it is cited by the orator in the case of a guardianship. The Athenians were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide savourably or severely, according to the circumstances of each particular case.

IV. As to the degree of diligence, which the law requires from a pawnee, I find myself again obliged to dissent from fir EDWARD COKE, with whoseopinion a similar liberty has before been taken in regard to a depositary; for that very learned man-

^{*} Πηλ ων καθυρπεί τις, διωτίως δρλισκάτειν, ώσωτς αν αυτός ίχη. Reifke's edition, 855. 3. Here the verb καθυρείται, may imply flight, or ordinary, negleck; or even fi aud, as Petit has rendered it.

lays it down, that, "if goods be delivered to "one as a gage or pledge, and they be ftolen, "he shall be discharged, because be bath a pro"perty in them; and, therefore, he ought to "keep them no otherwise than his own*:" I deny the first proposition, the reason, and the conclusion.

Since the bailment, which is the subject of the present article, is beneficial to the pawnee by securing the payment of his debt, and to the pawnor by procuring him credit, the rule, which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requifite for the person, to whom a gage or pledge is bailed, to take ordinary care of it; and he must consequently be responsible for ordinary neglect+. This is expressly holden by BRACTON; and, when I rely on his authority, I am perfectly aware, that he copied JUSTINIAN almost word for word, and that lord Holt, who makes considerable use of his treatife, observes three or four times, " that "he was an old author;" but, although he had been a civilian, yet he was also a great common-lawyer, and never, I believe, adopted the rules and expressions of the Romans, except when they coincided with the laws of England

^{* 1} Inst. 89. a. 4 Rep. 83. h. † Bract. 99. b. † I.d. Raym. 915, 916. 919.

in his time: he is certainly the best of our juridical classicks; and, as to our ancient authors, if their doctrine be not law, it must be left to mere historians and antiquaries; but, if it remain unimpeached by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected fagacity and experience of ages. The doctrine in question has the full affent of lord Holt himself, who declares it to be " sufficient, if the pawnee use true, and ordi-" nary, diligence for restoring the goods, and "that, fo doing, he will be indemnified, and, " notwithstanding the loss, shall resort to the "pawnor for his debt." Now it has been proved, that " a bailee cannot be confidered " as using ordinary diligence, who suffers the "goods bailed to be taken by fealth out of his "custody";" and it follows, that "a pawnee " shall not be discharged, if the pawn be simply " stolen from him; but if he be forcibly robbed " of it without his fault, his debt shall not be " extinguished.

The passage in the Roman institutes, which BRACTON has nearly transcribed, by no means convinces M. LE BRUN, that a pawnee and a borrower are not responsible for one and the same degree of negligence; and it is very certain, that

^{*} P. 370. note †.

ULPIAN, speaking of the Actio pignoratitia, uses these remarkable words? "Venit in bac actione " et dolus et culpa un in commodato, venit et cus-"todia; vis major non venit." To solve this difficulty, Noodt has recourse to a conjectural emendation, and supposes ur to have been inadvertently written for AT; but, if this was a mistake, it must have been pretty ancient, for the Greek translators of this sentence use a particle of fimilitude, not an adversative: there feems, however, no occasion for so hazardous a mode of criticism. ULPIAN has not said. " talis culpa qualis in commodato;" nor does the word UT imply an exact resemblance: he meaned, that a pawnee was answerable for neglect, and gave the first instance, that occurred, of another contract, in which the party was likewife answerable for neglect, but left the fort or degree of negligence to be determined by his general rule; conformably to which he himself expressly mentions PIGNUS among other contracts reciprocally useful, and distinguishes it from COMMODATUM, whence the borrower folely derives advantage*.

It is rather less easy to answer the case in the book of Assiste, which seems wholly subversive of my reasoning, and, if it stand unexplained, will break the harmony of my system; for there, in

^{*} Before, p. 370.

^{† 29} Aff. pl. 28.

an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it was delivered to him " in gage for a certain fum of money; that he " had put it among his other goods; and that all " together had been stolen from him:" now, according to my doctrine, the plaintiff might have demurred to the plea; but he was driven to reply, "that he tendered the money before the steal-"ing, and that the creditor refused to accept it," on which fact issue was joined; and the reason, affigned by the chief justice, was, that, " if a " man bail goods to me to keep, and I put them " among my own, I shall not be charged, if they " be stolen." To this case I answer: first, that, if the court really made no difference between a pawnee and a depositary, they were indubitably mistaken; for which affertion I have the authority of BRACTON, lord HOLT, and St. GER-MAN, who ranks the taker of a pledge in the fame class with a birer of goods*; next, that ina much later case, in the reign of HEN. VI. where a biring of custody seems to be meaned, the distinction between a theft and a robbery is taken agreeably to the Roman law+; and, laftly, that, although in the strict propriety of our English language, to steal is to take claudestinely, and to rob

^{*} Doct. and Stud. dial 2. ch. 38.

[†] Besore, p. 370. notet.

is to feize by violence, corresponding with the Norman verbs embleer and robber, yet those words are fometimes used inaccurately; and I always fuspected, that the case in the book of Assis related to a robbery, or a taking with force; a fufpicion confirmed beyond any doubt by the judicious Brook, who abridges this very case with the following title in the margin, "Que ferra " al perde, quant les biens font robbes*:" and, in a modern work, where the old cases are referred to, it appears to have been fettled, in conformity to them and to reason, "that if the pawn be laid " up, and the pawnee be robbed, he shall not be " answerable +:" but lord Coke seems to have used the word stolen in its proper sense, because he plainly compares a pawn with a deposit.

If, indeed, the thing pledged be taken openly and violently through the fault of the pledgee, he shall be responsible for it; and, after a tender and refusal of the money owed, which are equivalent to actual payment, the whole property is instantly revested in the pledger, and he may consequently maintain an action of trover: it is said in a most useful work, that by such tender and resusal the thing paymed "ceases to be a pledge and becomes a deposits;" but this must be an error

^{*} Abr. tit. Bailment, pl. 7. † 2 Salk. 522.

^{‡ 29} Aff. pl. 28. Yelv. 179. Ratcliff and Davis.

[§] Law of Nisi Prius, 72.

of impression; for there can never be a deposit without the owner's consent, and a depositary would be chargeable only for gross negligence, whereas the pawnee, whose special property is determined by the wrongful detainer, becomes liable in all possible events to make good the thing lost, or to relinquish his debt*.

The reason, given by Coke for his doctrine, namely, "because the pawnee has a property in " the goods pledged," is applicable to every other fort of bailment, and proves nothing in regard to any particular species; for every bailee has a temporary qualified property in the things, of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger, who may damage or purloin them+. By the Roman law, indeed, "even the possession of the " depositary was holden to be that of the person " depositing;" but with us the general bailee has unquestionably a limited property in the goods intrusted to his care: he may not, however, use them on any account without the confent of the owner, either expressly given, if it can possibly be obtained, or at least strongly prefumed; and this prefumption varies, as the thing is likely to be better, or worse, or not at all af-

^{*} Ld. Raym. 917. + Yearb. 21 Hen. VII. 14. b. 15. 2.

fected, by usage; fince, if Caius deposit a settingdog with Titius, he can hardly be supposed unwilling, that the dog should be used for partridge-shooting, and thus be confirmed in those habits, which make him valuable; but, if clothes or linen be deposited by him, one can scarce imagine, that he would fuffer them to be worn: and, on the other hand, it may justly be inferred, that he would gladly indulge Titius in the liberty of using the books, of which he had the euftody, fince even moderate care would prevent them from being injured. In the fame manner it has been holden, that the pawnee of goods, which will be impaired by usage, cannot use them; but it would be otherwise, I apprehend, if the things pawned actually required exercise and a continuance of habits, as sporting-dogs and horses: if they cannot be hurt by being worn, they may be used, but at the peril of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and she wear them at a publick place, and be robbed of them on her return, the must make them good: " if she keeps "them in a bag," fays a learned and respectable writer, " and they are stolen, she shall not be "charged";" but the bag could hardly be taken privately and quietly without her omission of or-

^{*} Law of Nisi Prins, 72.

dinary diligence; and the manner, in which lord HOLT puts the case, establishes my system, and confirms the answer just offered to the case from the Year-book; for, "if she keep the jewels," fays he, " locked up in her cabinet, and ' " her cabinet be broken open, and the jewels taken "thence, she will not be answerable*." Again; it is faid, that, where the pawnee is at any expense to maintain the thing given in pledge. as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge+; and this doctrine must be equally applicable to a general bailee, who ought neither to be injured nor benefited in any respect by the trust undertaken by him; but the Roman and French law, more agreeably to principle and analogy, permits indeed both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reafonable charges of their nourishment. It follows from these remarks, that lord Coke has asfigned an inadequate reason for the degree of diligence, which is demanded of a pawnee; and the true reason is, that the law requires nothing extraordinary of him.

^{*} Ld. Raym. 917. † Ow. 124.

¹ Poth. Depot, n. 47. Nantiffement, n. 35.

But, if the receiver in pledge were the only bailee, who had a special property in the thing bailed, it could not be logically inferred, "that, "therefore, he ought to keep it merely as his "own:" for, even if Caius have an absolute undivided property in goods, jointly or in common with Septimius, he is bound by rational, as well as positive, law to take more care of them than of his own, unless he be in fact a prudent and thoughtful manager of his own concerns; since every man ought to use ordinary diligence in affairs, which interest another as well as himself: "Aliena negotia," says the emperor Constantine, "exacto officio geruntur"."

The conclusion, therefore, drawn by fir EDWARD COKE, is no less illogical than his premisses are weak; but here I must do M. Le Brun the justice to observe, that the argument, on which his whole system is founded, occurred likewise to the great oracle of English law; namely, that a person, who had a property in things committed to his charge, was only obliged to be as careful of them as of his own goods; which may be very true, if the sentence be predicated of a man ordinarily careful of his own; and, if that was Le Brun's hypothesis, he has done little more than adopt the system of Gode-

^{*} C. 4. 35. 21.

partner and a co-proprietor, but requires a bigher degree in eight of the ten preceding contracts.

Pledges for debt are of the highest antiquity: they were used in very early times by the roving Arabs, one of whom finely remarks, "that the "life of man is no more than a pledge in the hands "of Destiny;" and the salutary laws of Moses, which forbade certain implements of husbandry and a widow's raiment to be given in pawn, deserve to be imitated as well as admired. The distinction between pledging, where possession, where it remains with the debtor, was originally Attick; but scarce any part of the Atbenian laws on this subject can be gleaned from the ancient orators, except what relates to bottomry in five speeches of Demosthers.

I cannot end this article, without mentioning a fingular case from a curious manuscript preserved at Cambridge, which contains a collection of queries in Turkish, together with the decisions or concise answers of the Mufti at Constantinople: it is commonly imagined, that the Turks have a translation in their own language of the Greek code, from which they have supplied the desects of their Tartarian and Arabian jurisprudence*;

^{*} Duck de Auth. Jur. Civ. Rom. I. 2. 6.

but I have not met with any such translation, although I admit the conjecture to be highly probable, and am persuaded, that their numerous treatises on Mabomedan law are worthy on many accounts of an attentive examination. The case was this: " Zaid had left with Amru divers " goods in pledge for a certain fum of money, " and some ruffians, having entered the house of " Amru, took away his own goods together " with those pawned by Zaid." Now we must necessarily suppose, that the creditor had by bis own fault given occasion to this robbery; otherwife we may boldly pronounce, that the Turks are wholly unacquainted with the imperial laws of BYZANTIUM, and that their own rules are totally repugnant to natural justice; for the party proceeds to ask, " whether, since the debt became " extinct by the loss of the pledge, and fince the " goods pawned exceeded in value the amount " of the debt, Zaid could legally demand the "balance of Amru;" to which question the great law-officer of the Othman court answered with the brevity usual on such occasions, OL-MAZ, It cannot be*. This custom, we must con-

^{*} Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. Hywel Dda. lib. 2. cap. 2. § 29. note x. It may possibly be the usage in Turkey to slipulate "ut amissio pignoris liberet de-"bitorem," as in C. 4. 24. 6.

feis, of propoling cases both of law and conscience under feigned names to the supreme judge, whose answers are considered as solemn decrees, is admirably calculated to prevent partiality and to save the charges of litigation.

- V. The last species of bailment is by no means the least important of the five, whether we consider the infinite convenience and daily use of the contract itself, or the variety of its branches, each of which shall now be succinctly, but accurately, examined.
- 1. Locatio, or locatio-conductio, REI, is a contract, by which the hirer gains a transient qualified property in the thing hired, and the owner acquires an absolute property in the stipend, or price, of the hiring; fo that, in truth, it bears a strong resemblance to the contract of emptio-venditio, or sale; and, fince it is advantageous to both contracting parties, the harmonious confent of nations will be interrupted, and one object of this essay defeated, if the laws of England shall be found, on a fair inquiry, to demand of the hirer a more than ordinary degree of diligence. In the most recent publication, that I have read on any legal subject, it is expressly faid, "that the hirer is to take all imaginable "care of the goods delivered for hire":" the

^{*} Law of Nisi Prius, 3d edition corrected, 72.

words all imaginable, if the principles before established be just, are too strong for practice even in the strict case of borrowing; but, if we take them in the mildest sense, they must imply an extraordinary degree of care; and this doctrine, I presume, is founded on that of lord HOLT in the case of Coggs and BERNARD, where the great judge lays it down, "that, if goods are let out " for a reward, the birer is bound to the UTMOST " diligence, fuch as the MosT diligent father of " a family uses "." It may seem bold to controvert so respectable an opinion; but, without infisting on the palpable injustice of making a borrower and a birer answerable for precisely the fame degree of neglect, and without urging, that the point was not then before the court, I will engage to show, by tracing the doctrine up to its real fource, that the dictum of the chief justice was entirely grounded on a grammatical mistake in the translation of a single Latin word.

In the first place, it is indubitable, that his lordship relied folely on the authority of Bracton; whose words he cites at large, and immediately subjoins, "whence it appears, &c." now the words, "talis ab eo desideratur custodia, "qualem diligentissimus paterfamilias suis

^{*} Ld. Raym. 916.

" rebus adhibit," on which the whole question depends, are copied exactly from JUSTINIAN*. who informs us in the proeme to his Institutes, that his decisions in that work were extracted principally from the Commentaries of GAIUS; and the epithet diligentissimus is in fact used by this ancient lawyer +, and by bim alone, on the fubiect of hiring: but GAIUS is remarked for writing with energy, and for being fond of using superlatives, where all other writers are satisfied with positives; fo that his forcible manner of expressing himself, in this instance as in some others, misled the compilers employed by the Emperor, whose words Theophilus rendered more than literally, and BRACTON transcribed; and thus an epithet, which ought to have been translated ordinarily diligent, has been supposed to mean extremely careful. By rectifying this mistake, we restore the broken harmony of the pandects with the institutes, which, together with the code, form one connected works, and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to adopt the interpretation of M. DE FERRIERE, who ima-

^{*} Bract. 62. b. Justin. Inst. 3. 25. 5. where Theophilus has

[†] D 19. 2. 25. 7. ‡ Le Brun, p. 93. § Burr. 426. VOL. VI. E E

gines, that both JUSTINIAN and GAIUS are speaking only of cases, which from their nature demand extraordinary care *.

There is no authority then against the rule, which requires of a birer the same degree of diligence, that all prudent men, that is, the generality of mankind, use in keeping their own goods; and the just distinction between borrowing and hiring, which the Jewish lawgiver emphatically makes, by saying, "if it be an hired thing, it came for its bire +," remains established by the concurrent wisdom of nations in all ages.

If Caius therefore hire a horse, he is bound to ride it as moderately and treat it as carefully, as any man of common discretion would ride and treat his own horse; and if, through his negligence, as by leaving the door of his stable open at night, the horse be stolen, he must answer for it; but not if he be robbed of it by highwaymen, unless by his imprudence he gave occasion to the robbery, as by travelling at unusual hours, or by taking an unusual road: if, indeed, he hire a carriage and any number of horses, and the owner send with them his possilion or coachman, Caius is discharged from all attention to the horses, and remains obliged only to

⁵ Inft. vol. V. p. 138.

⁺ Exod. xxii. 15.

take ordinary care of the glasses and inside of the carriage, while he sits in it.

Since the negligence of a servant, acting under his master's directions express or implied, is the negligence of the master, it follows, that, if the fervant of Caius injure or kill the horse by riding it immoderately, or, by leaving the stabledoor open, fuffer thieves to steal it, Caius must make the owner a compensation for his loss*; and it is just the same, if he take a ready-furnished lodging, and his guests, or fervants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. At Rome the law was not quite fo rigid; for POMPONIUS, whose opinion on this point was generally adopted, made the master liable, only when he was culpably negligent in admitting careless guests or servants, whose bad qualities he ought to have known †: but this distinction must have been perplexing enough in practice; and the rule, which, by making the head of a family answerable indiscriminately for the faults of those, whom he receives or employs, compels him to keep a vigilant eye on all his domesticks, is not only more simple, but more conducive to the publick fecurity, although, it may be rather harsh

^{*} Salk. 282. Ld. Raym. 619. . . . † D. 19. 2. 11.

in some particular instances *. It may here be observed, that this is the only contract, to which the French, from whom our word bailment was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire is by them called bail à loyer, and the letter for hire, bailleur, that is, bailor, both derived from the old verb bailler, to deliver; and, though the contracts, which are the subject of this essay, be generally confined to moveable things, yet it will not be improper to add, that, if immoveable property, as an orchard, a garden, or a farm, be letten by parol, with no other stipulation than for the price or rent, the leffee is bound to use the same diligence in preserving the trees, plants, or implements, that every prudent person would use, if the orchard, garden, or farm, were his own.

2. Locatio OPERIS, which is properly subdivisible into two branches, namely, faciendi, and mercium vebendarum, has a most extensive influence in civil life; but the principles, by which the obligations of the contracting parties may be ascertained, are no less obvious and rational, than the objects of the contract are often vast and important †.

^{*} Poth. Louage, n. 193.

[†] It may be useful to mention a nicety of the Latin language in the application of the verbs locare and conducere: the em-

If Titius deliver filk or velvet to a tailor for a fuit of clothes, or a gem to a jeweller to be fet or engraved, or timber to a carpenter for the rafters of his house, the tailor, the engraver, and the builder, are not only obliged to perform their feveral undertakings in a workmanly manner *: but, since they are entitled to a reward, either by express bargain or by implieation, they must also take ordinary care of the things respectively bailed to them: and thus, if a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, or to an hoftler to be dreffed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the ordinary neglect of themselves or their servants. It has, indeed, been adjudged, that, if the horse of a guest be sent to pasture by the owner's desire, the innholder is not, as fuch, responsible for the loss

ployer, who gives the reward, is locator operis, but conductor operarum; while the party employed, who receives the pay, is locator operarum, but conductor operis. Heinecc. in Pand. par. 3. § 320. So, in Horace,

" Tu fecanda marmora

" Locas"-

which the stonehewer or mason conduxit.

* 1 Ventr. 268. erroneously printed 1 Vern. 268. in all the editions of Bl. Comm. II. 452. The innumerable multitude of inaccurate or idle references, in our best reports and law-tracts, is the bane of the student and of the practiser.

of him by theft or accident *; and, in the case of Mosley and Fosser, an action against an agister for keeping a horse so negligently that it was folen, is faid to have been held maintainable only by reason of a special assumption +; but the case is differently reported by ROLLE, who mentions no fuch reason; and, according to him, chief justice POPHAM advanced generally, in conformity to the principles before established, that, " if a man, to whom horses are bailed for agistment, leave open the gates of " his field, in consequence of which neglect " they stray and are stolen, the owner has an " action against him:" it is the same, if the innkeeper fend his guest's horse to a meadow of bis own accord, for he is bound to keep safely all fuch things as his guests deposit within bis inn, and shall not discharge himself by his own act from that obligation; and, even when he turns out the horse by order of the owner, and receives pay for his grass and care, he is chargeable, furely, for ordinary negligence, as a bailee for hire, though not as an innkeeper by the general custom of the realm. It may be worth while to investigate the reasons of this general custom, which in truth means no more than common law, concerning innholders*.

^{* 8} Rep. 32. Cayle's case. † Mo. 543. 1 Ro. Abr. 4. † Reg. Orig. 105. a. Noy, Max. ch. 43.

Although a stipend or reward in money be the essence of the contract called locatio, yet the same responsibility for neglect is justly demanded in any of the innominate contracts, or, whenever a valuable confideration of any kind is given or stipulated. This is the case, where the contract do ut des is formed by a reciprocal bailment for use, as if Robert permit Henry to use his pleafure-boat for a day, in confideration that Henry will give him the use of his chariot for the same time; and so in ten thousand instances, that might be imagined, of double bailments: this too is the case, if the absolute property of one thing be given as an equivalent for the temporary or limited property of another, as if Charles give George a brace of pointers for the use of his bunter during the feafon. The fame rule is applicable to the contract facio ut facias, where two persons agree to perform reciprocal works; as if a mason and a carpenter have each respec-. tively undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house. this is the contract do ut facias, or facio ut des: and, in all these cases, the bailees must answer for the omission of ordinary diligence in preserving the things, with which they are intrusted: so, when Jacob undertook the care of Laban's slocks and herds for no less a reward than his younger daughter, whom he loved so passionately, that seven years were in his eyes like a few days, he was bound to be just as vigilant, as if he had been paid in shekels of silver.

Now the obligation is precifely the same, as we have already hinted*, when a man takes upon himself the custody of goods in confequence and consideration of another gainful contrast; and, though an innholder be not paid in money for securing the traveller's trunk, yet the guest facit ut faciat, and alights at the inn, not folely for his own refreshment, but also that his goods may be fafe: independently of this reasoning, the custody of the goods may be confidered as accessary to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light GAIUs and, as great a man as he, lord Holt, feem to view the obligation; for they agree, "that, although a bargeman " and a master of a ship receive their fare for " the passage of travellers, and an innkeeper " his pay for the accommodation and enter-" tainment of them, but have no pecuniary re-" ward for the mere custody of the goods be-

^{*} P. 375, 376.

- " longing to the passengers or guests, yet they
- " are obliged to take ordinary care of those
- " goods; as a fuller and a mender are paid for
- " their skill only, yet are answerable, ex locato,
- " for ordinary neglect, if the clothes be lost or

" damaged "."

In whatever point of view we confider this bailment, no more is regularly demanded of the bailee than the care, which every prudent man takes of his own property; but it has long been holden, that an innkeeper is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged in his inn, or stolen out of it. by any person whatever +; nor shall he discharge himself from this responsibility by a refusal to take any care of the goods, because there are suspected persons in the house, for whose conduct he cannot be answerable : it is otherwise, indeed, if he refuse admission to a traveller, because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's consent \.

Add to this, that, if he fail to provide honest fervants and honest inmates, according to the confidence reposed in him by the publick, his

^{*} D. 4.9. 5. and 12 Mod. 487.

[†] Yearb. 10 Hen. VII. 26. 2 Cro. 189.

¹ Mo. 78. § Dy. 158. b. 1 And. 29.

negligence in that respect is highly culpable, and he ought to answer civilly for their acts, even if they should rob the guests, who sleep in his chambers *. Rigorous as this law may feem, and hard as it may actually be in one or two particular inflances, it is founded on the great principle of publick utility, to which all private confiderations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of affociating with ruffians or pilferers, while the injured gueft could feldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them. Hence the Prætor declared, according to Pomponius, bis defire of securing the public from the dishonesty of such men, and by his edict gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except damno fatali, or by inevitable accident; and ULPIAN intimates, that even this feverity could not restrain them from knavish practices or suspicious neglect+.

^{* 1} Bl. Comm. 430. † D. 4.9. 1. and 3.

In all such cases, however, it is competent for the innholder to repel the presumption of his knavery or default, by proving that he took ordinary care, or that the force, which occasioned the loss or damage, was truly irresistible.

When a private man demands and receives a compensation for the bare custody of goods in his warehouse or store-room, this is not properly a deposit, but a biring of care and attention: it may be called locatio custodia, and might have been made a distinct branch of this last fort of bailment, if it had not feemed useless to multiply subdivisions; and the bailee may still be denominated locator opera, fince the vigilance and care, which he lets out for pay, are in truth a mental operation. Whatever be his appellation, either in English or Latin, he is clearly responfible, like other interested bailees, for ordinary negligence; and, although St. GERMAN feems to make no difference in this respect between a keeper of goods for bire and a simple depositary, yet he uses the word DEFAULT, like the CUL-PA of the Romans, as a generical term, and leaves the degree of it to be ascertained by the rules of law*.

In the fentence immediately following, he makes a very material distinction between the two contracts; for, "if a man, says he, have

^{*} Doct. and Stud. where before cited.

" a certain recompense for the keeping of goods, " and promife, at the time of the delivery, to " redeliver them safe at his peril, then he shall " be charged with all chances, that may befall; " but, if he make that promise, and have " nothing for keeping them, he is bound to no " cafualties, but fuch as are wilful, and happen " by his own default:" now the word PERIL, like periculum, from which it is derived, is in itself ambiguous, and sometimes denotes the risk of inevitable mischance, sometimes the danger arising, from a want of due circumspection; and the stronger sense of the word was taken in the first case against bim, who uttered it; but, in the second, where the construction is favourable, the milder sense was justly preferred*. Thus, when a person, who, if he were wholly uninterested, would be a mandatary, undertakes for a reward to perform any work, he must be confidered as bound still more strongly, to use a degree of diligence adequate to the performance of it: his obligation must be rigorously construed, and he would, perhaps, be answerable for flight neglect, where no more could be required of a mandatary than ordinary exertions. This is the case of commissioners, factors, and bailists, when their undertaking lies in fesance, and not simply

^{*} See before, p. 370.

in custody: hence, as peculiar care is demanded in removing and raifing a fine column of granate or porphyry, without injuring the shaft or the capital, GAIUS feems to exact more than ordinary diligence from the undertaker of fuch a work for a stipulated compensation*. COKE considers a factor in the light of a fervant, and thence deduces his obligation; but, with great submission, his reward is the true reason, and the nature of the bufiness is the just measure, of his duty +; which cannot, however, extend to a responsibility for mere accident or open robbery; and, even in the case of thest, a sactor has been holden excused, when he showed, " that he had laid up the goods of his principal " in a warehouse, out of which they were " stolen by certain malefactors to him un-" known \."

Where *skill* is required, as well as care, in performing the work undertaken, the bailee for bire must be supposed to have engaged himself for a due application of the necessary art: it is his own fault, if he undertake a work above his strength; and all, that has before been advanced on this head concerning a mandatary, may be applied with much greater force to a conductor

^{*} D. 19. 2. 7. + 4 Rep. 84. Ld. Raym. 918.

^{† 1} Inst. 89. a. § 1 Vent. 121. Vere and Smith.

operis faciendi*. I conceive, however, that, where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man, who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions, or a special undertaking, no more can fairly be demanded of him than the best of his ability †. The case, which SADI relates with elegance and humour in his Gulistan or Rose-Garden, and which PUFENDORF cites with approbation 1, is not inapplicable to the present subject, and may ferve as a specimen of Mabomedan law, which is not so different from ours, as we are taught to imagine: 'A man, who had a diforder in his eyes, called on a farrier for a re-• medy; and he applied to them a medicine commonly used for bis patients: the man lost his fight, and brought an action for damages: but the judge faid, "No action lies, for, if " the complainant had not himself been an ass, " he would never have employed a farrier;" and SADI proceeds to intimate, that, " if a " person will employ a common mat-maker to " weave or embroider a fine carpet, he must " impute the bad workmansh p to his own " folly §."

^{*} Spondet, say the Roman lawyers, peritiam artis.

[†] P. 381. † De Jure Nat. et Gent. lib. 5. cap. 5. § 3.

[§] Rosar. Polit. cap. 7. There are numberless tracts in

In regard to the diffinction before-mentioned between the nonfesance and the missesance of a workman*, it is indisputably clear, that an action lies in both cases for a reparation in damages, whenever the work was undertaken for a reward, either actually paid, expressly stipulated, or, in the case of a common trader, strongly implied; of which BLACKSTONE gives the following instance: " If a builder promises, " undertakes, or assumes to Caius, that he will " build and cover his house within a time li-" mited, and fails to do it, Caius has an action " on the case against the builder for this breach of his express promise, and shall recover a " pecuniary fatisfaction for the injury sustained " by fuch delay+." The learned author meaned, I presume, a common builder, or supposed a confideration to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the nonperformance of a mandatary1.

Before we leave this article, it seems proper to remark, that every bailee for pay, whether

Arabick, Persian, and Turkish, on every branch of jurisprudence; from the best of which it would not be difficult to extract a complete system, and to compare it with our own; nor would it be less easy, to explain in Persian or Arabick such parts of our English law, as either coincide with that of the Asiaticks, or are manifestly preserable to it.

^{*} P. 382, &c. + 3 Comm. 157. ‡ P. 383, 384, 385.

conductor rei or conductor operis, must be supposed to know, that the goods and chattels of his bailor are in many cases distrainable for rent, if his landlord, who might otherwise be shamefully defrauded, find them on the premisses*; and, as they cannot be diffrained and fold without his ordinary default at least, the owner has a remedy over against him, and must receive a compensation for his loss †: even if a depositary were to remove or conceal his own goods, and those of his depositor were to be seized for rentarrere, he would unquestionably be bound to make restitution; but there is no obligation in the bailee to suggest wise precautions against inevitable accident; and he cannot, therefore, be obliged to advise insurance from fire; much less to insure the things bailed without an authority from the bailor.

It may be right also to mention, that the distinction, before taken in regard to loans;, between an obligation to restore the specifick things, and a power or necessity of returning others equal in value, holds good likewise in the contracts of biring and depositing: in the first case, it is a regular bailment; in the second, it becomes a debt. Thus, according to ALFENUS in his samous law, on which the judicious

^{*} Burr. 1498. &c. † 3. Bl. Comm. 8. ‡ P. 392.

BYNKERSHOEK has learnedly commented, " if " an ingot of filver be delivered to a filver-" fmith to make an urn, the whole property is " transferred, and the employer is only a credi-" tor of metal equally valuable, which the "workman engages to pay in a certain shape ":" the fmith may consequently apply it to his own use; but, if it perish, even by unavoidable mischance or irrefiftible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time. It would be otherwife, no doubt, if the fame filver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were agreed to be specifically redelivered in the form of a cup or a standish.

3. Locatio operis MERCIUM VEHENDARUM is a contract, which admits of many varieties in form, but of none, as it seems at length to be settled, in the fubstantial obligations of the bailee.

A carrier for bire ought, by the rule, to be responsible only for ordinary neglect; and, in the time of HENRY VIII. it appears to have been generally holden, "that a common carrier "was chargeable, in case of a loss by robbery, only when he had travelled by ways danger-

^{*} D. 19. 2. 31. Bynk. Obf. Jur. Rom. lib. VIII. VOL. VI. F F

" ous for robbing, or driven by night, or at any inconvenient hour*:" but, in the commercial reign of ELIZABETH, it was resolved, upon the same broad principles of policy and convenience that have been mentioned in the case of innholders, "that, if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them +."

Now the reward or hire, which is considered by sir EDWARD COKE as the reason of this decision, and on which the principal stress is often laid in our own times, makes the carrier liable, indeed, for the omission of ordinary care, but cannot extend to irresistible force; and, though some other bailees have a recompense, as factors and workmen for pay, yet, even in Woodliese's case; the chief justice admitted, that robbery was a good plea for a factor, though it was a bad one for a carrier: the true ground of that resolution is the publick employment exercised by the carrier, and the danger of his combining with robbers to the infinite injury of commerce and extreme inconvenience of society ‡.

The modern rule concerning a common carrier is, that "nothing will excuse him, except the

^{*} Doct. and Stud, where often before cited.

^{† 1} Inst. 89. a. Mo. 462. 1 Ro. Abr. 2. Woodliefe and. Curties:

t Ld. Raym. 917. 12 Mod. 487.

act of God, or of the King's enemies*;" but a momentary attention to the principles must convince us, that this exception is in truth part of the rule itself, and that the responsibility for a loss by robbers is only an exception to it: a carrier is regularly answerable for neglect, but not, regularly, for damage occasioned by the attacks of rustians, any more than for hostile violence, or unavoidable missortune; but the great maxims of policy and good government make it necessary to except from this rule the case of robbery, lest confederacies should be formed between carriers and desperate villains with little or no chance of detection.

Although the Act of God, which the ancients too called Giz Gias and Vim divinam, be an expression, which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place inevitable accident: religion and reason, which can never be at variance without certain injury to one of them, assure us, that "not a gust of wind blows, nor," a slash of lightning gleams, without the knowledge and guidance of a superintending mind;" but this doctrine loses its dignity and sublimity by a technical application of it,

^{*} Law of Niss Prius, 70, 71.

which may in some instances border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous.

In a recent case of an action against a carrier, it was holden to be no excuse, "that the ship was tight, when the goods were placed on board, but that a rat, by gnawing out the akum, had made a small hole, through which the water had gushed*;" but the true reason of this decision is not mentioned by the reporter: it was in sact at least ordinary negligence, to let a rat do such mischief in the vessel; and the Roman law has, on this principle, decided, that, "si fullo vestimenta polienda" acceperit, eaque mures reserrant, ex locato temetur, quia debuit ab hac re caveret."

Whatever doubt there may be, among civilians and common-lawyers, in regard to a casket, the contents of which are concealed from the DE-POSITARY; it seems to be generally understood, that a common carrier is answerable for the loss of a box or parcel, be he ever so ignorant of its contents, or be those contents ever so valuable, unless he make a special acceptance s: but gross fraud and imposition by the bailor will deprive

^{* 1} Wils. part 1. 281. Dale and Hall.

[†] D. 19. 2. 13. 6. ‡ Before, p. 362, 364, 366.

^{§ 1} Stra. 145. Titchburn and White.

him of his action, and if there be proof, that the parties were apprized of each other's intentions, although there was no personal communication, the bailee may be considered as a special acceptor: this was adjudged in a very modern case particularly circumstanced, in which the former cases in Ventris, Alleyne, and Carthew, are examined with liberality and wisdom; but, in all of them, too great stress is laid on the reward, and too little on the important motives of public utility, which alone distinguish a carrier from other bailees for hire*.

Though no substantial difference is assignable between carriage by land and carriage by water, or, in other words, between a waggon and a barge, yet it soon became necessary for the courts to declare, as they did in the reign of JAMES I., that a common hoyman, like a common waggoner, is responsible for goods committed to his custody, even if he be robbed of them; but the reason said to have been given for this judgement, namely, because he had his hire, is not the true one; since, as we have before suggested, the recompense could only make

^{*} Burr. 2298. Chon and Paynton. See i Vent. 238. All. 93. Carth. 485.

⁺ Hob. ca. 30. 2 Cro. 330. Rich and Kneeland. "The first case of the kind, said lord Holt, to be found in our books." 12 Mod. 480.

him liable for temerity and imprudence, as if a bargemaster were rashly to shoot a bridge, when the bent of the weather is tempestuous; but not for a mere casualty, as if a hoy in good condition, shooting a bridge at a proper time, were driven against a pier by a sudden breeze, and overset by the violence of the shock*; nor, by parity of reason, for any other force too great to be resisted †: the publick employment of the hoyman, and that distrust, which an ancient writer justly calls the sinew of wisdom, are the real grounds of the law's rigour in making such a person responsible for a loss by robbery.

All, that has just been advanced concerning a land-carrier, may, therefore, be applied to a bargemaster or boatman; but, in case of a tempest, it may sometimes happen, that the law of jetson and average may occasion a difference. Barcrost's case, as it is cited by chief justice Rolle, has some appearance of hardship: "a box of jewels had been delivered to a ferry-"man, who knew not what it contained, and, a "studen storm arising in the passage, he threw the box into the sea; yet it was resolved, that "he should answer for it ‡:" now I cannot help

^{* 1} Stra. 128. Amies and Stevens.

[†] Palm. 548. W. Jo. 159. See the doctrine of inevitable accident most learnedly discussed in Desid. Heraldi Animadv. in Salmasii Observ. in Jus Att-et Rom. cap. xv.

[‡] All. 93.

suspecting, that there was proof in this case of culpable negligence, and probably the casket was both small and light enough, to have been kept longer on board than other goods; for, in the case of Gravesend barge, cited on the bench by lord Coke, it appears, that the pack, which was thrown overboard in a tempest, and for which the bargeman was holden not answerable, was of great value and great weight; although this last circumstance be omitted by Rolle, who says only, that the master of the vessel had no information of its contents*.

The subtilty of the human mind, in finding distinctions, has no bounds; and it was imagined by some, that, whatever might be the obligation of a barge-master, there was no reason to be equally rigorous in regard to the master of a ship; who, if he carry goods for profit, must indubitably answer for the ordinary neglect of himself or his mariners, but ought not, they said, to be chargeable for the violence of robbers: it was, however, otherwise decided in the great case of Mors and Slew, where "eleven persons armed "came on board the ship in the river, under pretence of impressing seamen, and forcibly took the chests, which the defendant had engaged to carry;" and, though the master was

^{* 2} Bulftr. 280. 2. Ro. Abr. 567.

entirely blameless, yet sir MATTHEW HALE and his brethren, having heard both civilians and common-lawyers, and, among them, Mr. Holt for the plaintiff, determined, on the principles just before established, that the bailor ought to recover*. This case was frequently mentioned afterwards by lord Holt, who said, that "the "declaration was drawn by the greatest pleader "in England of his time†."

Still farther: fince neither the element, on which goods are carried, nor the magnitude and form of the carriage, make any difference in the responsibility of the bailee, one would hardly have conceived, that a diversity could have been taken between a letter and any other thing. Our common law, indeed, was acquainted with no fuch diversity; and a private post-master was precifely in the fituation of another carrier; but the statute of CHARLES II. having established a general post-office, and taken away the liberty of fending letters by a private post;, it was thought, that an alteration was made in the obligation of the post-master general; and, in the case of Lane and Cotton, three judges determined, against the fixed and well-supported opinion of chief justice Holt, "that the post-master was not

^{* 1} Ventr. 190. 238. Raym. 229.

⁺ I.d. Raym. 920.

^{1 12} Cha. II. ch. 35. See the subsequent statutes.

answerable for the loss of a letter with exche-" quer-bills in it*:" now this was a case of ordinary neglect, for the bills were flolen out of the plaintiff's letter in the defendant's office+; and, as the mafter has a great salary for the discharge of his trust; as he ought clearly to answer for the acts of his clerks and agents; as the statute, professedly enacted for safety as well as dispatch, could not have been intended to deprive the subject of any benefit, which he before enjoyed; for these reasons, and for many others, I believe that CICERO would have said, what he wrote on a fimilar occasion to TREBATIUS, " Ego tamen "SCEVOLE affentior !: " It would, perhaps, have been different under the statute, if the post had been robbed, either by day or by night,

^{*} Carth. 487. 12 Mod. 482.

[†] In addition to the authorities, before cited, p. 370. note (†), for the distinction between a loss by stealth and by robbery, see Dunoulin, tract. De eo quod interest, note 184. and Rosella Casuum, 28. b. This last is the book, which St. German improperly calls Summa Rosella, and by misquoting which he misled me in the passage concerning the fall of a bouse, p. 396. The words of the author, Trovamala, are these: "Domus tua minabatur ruinam; domus corruit, et in-"terficitequum tibi commodatum; certè non potest dici casus for-"tuitus; quia diligentissimus reparasset domum, vel ibi non ha-"bitasset; si autem domus non minabatur ruinam, sed impetu tempessatis validæ corruit, non est tibi imputandum."

[‡] Epist. ad Fam. VII. 22.

when there is a necessity of travelling, but even that question would have been disputable; and here I may conclude this division of my essay, with observing, in the plain but emphatical language of St. German, "that all the former diversities be "granted by secondary conclusions derived upon "the law of reason, without any statute made in "that behalf; and, peradventure, laws and the "conclusions therein be the more plain and the "more open; for if any statute were made there-"in, I think verily, more doubts and questions "would arise upon the statute, than doth now, "when they be only argued and judged after "the common law*."

Before I finish the bistorical part of my essay, in which I undertook to demonstrate, "that a "perfect harmony subsisted on the interesting "branch of jurisprudence in the codes of nations "most eminent for legal wisdom;" I cannot forbear adding a few remarks on the institutions of those nations, who are generally called barbarous, and who seem in many instances to have deferved that epithet: although traces of sound reasoning and solid judgement appear in most of their ordinances.

By the ancient laws of the WISIGOTHS, which are indeed rather obscure, the "keeper of

^{*} Doct. and Stud. dial. 2. chap. 38. last sentence.

⁺ P. 335.

" a horse or an ox for bire, as well as a birer for " use, was obliged, if the animal perisbed, to re-" turn another of equal worth:" the law of the Baiuvarians on this head is nearly in the same words; and the rule is adopted with little alteration in the capitularies of CHARLEMAGNE and LEWIS the Pious*, where the Mosaick law before cited concerning a borrower may also be found†. In all these codes a depositary of gold, filver, or valuable trinkets, is made chargeable, if they are destroyed by fire, and bis own goods perish not with them; a circumstance, which fome other legislators have considered as conclufive evidence of gross neglect or fraud: thus, by the old Britisb tract, called the book of CYNAWG, a person, who had been robbed of a deposit, was allowed to clear himself by making oath, with compurgators, that he had no concern in the robbery, unless be bad saved bis own goods; and it was the same, I believe, among the Britons in the case of a loss by fire, which happened without the fault of the bailee; although Howel the Good feems to have been rigorous in this case, for the fake of publick fecurity . There was

^{*} Lindenbrog, LL. Wisigoth. lib. 5. tit. 6. § 1, 2, 3. and LL. Baiuvar. tit. 14. § 1, 2, 3, 4. Capitul. lib. 5. § 204.

[†] Capitul. lib. 6. § 22. Exod. xxii. 14, 15.

[†] LL. Hywel Dda, lib. 3. cap. 4. § 22. and lib. 3. cap. 3. § 40. See also Stiernb. De Jur. Sveon. p. 256, 257.

one regulation in the northern code, which I have not feen in that of any other nation: if precious things were deposited and fielen, time was given to fearch for the thief; and, if he could not be found within the time limited, a moiety of the value was to be paid by the depositary to the owner, " ut damnum ex medio uterque " sufficeret*."

Now I can scarce persuade myself, that the phrase used in these laws, si id perierit, extends to a perishing by inevitable accident; nor can I think, that the old Gotbick law, cited by STIERN-HOOK, fully proves his affertion; that "a de-" politary was responsible for irrefistible force;" but I observe, that the military law-givers of the north, who entertained very high notions of good faith and honour, were more frict than the Romans in the duties, by which depositaries and other trustees were bound: an exact conformity could hardly be expected between the ordinances of polished states, and those of a people, who could fuffer disputes concerning bailments to be decided by combat; for it was the Emperor FREDERICK II., who abolished the trial by battle in cases of contested deposits, and fubflituted a more rational mode of proof+.

^{*} LL. Wifigoth, lib. 5. tit. 5. § 3.

⁺ LL. Longobard. lib. 2. tit. 55. § 35. Conflit. Neapol. lib. 2. tit. 34.

I purposely reserved to the last the mention of the HINDU, or Indian code, which the learning and industry of my much-esteemed friend Mr. HALHED has made accessible to Europeans, and the Persian translation of which I have had the pleasure of seeing: these laws, which must in all times be a singular object of curiosity, are now of infinite importance; since the happiness of millions, whom a series of amazing events has subjected to a British power, depends on a strict observance of them.

It is pleafing to remark the fimilarity, or rather identity, of those conclusions, which pure unbiassed reason in all ages and nations seldom sails to draw, in such juridical inquiries as are not settered and manacled by positive institution; and, although the rules of the Pundits concerning succession to property, the punishment of offences, and the ceremonies of religion, are widely different from ours, yet, in the great system of contrasts and the common intercourse between man and man, the Pootee of the Indians and the Digest of the Romans are by no means dissimilar*.

^{* &}quot;Hæc omnia, says Grotius, Romanis quidem con-"gruunt legibus, sed non ex illis primitus, sed ex aquitate na-"turali, veniunt: quare eadem apud alias quoque gentes "reperire est." De Jure Belli ac Pacis, lib. 2. cap. 12. § 13.

Thus, it is ordained by the fages of Hindustan, that "a depositor shall carefully inquire into " the character of his intended depositary; who, " if he undertake to keep the goods, shall pre-" ferve them with care and attention; but shall " not be bound to restore the value of them, if "they be spoiled by unforeseen accident, or burned, " or flolen; UNLESS he conceal any part of them, "that has been faved, or unless his own effects " be secured, or unless the accident happen after "his refusal to redeliver the goods on a demand made by the depositor, or while the de-" positary, against the nature of the trust, pre-" fumes to make use of them:" in other words, " the bailee is made answerable for fraud, or " for fuch negligence as approaches to it*.

So, a borrower is declared to be chargeable even for cafualty or violence, if he fail to return the thing after the completion of the business, for which he borrowed it; but not, if it be accidentally lost or forcibly seized, before the expiration of the time, or the conclusion of the affair, for which it was lent; in another place, it is provided, that, if a pledge be damaged or lost by unforeseen accident, the creditor shall nevertheless recover his debt with interest, but the

^{*} Genteo Laws, chap. IV. See before, p. 373.

[†] Same chapter. See before, p. 397.

debtor shall not be entitled to the value of his pawn*; and that, if the pledgee use the thing pledged, he shall pay the value of it to the pledgor in case of its loss or damage, whilst he uses it.

In the same manner, if a person bire a thing for use, or if any metal be delivered to a workman, for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroyed or spoiled by natural missortune or the injustice of the ruling power, unless it be kept after the time limited for the return of the goods, or the persormance of the work.

All these provisions are consonant to the principles established in this essay; and I cannot help thinking, that a clear and concise treatise, written in the *Persian* or *Arabian* language, on the law of *Contracts*, and evincing the general conformity between the *Assatick* and *European* systems, would contribute, as much as any regulation whatever, to bring our *English* law into good odour among those, whose sate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care.

^{*} Chap. I. Sect. I. Before, p. 415. 416.

⁺ Chap. I. Sect. II. Before, p. 409.

[‡] Chap. IV. and Chap. X. Before, p. 418, 421.

Thus have I proved, agreeably to my undertaking, that the plain elements of natural law, on the subject of BAILMENTS, which have been traced by a short analysis, are recognised and confirmed by the wisdom of nations*; and I hasten to the third, or fynthetical, part of my work, in which, from the nature of it, most of the defimitions and rules, already given, must be repeated with little variation in form, and none in fubflance: it was at first my design, to subjoin, with a few alterations, the Synoplis of Delrio; but finding, that, as BYNKERSHOEK expresses himfelf with an honest pride, I bad leisure sometimes to write, but never to copy, and thinking it unjust to embellish any production of mine with the inventions of another, I changed my plan; and shall barely recapitulate the doctrine expounded in the preceding pages, observing the method, which logicians call Synthesis, and in which all sciences ought to be explained.

- I. To begin then with definitions: 1. BAIL-MENT is a delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use, for which they were bailed, shall have elapsed or be performed.
- 2. DEPOSIT is a bailment of goods to be kept for the bailor without a recompense.

[•] Before, p. 328 and 337.

- 3. MANDATE is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them.
- 4. LENDING FOR USE is a bailment of a thing for a certain time to be used by the borrower without paying for it.
- 5. PLEDGING is a bailment of goods by a debtor to his creditor to be kept till the debt be discharged.
- 6. LETTING TO HIRE is 1. a bailment of A THING to be used by the hirer for a compensation in money; or, 2. a letting out of WORK and LABOUR to be done, or CARE and ATTENTION to be bestowed, by the bailee, on the goods bailed, and that for a pecuniary recompense; or, 3. of CARE and PAINS in carrying the things delivered from one place to another for a stipulated or implied reward.
- 7. Innominate ballments are those, where the compensation for the use of a thing, or for labour and attention, is not pecuniary, but either 1. the reciprocal use or the gift of some other thing; or, 2. work and pains, reciprocally undertaken; or, 3. the use or gift of another thing in consideration of care and labour, and conversely.
- 8. ORDINARY neglect is the omission of that care, which every man of common prudence, and VOL. VI. GG

capable of governing a family, takes of his own concerns.

- g. Gross neglect is the want of that care, which every man of common sense, how inattentive foever, takes of bis own property.
- 10. SLIGHT neglect is the omission of that differee, which very circumspect and thoughtful persons use in securing their own goods and chattels.
- TI. A NAKED CONTRACT is a contract made without confideration or recompense.
- II. The rules, which may be confidered as axioms flowing from natural reason, good morals, and sound policy, are these:
- 1. A bailee, who derives no benefit from his undertaking, is responsible only for GROSS neglect.
- 2. A bailee, who alone receives benefit from the bailment, is responsible for SLIGHT neglect.
- 3. When the bailment is beneficial to both parties, the bailee must answer for ORDINARY neglect.
- 4. A SPECIAL AGREEMENT of any bailed to answer for more or less, is in general valid.
- 5. All bailees are answerable for actual FRAUD, even though the contrary be stipulated.
 - 6. No bailee shall be charged for a loss by

inevitable ACCIDENT or irrefistible FORCE, except by special agreement.

- 7. Robbert by force is confidered as irrefishible; but a loss by private STEALTH is prefumptive evidence of ordinary neglect.
 - 8. Gross neglect is a violation of good faith.
- 9. No ACTION lies to compel performance of a naked contract.
- 10. A reparation may be obtained by fuit for every DAMAGE occasioned by an INJURY.
- 11. The negligence of a servant, acting by his master's express or implied order, is the negatigence of the MASTER.
- III. From these rules the following propositions are evidently deducible:
- 1. A DEPOSITARY is responsible only for GROSS neglect; or, in other words, for a violation of good faith.
- 2. A DEPOSITARY, whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed.
- 3. A MANDATARY to carry is responsible only for GROSS neglect, or a breach of good faith.
- 4. A MANDATARY to perform a work is bound to use a degree of diligence adequate to the performance of it.
 - 5. A man cannot be compelled by ACTION

to perform his promise of engaging in a DEPOSIT or a MANDATE.

- 6. A reparation may be obtained by fuit for DAMAGE occasioned by the nonperformance of a promise to become a DEPOSITARY or a MANDATARY.
- · 7. A BORROWER FOR USE is responsible for SLIGHT negligence.
- 8. A PAWNEE is answerable for ORDINARY neglect.
- 9. The HIRER of a THING is answerable for ORDINARY neglect.
- 10. A WORKMAN for HIRE must answer for ORDINARY neglect of the goods bailed, and apply a degree of SKILL equal to bis undertaking.
- II. A LETTER to HIRE of his CARE and ATTENTION is responsible for ORDINARY negligence.
- 12. A CARRIER for HIRE, by land or by water, is answerable for ORDINARY neglect.
- IV. To these rules and propositions there are some exceptions:
- 1. A man, who *spontaneously* and *officiously* engages to *keep*, or to *carry*, the goods of another, though without reward, must answer for slight neglect.
- 2. If a man, through firong perfuasion and with reluctance, undertake the execution of a

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MANDATE, no more can be required of him than a fair exertion of his ability.

- 3. All bailees become responsible for losses by CASUALTY or VIOLENCE, after their refusal to return the things bailed on a LAWFUL DE-MAND.
- 4. A BORROWER and a HIRER are answerable in ALL EVENTS, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement.
- 5. A DEPOSITARY and a PAWNEE are anfwerable in ALL EVENTS, if they use the things deposited or pawned.
- 6. An INNKEEPER is chargeable for the goods of his guest within his inn, if the guest be robbed by the fervants or inmates of the keeper.
- 7. A COMMON CARRIER, by land or by water, must indemnify the owner of the goods carried, if he be ROBBED of them.
- V. It is no exception, but a corollary, from the rules, that "every bailee is responsible for a "loss by ACCIDENT OF FORCE, however inevitable or irrefistible, if it be occasioned by that degree of negligence, for which the nature of his contract makes him generally answeratible;" and I may here conclude my discussion of this important title in jurisprudence with a general and obvious remark; that "all the pre-

" ceding rules and propositions may be diversi-" fied to infinity by the circumstances of every " particular case;" on which circumstances it is on the continent the province of a judge appointed by the fovereign, and in ENGLAND, to our constant honour and happiness, of a jury freely ' chosen by the parties, finally to decide: thus, when a painted cartoon, pasted on canvas, had been deposited, and the bailee kept it so near a damp wall, that it peeled and was much injured, the question "whether the depositary " had been guilty of GROSS neglect," was properly left to the jury, and, on a verdict for the plaintiff, with pretty large damages, the court refused to grant a new trial*; but it was the judge, who determined, that the defendant was by law responsible for gross negligence anly; and, if it had been proved, that the bailee had kept his own pictures of the same fort in the fame place and manner, and that they too had been spoiled, a new trial would, I conceive, have been granted; and so, if no more than silight neglect had been committed, and the jury had, nevertheless, taken upon themselves to decide against law, that a bailee without reward was responsible for it.

Should the method used in this little tract be approved, I may possibly not want inclination,

^{* 2} Stra. 1099. Mytton and Cock.

if I do not want leisure, to discuss in the same form every branch of English law, civil and criminal, private and publick; after which it will be easy to separate and mould into distinct works, the three principal divisions, or the analytical, the bistorical, and the synthetical, parts.

The great system of jurisprudence, like that of the Universe, consists of many subordinate fystems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully perfuaded myfelf, is reducible to a few plain elements, either the wife maxims of national policy and general convenience, or the positive rules of our forefathers, which are feldom deficient in wisdom or utility: if LAW be a science, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason; but, if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and He will become the greatest lawyer, who has the strongest habitual, or artificial, memory. In practice, law certainly employs two of the mental faculties; reason, in the primary investigation and decifion of points entirely new; and memory, in transmitting to us the reason of sage and learned men, to which our own ought invariably to

yield, if not from a becoming modesty, at least from a just attention to that object, for which all laws are framed, and all societies instituted, THE GOOD OF MANKIND.

ADVERTISEMENT.

AFTER I had finished the preceding tract, to the satisfaction of several friends, but not to my own, I was informed, that the learned CHRIS-TIAN THOMASIUS had published a differtation on the same subject with the following title: De Usu Practico Doctrinæ difficillimæ Juris Romani de Culparum Præstatione in Contractibus; HALE, MDCCV. The fame of the author, and the high applause, which the very sensible Bynkershoek bestows on him, impressed me with a most favourable idea of his work, and with a ftrong defire to procure it; but, to my extreme disappointment, I cannot find it in any library, publick or private, in the Metropolis or in either of our Universities: I have sent for it, however, to Germany, and, when I receive it, shall take a fincere pleasure, either in correcting such errors, as it may enable me to detect in my effay, or in confirming the fystem, which I have adopted, by so respectable an authority.

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AN INQUIRY

INTO

THE LEGAL MODE

OF

SUPPRESSING RIOTS,

WITH

A CONSTITUTIONAL PLAN

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FUTURE DEFENCE.

Res videas quo modo se habeant: orbem terrarum, imperiis distributis, ardere bello; urbem sine legibus, sine judiciis, sine jure, sine side, relicam direptioni et incendiis.

CIC. Epist. ad Fam. 4. 1.

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AN INQUIRY

INTO

THE LEGAL MODE

OF

SUPPRESSING RIOTS.

IT has long been my opinion, that, in times of national adversity, those citizens are entitled to the highest praise, who, by personal exertions and active valour, promote at their private hazard the general welfare; that the fecond rank in the scale of honour is due to those, who, in the great council of the nation, or in other affemblies, legally convened, propose and enforce with manly eloquence what they conceive to be falutary or expedient on the occasion; and that the third place remains for those persons, who, when they have neither a necessity to act, nor a fair opportunity to speak, impart in writing to their countrymen fuch opinions as their reafon approves, and fuch knowlege as their painful researches have enabled them to acquire.

With these restrictions, the sword, the tongue, and the pen, which have too often been employed by the worst passions to the worst purposes, may become the instruments of exalted virtue; instruments, which it is not the right only, but the duty, of every man to use, who can use them; paying always a sacred regard to the laws of that country, which he undertakes to defend, to advise, or to enlighten.

A sense of this duty and a consciousness of this right have impelled me, with no views, as it will be readily believed, of ambition or interest, much less from any factious motive, to take up that instrument, which I have stated as the least honourable of the three, and to present the publick with a few considerations on a subject no less interesting at the present hour than important to all future ages.

Having unhappily been a vigilant and indignant spectator of the late abominable enormities; having seen the senate besieged, and the senators insulted; the laws of our country desied, and the law of nations violated; having beheld the houses of our truest patriots and most respectable magistrates either destroyed, assailed, or menaced; having passed a whole night encircled by the blazing habitations of unosfending individuals, and by the slames of those edifices which publick justice had allotted to various classes of offenders; having lamented over a great metropolis exposed for many days to the sury of a licentious rabble; having believed the noblest commercial City in the world to be in danger of a second conflagration; having in vain sought access to the courts at Westminster in sull term, and to the houses of parliament in sull session; having, in a word, been witness to horrors, all the concurrent causes of which are not easy to be known, and all the consequences of which are less easy to be predicted; I could not but see at length, with a mixed sensation, between anguish and joy, the vigorous and triumphant exertions of the executive power; and I admitted the necessity of those exertions, whilst I deplored it.

Every well-disposed man, and lover of tranquility, must have rejoiced, that, on the ninth of June, the peaceable and terrified inhabitants of this noble Capital might enjoy repose; that the valuable effects, which many had removed, and some had even buried, might be replaced; that the artisan might resume his implements, and the student, his books; that justice had reascended her seat; and that order was succeeding to confusion, harmony to discord; but every honest man and lover of his country must have grieved, that a whole week was then before us, in which the necessary adjournment of the Commons, who would otherwise have been deliberating on

the state of the metropolis and the kingdom, had left us under a power, which, whatever it might be in form and in effect, was in truth and substance, dictatorial.

In this awful interval a question occurred to me, which must naturally have presented itself to many others: "Whether the still-subsisting "laws and genuine constitution of England "had not armed the civil state with a power sufficient, if it had been previously understood and prepared, to have suppressed ever so formidable a riot without the intervention of the military."

If no such power legally existed in the state, our system, I thought, must be desective in a most essential point; since no people can be really and substantially free, whose freedom is so precarious, in the true sense of the word, as to depend on the protection of the soldiery; and even our protectors, who for several days possibly could not, but certainly did not, act at all, might have been necessarily called away, in the most dangerous moment, to defend our coasts and maritime towns: if, on the other hand, such a power of self-protection did exist, our laws, I concluded, must have been disgracefully neglected, and ought to be restored to full vigour and energy.

A very short inquiry enabled me to answer

the question, at least to my own satisfaction, in the affirmative; and it is the result of this inquiry, which I now request the public to accept with the indulgence due to an occasional production, and with the attention due to a subject of general importance.

This then is the proposition, which I undertake to demonstrate: "That the common, and statute, laws of the realm, in force at this day, give the *civil* state in every county a power, which, if it were perfectly understood and continually prepared, would effectually quell any riot or insurrection, without assistance from the *military*, and even without the modern riot-act."

To this proposition I shall strictly, and, as far as I am able, logically confine myself; avoiding all parade of legal or antiquarian learning, and omitting all such disquisitions as might answer the purpose of ostentation, which I disdain, but not of utility, which alone I seek: should the curious and intelligent reader be desirous of investigating the powers of magistrates and of courts in recording riots and punishing rioters, and of tracing the history of our ancient and modern laws for the preservation of publick tranquillity, from that of king INA to that of George the First, he will receive ample information from the various books of authority, which I shall

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have occasion to cite in the course of my argument.

It is in every one's mouth, that, on all violent breaches of the peace, the sheriff of the county is not only authorized but commanded to raife the Posse Comitatús, and forcibly to suppress the tumult; but, if most of those, who use this expression, will examine their own minds, they will presently perceive, that they utter words, which convey to them no distinct idea, and that the power of the county, like many other powers in nature and jurisprudence, is very ill ascertained, and very imperfectly comprehended. Logicians give us an admirable rule, "that we should seek " after a clear, precise and complete conception of " things, as they really exist in their own nature " and in all their parts, and should not always " imagine that there are ideas, because there are " words*:" let us apply this rule to the case before us, and endeavour to form a luminous, fixed, comprehensive notion of the power in question; without supposing that we comprehend it, merely because we know, that, besides its Latin name, it is called in Norman French, Poiar del Countee, and sometimes, Aide del paist.

We cannot begin our investigation under a

Watts, part I. chap. vi.

† Crompt. 124.

more certain or more respectable guide, than Chief Justice FINEUX, whose words I shall transcribe from that most venerable repository of genuine English wisdom, the Year books*: "At the beginning," fays that learned Judge, " all the administration of justice was in one " hand, namely, in the Crown; then, after the "multiplication of the people, that administra-"tion was distributed into counties, and the " power was committed to a deputy in each " county, namely, the Viscount, or Sheriff; who " was the King's deputy to preferve the peace; " and thus it is, that all people must, in obe-"dience to him, be ready in defence of the " realm, when enemies come: thus too was he " affigned to be a conservator of the peace, to " punish malefactors, to defend the realm when " enemies invade it, to be attendant on the King "in war-time, and to cause all people in his "county to go with the King to defend the " land against enemies."

Who the people are, that the laws of England required, and still require, to be ready and obedient to the sheriff on all occasions of publick disturbance, we learn from the judicious antiquary, LAMBARD, who cites and adopts the opinion of Mr. Marrow delivered in a work,

* 12. Hen. VII. 17.

which I suppose to have been a reading on the statute 13 Hen. IV. His opinion was, "that the "justices of the peace, sheriff or under sheriff, "ought to have the aid and affistance of all "knights, gentlemen, yeomen, labourers, ser-"vants, apprentices, and likewise of wards, and of other young men above the age of sisteen "years; because all of that age are bound to "have barness, or armour, by the statute of "Winchester*.'.

What effect the subsequent repeal of the statutes of armour might have on the reason affigned by Mr. Marrow for his opinion, it is needless to inquire; for it seems obvious, that the statutes of JAMES I. removed the necessity only, and not the propriety, of having arms, or, to use the very words of the old act, armure pur la pees garder; and the doctrine in Lambard is generally understood to be law+. The passage abovecited appears, however, to have misled the great commentator on the laws of England, who feems to have collected from it, that none were bound to obey the summons of the sheriff, but persons under the degree of nobility; whereas the patent of affistance, cited by Dalton ||, commands barons, earls, and dukes, to be auxiliantes et re-

^{*} Lamb. Eiren. 316. † Dalt. c. 95. † 1 Comm. 344. 4 Comm. 122. || C. 1.

fpondentes to the sheriff in all things belonging to his office.

The power of the county, therefore, includes the whole civil state, from the duke to the peafant; while the military state, as fuch, forms no part of that power, being under a different command, and fubject to a different law; but, as every foldier in England is at the same time a citizen, he is authorized and perhaps bound, when under no particular orders or at no particular station, to exert himself, like any other good fubject, in the suppression of tumults, the prevention of felony, and the apprehension of the rioters or felons. This I mean: when the foldiery, not being upon military duty, happen to be present at a riot, and in their civil capacity forcibly suppress it, their act is not only legal but laudable; and the colour of their clothes, or the nature of their arms, make no kind of difference; but, when they are in truth called out by the executive magistrate, and are in fact no more than instruments in the hands of their commanders, their acts can only be justified by that NECESSITY which always defends what it compels, which for the time fuperfedes all positive law, but of the real existence of which their country must afterwards judge, unless the legislature should, in their wisdom, be pleased to declare it. For this distinction I can produce no written authority; but it feems confonant to reason as well as truth.

This power of the county, of which we may now begin to form a distinct idea, is mentioned, as well known and well understood, in a variety of statutes, which were confirmatory of the common law; and some parts of which I shall cite in the original languages, how barbarous or inelegant soever they may appear to a classical eye.

The stat. Westm. 1. c. 17. ordains "qe le vis-" counte ou le bailiff, prise ove luy poyer de son " countee, ou de sa baille, voit essayer de faire le "plevin des averes a celuy qe prit les averes." And that of Westm. 2. c. 39. is more peremptory in cases of resistance to the execution of civil process: "Multoties etiam dant responsum, " quod non potuerunt profequi præceptum regis " propter resistentiam potestatis alicujus magna-" tis, de quo caveant vicecomites de cætero, quia 66 hujufmodi responsio multum redundat in de-" decus domini regis; et, quam citò ballivi fui « testificantur, quòd invenerunt hujusmodi re-" fistentiam, statim omnibus omissis, assumpto " secum posse comitatús sui, eant in propriâ per-" fonâ ad faciendam executionem." By the 17 Rich. II. c. 8. it is enacted, that, in case of any tumult or disorder, "a pluis tost qu viscontz " et autres ministres le roi poent ent avoir

"conissance, ove la force del countee et pais, où
tiel cas aviegne, ilz mettent destourbance encontre tiel malice ove tout lour poair, et
preignent tielx messesours, et les mettent en
prisone tanqe due execution de leie soit fait
de eux, et qe touz seignurs et autres liges du
roialme soient entendantz et aidantz, de tout
lour force et poair, as viscontz et ministres avant
ditz."

Again: by the 13 Hen. IV. c. 7. "Ordeig-" nez est et establiz, qe, si aucun riot assemblee " ou rout des gentz encontre la loie se face en "aucune partie del roialme, les justices de paix, 66 trois ou deux de eux a meyns, et le viscont " ou fouth viscont del countee, ou tiel riot assem-" blee ou rout se ferra enapres, veignent ove le " poair del countee, si besoigne serra, pur eux " arester, et eux arestent." In the construction of this last statute it has been holden*, that, although it speak of three or two justices at least, yet one justice may raise the power and suppress a riot; for it is a beneficial law, faid FINEUX, and was enacted for the prevention of mischief, which might ensue, if a justice were to wait for others. It has also been adjudged, that, under the word ministers, in the stat. 17 Rich. II. c. 8. justices of peace are comprised +; and so are constables,

^{* 14} Hen. VII. 10. Crompt. 46. b. † Crompt. 46. a.

by the opinion of Fitzberbert cited by Crompton, and confirmed by the Year book I Hen. VII. 10; where it is laid down, that "constabularii "villæ super affraiam possunt levare populum."

We may therefore conclude, that, in all cases of tumult and infurrection, the sheriff, or other minister, may and ought to make proclamation, commanding all fuch persons, as constitute the power of the county, to assemble and assist him*; or he may fend a particular warning or summons, for the same purpose, to every individual of the posse, who must attend such summons under pain of a heavy fine and imprisonment; for, by the stat. 2 Hen. V. c. 8. it is provided, " qe " les lieges du roi esteantz sufficeantz pur tra-" vailler en le countee, ou tielx routes assemblez " ou riotes font, soient affistantz as justices, com-" missioners, viscont, et soutz-viscont, de mesme " le countee, qant ilz serront reasonablement "garniz, pur chivacher, ove les ditz justices, s commissioners, et viscont ou soutz-viscont en " aide de resistence de tielx riotes routes et as-" semblez sur peine demprisonement et faire fyn " et ranceon al roi:" And the offence of neglecting to join the power of the county, after fuch reasonable warning, is ranked by Sir William

[•] Dalt. c. 95.

Blackstone under the class of contempts against the king's prerogative*.

Having fixed our ideas concerning the nature of this legal power, the mode of raifing it, and the punishment of a criminal neglect to join it, let us consider, first, by the help of reason only, what corollaries necessarily follow the doctrine, which we have expounded; and, next, inquire whether authority and reason, which lord Coke justly calls the two faithful witnesses in matter of law+, coincide on the question before us; as they indubitably will, unless either our previous ratiocination be illogical, or the minds of ancient and modern lawyers have taken a bent from the prejudices of their respective ages.

From the obligation of the sheriff, or other minister, to assemble the power of his county for the suppression of any rebellion, insurrection, riot, or affray, and for the repelling of invading enemies; from the duty incumbent on every man of sufficient years and strength to associate himself with the power so assembled, and from the principles of natural justice, which will neither require men to do impossible things, nor resuse them the means of performing what they are commanded to perform; from these obligations and these principles it instantaneously follows: First;

^{* 4} Com. 122.

^{+ 1} Inst. Pref.

That the sheriff or other peace-officer is bound to raise *fuch* a power as will effectually quell the tumult either really existing or justly feared.

Secondly; That the power so raised may and must be armed with such weapons, and act in such order, as shall enable them totally to suppress the riot or insurrection, or to repel the invaders.

Thirdly; That, in the use of such weapons, the power may justify the charging, wounding, or even killing, the rioters or insurgents, who persist in their outrages, and resule to surrender themselves.

Fourthly; That the power of every county ought at all times, but especially in times of danger, to be *prepared* for attending the magistrate, and to know the *use* of such weapons, as are best adapted to the suppression of tumults.

Fifthly; That, fince the musket and bayonet are found by experience to be the most effectual arms, all persons, who constitute the power of a county, are bound to be competently skilled in the use of them.

Sixthly; That, fince the only safe and certain mode of using them with effect is by acting in a body, it is the duty of the whole civil state to know the platoon-exercise, and to learn it in companies.

As no authority, according to Charron, can frand without reason, so we find, by constant experience, that no reason can surmount the passions and prejudices of men without the aid of authority; and I am happy in believing, that both of them perfectly coincide in support of the foregoing propositions: first, therefore, I shall prove them by citing cases, which have been solemnly adjidged, together with the opinions of learned lawyers, whose works are much respected in our courts of justice; and, next, I shall inquire, whether those cases and opinions have been over-ruled or shaken by any subsequent decisions, or acts of the legislature.

The earliest resolution upon the subject, that has occurred to me, was in a case, which the very learned and judicious Brook thought worthy of note* in his time, and which, in the present time, deserves peculiar attention. It is reported in French in the first page of the Year book 3 Hen. VII. and it is manifestly the same with that afterwards abridged in an impersect Latin note printed, out of its place, in the tenth page of the same book; though Brook seems to have considered them as different, or rather not to have observed their identity; for, in the title of his Abridgement just alluded to, he gives them

^{*} Bro. Abr. tit. Office et Officer. 23.

in separate articles, without melting both parts of the Year book together, as I propose to do; by which means I shall extract the whole case and form one consistent state of it.

JOHN DEINS had been outlawed in the county of Suffolk for felony; and, having brought a writ of error to reverse the outlawry, had obtained a Non Molestando, which he delivered to the escheator, John Lenthorp; who, nevertheless, seised and took away his effects. Upon this, Deins replevied; and EDMUND BEDINGFIELD, the sheriff, issued his precept to Thomas Gire, his bailiff, jurus et conus, together with Roger Hopton, Edmund Heningham, and three other perfons, directing them to take the goods of the plaintiff out of the escheator's possession: accordingly, the bailiff and his party took forcibly from Lenthorp an hundred sheep, which they delivered to Deins; and, in order to make delivery of the goods and cattle which remained, they affembled all the inhabitants of five adjacent vills; who, in number three hundred, arrayed in a warlike manner, and armed with brigandines, jackets of mail, and GUNS, united and affociated themselves, and marched* to the place where the cattle were detained; but did not proceed to any other act of violence.

^{*} Modo guerrino arraiati se univerunt et associaverunt, et iter suum arripuerunt, 3 Hen. VII. 1. 10.

For this imagined breach of the peace, and military array, an indictment was preferred in the King's Bench against the plaintiff in replevin, the sheriff and his bailiff, and the persons who had affished them; but the court unanimously adjudged, that the indictment was void; founding their judgement, as it seems, on the reasons advanced by serjeant Keble, whose argument it may be proper to state at large.

"As to the plaintiff in replevin, faid he, no wrong was committed by him; for the escheation, when he took the goods, after the Non Molestando had been delivered to him, acted unlike an officer; since it was his duty, in that instant, to surcease his process: Deins, therefore, was perfectly justified in complaining to the sherist, and must consequently be discharged from this indictment.

"Nor did the sheriff transgress his duty in exe"cuting the replevin; for, when the party came
"to him, he could not know, whether he was an
"outlaw or not; or whether or no the escheator
"had seised the cattle in the King's right; which
"ought to have been shown by the King's offi"cer. The bailiss too must be discharged; for
"the servant is in the same condition with the
"master; and, as the sheriss cannot do every
"thing himself, his deputy must have the same
"power with him.

"In regard to his affembling three hundred men, that was no illegal act*; for every man is bound to affect the sheriff and his bailiff; to fupport him in executing the King's writs; and to give him aid in all cases of need; and this by common law and common reason, not-withstanding the statutes of Westminster the first and second. So, if any man resuse to asif sist the sheriff at his request, he shall be fined, whether it be to execute process, or to apprehend selons."

The Court agreed, that the bailiff had as good a right to raise the power as the sheriff himself; because it is all one office and one authority.

It was urged, "that, if men assemble with arms and do nothing. it shall be intended, that "they assembled with a bad design;" but it was answered, that in some cases the presumption might be just; in others, not: thus the use of armour on particular occasions, as on Midsummer eve in London, and at other times for sport, is not punishable; and, here, the cause of the assembly appears, namely to execute a replevin. Even if they had acted, yet their assembly was lawful in the beginning; and such assemblies are not illegal as are not to the terror of the people of

[•] Ceo nest incontre la ley: So Brook reports his words, tit. Riots, 2.

our lord the king; which words ought to be in every indictment for an unlawful affembly.

Another point was touched upon by the king's ferjeants: "that the sheriff cannot take with "him fo many armed men, but only a reasonable "party;" to which it was answered, that, if he were so restrained, he might be in great jeopardy and peril of his life; and for this reason, be may take as many as be pleases at his own discretion.

Lastly, it was argued on the statute of Westm. 2. c. 39*, that the sheriff might raise the power of his county after complaint made, and not before; but the judges held, that he might raise it before by the common law.

This case (which, for convenience in citation, I shall call Beding field's Case), is irresistibly strong in support of my first and second corollaries; for, although there seems to have been some doubt at first in the minds of the judges, as it was merely the execution of civil process, yet, if the armed men had marched in array for the purpose of apprehending felons, there would have been no debate on the legality of the act; and, after an argument at the bar, the former doubt was entirely removed.

The statute of Marlbridge, c. 21. seems here to be meant; the words post querimoniam factan not being used in stat. Westm. 2.

The next is the case of a riot at Drayton Basset in Staffordsbire, determined in the Star-chamber in the twenty-fourth of Elizabeth, and cited more than once by Crompton*; who fays that the court resolved, 1. That, if the two justices, nearest to the place where the riot is committed, do not act as they are required by stat. 13 Hen. 1V. c. 17. each of them shall pay an bundred pounds; and the other justices of the same county, where the tumult was, shall be fined for not suppressing it, if there was any default in them. 2. That the sheriff and justices of peace may take as many men in armour as are necessary, with Guns, and so forth, and kill the rioters, if they will not vield themselves; for the stat. 13 Hen. IV. c. 17. fays, that they MUST arrest them; and, if the justices, or any of their company, kill any of the rioters, who will not furrender themselves, it is no offence in them.

This case of *Drayton Basset*, which is also cited and approved by *Sir Matthew Hale*†, incontestably demonstrates my *third* corollary.

In the 34th or 43d of Elizabeth (for the date is differently reported by some transposition of the figures) the doctrine in Beding field's case

^{*} Crompt. 46. b. 124. b. † 1 H. P. C. 495.

was fully recognized and established by the decifion in the case of St. John*, or Gardener+; which, being subsequent to the stat. 33 Hen. VIII. c. 6. prohibiting the use of band-guns, clearly shows, that no alteration in the ancient law was made by that prohibition.

The case was this: Gardener had obtained a judgement against St. John, and procured a writ of execution directed to the sheriff of Bedford, who made a warrant to Gardener's own brother as a special bailiff; but, resistance being justly feared, the bailiff armed himself with a dagge, or short gun. It happened that St. John was a justice of peace for Bedfordsbire, and seems to have had that little learning, which, in law rather more than in poetry, is a dangerous thing, especially when it is coupled with knavery; for, having notice how the bailiff was armed, he contrived to have him seised by his servants, and brought before himself as the next justice; when, by colour of his office and the statute of Henry VIII. he committed the officer, who came to arrest him, until he should pay ten pounds, one moiety to the queen, and another to the informant. The bailiff having removed himself by babeas corpus, and the whole matter being disclosed to the court, it was refolved, "that the sheriff or any of his mi-

^{* 5.} Rep. 71. 72. † Cro. Eliz. 821, 822. ▼OL. VI. I I

"nisters, in execution of justice, may carry "dagges or band-guns, or other weapons inva"five or defensive, the same not being restrained by the general prohibition of the statute; for, "if it were, no justice would be administered."

By stronger reason such weapons may be carried for the purpose of suppressing riots, apprehending felons, or repelling invaders. It may here be observed, that the statute of Hen. VIII. was enacted for the prevention of mischief, that might be occasioned by the use of little bandguns, which might be carried secretly and kill on a sudden; but guns of a proper length were not prohibited.

The Case of Arms, or Burton's case, next presents itself to our examination: it is of very high authority, and so apposite to the object of our inquiry, that I shall make no apology for citing it in the very words of the learned reporter*: "Upon an assembly of all the justices "and barons at Serjeant's Inn this Easter term (39 Eliz.), on Monday the 15th of April, this "question was moved by Anderson, Chief Justice of the Common Bench; Whether men may arm themselves to suppress riots and rebellions, "or to resist enemies, and endeavour of themselves to suppress or resist such disturbers of the peace "and quiet of the realm; and, upon good deli-

^{*} Poph. 121, 122.

" beration, it was refolved by them all, that every " justice of peace, sheriff, and other minister, or 66 OTHER SUBJECT OF THE KING, where fuch " accident happens, may do it; and, to fortify " this their resolution, they perused the statute of " Northampton, 2 Edw. III. c. 3. which enacts, " that none be so hardy as to come before the king's "justices or other ministers of the king in the ex-" ecution of their office with force and arms, nor to " bring force in affray of the peace, or to ride orgo " armed by night or day, EXCEPT the servants of " the king in his presence, or the ministers of the " king in the execution of his precepts, or of their " office, and those who are in their company affift-" ing them, OR UPON CRY MADE FOR WEA-66 PONS TO KEEP THE PEACE, and this in " places where accidents happen, upon the pe-" nalty in the same statute contained; where-" by it appeareth, that, upon cry made for wea-" pons to keep the peace, EVERY MAN, where "fuch accidents happen, for breaking the peace, " may by law arm bimfelf against fuch evil-doers; " but they took it to be the more discrete way for " every one in such a case to be affistant to the " justices, sheriffs, or other ministers of the king " in the doing of it."

Highly as the authority of Sir John Popham deserves to be respected, it is to be wished, that Lord Anderson himself had given us a full account

of his own opinion with that of the other judges; but he has left us no more than a short note* to the same effect with the preceding report. This case also is cited by Hale+, and the very words in Popham are transcribed by Sir John Kelyng in his report of Lymerick's case‡. I think it a ftrong proof of my fourth corollary, respecting the necessity of being prepared at all times to keep the peace; but, if a particle of doubt on that head can remain, it will be diffipated at once by the statute of Westm. 1. c. 9. by which, as it is cited by Cromptons, "purveu est, qe touz con-" tinualment soient prestez et apparaillez al maun-" dement et al fomons des viscountes, et al crye " del pais de suire et darester felons, qant mestier " ferra, auxibien dedeins fraunchises come de-"hors; et ceux, qe ceo ne ferront, et de ceo " foient atteintz, le roi prendra a eux grave-" ment;" whence it should seem, that ALL SUB-JECTS, who are not continually prest, or ready, for the orders of the sheriff on an alarm in the country, are exposed to the royal displeasure and to a severe penalty; and the word prest (which in modern times has been either ignorantly or intentionally confounded with the participle paffive of the verb to press) is used for prepared by Chief Justice Finieux in a passage before cited:

^{* 2} And. 67. † 1 H. P. C. 53. ‡ Kel. 76. § 124. 3.

I am aware, however, that communialment is the usual reading; which will give a sense rather less forcible, "that all men generally shall be "ready and accourted at the summons of the "sheriff;" but this amounts to the same thing; for how can a man be armed and apparelled in an instant on a sudden alarm, unless his weapons and accourtements were previously at hand?

The opinions of the learned, which form the fecond branch of my proofs, can add little weight to four cases of such authority, as those of Bedingfield, Drayton Basset, St. John, and the Case of Arms: indeed, these cases seem to have been the guides of Lambard and Dalton, Hale and Hawkins; who all agree, that " it is referred to "the discretion of the sheriff, under-sheriff, or " other person authorized to raise the posse, how " many men they will affemble, and how they " shall be armed, weaponed, or otherwise furnished " for the business;" that " private persons may " arm themselves in order to suppress a riot, and "that all, who attend the justices in order to 44 quell a tumult, may take with them fuch wea-" pons as shall enable them to do it effectually+; " that, lastly, in executing process or apprehend-"ing rioters, they may, by the common law,

^{*} Lamb. Eiren. 317. Dalt. c. 95. † 1 Hawk. P. C. c. 65.

"beat, wound, or kill, any of the opponents or infurgents, who shall resist them";" all which opinions are supported by solemn decisions, and are, in truth, the conclusions of natural reason from the simplest and surest premisses.

The fifth and fixth propositions, which I confider as fimple corollaries, are founded in part on extrinsick assumptions, drawn from history and experience: they may therefore, even by the rules of law, admit of proof from the authority of men, " quibus in arte suâ credendum est;" and the following citation from Mr. 'WIND-HAM's elegant introduction to his Plan of Difcipline for the Norfolk Militia will be thought as convincing as any passage in Fitzherbert or Brook. "About the beginning of this century, "fays he, the troops in Europe were univerfally " armed with firelocks; to which, much about " the fame time, the bayonet being added, pikes " also were laid aside. When the use of fire-" arms began to be generally established, the ne-" cessity of a great regularity and uniformity, in " the manner of using those arms, became appa-" rent: it was foon discovered, that those troops, " which could make the briskest fire, and sustain " it longest, had a great superiority over others " less expert; and, likewise, that the efficacy and

^{*} Lamb. Eiren. 318. 1 Hale, H. P. C. 495.

46 power of fire did not confift in random and scat-" tering shots made without order, but in the fire " of a body of men at once, and that properly timed " and directed. It was therefore necessary to ex-" ercife the troops in loading quick, and firing to-" gether by the word of command; but, as the aukwardness, carelessness, and rashness, of "young foldiers (if left to themselves) must oc-" casion frequent accidents, and the loss of many " of their own party, by the unskilful manner of " using their fire-arms, especially in the hurry of " an engagement, it became a matter of indispen-" Sable necessity to teach soldiers an uniform me-" thod of performing every action that was to be "done with the musket, that they might all do " it in the most expeditious and safest manner."

Should any doubt be raifed as to the legality of assembling for this purpose, and should the words of Sir Matthew Hale, whom of all men I respect the most, be opposed to me, that, "where people are assembled in great numbers armed with weapons offensive, or weapons of war, if they march thus armed in a body, if they have chosen commanders or officers, if they march cum vexillis explicatis or with drums or trumpets, and the like, it may be considerable, whether the greatness of their numbers, and their continuance together doing these acts, may not amount to more guerring

" arraiati, or a levying of war*," which may be construed an encroachment on the prerogative of the crown; the answer is no less obvious than decisive, in the language of BRACTON, that, Voluntas et propositum distinguunt maleficiat; that, the intent being good, the act cannot be bad; and that Beding field's case is an express authority for the legality of "marching armed in a body " more guerrino arraiati," even for the purpose of executing a civil process, to which there is just expectation of violent resistance. So neceffary, indeed, is order and discipline in directing the exertions of an armed affembly, that the statutes 3 and 4 Edw. VI. c. 5. and 1 Mary, c. 12. (which are no longer in force, but were the models of the well-known riot-act) expressly authorize the sheriffs, justices, mayors, and bailiffs, " to raise power and array them in manner of war " against the rioters:" and here I may again apply those found maxims, to which I before alluded: 1. That the law requires no impossible things; but it is impossible to join the power and fuppress a riot effectually, without being at least moderately skilled in the use of fire-arms, and ready in the common evolutions. when the law permits or enjoins the performance of any act, all the means of performing it are also

^{* 1} H.P.C. 131. + 3 Inst. 9. ‡ L. 3 c. 14 § 13.

permitted or enjoined; but the law doth permit and command every fubject of this realm to arm himself and use his arms with effect for the suppression of tumults: the conclusion, in both forms of reasoning, follows too closely and too evidently to admit of a doubt.

That the four cases, on which I have relied, have never been shaken by any later decision, appears from the uniform recognition of their authority by the best modern writers: indeed, nothing less than an act of the legislature could justly over-rule unanimous and well-considered resolutions; but no act whatever has in any degree affected them; and the common law, which in general is the perfection of human wisdom, happily in this instance has stood like a rock amid the conflict of statutes rolling upon statutes.

Neither of the statutes of Westminster had any effect on the decision in Beding field's case; nor was that of St. John at all influenced by the subsequent prohibition of hand-guns; nor the Case of Arms by the statute of Northampton; and though the act of queen Mary was continued during the life of Elizabeth, yet Sir Matthew Hale observes, that, " the case of Drayton "Basset was not within that statute, nor de"pending on it*." In the same manner serjeant

^{* 1} H. P. C. 495.

Hawkins remarks, in conformity to Hale and to reason, which will very seldom be sound at variance, "that the stat. 1. Geo. I. c. 5. commonly "called the riot-act, being wholly in the affirmative, cannot be thought to take away any part of the authority in the suppressing of a riot, "which was before that time given either to "officers, or private persons, by the common law or by statute*."

Having shown the nature and extent of the Posse Comitatuum, and proved that it is required by law to be equal in its exertion to a well-disciplined army, I have established the proposition, which I undertook to demonstrate; "That the common and statute laws of the realm, in force at this day, give the civil state in every county apower, which, if it were perfectly understood and continually prepared, would essectually quell any riot or insurrection, without assistance from the military, and even without the modern riot-act."

One fide, therefore, of the diffressing alternative, to which I was reduced, concerning the precariousness of English Freedom; is happily removed; but the other fide remains, "that our laws have been disgracefully neglected, and "ought to be restored to full vigour and energy."

^{* 1} P. C. c. 65. + P. 466. ‡ P. 464.

To what fatal cause must we ascribe a neglect fo shameful and so dangerous? I answer boldly, yet, I hope, without arrogance, fince I use the very words of BLACKSTONE, " to the vast ac-" quisition of force arising from the riot-act and "the annual expedience of a standing army *:" which has induced a disposition, cherished by the indolence natural to man, and promoted by the excessive voluptuousness of the age, to look up folely for protection to the executive power and the foldiery; a disposition, which must instantly be shaken off, if any spark of virtue remain in our bosoms; for, although we are happy in a prince, who "will never harbour a thought or " adopt a perfuasion in any the remotest degree " detrimental to the liberty of Britain+," yet in free states a military power must ever be an object of jealoufy; and, fince our excellent constitution will be claimed by our posterity as their best inheritance, we must act with a provident care, lest, two centuries hence, the fable of the horse should be verified in our descendants, who may be in need of protection against their protectors, and be forced to carry barness, notwithstanding the repeal of the statute of Winchester.

For the history of the riot-act, so laboured and .

^{* 4} Comm. 434. † 1 Bh Comm. 337.

fo ineffectual, I must refer my reader to the incomparable author, whom I fo frequently cite, the commentator on the laws of England; who expresses his jealousy and disapprobation of it with no less delicacy than wisdom*: in respect to the number of capital felonies created by it, which Blackstone seems highly to have disapproved, I shall say nothing, as it is not my prefent subject; but I may, with all due reverence for the legislature in the first year of GEORGE the First, observe, that the act was a bad copy of a bad model, the statute of Mary; that there feems to have been no occasion to make it perpetual, much less to enlarge it; that it is in some parts liable to dangerous misinterpretation; that it has been found wholly inadequate to the end proposed by it; and that the third clause of it was in great measure unnecessary, as it only affirms " our ancient law, which had pretty well guarded "against any violent breach of the peace+." Confirmatory statutes are always attended with the danger of superfeding the use, and obliterating the remembrance, of the common law, which they confirm, and which the wisdom of ages had before fufficiently established.

As to the best mode of restoring our laws to their full vigour and energy, and of providing for

^{* 4} Comm. 143.

^{† 4} Bl. Comm. 147.

our future defence, I shall certainly submit it to the difcretion of my countrymen who are bound by those laws; and shall only suggest to them the following plan; after premising, in the words of serjeant Hawkins, " that, although " private persons may arm themselves in order to " suppress a riot, and may consequently use arms " in the suppressing of it, if there be a necessity " for their fo doing; yet it feems to be extremely "hazardous for private persons to proceed to " those extremities in common cases, lest, under " the pretence of keeping the peace, they cause a "more enormous breach of it; and, therefore, " fuch violent methods feem only proper against " such riots as savour of rebellion, for "the suppressing of which no remedies can be " too fevere "."

THE PLAN.

T.

Let all fuch persons in every county of Eng-LAND as are included in the power of that county, and are of ability to provide themselves with arms, and pay for learning the use of them, be furnished each with his musket and bayonet, and their necessary appendages.

* 1 Hawk. P. C. c. 65.

II.

Let several companies be formed, in every county, of sixty such men or more, voluntarily affociated for the sole purpose of joining the power, when legally summoned, and, with that view, of learning the proper use of their weapons, street-firing, and the various evolutions necessary in action.

III.

Let the companies be taught, in the most private and orderly manner, for two or three hours early every morning, until they are competently skilled in the use of their arms: let them not, unnecessarily, march through streets or high-roads, nor make any the least military parade, but consider themselves entirely as part of the civil state.

IV.

Let each member of a company, when he has learned the use of his arms, keep them for the defence of his house and person, and be ready to join his company in using them for the suppression of riots, whenever the sheriff, under-sheriff, or peace officer shall raise the power, or there shall be a cry made for weapons to keep the peace.

V.

Let the caution, prefixed to this plan, be di-

ligently observed, and the law, contained in the preceding citations, be held ever sacred: nor letany private person presume to raise the power of the county*, which is the province of the sheriss, under-sheriss or magistrate; although a cry for weapons to keep the peace may be made in cases of extreme necessity, and in them only, by private persons.

VI.

If any mark of distinction in dress shall be thought expedient, that the several companies may know each other, in the forcible suppression of a riot, let such a regulation be severally referred, with any other rules that may be necessary, to a committee chosen out of each company.

The great advantages of such associations are so apparent, that I shall forbear at present to expatiate on them; but shall be satisfied with applying to them what Pulton says of the old tilts and justs, "that the cause, beginning, and "end thereof do tend do the laudable exercise of true valour and manhood, and to the encouragement and enabling of the actors therein to defend the realm and the peace thereof;" and with observing, in the words of the stat. 33.

^{* 1} Hale, II. P. C. 601. + De Pace, 25. b.

Hen. VIII. c. 6, that the musket may now be made, what the long bow was formerly, "the surface furety, safeguard, and continual defence, of this realm of *England*, and an inestimable dread and terror to the enemies of the same."

Objections will certainly be raifed; for who can propose a measure, however salutary, to which no man will object? I expect them, however, chiefly from those, whose indolence may induce them rather to feek protection from a power able to crush them, than to protect themfelves by joining a power provided by free and equal laws; or from those, who, as MILTON fays, "have betaken themselves to state-affairs 44 with fouls fo unprincipled in virtue and true "generous breeding, that flattery, and court-" shifts, and tyrannous aphorisms, appear to "them the highest points of wisdom." To such men it will be fufficient to give this general anfwer; that, as there is no necessity of applying either to the executive, or to the legislative, power for permission to obey the laws, we are not to debate on vague notions of expedience, groundless jealousies, or imaginary consequences: the fole question is, "whether the doctrine ex-" pounded in these pages be law;" if it be, there is no room for deliberation, fince it is a maxim, that no man must think himself wiser than the law, which is the gathered wisdom of many ages; and

fo favourable is the common law of ENGLAND to the rights of our species, which it is unhappily become the fashion to deride and vilify, that, if any man will broach a position in favour of genuine, rational, manly freedom, I will engage to supply him with abundant authorities in support of it.

I persuade myself, that infinite good must refult from the general adoption of my plan; and that no possible evil can be mixed with it, as long as the cautions and restrictions before suggested shall be duly observed, and our excellent constitution be kept in its just balance at that nice point, which is equally removed from the pernicious extremes of republican madness, ariftocratical pride, and monarchical folly; nor have I any scruple to confess, that, as every soldier in ENGLAND is at the same time a citizen. I wish to fee every citizen able at least, for the preservation of publick peace, to act as a foldier: when that shall be the case, the LIBERTY OF BRITAIN will ever be unassailed; for this plain reason—it will be unassailable.

The security, and consequently the happiness, of a free people do not consist in their belief, however firm, that the executive power will not attempt to invade their just rights, but in their consciousness that any such attempt would be wholly inessectual.

VOL. VI.

SPEECH

TO

THE ASSEMBLED INHABITANTS OF

THE COUNTIES OF

MIDDLESEX AND SURRY,

THE CITIES OF

LONDON AND WESTMINSTER,

AND THE BOROUGH OF

SOUTHWARK.

XXVIII MAY, M.DCC.LXXXII.

ADVERTISEMENT.

HAVING been informed, that parts of my Speech on the 28th of May at the London Tavern were thought obscure, yet important, I have endeavoured to recollect what I then took the liberty to say, and have consented to let the argument go abroad in its rude and unpolished state. What offence this publication may give, either in parts or in the whole, is the last and least of my cares: my first and greatest is, to speak on all occasions what I conceive to be just and true.

SPEECH

ON

THE REFORMATION OF PARLIAMENT.

MY LORD MAYOR,

SO far am I from rising to intimate the slightest shade of dissent from this respectable and unanimous affembly, or the minutest disapprobation of the two resolutions proposed, that I despair of finding words fufficiently strong to express my joy and triumph at the perfect harmony, with which the first of them has already passed, and to which the fecond will, I trust, be thought equally entitled: but, on the last reading of the proposition now before you, it struck me, that, although it was in fubstance unexceptionable, yet it might easily be improved in form by the infertion of two or three words referring to the preceding resolution, and thus be rendered more conducive to our great object of generally declaring our concurrent fense, and avoiding any chance of disunion upon specifick points. Every

proposition, intended to meet with universal concurrence, ought to have three distinguishing properties; it should be just, simple, comprehensive: without justice, it will be rejected by the wise and good; without fimplicity, it will involve complex matter, on which the wifest and the best may naturally differ; and without comprehenfiveness, it will never answer any purpose of consequence and extent. The first resolution. " that petitions ought to be prepared for a more " complete representation of the people," has all of these properties in an eminent degree: it is so just, that, if this meeting had been ten times as large, there would not have been one diffent ent voice on that ground; so simple, that it affords no scope or subject for cavil; so comprehensive, that, when the house of commons have the petitions before them, it will give room for every particular plan, which the ingenuity of any member, duly tempered by wisdom, yet actuated by true patriotism, can suggest.

Ought not the fecond proposition, "that the "fense of the people should be taken this sum-"mer in order to prepare their feveral petitions," to be somewhat restrained in the generality of the expression? It is just, but rather too comprehensive: the fense of the people is a phrase of measureless compass, and may include their several opinions, however specifick, however dif-

cordant. This is the very evil, which we are anxious to prevent; fince we all agree, that no particular mode of reformation should be prefcribed to the house, lest they should reject, for no other reason, some good plan, which, if left to the operation of their own minds, they may probably adopt. Might not the sentence be thus corrected, " that the fense of the people should "be taken on the preceding resolution?" this I offer as a mere fuggestion to wifer heads, and will not trouble the affembly by shaping it into a motion: indeed, if both resolutions be taken together, and it be understood, that we mean to recommend petitions on the general ground, in order to shun that fatal rock, diversity of sentiment on particulars, I desire no more, and am very little folicitous about accuracy of expression; hoping at the same time, although the five circles here affembled have no right or pretension to take the lead in the nation, yet that the other counties, districts, and towns in Great Britain will approve our idea, and not disdain to follow our example: in that event I finile at the thought of a miscarriage, and am confident, that, with concurrence, perseverance, and moderation, the people of England must prevail in a claim so effential to their liberty, and to the permanence of an administration, who profess to govern with their confidence.

Mere I should regularly cease; especially, as I now labour under the pressure of the epidemical complaint, which alone can have prevented this meeting from being as numerous as it is respectable: it could not prevent my attendance, for, in health or in sickness, I am devoted to your service; and I shall never forget the words of an old Roman, Ligarius; who, when the liberties of his country were in imminent danger, and when a real friend to those liberties was condoling with him on his illness at so critical a time, raised himself on his couch, seised the hand of his friend, and said, If you have any business worthy of yourselves, I am well.

It was not in truth my design to have spoken at all this evening; but, since I have risen to explain a sudden thought, I will avail myself of your favourable attention, and hazard a few words upon the general question itself: on the smallest intimation of your wishes, I will be silent. Numbers will have patience to hear, who have not time to read; besides, that it is always easier to speak than to write; and, as to myself, a very particular and urgent occasion, which calls me for some months from England, will deprive me of another opportunity to communicate my sentiments in either form, until the momentous object before us shall be made certainly attainable through the concord, or for ever lost

and irrecoverable through the disagreement, of the nation.

The only specious argument, that I have anywhere heard, against a change in the parliamentary representation of the people, is, that, "a constitution, which has stood for ages, ought not to be altered."

This objection appears on a superficial view so plausible, and applies itself so winningly to the hearts of Englishmen, who have an honest prejudice for their established system, without having in general very distinct ideas of it, that a detection of the sophism, for such I engage to prove it, becomes absolutely necessary for the promotion of your glorious enterprise.

I will risk your impatience; for, though I am aware, that allusions to hist ry and interpretations of old statutes are not very proper in addresses to popular assemblies; yet, when popular assemblies take upon them, as they justly may, to act and resolve upon constitutional points, they are bound to seek or to receive information, lest their actions should be rash and their resolutions ill-founded. A power exerted through passion or caprice, without a deep knowledge of the business in hand, and a fair application of the intellectual faculties, is a tyrannical power, whether it be regal, aristocratical, or popular; and the prevalence of any such power, by the overbearing

strength of king, nobles, or people, would form an immediate tyranny, and in a moment subvert the constitution.

That constitution, which, I persuade myself, will not be subverted, consists of form and spirit, of body (if I may so express myself), and of foul: but, in a course of years, the form is apt to deviate fo widely from the spirit, that it becomes expedient almost évery century to restore its genuine purity and loveliness. The objection, which I undertake to remove, is fophistical, either by design or through ignorance; for the proposition is true in one sense of the word constitution, and false in the other; and the sense, in which it is true, is inapplicable to the question. It is true, that the spirit of the constitution ought not to be changed: it is false, that the form ought not to be corrected; and I will now demonstrate, "that the spirit of our constitution requires a " representation of the people, nearly equal and " nearly universal." Such as cannot or will not follow me in the premisses, both can and will (or I greatly deceive myfelf) bear away the conclufion in their memory; and it is of higher importance than they may imagine.

There has been a continued war in the constitution of *England* between two jarring principles; the evil principle of the feudal system with his dark auxiliaries, ignorance and false philoso-

phy; and the good principle of increasing commerce, with her liberal allies, true learning and found reason. The first is the poisoned source of all the abominations, which history too faithfully records: it has blemished and polluted, wherever it has touched, the fair form of our constitution, and for ages even contaminated the While any dregs of this baneful fvftem remain, you cannot justly boast of general freedom: it was a system of niggardly and partial freedom, enjoyed by great barons only and many acred men, who were perpetually infulting and giving check to the king, while they racked and harrowed the people. Narrow and base as it was, and confined exclusively to landed property, it admitted the lowest freebolders to the due enjoyment of that inestimable right, without which it is a banter to call a man free; the right of voting in the choice of deputies to affift in making those laws, which may affect not his property only, but his life, and, what is dearer, his liberty; and which are not laws, but tyrannous ordinances, if imposed on him without his suffrage given in person or by deputation. This I conceive to have been the right of every freeholder, even by the feudal polity, from the earliest time; and the statute of HENRY IV. I believe to have been merely declaratory: an act which passed in the seventh year of that prince, near four hundred years ago, ordains, that, "all "they, who are present at the county court, as "well suitors duly summoned for the same cause, "as others, shall proceed to the election of their "knights for the parliament." All suitors, you see, had the right; and all freeholders were suitors in the court, however low the value of their freeholds. Observe all along, that one pound in those days was equal to ten at least in the present time. Here then is a plain declaration, that minuteness of real property created no harsh suspicion of a dependent mind; for a harsh suspicion it is, and, by proving too much, proves nothing.

What caused the absurd, yet fatal, distinction between property, personal and real? The seudal principle. What created another odious distinction between free and base holdings, and thus excluded copyholds of any value? The seudal principle. What introduced an order of men, called villains, transferable, like cattle, with the land which they stocked? The seudal principle. What excludes the holders of beneficial leases? The seudal principle. What made personalty, in those times, of little or no estimation? The seudal principle. What raised the silly notion, that the property, not the person, of the subject, was to be represented? The seudal principle. What prevented the large provision in

the act of Henry IV. by which all freebolders were declared electors, from being extended to all holders of property, however denominated, however inconsiderable? The same infernal principle, which then fubdued and stifled the genuine equalifing spirit of our constitution. we find that this demon was himself in process of time fubdued, as he certainly was by the extension of commerce under Elizabeth, and the enlarged conceptions which extended commerce always produces, by the revival of learning, which dispelled the darkness of Gothick ignorance, and by the great transactions of the last century, when the true theory and genuine principles of freedom were unfolded and illustrated, we shall not hesitate to pronounce, that, by the spirit of our constitution, all Englishmen, having property of any kind or quantity, are entitled to votes in chusing parliamentary delegates. The form foon received a cruel blemish; for, in the eighth of HENRY VI. the property of fuitors qualified to vote, was restrained to " forty shil-"lings a year above all charges," that is, to twenty pounds at least by the present value of money. I agree with those, who consider this act as basely aristocratical, as a wicked invasion of clear popular rights, and therefore in a high degree unconflitutional: it is also a disgraceful confession of legislative weakness; for the evil, pretended to be remedied by it, was, that the county elections were tumultuary. What! could not the wisdom of the legislature suggest a mode of preventing tumult, if the laws already subsisting had been insufficient for that purpose, without shaking the obligation of all suture laws, by narrowing the circle of those, who, being affected by them, ought by natural equity to assist in framing them? Ridiculous and indefensible!

In the twelfth of CHARLES II. the mighty fabrick of the feudal fystem was shaken from its basis; but, though its ramparts were overset, its connexions and covered ways destroyed, and its very foundations convulsed, yet the ruins of it have been found replete with mischief, and the mischief operates, even while I speak.

At the Revolution, indeed, the good spirit of the constitution was called forth, and its fair principles expanded: it is only since that auspicious event, that, although we may laugh, when lawyers call their vast assemblage of sense and subtilty the perfection of buman wisdom, yet we shall deride no man, who afferts the constitution of England to be in theory the most perfect of human systems—in theory, not in practice; for, although you are clearly entitled to all the advantages, which the principles of the constitution give you, while you claim those advantages by

cool and decent petition, yet, either from some unaccountable narrowness in the managers of the Revolution, or from the novelty and difficulty of their fituation, they left their noble work fo unfinished, and the feudal poison so little exterminated, that, to use the words of your favourite poet, "they cotched the fnake, not killed it." Who could have imagined, that, in the eighteenth of GEORGE II. the statute of Henry VI. would have been adopted and almost transcribed? Who could have dreamed, that, in the thirty-first of the fame king, the last act would have been recited and approved, with a declaration added, that no tenant by copy of court roll should vote at an election for knights of the shire under penalty of fifty pounds? It was the accurfed feudal principle, which suggested these laws, when the fairest opportunity presented itself of renovating the constitution. Another gale has now sprung up; and, unless you catch it while it blows, it will be gone for ever.

I have proved, unless I delude myself, "that the "spirit of our constitution requires a representation "of the people nearly equal and nearly univer- fal." Carry this proposition home with you, and keep it as an answer to those, who exclaim "that "the constitution ought not to be changed." I said nearly universal; for I admit, that our constitution, both in form and spirit, requires some pro-

perty in electors, either real or personal, in posfession or in action; but I consider a fair trade or prosession as valuable property, and an Englishman, who can support himself by honest industry, though in a low station, has often a more independent mind than the prodigal owner of a large encumbered estate. When Prynne speaks of every inhabitant and commoner, to whom he supposes that the right of voting originally belonged, I cannot persuade myself, that he meaned to include such as, having nothing at all, and being unable or unwilling to gain any thing by art or labour, were supported by alms.

If modern authorities be demanded in aid of my opinions, I shall only mention the great judge, Sir William Blackstone, and I mention him the more willingly, because he never professed democratical fentiments, and, though we admire him as the fystematical arranger of our laws, yet we may fairly doubt the popularity of his political notions: nevertheless, he openly allows in his Commentary, "that the spirit of our consti-"tution is in favour of a more complete repre-" fentation of the people." This too is allowed by the very man, who, in another tract, intimates an opinion, "that the value of freeholds them-" felves should be greatly advanced above what " is now required by law to give the proprietor " a voice in county elections." I told you, that

all reasoning from the statute of *Henry* VI. proved too much, and, consequently, nothing; for, who now would bear the idea of disqualifying those electors of *Surry* and *Middlesex*, whose freeholds were not of the annual value of twenty pounds?

I hear a murmur among you, and perceive other marks of impatience. Indulge me a moment, and I will descend; but let me not be misapprehended. I do not propose to conclude with a specifick motion: it is my deliberate opinion, confirmed by my observations on the event of your affociations to reduce the influence of the Crown, that your petitions and resolutions must be very general. In my own mind I go along with you to the full length of your wishes. If the present system of representation be justly compared to a tree rotten at the heart, I wish to see removed every particle of its rottennefs, that a microscopick eye could discern. I deride many of the fashionable doctrines: that of virtual representation I hold to be actual folly; as childish, as if they were to talk of negative representation, and to contend, that it involved any positive idea. Substitute the word delegation or deputation, instead of representation, and you will instantly see the absurdity of the conceit. Does a man, who is virtually, not actually, re-

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presented, delegate or depute any person to make those laws, which may affect his property, his freedom, and his life? None; for he has no fuffrage. How then is he reprefented according to the principles of our constitution? As well might a Roman tyrant have urged, that all his vaffals were represented in his person: he was augur and high priest; the religious state was, therefore, represented by him: he was tribune of the people; the popular part of the nation were, therefore, represented: he was consul, dictator, master of the horse, every thing he pleased; the civil and military states were, therefore, concentrated in him; the next deduction would have been, that the slaves of his empire were free men. There is no end of abfurdities deducible from fo idle a play upon words.

That there may be an end of my address to you, which has been too long for the place and occasion, but too short for the subject, I resume my seat with a full conviction, that, if united, and dependent on Yourselves alone, you must succeed; if disunited, or too confident in others, you must fail. Be persuaded also, that the people of England can only expect to be the happiest and most

glorious, while they are the freest, and can only become the freest, when they shall be the most virtuous, and most enlightened, of nations.

London, May 14, 1782.

SIR,

I TAKE the liberty of submitting to your ferious attention the Plan of National Defence lately suggested by government, compared with a different plan now approved, though subject to revision, by a Company of Loyal Englishmen, of which I have the honour to be One. You will instantly see, that the first plan was nobly conceived by fome great mind, and intended for the noblest purposes; but that, in the detail, it appears to be innovating, harsh, unconstitutional, and big with alarming confequences; too expensive for the treasury, who have no treasures to lavish, and too distrustful of a generous and spirited people, who would vigoroufly support a government that sincerely confided in them. The fecond plan you will find (and we pledge our honours to prove) already fanctioned, and even required, by Law, agreeable to the Constitution, and calculated to preserve it; not too expensive to real patriots, who will hardly be niggards at fuch a moment as this; and not at all dangerous to fo wife and just a government as the present. If nothing can raise a manly spirit, and excite a liberal emulation, in *English* gentlemen, yeomen, and traders, but the actual descent of three united armies on our coasts, they will then vainly solicit that protection for their houses and families, which they now have in their own hands, on a glorious invitation from the First and Best of Magistrates.

I am, &c.

A VOLUNTEER.

P. S. Give me leave to observe, that the Lords-Lieutenants, as such, have no more to do with this great business than the bench of Bishops.

HEADS OF A PLAN

For raising Corps in several principal Yowns in Great Britain, inclosed in a Letter from the Earl of Shelburne to the Chief Ma-GISTRATES of several Cities and Towns.

- rst. THE principal towns in Great Britain to furnish one or more battalions each, or a certain number of companies each, in proportion to their fize and number of inhabitants.
- 2d. The officers to be appointed from among the gentlemen of the neighbourhood, or the inhabitants of the said towns, either by commission from his Majesty, or from the Lord-Lieutenant of the County, upon the recommendation of the Chief Magistrate of the town in which the Corps are raised.
- 3d. They are to be possessed of some certain estate in land or money, in proportion to their rank.
- 4th. An Adjutant or Town-Major in each town to be appointed by his Majesty.
- 5th. A proper number of Serjeants and Corporals from the army to be appointed for the Corps in each town, in proportion to their numbers.

6th. The faid Serjeants and Corporals, as well

as the Adjutant or Town-Major, to be in the Government pay.

7th. The men to exercise frequently, either in battalions, or by companies, on Sundays, and on Holidays, and also after their work is over in the evenings.

8th. Arms, accourrements, and ammunition, to be furnished at the expence of Government, if required.

9th. Proper magazines, or storehouses, to be chosen or erected in each town, for keeping the said arms, &c.

returned into the storehouses as soon as the exercise is sinished.

11th. The Adjutant or Town-Major to be always present at exercise, and to see that the men afterwards march regularly, and lodge their arms in the storehouses.

12th. Proper penalties to be inflicted on such as absent themselves from exercises, as also for disobedience of orders, insolence to their officers, and other disorderly behaviour.

13th. The above Corps not to be obliged, on any account, or by any authority whatever, to move from their respective towns, except in times of actual invasion or rebellion. 14th. His Majesty shall then have power to order the said corps to march to any part of Great Britain, as his services may require.

15th. They are, on such occasions, to act either separately, or in conjunction with his Majesty's regular forces, and be under the command of such General officers as his Majesty shall think proper to appoint.

16th. Both officers and men to receive full pay as his Majesty's other regiments of foot from the day of their march, and as long as they shall continue on service out of their towns.

17th. They are to be subject to military discipline, in the same manner as his Majesty's regular forces, during the said time of their being called out, and receiving government pay.

18th. All officers who should be disabled in actual service to be entitled to half-pay, and all non-commissioned officers and private men, disabled, to receive the benefit of Chelsea Hospital.

19th. The widows of officers killed in the fervice to have a pension for life.

20th. The time of service to be named.

SKETCH OF A PLAN

- For raifing a Constitutional Force in the Towns, Cities, and Counties of Great Britain; being an Answer, Article by Article, to the Plan annexed.
- Ist. AGREED, with this addition—And other Battalions, or Companies, to be also voluntarily formed out of the Hundreds, Tythings, and Hamlets, of each county, in proportion to its extent and populousness.
- 2d. The Officers, and, in some companies, the men, to enrol themselves, from among the Gentry, Yeomanry, and Substantial Householders, and the Officers to be commissioned respectively by the High Sheriff, and Chief Magistrate, of each county and town.
- 3d. The ranks of the Officers to be proportioned to their contributions to a fund raifed for purposes mentioned in subsequent articles.
- 4th. An Adjutant or Town-Major in each county or town, to be elected by the Officers.
- 5th. Agreed, for the purpose of drilling the men, until a certain number of the volunteers can be qualified to act as Serjeants and Corporals.

6th. The said Drill-Serjeants and Corporals from the army to continue in the pay of government; but the Adjutants and Town-Majors to be paid, if they desire pay, out of a fund voluntarily raised for that purpose in the several counties and towns.

7th. Agreed.

8th. Arms, Accourrements, and Ammunition, to be furnished at the expense of the counties and towns, if required; or of the officers, if they are generously disposed.

9th. The said arms, &c. to be kept by each man, in bis own bouse, for his legal protection.

10th. Rejected.

11th. The officers to take care, after exercise, that the men march regularly, and return home with their arms.

12th. Agreed, with this addition—A set of Laws, or Articles, to be drawn up by the Officers, and subscribed or openly consented to by the men, after a distinct reading and explanation of each article. "Consensus facit Legem."

13th. Agreed, the words sounties or being inferted after the word respective.

14th. The bigb sheriff of each county, and chief magistrate of each town, shall then (on due notice to government) have power to order the said corps to march to any part of

Great Britain, as the publick service may require.

15th. Agreed, in case of actual invasion; but in riots the magistrates to call out their respective corps: and, as to rebellion, or civil war, (which God avert!) no specifick provisions can be made for so dreadful and improbable an event.

16th. The counties and towns to pay the men who require it; but such, as enrol them-felves without pay, to wear some mark of distinction, and the officers to serve at their own expense.

17th. Agreed, in case of actual invasion only; but the words, and receiving government pay, to be omitted.

18th. Officers disabled in actual service to be rewarded by a new order (as a star and ribband, orange coloured or mixed), or by an eulogium pre-claimed and recorded by the sheriffs of their serveral counties, or the chief magistrates of their corporate towns; and the men to receive a comfortable subsistence at their own homes, with a fixed annuity for life out of the voluntary fund.

19th. The widows and children of Officers and Men killed in the service against invaders to have also pensions for life.

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20th. The companies called out as above to be discharged ipso facto, as soon as the invaders are repelled, or the particular service terminated.

A Company of Loyal English Gentlemen.

THE

PRINCIPLES OF GOVERNMENT,

IN

A DIALOGUE

BETWEEN

A GENTLEMAN AND A FARMER.

ADVERTISEMENT.

A SHORT defence hath been thought necessary, against a violent and groundless attack upon the FLINTSHIRE COMMITTEE, for having testified their approbation of the following Dialogue, which hath been publickly branded with the most injurious epithets; and it is conceived, that the sure way, to vindicate this little Tract from so unjust a character, will be as publickly to produce it.— The friends of the Revolution will instantly see, that it contains no principle, which has not the support of the highest authority, as well as the clearest reason.

If the doctrines which it slightly touches, in a manner suited to the nature of the Dialogue, be "seditious, treasonable, and diabolical," Lord Somers was an incendiary, Locke a traitor, and the Convention parliament a pandæmonium; but, if those names are the glory and boast of England, and if that convention secured our liberty and happiness, then the doctrines in question are not only just and rational but constitutional and salutary; and the reproachful epithets belong wholly to the system of those, who so grossly misapplied them.

PRINCIPLES OF GOVERNMENT.

- F. WHY should humble men, like me, sign or set marks to petitions of this nature? It is better for us Farmers to mind our husbandry, and leave what we cannot comprehend to the King and Parliament.
- G. You can comprehend more than you imagine; and, as a free member of a free state, have higher things to mind than you may conceive.
- F. If by free you mean out of prison, I hope to continue so, as long as I can pay my rent to the 'squire's bailiss; but what is meant by a free state?
- G. Tell me first what is meant by a club in the village, of which I know you to be a member.
- F. It is an affembly of men, who meet after work every Saturday to be merry and happy for a few hours in the week.
 - G. Have you no other object but mirth?
 - F. Yes; we have a box, into which we con-

favings, and out of which any members of the club are to be relieved in fickness or poverty; for the parish officers are so cruel and insolent, that it were better to starve than apply to them for relief.

- G. Did they, or the 'squire, or the parson, or all together, compel you to form this society?
- F. Oh! no—we could not be compelled; we formed it by our own choice.
- G. You did right—But have you not some head or president of your club?
- F. The master for each night is chosen by all the company present the week before.
- G. Does he make laws to bind you in case of ill temperor misbehaviour?
- F. He make laws! He bind us! No; we have all agreed to a fet of equal rules, which are figned by every new comer, and were written in a strange hand by young Spelman, the lawyer's clerk, whose uncle is a member.
- G. What should you do, if any one member were to insist on becoming perpetual master, and on altering your rules at his arbitrary will and pleasure?
 - F. We should expel him.
- G. What, if he were to bring a serjeant's guard, when the militia are quartered in your

neighbourhood, and infift upon your obeying him?

- F. We should resist, if we could; if not, the society would be broken up.
- G. Suppose that, with his serjeant's guard, he were to take the money out of the box or out of your pockets?
 - F. Would not that be a robbery?
- G. I am feeking information from you. How should you act on such an occasion?
- F. We should submit, perhaps, at that time; but should afterwards try to apprehend the robbers.
 - G. What, if you could not apprehend them?
- F. We might kill them, I should think; and, if the King would not pardon us, God would.
- G. How could you either apprehend them, or, if they refisted, kill them, without a sufficient force in your own hands?
- F. Oh! we are all good players at fingle slick, and each of us has a stout cudgel or quarter-staff in the corner of his room.
- G. Suppose that a few of the club were to domineer over the rest, and insist upon making laws for them——
- F. We must take the same course; except that it would be easier to restrain one man, than VOL. VI.

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a number; but we should be the majority with justice on our side.

- G. A word or two on another head. Some of you, I prefume, are no great accountants.
- F. Few of us understand accounts; but we trust old Lilly the schoolmaster, whom we believe to be an honest man; and he keeps the key of our box.
- G. If your money should in time amount to a large sum, it might not perhaps be safe, to keep it at his house or in any private house.
 - F. Where else should we keep it?
- G. You might chuse to put it into the funds, or to lend it the 'squire; who has lost so much lately at *Newmarket*, taking his bond or some of his sields as your security for payment with interest.
- F. We must in that case confide in young Spelman, who will soon set up for himself, and, if a lawyer can be honest, will be an honest lawyer.
- G. What power do you give to Lilly, or should you give to Spelman in the case supposed?
- F. No power. We should give them both a due allowance for their trouble, and should expect a faithful account of all they had done for us.

- G. Honest men may change their nature. What, if both or either of them were to deceive you.
- F. We should remove them, put our trust in better men, and try to repair our loss.
- G. Did it never occur to you, that every state or nation was only a great club?
- F. Nothing ever occurred to me on the subject; for I never thought about it.
- G. Though you never thought before on the fubject, yet you may be able to tell me, why you suppose men to have assembled, and to have formed nations, communities, or states, which all mean the same thing.
- F. In order, I should imagine, to be as happy as they can, while they live.
 - G. By happy do you mean merry only?
- F. To be as merry as they can without hurting themselves or their neighbours, but chiefly to secure themselves from danger, and to relieve their wants.
- G. Do you believe, that any King or Emperor compelled them so to associate?
- F. How could one man compel a multitude? A King or an Emperor, I presume, is not born with a hundred hands.
- G. When a prince of the blood shall in any country be so distinguished by nature, I shall then, and

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then only, conceive him to be a greater man than you. But might not an army, with a King or General at their head, have compelled them to alfemble?

- F. Yes; but the army must have been formed by their own choice. One man or a few can never govern many without their consent.
- G. Suppose, however, that a multitude of men, assembled in a town or city, were to chuse a King or Governor, might they not give him high power and authority?
- F. To be fure; but they would never be fo mad, I hope, as to give him a power of making their laws.
 - G. Who else should make them?
 - F. The whole nation or people.
 - G. What, if they disagreed?
- F. The opinion of the greater number, as in our village-clubs, must be taken and prevail.
- G. What could be done, if the fociety were fo large, that all could not meet in the fame place?
 - F. A greater number must chuse a less.
 - G. Who should be the chusers?
- F. All, who are not upon the parish. In our club, if a man asks relief of the overseer, he ceases to be one of us, because he must depend on the overseer.

- G. Could not a few men, one in feven for instance, chuse the assembly of law-makers as well as a larger number?
- F. As conveniently, perhaps; but I would not fuffer any man to chuse another, who was to make laws, by which my money or my life might be taken from me.
- G. Have you a freebold in any county of forty shillings a year?
- F. I have nothing in the world but my cattle, implements of husbandry, and household goods, together with my farm, for which I pay a fixed rent to the 'fquire.
 - G. Have you a vote in any city or borough?
- F. I have no vote at all; but am able by my honest labour to support my wife and four children; and, whilst I act honestly, I may defy the laws.
- G. Can you be ignorant, that the Parliament, to which members are fent by this county, and by the next market-town, have power to make new laws, by which you and your family may be stripped of your goods, thrown into prison, and even deprived of life?
- F. A dreadful power! I never made inquiries, having business of my own, concerning the business of Parliament, but imagined, that the laws had been fixed for many hundred years,

- G. The common laws, to which you refer, are equal, just, and humane; but the King and Parliament may alter them, when they please.
- F. The King ought, therefore, to be a good man, and the Parliament to confift of men equally good.
- G. The King alone can do no harm; but who must judge the goodness of Parliament-men?
- F. All those whose property, freedom, and lives may be affected by their laws.
- G. Yet fix men in seven, who inhabit this kingdom, have, like you, no votes; and the petition, which I desired you to sign, has nothing for its object, but the restoration of you all to the right of chusing those law-makers, by whom your money or your lives may be taken from you. Attend, while I read it distinctly.
- F. Give me your pen—I never wrote my name, ill as it may be written, with greater eagerness.
- G. I applaud you, and trust, that your example will be followed by millions. Another word before we part. Recollect your opinion about your club in the village, and tell me what ought to be the consequence, if the King alone were to insist on making laws, or on altering them at his will and pleasure.
 - F. He too must be expelled.

- G. Oh! but think of his standing army and of the militia, which now are his in substance, though ours in form.
- F. If he were to employ that force against the nation, they would and ought to resist him, or the state would cease to be a state.
- G. What, if the great accountants and great lawyers, the Lillys and Spelmans, of the nation were to abuse their trust, and cruelly injure, instead of faithfully serving, the publick?
- F. We must request the King to remove them, and make trial of others, but none should implicitly be trusted.
- G. But what, if a few great lords or wealthy men were to keep the king himself in subjection, yet exert his force, lavish his treasure, and misuse his name, so as to domineer over the people, and manage the Parliament.
 - F. We must fight for the King and ourselves.
- G. You talk of fighting, as if you were speaking of some rustick engagement at a wake; but your quarter-staffs would avail you little against bayonets.
- F. We might eafily provide ourselves with better arms.
- G. Not so easily; when the moment of resistance came, you would be deprived of all arms; and those who should furnish you with

them, or exhort you to take them up, would be called traitors, and probably put to death.

- F. We ought always, therefore, to be ready; and keep each of us a strong firelock in the corner of his bed-room.
- G. That would be legal as well as rational. Are you, my honest friend, provided with a musket?
- F. I will contribute no more to the club, and purchase a firelock with my savings.
- G. It is not necessary—I have two, and will make you a present of one with complete accoutrements.
- F. I accept it thankfully, and will converse with you at your leifure on other subjects of this kind.
- G. In the mean while, spend an hour every morning in the next fortnight in learning to prime and load expeditiously, and to fire and charge with bayonet firmly and regularly. I say every morning; because, if you exercise too late in the evening, you may fall into some of the legal snares, which have been spread for you by those gentlemen, who would rather secure game for their table, than liberty for the nation.
- F. Some of my neighbours, who have ferved in the militia, will readily teach me; and, per-

haps, the whole village may be perfuaded to procure arms, and learn their exercise.

- G. It cannot be expected, that the villagers should purchase arms, but they might easily be supplied, if the gentry of the nation would spare a little from their vices and luxury.
- F. May they turn to some sense of honour and virtue!
- G. Farewell, at present; and remember, "that a free state is only a more numerous and "more powerful club, and that he only is a free "man, who is member of such a state."
- F. Good morning, Sir! You have made me wifer and better than I was yesterday; and yet, methinks, I had some knowledge in my own mind of this great subject, and have been a politician all my life without perceiving it.

THE CHARACTER

OF

JOHN LORD ASHBURTON.

THE publick are here presented not with a fine picture, but a faithful portrait, with the character of a memorable and illustrious man, not in the style of panegyrick on a monument, but in the language of sober truth, which friendship itself could not induce the writer to violate.

John Dunning (a name to which no title could add lustre) possessed professional talents which may truly be called inimitable; for, besides their superlative excellence, they were peculiarly his own; and as it would scarcely be possible to copy them, so it is hardly probable that nature or education will give them to another. His language was always pure, always elegant; and the best words dropped easily from his lips into the best places with a fluency at all times associately melodious: his style of speaking consisted of all the turns, oppositions, and sigures, which

the old Rhetoricians taught, and which Cicero frequently practifed, but which the auftere and folemn spirit of Demosthenes refused to adopt from his first master, and seldom admitted into his orations, political or forensick.

Many at the bar and on the bench thought this a vitiated style; but, though dissatisfied as criticks, yet, to the confusion of all criticism, they were transported as hearers. That faculty, however, in which no mortal ever furpaffed him, and which all found irrefistible, was his wit. This relieved the weary, calmed the refentful, and animated the drowfy: this drew smiles even from such as were the objects of it; scattered flowers over a defert; and, like sun-beams fparkling on a lake, gave spirit and vivacity to the dullest and least interesting cause. Not that his accomplishments, as an advocate, confisted principally in volubility of speech or livelinessof raillery. He was endued with an intellect. fedate, yet penetrating; clear, yet profound; fubtle, yet strong. His knowledge too was equal to his imagination, and his memory to his knowledge. He was no less deeply learned in the sublime principles of jurisprudence and the particular laws of his country, than accurately skilled in the minute, but useful, practice of all our different courts. In the nice conduct of a complicated

cause, no particle of evidence could escape his vigilant attention, no shade of argument could elude his comprehensive reason. Perhaps the vivacity of his imagination fometimes prompted him to sport where it would have been wifer to argue; and, perhaps, the exactness of his memory sometimes induced him to answer such remarks as hardly deserved notice, and to enlarge on fmall circumstances which added little to the weight of his argument: but those only who have experienced can, in any degree, conceive the difficulty of exerting all the mental faculties in one instant, when the least deliberation might lose the tide of action irrecoverably. The people feldom err in appreciating the character of speakers; and those clients who were too late to engage DUNNING on their fide, never thought themselves secure of success, while those against whom he was engaged were always apprehensive of a defeat.

As a lawyer, he knew that Britain could only be happily governed on the principles of her constitution, or publick law; that the regal power was limited, and popular rights ascertained by it; but that the aristocracy had no other power than that which too naturally results from property, and which laws ought rather to weaken than fortify: he was, therefore, an equal supporter of

just prerogative, and of national freedom, weighting both in the noble balance of our recorded constitution. An able and aspiring statesman, who professed the same principles, had the wisdom to folicit, and the merit to obtain, the friendship of this great man; and a connection, planted originally on the firm ground of fimilarity in political fentiments, ripened into personal affection which nothing but death could have diffolved or impaired. Whether in his ministerial station he might not suffer a few prejudices infensibly to creep on his mind, as the best men have fuffered because they were men, may admit of a doubt; but, if even prejudiced, he was never uncandid, and though pertinacious in all his opinions, he had great indulgence for fuch as differed from him.

His sense of honour was losty and heroick; his integrity stern and inslexible; and though he had a strong inclination to splendour of life, with a taste for all the elegancies of society, yet no love of dignity, of wealth, or of pleasure, could have tempted him to deviate, in a single instance, from the straight line of truth and honesty. He carried his democratical principles even into social life, where he claimed no more of the conversation than his just share, and was always candidly attentive, when it was his turn to be a hearer. His enmitties were strong, yet placable;

but his friendships were eternal; and if his affections ever fubdued his judgment, it must have been in cases, where the same or interest of a friend were nearly concerned. The veneration with which he constantly treated his father, whom his fortunes and reputation had made the happiest of mortals, could be equalled only by the amiable tenderness which he shewed as a parent. He used to speak with wonder and abhorrence of Swift, who was not ashamed to leave a written declaration, "that he could never be fond of children;" and with applause of the caliph, who, on the eve of a decifive battle, which was won by his valour and wisdom, amused himself in his tent with seeing his children ride on his fcymitar, and play with his turban, and dismissed a general, as unlikely to treat the army with lenity, who durst reprove him for fo natural and innocent a recreation.

For some months before his death, the nursery had been his chief delight, and gave him more pleasure than the cabinet could have afforded: but this parental affection, which had been a source of so much felicity, was probably a cause of his fatal illness. He had lost one son, and expected to lose the other, when the author of this painful tribute to his memory parted from him with tears in his eyes, little hoping to see him again in a perishable state.—As he perceives,

without affectation, that his tears now steal from him, and begin to moisten the paper on which he writes, he reluctantly leaves a subject, which he could not soon have exhausted; and when he also shall resign his life to the great Giver of it, he desires no other decoration of this humble grave-stone than this honourable truth:

With none to flatter, none to recommend, DUNNING approv'd and mark'd him as a friend.

END OF THE SIXTH VOLUME.

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