THE

## WORKS

OF

## SIR WILLIAM JONES.

WITT
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## THE

# LAWS OF MENU, 

SON OF BRAHMÁ,

(CONTINUED.)

## CHAPTER THE NINTH.

On $\begin{aligned} & \text { Judicature; } \text { on Law, Private and Criminal; }\end{aligned}$ and on the Commercial and Servile Clafles.

1. 'I NOW will propound the immemorial - duties of man and woman, who muft both ' remain firm in the legal path, whether united

- or Séparated.

2. ' Day and night muft women be held by - their protectors in a flate of dependence; but - in lawful and innocent recreatioṇ, though ' rather addicted to them, they may be left at - their own difpofal.
3. 'Their fathers protect them in childhood; ' their hurbands protect them in youth; their ' fons protect them in age : a woman is never - fit for independence.
vol, vi,
4. 'Reprehenfible is the father, who gives ' not his daughter in marriage at the proper ' time; and the hurband, who approaches not ' his wife in due feafon; reprehenfible alfo is - the fon, who protects not his mother after the - death of her lord.
5. 'Women muft, above all, be reftrained - from the fmalleft illicit gratification ; for, not - being thus reftrained, they bring forrow on - both families:
6. ' Let hurbands confider this as the fupreme - law, ordained for all claffes; and let them, ' how weak foever, diligently keep their wives ' under lawful reftrictions;
7. 'For he, who preferves his wife from - vice, preferves his offspring from fufpicion of - baftardy, his ancient ufages from neglect, his - family from dijgrace, himfelf from anguif, and - his duty from violation.
8. 'The hurband, after conception by his - wife, becomes himfelf an embryo, and is born - a fecond time here below; for which reafon - the wife is called jáyá, fince by her (jáyate) ${ }^{6}$ he is born again :
9. 'Now the wife brings forth a fon endued - with fimilar qualities to thofe of the father;

- fo that, with a view to an excellent offspring,
- he muft vigilantly guard his wife.

10. 'No man, indeed, can wholly reftrain
' women by violent meafures; but, by thefe - expedients, they may be reftrained :
II. ' Let the hurband keep his wife employ-- ed in the collection and expenditure of wealth, - in purification and female duty, in the pre-- paration of daily food, and the fuperintend' ence of houfehold utenfils.
11. ' By confinement at home, even under - affectionate and obfervant guardians, they are

- not fecure; but thofe women are truly fecure,
- who are guarded by their own good inclina-
- tions.

13. ' Drinking Jpirituous liquor, affociating - with evil perfons, abfence from her hufband, - rambling abroad, unfeafonable fleep, and - dwelling in the houfe of another, are fix - faults which bring infamy on a married wo-- man:
14. 'Such women examine not beauty, nor - pay attention to age; whether their lover be - handfome or ugly, they think it is enough - that he is a man, and purfue their pleafures.
15.'Through their paffion for men, their - mutable temper, their want of fettled affection, - and their perverfe nature (let them be guard' ed in this world ever fo well) they foon be-- come alienated from their hufbands. 16. 'Yet fhould their hurbands be diligently ; careful in guarding them; though they well
© know the difpofition, with which the lord of - creation formed them:
15. ' Menu allotted to fuch women a love of ' their bed, of their feat, and of ornament, impure appetites, wrath, weak flexibility, defire ' of mifchief, and bad conduct.
16. 'Women have no bufinefs 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 ' muft be as foul as falfehood itfolf; and this is ' a fixed rule.
17. ' To this effect many texts, which may - fhow their true difpofition, are chanted in the .

- Védas: hear now their expiation for fin.

20. "That pure blood, which my mother "defiled by adulterous defire, frequenting the " houfes 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, ' 'wbich her fon, who knows her guilt, muft pro' nounce for her;
21. 'And this expiation has been declared ' for every unbecoming thought, which en-- ters her mind, concerning infidelity to her ' hurband; fince that is the beginning of adul-- tery.
22. 'Whatever be the qualities of the man, ! with whom a woman is united by lawful
' marriage, fuch qualities even the affumes;
${ }^{*}$ like a river united with the fea.
23. ' Acshama'la', a woman of the loweft

- birth, being thus united to Vasisht'ha, and
- Sa'rangí, being united to Mandapa'la;
' were entitled to very high honour :

24. 'Thefe, and other females of low birth, - have attained eminence in this world by the

- refpective good qualities of their lords.

25. 'Thas has the law, ever pure, been pro-
' pounded for the civil conduct of men and
'women: hear, next, the laws concerning ' children, by obedience to which may happi-- nets be attained in this and the future life.
26. 'When good women, united with huf-

- bands in expectation of progeny, eminently
- fortunate and worthy of reverence, irradiate
' the houfes of their lords, between them and ' goddeffes of abundance there is no diverfity - whatever.

27. 'The production of children, the nur' ture of them, when produced, and the daily - fuperintendence of domeftick affairs, are pe-- culiar to the wife:
28. ' From the wife alone proceed offspring, ' good houfehold management, folicitous atten-- tion, moft exquifite careffes, and that heavenly - beatitude, which fhe obtains for the manes of ' anceftors, and for the bufband himfelf.
29. 'She, who deferts not her lord, but $s$ keeps in fubjection to him her heart, her - fpeech, and her body, fhall attain his manfion 6 in heaven, and, by the virtuous in this world, ' be called Sádhwò, or good and faithful;
30. ? But a wife, by dilloyalty to her huf-- band, thall incur difgrace in this life, and be : born in the next from the womb of a thakal, f or be tormented with horrible difeafes, which ' punifh vice.
3.1. 'LeARN now that excellent law, univer-- fally falutary, which was declared, concerning ! iffiue, by great and good fages formerly born,
31. 'They confider the male iffue of a wo-〔 man as the fon of the lord; but, on the fub? ject of that lord, a difference of opinion is ' mentioned in the Véda; fome giving that ' name to the real procreator of the child,' and ' others applying it to the married poffeffor of f the woman.
32. 'The woman is confidered in law as the - field, and the man as the grain: now vegeta\& ble bodies are formed by the united operation ? of the feed and the field.
33. 'In fome cafes the prolifick power of * the male is chicfly diftinguifhed; in others, 4 the receptacle of the female; but, when both 4 are equal in dignity, the offspring is moft © highly efteemed :
34. ' In general, as between the male and - female powers of procreation, the male is held - fuperiour; fince the offspring of all procreant - beings is diftinguifhed by marks of the male ' power.
35. 'Whatever be the quality of feed, fcat-- tered in a field prepared in due feafon, a plant ' of the fame quality fprings in that field, with - peculiar vifible properties.
36. 'Certainly this earth is called the pri-- meval womb of many beings; but the feed ${ }^{6}$ exhibits not in its vegetation any properties - of the womb.
37. ' On earth here below, even in the fame

- ploughed field, feeds of many different forms, - having been fown by hufbandmen in the ' proper feafon, vegetate according to their - nature :

39. 'Riceplants, mature in fixty days, and - thofe, which require tranfplantation, mudga, - tila, mába, barley, leaks, and fugarcanes all - fpring up according to the feeds.
40. 'That one plant thould be fown, and - another produced, cannot happen: whatever - feed may be fown, even that produces its - proper ftem.
41. 'Never muft it be fown in another
' man's field by him, who has natural good

- fenfe, who has been well inftructed, who
- knows the Véda and its Angas, who defires - long life :

42. 'They, who are acquainted with paft - times, have preferved, on this fubject, holy ? ftrains chanted by every breeze, declaring, 'that " feed muft not be fown in the field of " another man."
43. 'As the arrow of that hunter is vain;

6 who fhoots it into the wound, which another
f had made juft before in the antelope, thus

* inftantly perifhes the feed, which a man

6 throws into the foil of another :
44. 'Sages, who know former times, confi-- der this earth (Prit' bivi) as the wife of king

- Príthu ; and thus they pronounce cultivated
- land to be the property of him, who cut away
- the wood, or wbo cleared and tilled it; and the
- antelope, of the firft hunter, who mortally

6 wounded it.
45. 'Then only is a man perfect, when he - confifts of three perfons united, his wife, him-

- felf, and his fon; and thus have learned Bráb-- mens announced this maxim: "The hufband " is even one perfon with his wife," far all do-- meftick and religious, not for all civil, purpofes. 46. 'Neither by fale nor defertion can a - wife be releafed from her hurband: thus we
f fulby acknowledge the law enacted of old by 6 the lord of creatures.

47. ' Once is the partition of an inheritance - made; once is a damfel given in marriage;
' and once does a man fay "I give:" thefe

- three are, by good men, done once for all and - irrevosably.

48. ' As with cows, mares, female camels, flave girls, milch buffalos, thegoats, 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 poffeffion,
- fow it in foil owned by another, can receive
- no advantage whatever from the corn, which
- may be produced:

50. • Should a bull beget a hundred calves

- on cows not owned by his mafter, thofe
- calves belong folely to the proprietors of
- the cows; and the ftrength of the bull was
- wafted:
- 51. 'Thus men, who have no marital pro-
- perty in women, but fow in the fields owned
- by others, may raife up fruit to the hurbands;
- but the procreator can have no advantage
- from it.

52. 'Unlefs there be a fpecial 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 confidered 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 feed, - conveyed into it by water or wind, fhould - 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 heep, of flave girls, hens, and - milch buffalos, unlefs there be a fpecial agree-- ment.
55. 'Thus has the comparative importance - of the foil and the feed been declared to you:

- 1 will next propound the law concerning - women, who have no iffue by their hufbands.

57. 'The wife of an clder brother is con-

- Gidered as mother-in-law to the younger; and
- the wife of the younger as daughter-in-law to - the elder:

58. 'The elder brother, amoroully ap-- proaching the wife of the younger, and the - younger, careffing the wife of the elder, are

- both degraded, even though anthorized by the
' hufband or jpiritual guide, except when fuch - wife has no iffue.

59.     - On failure of iffue by the hurband, if ' he be of the fervile clafs, the defired offspring ' may be procreated, either by his brother or ' fome other fapinda, on the wife, who has been - duly authorized:
60. 'Sprinkled with clarified butter, filent, ' in the night, let the kinfman thus appointed ' beget one fon, but a fecond by no means, on - the widow or childlefs wife:

6r. 'Some fages, learned in the laws con-- cerning women, thinking it poffible, that the - great object of that appointment may not be - obtained by the birth of a fingle fon, are of opi-
' nion, that the wife and appointed kinfman ' may legally procreate a fecond.
62. 'The firft object of the appointment - being obtained according to law, both the - brother and the widow muft live together like ' a father and a daughter by affinity.
63. ' Either brother, appointed for this pur' pofe, who deviates from the frict rule, and - acts from carnal defire, thall be degraded, as ' having defiled the bed of his daughter-in-law ' or of his father.
64. ' By men of twiceborn claffes no widow, - or childle/s wife, muft 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 commiffion to a brother or other ' near kinfman 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' prehended by learned Bráhmens; yet it is de-- clared to have been the practice even of men, - while Ve'na had fovereign power:
67.     - He, poffeffing the whole earth, and

- thence only called the chief of fage monarchs, - gave rife to a confufion of claffes, when his
- intellect became weak through luft.

68. 'Since his time the virtuous difapprove

- of that man, who, through delufion of mind;
- directs a widow to receive the carefles of another - for the fake of progeny.

69. ' The damfel, indeed, whofe humand - Thall die after troth verbaliy plighted, but

- before confummation, his brother fhall take in
- marriage aicording to this rule:

70. 'Having efpoufed 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 feafon; and until iffue

- be had.

71. Let no man of fenfe, who has once

## COMMERCIAL AND SERVILE CLASSES.

- given his daughter to a fuitor, give her again
' to another; for he, who gives away his
' daughter, whom he had before given; incurs
- the gailt and fine of fpeaking falfely in a
' caufe concerning mankind,

72. 'Evbn though a man have married a ' young woman in legal form, yet he may aban' don her, if he find her blemifhed, afflicted
' with difeafe, or previoully deflowered, and
' given to him with fraud:
73. 'If any man give a faulty damifel in
' marriage, without difclofing her blemifh, the
'hufband may annul that act of her illminded
' giver.
74. 'Should a man have bufinefs 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 amifs, if the be diftreffed by ' want of fubfiftence:

75.     - While her hufband, having fettled her
' maintenance, refides abroad, let her continue

- firm in religious aufterities; but, if he leave ' her no fupport, let her fubfift by Jpinning and - other blamelefs arts.

76. 'If he live abroad on account of fome - facred duty, let her wait for him eight ! years; if ou account of knowledge or fame,

- fix; if on account of pleafure, three : after - thofe terms have expired, ghe muft follow him.

77. ' For a whole year let a huiband bear - with his wife, who treats him with averfion; - but, after a year, let him deprive her of herfepa-- rate property, and ceafe to cohabit with her. 78. 'She, who neglects her lord, though ad-- dicted to gaming, fond of firituous liquors, ' or difeafed, muft be deferted for three months, - and deprived of her ornaments and houfehold - furniture :
78. 'But the, who is averfe from a mad huf-- band, or a deadly finner, or an eunuch, or one - without manly ftrength, or one afflicted with - fuch maladies as punifh crimes, muft neither - be deferted nor ftripped of her property.
79. ' A wife, who drinks any fpirituous - liquors, who acts immorally, who fhows ' hatred to her lord, who is incurably difeafed, ' who is mifchievous, who waftes his property, - may at all times be fuperfeded by another ' wife.
80. ' A barren wife may be fuperfeded by ${ }^{6}$ another in the eighth year: ine, whofe chil-- dren are all dead, in the tenth; the, who - brings forth only daughters, in the eleventh; - The, who fpeaks unkindly, without delay;
81. 'But fhe, who, though aftlicted with

## COMMERCIAL AND SERVILE CLASSES.

- illnefs, is beloved and virtuous, muft never be - difgraced, though the may be fuperfeded by - another wife with her own confent.

83.     - If a wife, legally fuperfeded, thall de-- part in wrath from the houfe, the muft either - inftantly be confined, or abandoned in the ' prefence of the whole family:
84. 'But hhe, who, having been forbidden, ' addicts herfelf to intoxicating liquor even at ' jubilees, or mixes in crowds at theatres, muft ' be fined fix racticás of gold.
85. 'Whentwiceborn men take wives, both - of their own clafs and others, the precedence, - honour, and habitation of thofe wives, muft ' be fettled according to the order of their - claffes :
86. ' To all fuch married men, the wives of ' the fame clafs only (not wives of a different ' clafs by any means) mult perform the duty ' of perfonal attendance, and the daily bufinefs ' relating to acts of religion;
87. 'For he, who foolihly caules thofe ' duties to be performed by any other than his ' wife of the fame clafs, when the is near at - hand, has been immemorially confidered as a ' mere Chandála begotten on a Bráhmeni.
88. ' To an excellent and handfome youth ' of the fame clafs, let every man give his - daughter in marriage, according to law ; even
' though the have not attained her age of eight ' years:
89. ' But it is better, that the damfel, ' though marriageable, fhould flay at home till - her death, than that he fhould ever give her - in marriage to a bridegroom void of excellent ' qualities.
90. •Three years let a damfel wait, though

- The be marriageable; but, after that term, let - her chufe for herfelf a bridegroom of equal ' rank:

91. ' If, not being given in marriage, the ' chufe her bridegroom, neither the, nor the ' youth chofen, commits any offence;
92. ' But a damfel, thus electing her huf' band, 'hall not carry with her the ornaments,

- which fhe received from her father, nor thofe
' given by her mother or brethren: if Ohêe carry - them away, fhe commits theft.

93. ' He , who takes to wife a damfel of full ' age, fhall not give a nuptial prefent to her

- father; fince the father lof his dominion
- over her, by detaining her at a time, when
- the might have been a parent.

94. ' A man, aged thirty years, may marry
' a girl of twelve, if be find one dear to his

- heart; or a man of twenty-four years, a
- damfel of eight: but, if he fini/b bis ftudent/ßip
- earlier, and the duties of has next order would
d otherwife be impeded, let him marry immes
- diately.

95. 'A wife, given by the gods, who are

- named in the bridal texts, let the hubband te-- ceive and fupport conftantly, if the be vir-
' tuous, though he married her not from in-- clination: fuch conduct will pleafe the gods.

96. To be mothers were women created ;

- and to be fathers, men; teligious rites, there-
- fore, are ordained in the Vida to be performed
${ }^{2}$ by tbe hu/band together with the wife.

97. ' If a nuptial gratuity has actaally been

- given to a damfel, and he, who gave it, Ahould - die before marriage, the damfel fhall be mar-
- ried to his brother, if fhe confent;

98. 'But even a man of the fervile clafs d ought not to receive a gratuity, when he gives - his daughter in marriage; fince a father, who

- fakes a fee on that occafion, tacitly fells his - daughter.

99. ' Neither ancients nor moderns, who - were good men, have ever given a damfel in - marriage, after fhe had been promifed to an-- other man ;
100.     - Nor, even in former creations, have

- we heard the virtuous approve the tacit fale of
' a daughter for a price, under the name of a
- nuptial gratuity.

101. "Let mutualfidelity continue till death:". VOL, VI.

- this, in few words, may be confidered as the - fupreme law between hurband and wife.

102. 'Let a man and woman, united by - marriage, conftantly beware, left, at any - time difunited, they violate their mutual - fidelity.
103. 'Thus has been declared to you the - law, abounding in the pureft affection, for - the conduct of man and wife; together with - the practice of raifing up offspring to a hu/band - of the fervile clafs an failure of ifue by him be-- gotten: learn now the law of inheritance.
104. 'After the death of the father and the

- mother, the brothers, being affembled, may
- divide among themfelves the paternal and
- maternal eftate ; but they have no power over
- it, while their parents live, unlefs the fatber - cbufe to diftribute it.

105.     - The eldeft brother may take entire ' poffeffion of the patrimony; and the others ' may live under him, as they lived under their - father, unlefs they cbufe to be feparated. 106. • By the eldeft, at the moment of his - birth, the father, having begotten a fon, dif-- charges his debt to his own progenitors; the ' eldeft fon, therefore, ought before partition to - manage the whole patrimony:
106.     - That fon alone, by whofe birth he - difcharges his debt, and through whom he

- attains. immortality, was begotten from a - fenfe of duty: all the reft are confidered by - the wife as begotten from love of pleafure. 108. ' Let the father alone fupport his fons; ' and the firft born, his younger brothers; and - let them behave to the eldeft, according to - law, as children Jould bebave to their father.

109. ' The firft born, if virtuous, exalts the - family, or, if vitious, deftroys it: the firft born - is in this world the moft refpectable; and the ' good never treat him with difdain.
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 fhould be ' refpected as a maternal uncle, or other kinf${ }^{\prime}$ man.
111. "Either let them thus live together, ' or, if they defire Separately to perform religious ' rites, let them live apart; fince religious du-- ties are multiplied in feparate houfes, their - Teparation is, therefore, legal and even laud-- able.
112. 'The portion deducted for the eldeft is ' a twentieth part of the heritage, with the beft ' of all the chattels; for the middlemoft, half ' of that, or a fortieth; for the youngeft, a ' quarter of it, or an eightieth.

11 . - The eldeft and youngeft refpeatively

- take their juft mentioned portions; and, if - there be more than orse between them, each - of the intermediate fons has the mean portion, - or the fortieth.

114. ' Of all the goods collected, Fet the firft - born, if be be tranfcendantly learned and vir-- troxus, take the beft artick, whatever is moft a excellent in its kiad, and the beft of ten cows - or the like:
$115 .{ }^{\text {' But, among brothers equally fkilled in }}$ - performing their feveral duties, there is no - deduction of the beft in ten, or the moft excel-- lent chattel; though fome trifle, as a mark of - greater veneration, fhould be given to the firft - born.
115. 'If a deduction be thus made, let equal - Thares of the refidue be afcertained and re-- ceived; but, if there be no deduction, the - fhares muft be diftributed in this manner:
116. 'Let the eldeft have a double thare, - and the next born, a fhare and a half, if they - clearly furpafs the reft in virtue and karning; - the younger fons muft have each arlhare: if - all be equal in good qualities, they muft all take - Sbare and fbare alike.
118.' To the unmarried daughters by the - Same mother, let their brothers give portions ' out of their own allotments refpectively, ac--cording to the clafes of their feveral motbers:

- let each give a fourth part of his own diftinet
- Ihare; and they, who refufe to give it, fhall - be degraded.

119. 'Let them never divide the value of a - fingle goat or theep, or a fingle beaft with " uncloven hoofs: a fingle goat or theep re' maining after an equal difribution belongs to - the firft born.
120. 'Should a younger brother in tbe man-

- ner before mentioned have begotten a fon on the
- wife of his deceafed elder brother, the divifion
' mult then be made equally betraeen that fon,
s who reprefents the deceafed, and his natural fa-
' ther: thus is the law fetted.

121. 'The reprefentative is not fo far wholly

- fubrtituted by law in the place of the deceafed
' priacipal, as to have the portion of an elder fon; - and the prineipal became a father in confe' quence of the procreation by his younger bro' tber; the fon, therefore, is entitled by faw to ' an equal hare, but not to a double portion.

122. 'A younger fon being born of a firft ' married wife, after an elder fon had been ' born of a wife laft married, but of a lower - clafs, it may be a doube in that cafe, how the - divifion thall be made:
123. 'Let the fon, born of the elder wife, ' take one moft excellent bull deducted from ' the inheritance: the next excellent bulls are

- for thofe, who were born firft, but are inferior - on account of their mothers, who weere married - laft.

124. ' A fon, indeed, who was firf born, ' and brought forth by the wife firft 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 clafs and without any otber diftinction, - 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 frabrábmanyá, depends on actual ' priority of birth; and of twins alfo, if any fuch - be conceived among different wives, the eldeft - is he, who was firft actually born.
127. 'He, who has no fon, may appoint his - daughter in this manner to raife up a fon for - him, faying: " the male child, who thall be " born from her in wedlock, thall be mine for "the purpofe of performing my obfequies."
128. 'In this manner Dacsha himfelf, lord ' of created beings, anciently appointed all his - ffty daughters to raife up fons to him, for the - fake of multiplying his race:
129. 'He gave ten to Dherma, thirteen to

- Casyapa, twenty-feven to Sóma, king of - Bráhmens and medical plants, after doing ho-
- nour to them with an affectionate heart.

130.     - The fon of a man is even as himfelf; ${ }^{6}$ and as the fon, fuch is the daugbter thus ap-- pointed: how then, if he bave no fon, can any - inherit his property, but a daughter, who is - clofely united with his own foul?
131. 'Property, given to the mother on ' her marriage, is inherited by her unmarried - dayghter; and the fon of a daughter, appoint-- ed in the manner juft mentioned, shall inherit - the whole eftate of her father, who leaves no - fon by himfelf begotten:
132. 'The fon, however, of fucb a daughter, - who fucceeds to all the wealth of her father - dying without a fon, muft 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 - Juch a daughter, there is no difference in law; - fince their father and mother both fprang - from the body of the fame man :
134. ' But, a daughter having been appoint-- ed to produce a fon for her father, and a fon, ' begotten by bimfelf, being afterwards born, the ' divifion of the heritage mult in that cafe be' equal ; fince there is no right of primogeni-- ture for a woman.
135. 'Should a daughter, thus appointed to ! raife up a fon for her father, die by any ac. - cident without a fon, the hufband of that - daughter may, withour hefitation, poffefs him© felf of her property.
136. • By that male child, whom a daughter - thus appointed, either by an implied intention - or a plain declaration, thall produce from an - hurband of an equal clafs, the maternal grand-- father becomes in law the father of a fon: ؛ let that fon give the funeral eake and poffers 6 the ipheritance.
137.     - By a fon, a man obtains victory ower ' all people; by a fon's fon, he enjoys immor. - tality; and, afterwards, by the fon of that ' grandfon, he reaches the folar abode.
138. 'Since the fon (tráyaté) delivers his 'f father from the hell named put, he was, ' therefore, called puttra by Bzahma' himfelf:
139. 'Now between the fons of his fon and s of his daughter thus appointed, there fubfifts in ' this world no difference; for even the fon of - Juch a daughter delivers him in the next, like - the fon of his fon.
140. 'Let the fon of fuch, a daughter offer * the firft funeral cake to his mother; the fe-- cond to her father ; the third, to her paternal - grandfather.
141. 'Or the man, to whom a fon has been

- given, according to a fubfequent law, adorned - with every virtue, that fon fhall take a fifth - or fixth part of the heritage, though brought
- from a different family.

142. 'A given fon muft never claim the - family and eftate of his natural father : the

- funeral cake follows the family and eftate: - but of him, who has given away his fon, the - funeral oblation is extinct.

143. 'The fon of a wife, not authorized to - have iffue by another, and the fon begotten. - by the brother of the hurband, on a wife, who - has a fon then living, are both unworthy of - the beritage; one being the child of an adul-

- terer, and the other produced through mere - luft.

144. 'Even the fon of a wife duly authorized, ' not begotten according to the law already pro-- pounded, is unworthy of the paternal eftate; ' for he was procreated by an outcaft:
145.     - But the fon legally begotten on a wife, ' authorized for the purpofe before mentioned, ' may inherit in all re/pects, if be be virtuous and - learned, as 2 fon begotten by the hubband; - fince in that cafe the feed and the produce be-- long of right to the owner of the field.
146. 'He, who keeps a fixed and moveable ' eftate of his deceafed brother, maintains the ' widow, and raifes up a fon to that brother,

- muft give to that fon, at the age of fifteen, 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 Sapinda, of her huiband, that fon, if

- begotten with amorous embraces, and tokens of - impure defire, the fages proclaim bafeborn ' and incapable of inheriting.

148. 'THIs law, which has preceded, muft be - underftood of a diftribution among fons be-

- gotten on women of the fame clafs: hear now
; the law concerning fons by feveral women of
- different claffes.

149. 'If there be four wives of a Brábmen - in the direct order of the claffes, and fons are

- produced by them all, this is the rule of par-
- tition among them:

150. 'The chief fervant in hurbandry, the - bull kept for impregnating cows, the riding - horfe or carriage, the ring and other ornamente, - and the principal meffuage, fhall be deducted

- from the inheritance and given to the Bráb-
- men fon, together with a larger fhare by way - of preeminence.

151. 'Let the Brábmen take three Thares of "the refidue; the fon of the C/batriyá wife,

- two thares; the fon of the Vaify wife, a thare
- and a half; and the fon of the Suidra wife,
- may take one fhare.

152. ' Or, if no deduction be made, let fome - perfon learned in the law divide the whole ' collected eftate into ten parts, and make a - legal diftribution by this following rule:
153. 'Let the fon of the Brábmanì take four - parts; the fon of the C/batriyá, three; let the - fon of the Vaifyá have two parts; let the fon - of the Súdra take a fingle part, if be be vir' tuous.
154. 'But whether the Bráhmen have fons, ' or have no fons, by wives of the three firft - clafles, no more than a tenth part muft be ' given to the fon of a Súdra.
155. ' The fon of a Bráhmen, a C/batriyá, or ' a Vaifyá by a woman of the fervile clafs, fhall " inherit no part of the eftate, unlefs be be vir' tuous; nor jointly with otber fons, unlefs bis mo' ther was lawufully 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 fame clafs, muft divide
' the heritage equally, after the younger bro-- thers have given the firft born his deducted

- allotment.

157. 'For a Súdra is ordained a wife of his - own clafs, and no other: all, produced by her,

- fhall have equal fhares, though the have a
- hundred fons.

158. 'Of the twelve fons of men, whom

- Menu, fprung from the Self-exiftent, has
' named, fix are kinfmen and heirs; fix, not
- heirs, exccpt to tbeir own fathers, but kinfmen.

15 9. ' The fon begotten by a man himfelf
4 in lawful wedlock, the fon of his wife begotten

- in the manner before defcribed, a fon given to
- him, a fon made or adopted, a fon of concealed
- birth, or wbofe real fatber cannot be known, and
${ }^{6}$ a fon 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 fon by a Súdra, are the fix kinf-- men, but not heirs to collaterals.
161. 'Such advantage, as a man would gain, - who fhould attempt to pafs deep water in a

- boat made of woven reeds, that father obtains,
- who paffes the gloom of death, leaving only
- contemptible fons, who are the eleven, or at leaft
- the fix, laft mentioned.

162. ' If the two heirs of one man be the

- Son of his own body and a fon of his wife by
- a kinfman, the former of wobom was begotten
- after bis recovery from an illnefs thought incura-
- ble, each of the fons, exclufively of the other,
- Thall fucceed to the whole eftate of his natural
- father.

163. "The fon of his own body is the fole

- heir to his eftate, but, that all evil may be re-- moved, let him allow a maintenance to the ' reft;

164. "And, when the fon of the body has - taken an account of the paternal inheritance, ${ }^{6}$ let him give a fixth part of it to the fon of 'the wife begotten by a kinfman, before his fa' ther'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 fucceed immediately to the pa-- ternal eftate in the manner juft mentioned; but - the ten other fons can only fucceed in order ' to the family duties and to their fhare of the - inheritance, thofe laft 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 'firft in rank, as the fon of his body.
167. ' He, who was begotten, according to - law, on the wife of a man deceafed, or im' potent, or difordered, after due authority given ' to her, is called the lawful fon of the wife.
168. ' He, whom his father, or mother witb - ber hufband's affent, gives to another as his'

- fon, provided that the donee have no iffue, if
- the bry be of the fame clafs and affectionately
- difpofed, is confidered as a fon 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 clafs, endued with filial - virtues, acquainted with the merit of perform-- ing obfequies to bis adopter, and with the fin of - amitting them.
170. 'In whofe manfions foever a male - child thall be brought forth by a married wo-- man, wbofe hufband bas long been abjent, if the - real father cannot be difcovered, but if it be - probable that be was of an equal clafs, 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 lon, after he has been deferted woith-- out juft caufe 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 houfe of her - father, if the afterwards marry her lover, is - defcribed as a fon begotten on an unmarried - girl.
173. 'If a pregnant young woman marry, - whether her pregnancy be known or unknown, * the male child in her womb belongs to the - bridegroom, and is called a fon received with - his bride.
$1740^{\circ} \mathrm{He}$ is called a fon bought, whom a

- man, for the fake of having a fon to perform his - obfequies, purchafes from his father and mo-
' ther, whether the boy be equal or unequal to
' himfelf in good qualities, for in clafs all adopted - Sons muft be equal.

175. ' He , whom a woman, either forfaken - by her lord or a widow, conceived by a fecond ' hufband, whom the took by her own defire,
'though againft law, is called the fon of a wo-- man twice married:
176. ' If, on ber fecond marriage, fhe be fill ' a virgin, or if the left her huiband under the - age of puberty and return to him at his full ' age, fhe muft again perform the nuptial cere' mony, either with her fecond, or her young and - deferted, hurband.
177. ' He , who has loft his parents, or been ${ }^{6}$ abandoned by tbem without juft caufe, and ' offers himfelf to a man as bis fon, is called a ' fon felfgiven.
178. ' A fon, begotten through luft on a $5 \times 1$ -- dra by a man of the prieftly clafs, is even as ' a corpfe, though alive, and is thence called in ' law a living corpfe:
179. ' But a fon, begotten by a man of the - fervile clafs on his female flave, or on the fe-- male flave of his male llave, may take a - Share of the heritage, if permitted by the otber ' Jous: thus is the law eftablifhed.

18a. 'Thefe cleven fons (the fon of the wife, 6 and the reft as enumerated) are allowed by - wife legiflators to be fubftitates in order for - fons of the body, for the fake of preventing a - failure of obfequies;
181. ' Though fuch, as are called fons for - that purpofe, but were produced from the - manhood of others, belong in truth to the fad ther, from whofe manhood they feverally - fprang, and to no other, except by a juft fiction - of law.
182. ' If , among feveral brothers of the - whole blood, one have a fon born, Menu - pronounces them all fathers of a male child - by means of that fon; fo that, if fucb nepherw 'c would be the beir, the uncles have no power to - adopt fons:
183. 'Thus if, among all the wives of the - fame hufband, one bring forth a male child, - Menu has declared them all, by means of - that fon, to be mothers of male iffue.
184. 'On failure of the beft, and of the next - beft; among thofa tavelve fons, let the inferiour - in order take the heritage; buf, if there be ' many of equal rank, let all be fharers of the © eftate.
185. ' Not brothers, nor parents, but fons, - if living, or their male ifue, are heirs to the de-- ceafed, but of him, who leaves no fon, nor a

- wife, nor at daugbter, the father Thall take the - inheritance; and; if he ledve neitber fatber, nor - motber, the brothers.

186. 'To three anceftors muft water be given
' at their obfequies; for three (the father, his - father, and tbe patetnal grändfatber) is the fu-

- neral cake ordained: the fourth in defcent is
' the giver of oblations to them, and their heir, if
' they die witbout nearer defcendants; but the
- fifth has no concern witb the gift of the funeral
' cake.

187. 'To the neareft Japinda, male or female,

- after him in the third degree, the inheritance
' next belongs; then, on failure of fapindas and
- of their iffue, the famánódaca, or diftant kinf-
' man, thall be the heir ; or the firitual pre-
- ceptor, or the pupil, or the felloweftudent, of the
- deceafed:

188. ' On failure of all thofe, the lawful

- heirs are fuch Bráhmens, as have read the
- three Vedas, as are pure in body and mind, as
- have fubdued their paffions; and they mu/t
- confequently offer the cake: thus the rites of - obfequies cannot fail.

189. " The property of a Bráhmen thall never - be taken as an efcheat by the king : this is a - fixed law: but the wealth of the other claffes, ' on failure of all heirs, the king may take.
190. ' If the widow of a man, who died vol. vi.

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- without a fon, raife up a fon to him by one of - his kinfmen, let her deliver to that fon, at his - full age, the collected eftate of the deceafed, ' whatever it be.

191. ' If two fons, begotten by two fuccefive, - hufbands, who are both dead, contend for their - property, then in the hands of their mother, - let each take, exclufively of the other, his own - father's eftate.
192. ' On the death of the mother, let a! ' the uterine brothers, and the uterine fifters, if ' unmarried, equally divide the maternal eftate: - each married fifter ball have a faurth part of a - brother's allotment.
193. 'Even to the daughters of thofe - daughters, it is fit, that fomething fhould be ' given, from the affets of their maternal grand, ' mother, on the fcore of natural affection.
194. 'What was given before the nuptial - fire, what was given on the bridal proceffion, ' what was given in token of love, and what - was received from a brother, a mother, or a - father, are confidered as the fixfold Separate
${ }^{\text {r }}$ property of a married woman:
195. 'What the received after marriage

- from the family of her hufband, and what ' her affectionate lord may have given her, fhall
- be inherited, even if fhe die in his lifetime, by - her children.

196. ' It is ordained, that the property of a ' woman, married by the ceremonies called

- Brábma, Daiva, Arßba, Gándbarva, or Prá-- jápatya, fhall go to her hurband, if the die ' without iffue.

197. • But her wealth given on the marriage - called $A$ fura, or on either of the two others, is - ordained, on her death without iffue, to be' come the property of her father and mother.
198. 'If a widow, whofe hufband bad otber ' wives of different clafles, fhall have received ' wealth at any time as a gift from her father, ' and Jball die without ifue, it fhall go to the ' daughter of the Bráhmani wife, or to the iffue - of that daughter.
199. ' A woman fhould never make a hoard ' from the goods of her kindred, wbich are ' common to ber 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 hufbands, the
' heirs of thofe hufbands fhall not divide among
' themfelves: they, who divide it among them-- felves, fall deep into fin.
201. ' Eunuchs and outcafts, perfons born ' blind or deaf, madmen, idiots, the dumb, and ' fuch as have loft the ufe of a limb, are excluded ' from a fhare of the heritage;
202. • But it juft, that the heirs whe

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- knows his duty, fhould give all of them food
- and raiment for life without ftint, according to ' the beft of his power: he, who gives them - nothing, finks affuredly to a region of punijb-- ment.

203.     - If the eunuch and the reft fhould at ' any time defire to marry, and if the wife of the - eunuch foould raife up a fon to bim by a man le' gally appointed, that fon and the iffue of fuch, ' as have children, fhall be capable of inheriting. 204. 'After the death of the father, if the - eldeft brother acquire wealtb by bis own efforts - before partition, a fhare of that acquiftion thall ' go to the younger brothers, if they have made ' a due progrefs in learning;
204. ' And if all of them, being unlearned, - acquire property before partition by their own - labour, there thall be an equal divifion of that ' property without regard to the firft born; for it ' was not the wealth of their father: this rule is - clearly fettled.
s06. 'Wealth, however, acquired by learn' ing, belongs exclufively to any one of tbem, ' wobo acquired it; fo does any thing given by a ' friend, received on account of marriage, or ' prefented as a mark of refpect to a gueft.
205. ' If any one of the brethren has a com' petence from his own occupation, and wants - not the property of bis faler, he may debar

- bimfelf from his own fhare, fome trife being 'given him as a confideration, to prevent future - Arrifc.

208. 'What a brother has acquized by la' bour or fkill, without ufing the patrimony, he ' fhall not give up without his affent; for it was ' gained by his own exertion:
209. 'And if a fon, by his own efforts, re' cover a dibt or property unjufly detained, which ' could not be recovered before by bis fatber, he - fhall not, unlefs by his free will, put it into ' parcenary with his brethren, fince in fact it ' was aequired by himfelf.
210. 'If brethren, onee divided and living ${ }^{6}$ again together as parceners, make a fecond ' partition, the fhares muft in that cafe be ' equal; and the firft born fhall have no right of - deduction.
211. 'Should the eldeft or youngeft of feve${ }^{6}$ ral brothers be deprived of his fhare by a civil ' deatb on bis entrance into the fourth order, ' or fhould any one of them die, his veffed inter. ' eft in a thare thall not wholly be loft;
212. 'But, if he leave neitber fon, nor wife, - mor daugbter, nor father, nor mother, his uter' ine brothers and fifters, and fuch brothers as ' were reunited after a feparation, fhall affemble ' and divide his thare equally.
213. ' Any eldeft brother, who from avarice - fhall defraud his younger brother, fhall forfeit

- the bonours of his primogeniture, be deprived ' of his own fhare, and pay a fine to the king. 214. ' All thofe brothers, who are addicted ' to any vice, lofe their title to the inheritance: ' the firft born fhall not appropriate it to him'felf, but fhall give fhares to the youngeft, if ' they be not vitious.

215. ' If, among undivided brethren living ' with their father, there be a common exertion ' for common gain, the father fhall never make ${ }^{\text {' }}$ an unequal divifion among them, when they - divide tbeir families.
216. 'A fon, born after a divifion in the ' lifetime of bis fatber, fhall alone inherit the ' patrimony, or hhall have a fhare of it with the ' divided brethren, if they return and unite ' themfelves with him.
217. 'Of a fon, dying childlefs and leaving s no widow, the father and mother hall take the ' eftate; and, the mother alfo being dead, the 'paternal grandfatber and grandmother fhall ' take the heritage on failure of brothers and ne-- pheres.
218. ' When all the debts and wealth have ' been juftly diftributed according to law, any ' property, that may afterwards be difcovered, - fhall be fubject to a fimilar diftribution.
219. ' Apparel, carriages, or riding horfes, ' and ornaments of ordinary value, which any of ' the beirs bad ufed by confent before partition,
< dreffed rice, water in a woll or ciftern, female - flaves, family priefts, or fpiritual counfellors,
b and pafture ground for cattle, the wife have ' declared indivifible, and fill to be ufed as be-- fore.
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 prefent the law ' concerning games of chance.
221. 'Gaming, either with inanimate or
' with animated things, let the king exclude
' wholly from his realm: both thofe modes of

- play caufe deftruction to princes.

222. 'Such play with dice and the like, or by
' matches between rams and cocks, amounts to
' open theft; and the king mult ever be vigilant - in fuppreffing both modes of play:
223. 'Gaming with lifelefs things is known ' among men by the name of dyuita; but $\int a$ ' mábwaya fignifies a match between living ' creatures.
224. 'Let the king punifh corporally at dif-
${ }^{2}$ cretion both the gamefter and the keeper of $a$, - gaming houfe, whether they play with inani-- mate or animated things: and men of the

- fervile clafs, who wear the firing and other
' marks of the twiceborn.

225. 'Gamefters, publick dancers and fing-
' ers, revilers of fcripture, open hereticks, men 6 who perform not the duties of their feveral - claffes, and fellers of firituous liquor, let him ? inftantly banifh from the town:
226. 'Thofe wretches, lurking like unfeen ' thieves in the dominion of a prince, conti© nually harafs his good fubjects with their viti-- ous conduct.
227. 'Even in a former creation was this f vice of gaming found a great provoker of en-- mity; let no fenfible man, therefore, addict - himfelf to play even for his amufement: 228. On the man addicted to it, either priv - vately or openly, let punifhment be inflicted \& at the difcretion of the king.
228. 'A MAN of the military, commercial, 6 or fervile clafs, who cannot pay a fine, fhall - difcharge the debt by his labour: a prieft fhall - difcharge it by little and little.
229. 'For women, children, perfons of crazy : intellect, the old, the poor, and the infirm, - the king fhall order punifhment with a fmall. 6 whip, a twig, or a rope.

231, 'Those minifters, who are employed ' in publick affairs, and, inflamed by the blaze ' of wealth, mar the bufinefs of any perfon ' concerned, let the king ftrip of all their pro© perty.
232. 'Such, as forge royal edioss an. dif?

- fenfions among the great minifters, or kill * women, priefts, or children, let the king put - to death; and fuch, as adhere to his enemies.

233. 'Whatever bufinefs has at any time b been tranfacted conformably to law, let him ' confider as finally fettled, and refufe to un. © ravel;
234. 'But whatever bufinefs has been con? cluded illegally by his minifters or by a judge, 'let the king himfelf reexamine; and let him ' fine them each a thoufand panas,
235. 'The flayer of a prieft, a foldier or ' merchant drinking arak, or a prieft drinking ' arak, mead, or rum, he, who fteals the gold of ' a prieft, and he, who violates the bed of his ' natural or Spiritual father, are all to be con' fidered refpectively as offenders in the higheft - degree, except tbofe, whofe crimes are not fit ta ' be named:
236. ©n fuch of thofe four, as have not ? actually performed an expiation, let the king © legally inflict corporal punifhment, together - with a fine,
237. 'For violating the paternal bed, let the ' mark of a female part be impreffed on the fore - bead with bot iron; for drinking fpirits, a vint' ner's flag; for ftealing facred gold, a dog's - foot; for murdering a prief, the figure of a ! headlefs corpre;
238. 'With none to eat with them, with ' none 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 irdelible marks, they - fhall be deferted by their paternal and mater-- nal relations, treated by none with affection, - received by none with refpect: fuch is the or-- dinance of Menu.
240. 'Criminals of all the claffes, having ' performed an expiation, as ordained by law, ' fhall not be marked on the forehead, but con-- demned to pay the higheft fine:
241. 'For crimes by a prieft, wobo bad a - good character before bis offence, the middle - fine fhall be fet on him; or, if bis crime was ' premeditated, he fhall be banifhed from the - realm, taking with him his effects and his fa' mily;
242. 'But men of the other claffes, who - have committed thofe crimes, thougb without ' premeditation, fhall be ftripped of all their pof-- feffions; and, if their offence was premedi'tated, thall be corporally, or even capitally, ' punifhed, according to circumfances.
243. 'Let no virtuous prince appropriate - the wealth of a criminal in the higheft degree;

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- for he, who appropriates it through covetour-
' nefs, is contaminated with the fame guilt:

244. 'Having thrown fuch a fine into the - waters, let him offer it to Varuna; or let - him beftow it on fome prieft of eminent learn-- ing in the fcriptures :
245. 'Varuna is the lord of punifhment; - he holds a rod even over kings; and a prieft,
' who has gone through the whole Véda, is - equal to a fovereign of all the world.
246. ' Where the king abftains from receivt ' ing to bis own ufe the wealth of fuch offenders, ' there children are born in due feafon and en-- joy long lives;
247. 'There the grain of hufbandmen rifes - abundantly, as it was refpectively fown; there ' no younglings die, nor is one deformed ani' mal born.
248. 'Should a man of the bafeft clafs, ' with preconceived malice, give pain to Bráb' mens, let the prince corporally punith him by ' various modes, that may raife terrour.
249. 'A king is pronounced equally unjuft ' in releafing the man, who deferves punifh' ment, and in punißhing the man, who de' ferves it not: he is juft, who always inflicts ' the punifhment ordained by law.
250. 'Thefe eftablifhed rules for adminifter-- ing juftice, between two litigant partits, have

* been propounded at length under eighteen - heads.

251. 'Thus fully performing all duties re' quired by law, let a king feek witb jufice to - poffefs regions yet unpoffeffed, and, when ' they are in his poffeffion, let him govern them ${ }^{6}$ well.
252. 'His realm being completely arranged ${ }^{6}$ and his fortreffes amply provided, let him ever © apply the moft diligent care to eradicate bad - men refembling thorny weeds, as the law di-- rects.
253. ' By protecting fuch as live virtuoully, - and by rooting up fuch as live wiekedly, thofe - kings, whofe hearts are intent on the fecurity ' of their people, fhall rife to heaven.
254. 'Of that prince, who takes a revenue,
' without reftraining rogues, the dominions are * thrown into diforder, and himfelf fhall be pre© cluded from a celeftial abode;
255. ' But of him, whofe realm, by the - ftrength of his arm, is defended and free from ' terrour, the dominions continually flourifh, - like trees duly watered.
256. 'Let the king, whofe emiffaries are - his eyes, difcern well the two forts of rogues, ' the open and the concealed, who deprive - other men of their wealth:
257. 'Open rogues are they, who fubfift by

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- cheating in various marketable commodities;
r and concealed rogues are they, who fteal and
- rob in forefts and the like fecret places.

258. 'Receivers of bribes, extorters of mo-
' ney by threats, debafers of metals, gamefters,

- fortunetellers, impofters, and profeffors of pal-
' miftry;

259. ' Elephant breakers and quacks, not per'forming what they engage to perform, pre-
' tended artifts, and fubtil harlots;
260. 'Thefe and the like thorny weeds,
' overfpreading the world, let the king difcover
' with a quick fight, and others, who act ill in

- fecret; worthlefs men, yet bearing the out-
' ward figns of the worthy.

261. 'Having detected them, by the means
' of trufty perfons difguifed, who pretend to

- have the fame occupation with them, and of
- fpies placed in feveral ftations, let him bring
' them by artifice into his power:

262. 'Then, having fully proclaimed their
' refpective criminal acts, let the king inflict
' punifhment legally, according to the crimes
${ }^{-}$proved;
263. 'Since, without certain punifhment, it ' is impoffible to reftrain the delinquency of - fcoundrels with depraved fouls, who fecretly 'prowl over this earth.
264. 'Muchfrequented places, cifterns of
' water, bake houfes, the lodgings of harlots, ' taverns and victualling fhops, fquares where ' four ways meet, large' well known trees, ' affemblies, and publick fpectacles;
265. ' Old courtyards, thick ts, the houfes ' of artifts, empty manfions, groves, and gar-- dens;
266. 'Thefe and the like places let the king ' guard, for the prevention of robberies, with - foldiers, both ftationary and patroling, as well - as with fecret watchmen.
267. 'By the means of able fpies, once ' thieves but reformed, who, well knowing the - various machinations of rogues, affociate with
' them and follow them, let the king detect and - draw them forth:
268. ' On pretexts of dainty food and gra-- tifications, or of feeing fome wife prieft, who - could enfure tbeir .fuccefs, or on pretence of - mock battles and the like feats of ftrength, let ' the fipies procure an affembly of thofe men. 269. 'Such as refufe to go forth on thofe oc' cafipns, deterred by former punifoments, which - the king had inflizted, let him feize by force, ' ard put to death, on proof of their guilt, with ' their friends and kinfmen, paternal and ma-

- ternal, if proved to be their confederates.

270. 'Let not a juft prince kill a man con-
$1 \cdot$ victed of fimple theft, unlefs taken with the

- mainer or with implements of robbery; but ' any thief, taken with the mainer, or with
- fuch implements, let him defroy without he-- fitation;

271. ' And let him flay all thofe, who give ' robbers food in towns, or fupply them with ' implements, or afford them fhelter.
272. 'Should thofe men, who are appointed 'to guard any diftricts, or thofe of the vicinity, ' who were employed for that purpofe, be neu' tral in attacks by robbers and inactive in feiz'ing them, let him inftantly punifh them as ' thieves.
273. ' Him, who lives apparently by the ' rules of his clafs, but really departs from thofe ' rules, let the king feverely punifh by fine, as a ' wretch, who violates his dury.
274. 'They, who give no affiftance on the ' plundering of a town, on the forcible breaking ' of a dike, or on feeing a robbery on the high'way, fhall be banifhed with their cattle and 'utenfils.
275. ' Men, who rob the king's treafure, or

- obftinately oppofe his commands, let him de-- Atroy by various modes of juft punifhment; ' and thofe, who encourage his enemies. 276. ' Of robbers, who break a wall or ${ }^{4}$ partition, and commit theft in the night, let
' the prince order the hands to be lopped off, - and themfelves to be fixed on a fharp ftake.

277. 'Two fingers of a cutpurfe, the thumb - and the index, let him caufe to be amputated ' on his firft conviction; on the fecond, one - hand and one foot; on the third, he fhall fuffer - death.
278. 'Such, as give thieves fire, fuch as give ' them food, fuch as give them arms and apart' ments, and fuch as knowingly receive a thing - folen, let the king punifh as be would punifb a ' thief.
279. 'The breaker of a dam to fecure a pool, ${ }^{6}$ let him punif by long immerfion under - water or by keen corporal fuffering; or the of-- fender fhall repair it, but mult pay the higheft - mulct.
280. 'Thofe, who break open the treafury, ' or the arfenal, or the temple of a deity, and ${ }^{6}$ thofe, who carry off royal elephants, horfes, ' or cars, let him without hefitation deftroy.

28 I . ' He , who fhall take away the water of

- an ancient pool, or fhall obftruct a watercourfe,
' muft be condemned to pay the loweft ufual
' amercement.

282. ' He , who fhall drop his ordure on the

- king's highway, except in cafe of neceffity,
- Ihall pay two panas and immediately remove - the filth;

283. 'But a perfon in urgent neceffity, 2 - very old man, a pregnant woman, and a child, - only deferve reproof, and chall clean the place ' themfelves: that is a fettled rule,
284. 'All phyficians and furgeons acting ${ }^{6}$ unikilfully in their feveral profeffions, muft ' pay for injury to brute animals the loweft, but - for injury to human creatures the middle, ' amercement.
285. ' THE breaker of a footbridge, of a pub' liek flag, of a palifade, and of idols made of ' clay, thall 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 loweft of the ' three; but damages muft always be paid.
287. 'The man, who thall deal unjuftly ' with purchafers at a fair price by delivering 'goods of lefs value, or fhall fell at a high price ' goods of ordinary value, fhall pay according to ' circumftances, the loweft or the middle amerce-- ment.
288. ' Let the king place all prifons near a ' publick road, where offenders may be feen ' wretched or disfigured.
289. ' Him, who breaks down a publick 'wall, him, who fills up a publick ditch', him,
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* who throws down a publick gate, the king chall - fpeedily banifh.

290. ' For all facrifices to deftroy innocent
' men, the punifhment is a fine of two hundred 'panas; and for machinations with 'poiforious ' roots, and for the various cbarms and witch-- eries intended to kill, by perfons not effecting ' their purpofe.
291. • THE feller of bad grain for good, or of ' good feed placed at the top of the bag, to con-- ceal the bad below, and the deftroyer of knowh ' landmarks, muft fuffer fuch corporal punifh-- ment as will disfigure them;
292. 'But the moft pernicious of all de${ }^{6}$ ceivers is a goldfmith, who commits frauds: 'the king thall order him to be cut piecemeal - with razors.
293. ' For ftealing implements of hufban'-- dry, weapons, and prepared medicines, let ' the king award punifhment according to the - time and according to their ufe.
294. 'The king, and his council, his me-- tropolis, his realm, his treafure, and his army, - together with his ally, are the feven members - of his kingdem; whence it is called Septánga:
295. 'Among thofe feven' members of a ' kingdom, let him confider the ruin of the - firf, and fo forth in order, as the greateft ca-- lamity;

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296. ' Yet, in a fevenparted kingdom here ' below, there is no fupremacy among the fe${ }^{6}$ veral parts, from any preeminence in ufeful ' qualities: but all the parts muft reciprocally ' fupport each other, like the three faves of a ' holy mendicant :
297. ' In thefe and thofe acts, indeed, this 'and that member may be diftinguifhed; and ' the member, by which any affair is tranf'acted, has the preeminence in that particular ' affair.
298. 'When the king employs emiffaries', ' when he exerts power, when he regulate's ' publick bufinefs, let him invariably know both ' bis own ftrength and that of his enemy,
299.     - With all their Several diftreffes and ' vices: let him then begin his operations, hav' ing maturely confidered the greater and lefs - importance of particular acts:
300. ' Let him, though frequently dijappointed, ' renew his operations, how fatigued foever', ' again and again: fince fortune always attend's 'the man, who, having begun well, ftrenuoully ' 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 reprefent
' each of thofe ages :

302. 'Sleeping, he is the Cali age; waking
' the $D$ wápara; exerting himfelf in action, the

- Trétá; living virtuoufly, the Satya.

303. ' Of Indra, of Su'rya, of Pavana, - of Yama, of Varuna, of Chandra, of - Agni, and of Prị'hivì, let the king emulate ' the power and attributes.
304. 'As Indra fheds plentiful fhowers - during the four rainy months, thus let him, - acting like the regent of clouds, rain juft gra-- tifications over his kingdom:
305. 'As Su'rya with ftrong 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 - concealed emiffaries:
307. 'As Yama, at the appointed time, - punifhes friends and foes, or thofe who revere, - and thofe who contemn, him, thus let the king, ${ }^{6}$ refembling the judge of departed fpirits, ' punifh offending fubjects:
308. 'As Varuna moft affuredly binds the ' guilty in fatal cords, thus let him, reprefent-- ing the genius of water, keep offenders in - clofe confinement :
309. ! When the people are na lefs delighted ! on feeing the king, than on feeing the full
' moon, he appears in the character of Chan${ }^{6}$ dra :
310. ' Againtt criminals let him ever be ar* dent in wrath, let him be fplendid in glory, - let him confume wicked minifters, thus cemulating the functions of AGNI, regent of - fire.

3ir. 'As Prít'hivi fupports all creatures
' equally, thus a king, fuftaining all fubjects, - refembles in his office the goddefs of earth.
312. 'Engaged in thefe duties and in others; * with continual activity, let the king above all 'things reftrain robbers, both in his own terri' tories and in thofe of other princes, from whicts 'they come, or in which they Jeek refuge.
313. 'Let him not, although in the great' eft diftrefs for money, provoke Bráhmens to ' anger by taking their property; for they, once © enraged, could immediately by facrifices and - imprecations deftroy him with his troops, ele' phants, horfes and cars.
314. 'Who, without perihing, could pro' voke thofe holy men, by whom, that is, by 'whofe anceftors, under Brahma', the allde' vouring fire was created, the fea with waters ' not drinkable, and the moon with its wane ' and increafe?
315.' What prince could gain wealth by - oppreffing thofe, who, if angry, could frame

- other worlds and regents of worlds, could give - being to new gods and mortals?

316. 'What man, defirous of life, would 'injure thofe, by the aid of whom, that is, by - whofe oblations, worlds and gods perpetually - fubfift; thofe who are rich in the learning of ' the Veda?
317. 'A Bráhmen, whether learned or igno? rant, is a powerful divinity; cven as fire is a ' powerful divinity, whether confecrated or © popular.
318. 'Even in places for burning the dead, ${ }^{6}$ the bright fire is undefiled; and, when pre$\varsigma$ fented with clarified butter at fubfequent facri-- fices, blazes again with extreme f plendour:
319. 'Thus, although Bráhméns employ ' themfelves in all forts of mean occupation, ' they muft.invariably be honoured; for they ' are fomething tranfcendently divine.
320. 'Of a military man, who raifes his ' arm violently on all occafions againft the ' prieftly clafs, the prieft himfelf fhall be the - chaftifer; fince the foldier originally proceed' ed from the Bráhmen.
321. ' From the waters arofe fire; from the ? prieft, the foldier; from fone, iron: their all-- penetrating force is ineffectual in the places, - whence they refpectively fprang.
322. 'The military clafs cannot profper

- without the facerdotal, nor can the facerdotal
- be raifed without the military: both claffes, by
- cordial union, are exalted in this world and - in the next.

323. 'SHould the king be near bis end through - Same incurable difeafe, he muft beftow on the ' prietts 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 abftaining from food.

324. 'Thus conducting himfelf, and ever - firm in difcharging his royal duties, let the king ' employ all his minifters in acts beneficial to his ${ }^{6}$ people.
325. 'Thefe rules for the conduct of a mi-- litary man having been propounded, let man' kind next hear the rules for the commercial ' and fervile claffes in due order.

- 326. 'Let the Vaifya, having been girt with ' his proper facrificial thread, and having mar' ried an equal wife, be always attentive to his ' bufinefs of agriculture and trade, and to that of - keeping cattle;

327. 'Since the lord of created beings, hav-- ing formed herd, and flocks, intrufted them to ' the eare of the Vaifya, while he intrufted the
${ }^{6}$ whole human fpecies to the Brábmen and the

- Chatriya:

328. 'Never muft a Vaifya be difpofed to fay,
"I keep no cattle;" nor, he being willing to ' keep them, muft they by any means be kept a by men of another clafs.
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 fkilled likewife in the time - and manner of fowing feeds, and in the bad or s good qualities of land; let him alfo perfectly - know th ecorrect modes of meafuring and - wweighing,
331.     - The excellence or defects of commo - dities, the advantages and difadvantages of - different regions, the probable gain or lofs on - vendible goods, and the means of breeding - cattle with large augmentation:
332. 'Let him know the juft wages of fer-- vants, the various dialects of men, the beft - way of keeping goods, and whatever alfe be-- longs to purchafe and fale.
333. 'Let him apply the moft vigilant care - to augment bis wealth by performing his duty; - and, with great folicitude, let him give nou-- rifhment to all fentient creatures.
334. 'Servile attendance on Bráhmens - learned in the Veda, chiefly on fuch as keep - houfe and are famed for virtue, is of itfelf the - highent duty of a Súdra, and leads him to - future beatitude;

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335.     * Pure in body and mind, humbly ferving - the three higher claffes, mild in fpeech, never - arrogant, ever feeking refuge in Bráhmens ' principally, he may attain the moft eminent - clafs in anotber tranfmigration.
336. 'This clear fyftem of duties has been ' promulgated for the four claffes, when they ' are not in diftrefs for fubfiftence; now learn - in order their feveral duties in times of necefo ' Gity.'

## CHAPTER THE TENTH.

On the mixed Claffes; and on Times of Diftrefs.

1. 'LET the three twiceborn claffes, remain-

- ing firm in their feveral duties, carefully read
- the Veda; but a Brálmen muft explain it to
- them, not a man of the other two claffes: this
- is an eftablifhed rule.

2. 'The Brábmen muft know the means of - fubfiftence ordained by law for all the claffes, ' and muft declare' them to the reft: let him-- felf likewife act in conformity to law.
3. 'From priority of birth, from fuperiority - of origin, from a more exact knowledge of - fcripture, and from a diftinction in the facri-- ficial thread, the Brábmen is the lord of all - claffes.
4. 'The three twiceborn claffes are the fa-- cerdotal, the military, and the commercial; - but the fourth, or fervile, is onceborn, that is,

- has no fecond birth from the gáyatrí, and wears
- no thread: nor is there a fifth pure clafs.

5. 'In all claffes they, and they only, who

- are born, in a direct order, of wives equal in
- clafs and virgins at the time of marriage, are F to be confidered as the fame in clafs with their 8. fathers:

6. 'Sons, begotten by twiceborn men, on - women of the clafs next immediately below

- them, wife legiflators call fimilar, not the fame,
- in clafs with their parents, becaufe they are
- degraded, to a middle rank between both, by the - lownefs of their mothers: they are named in ¢ order, Múrdhábhifhicta, Máhifhya, and Ca' rana, or Cáyaft'ha; and their feveral employ' ments are teacbing military exercifes; mufck,
- aftronomy, and keeping herds; and attendance on © princes.

7. 'Such is the primeval rule for the fons ' of women one degree lower than their bufbands:
' for the fons of women two or three degrees

- lower, let this rule of law be known.

8. ' From a Brábmen, on a wife of the Vaifya ' clafs, is born a fon called Ambajbt'ba, or - Vaidya, on a Súdra wife a Nißháda, named - alfo Párafava:
9. ' From a C/Jatriya, on a wife of the Súdra ' clafs, fprings a creature, called Ugra, with a - nature partly warlike and partly fervile, fero-
' cious in his manners, cruel in his acts.
10. 'The fons of a Brábmen by women of ' three lower claffes, of a C/batriya by women of
'two, and of a Vaifya by one lower clafs, are

- called apafadäb, or degraded below their fu--tbers.

11. ' From a C/batriya, by a Bráhmeni wife, - fprings a Súta by birth; from a Vaifya, by a - military or facerdotal wife, fpring a Mágadba - and a Vaidéha.
12. 'From a Súdra, on women of the com-- mercial, military, and prieftly claffes, are born - fons of a mixed breed, called A'yógava, C/Bat-- tri, and Chandála, the loweft of mortals.
13. 'As the Ambafbt'ba and Ugra, born in ' a direct order with one class between tbofe of - their parents, are confidered in law, fo are the - C/battrĭ and the Vaidéba, born in an inverfe ; order with one intermediate clafs; and all four - may be touched wichout impurity.
14.     - Thofe fons of the twiceborn, who are - begotten on women without an interval ( $A n$ -- tara) between the claffes mentioned in order, - the wife called Anantaras, giving them a di-- finct name from the lower degree of their - mothers.
15. ' From a Brábmen, by a girl of the Ugra - tribe, is born an Avrita; by one of the Am-- baft'ba tribe, an A'bhira; by one of the A'yó-- gava tribe, a Dhigvana.
16. 'The A'yogava, the C/Battrí, and the - Chandála, the loweft of men, fpring from a - Súdra in an inverfe order of the clafes, and

- are, therefore, all three excluded from the per' formance of obfequies to their anceftors:

17. ' From a Vaifya the Mágadba and Vaidd' ba, from a C/batriya the Súta only, are born - in an inverfe order; and they are three other - fons excluded from funeral rites to their fathers.
18. 'The fon of a Nißbáda, by a woman of 'the Súdra clafs, is by tribe a Puccafa; but the - fon of a Súdra by a Ni/Jádz woman, is named - Cuccutaca.
19. ' One, born of a C/battrí by an Ugrá, is ' called Swapáca; and one, begotten by a Vaide' ha on an Ambabbthi wife, is called Véna.
20. 'Thofe, whom the twiceborn beget on ${ }^{6}$ women of equal claffes, but who perform not ' the proper ceremonies of a/fuming the thread, - and the like, people denominate Vrátyas, or ' excluded from the gáyatri.
21. 'From fuch an outcaft Bráhmen fprings ' a fon of a finful nature, who in different coun' tries is named a Bhúrjacantaca, an A'vantya, ' a Vátadhána, a Pufopadha, and a Saic'ha:
22. ' From fuch an outcaft C/batriya comes ‘ a fon called a 7 'halla, a Malla, a Nicli'bivi, a ' Nata, a Carana, a C'hafa, and a Dravira:
23. ' From fuch an outcaft Vaifya is born a - fon called Sudhanwan, Chárya, Cáru/ba, Vi-- janman, Maitra, and Satzoata.
24. ' By intermixtures of the claffes, by their

- matriages with women who ought not to be - married, and by their omiffion of prefcribed
- duties, impure claffes have been formed.

25. 'Those men of mingled births, who - were born in the inverfe order of claffes, and

- who intermarry among themfelves, I will now - compendioufly defcribe.

26.     - The Súta, the Vaidébd, and the Cban-- dála, that loweft of mortals, the Mágadha; the - C/battrĭ by tribe, and the A yógava,
27. 'Thefe fix beget fimilar fons on women

- of their own claffes, or on women of the fame
- clafs with their mothers; and they produce
' the like from women' of the two higheft - claffes, and of the loweft:

28. 'As a twiceborn fon may fpring from a

- Brábmen by women of two claffes out of ${ }^{6}$ three, a fimilar fon, when there is no interval ${ }_{5}$ - and an equal fon from a woman of his own - clafs, it is thus in the cafe of the low tribes - in order.

29. 'Thofe fix beget, on women of their - own tribes, reciprocally, very many defpica-- ble and abjeet races even more foul than their - begetters.
30. 'Even as a Súdra begets, on a Bráhmenı̀

- woman, a fon more vile than himfelf, thus
' any other low man begets, on woman of the - four claffes, a fon yet lower.

31. 'The fix low claffes, marrying inverfels, - beget fifteen yet lower tribes, the bafe pro-- ducing ftill bafer; and in a direct order they - produce fifteen more.
32. ' A Dafyu, or outcaft of any pure clafs, - begets on an A'yógavì woman a Sairindbra, ' who fhould know how to attend and to drefs - his mafter; though not a llave, he muft live ' by flavih work, and may alfo gain fubfiftence ' by catching wild beafts in toils:
33. 'A Vaidéba begets on her a fweetvoiced - Maitréyaca, who, ringing a bell at the ap-- pearance of dawn, continually praifes great ' men:
34. ' A Ni/Jáda begets on her a Márgava, ' or Dáfa, who fubfifts by his labour in boats, - and is named Caiverta by thofe, who dwell in - A'ryáverta, or the land of the venerable.
35. 'Thofe three of a bafe tribe are feverally - begotten on $A^{\prime} y o ́ g a v i ́ ~ w o m e n, ~ w h o ~ w e a r ~ t h e ~$ - clothes of the deceafed and eat reprehenfible - food.
36. 'From a Nißbáda fprings by a woman of ' tbe Vaidéha tribe, a Cárávara, who cuts leat ther, and from a Vaidéba fpring by women of ' the Cárávara and Nifháda cafts, an Andhra ' and a Méda, who muft live without the town. 37. - From a Cbandála, by a Vaidéb̀ woman, ' comes a Pándufópáca, who works with cane
${ }^{*}$ and reeds; and from a Ni/bada, an Abindicts - who acts as a jailor.
37. 'From a Cbandála, by a Puccasì woman, - is born a Sópáca, who lives by punifhing crimi' nals condemned by the king, a finful wretch ${ }^{6}$ ever defpifed by the virtuous.
38. ' A Nißbd́dì woman, by a Chandála, pro-- duces a fon called Antyavafayin, employed in ${ }^{6}$ places for burning the dead, contemned even ' by the contemptible.
39. 'Thefe, among various mixed claffes, ' have been defcribed by their feveral fathers c and mothers; and, whether concealed or open, ' they may be known by their occupations.
40. 'Six fons, three begotten on women of - the fame clafs, and tbree on women of lower - claffes, muft perform the duties of twiceborn ' men; but thofe, who are born in an inverfe ' order, and called lowborn, are equal, in refpect ' of duty, to mere Súdras.
41. ' By the force of extreme devotion and - of exalted fathers, all of them may rife in time - to high birth, as by the reverfe they may fink ' to a lower ftate, in every age among mortals - in this inferiour world.
42. ' The following races of C/hatriyas, by ' their omiffion of holy rites and by feeing no - Brdbmens, have gradually funk among men to ' the loweft of the four claffes:
43. ' Paund'racas, Odras, and Draviras; - Cámböas, Yavanas, and Sacas; Páradas,

- Pablavas, Cbinas, Girátas, Deradas, and - C'bafas.

45. ' All thofe tribes of men, who fprang ' from the mouth, the arm, the thigh, and the ' foot of Brahma', but who became outcafts by ' having neglected their duties, are called Dafyus, ' or plunderers, whether they fpeak the language - of Mléchch'bas, or that of A'ryas.
46. 'Those fons of the twiceborn, who are ' faid to be degraded, and who are confidered as ' lowborn, fhall fubfift only by fuch employ' ments, as the twiceborn defpife.
47. 'Sutas muft live by managing horfes and ' by driving cars; Ambafbt'bas, by curing dif' orders; Vaidébas, by waiting on women; Má-- gadbas, by travelling with merchandize;
48. ' Nißbádas, by catching fifh; an A'yógava, ' by the work of a carpenter; a Méda, an $A n$ -- dbra, and (the fons of a Brábmen by wives of ' the Vaidéba and Ugra claffes, refpectively called)
'a Cbuncbu and a Madgu, by flaying beafts of ' the forelt;
49. ' A C/battrǐ, an Ugra, and a Puccafa, ' by killing or confining fuch animals as live in ' holes: Dbiguanas, by felling leather; Vénas, ' by ftriking mufical inftruments:
50.     - Near large publick trees, in places for ' burning the dead, on mountains, and in ' groves, let thofe tribes dwell, generally known, ' and engaged in their feveral works.
51. 'The abode of a Cbandála and a Swa-- páca muft be out of the town; they muft not - have the ufe of entire veffels; their fole weatith ' muft be dogs and affes:
52. 'Their clothes muft be the mantles of ' the deceafed; their difhes for food, broken 'pots; their ornaments, rufty iron; continually ' muft they roam from place to place :
53. 'Let no man, who regards his duty re' ligious and civil, hold any intercourfe with - them; let their tranfactions be confined to ' themfelves, and their marriages only between ' equals:
54. 'Let food be given to them in pot-- fherds, but not by the hands of the giver; - and let them not walk by night in cities or ' towns:'
$55 .^{\circ} \mathrm{By}$ day they may walk about for the ' purpofe of work, diftinguifhed by the king's ' badges; and they fhall carry out the corpfe of ' every one, who dies without kindred: fuch ' is the fixed rule.
55. 'They fhall always kill thofe, who are ' to be flain by the fentence of the law, and by 'the-royal warrant; and let them take the
' clothes of the flain, their beds, and their or' naments.
56. ' Him, who was born of a finful mother, ${ }^{6}$ and confequently in a low clafs, but is not ' openly known, who, though worthlefs in
' truth, bears the femblance of a worthy man, let
' people difcover by his acts:
57. ' Want of virtuous dignity, harfhnefs of ' fpeech, cruelty, and habitual neglect of pre' fcribed duties, betray in this world the fon of
' a criminal mother.
58.     - Whether a man of debafed birth affume
' the character of his father or of his mother,
' he can at no time conceal his origin:
59. ' He, whofe family had been exalted, - but whofe parents were criminal in marrying, ' has a bafe nature, according as the offence of
'bis mother was great or fmall.
60. ' In whatever country fuch men are ' born, as deftroy the purity of the four claffes, ' that country foon perifhes together with the na' tives of it.
61. ' Defertion of life, without reward, for ' the fake of preferving a prieft or a cow, a wo' man or a child, may caufe the beatitude of ' thofe bafeborn tribes.
62. Avoiding all injury to animated beings, ' veracity, abftinence from theft, and from unjuft - feizure of property, cleanlinefs, and command
' over the bodily organs, form the compendious;

- fyftem of duty, which Menu has ordained for ' the four claffes.

64. 'Should the tribe fprung from a Bráb' men, by a Súdra woman, produce a fuccefizon of 'cbildren by the marriages of its women with ' other Brabmens, the low tribe fhall be raifed:
' to the higheft in the feventh generation.
65. 'As the fon of a Súdra may tbus attain ' the rank of a Bráhmen, and as the fon. of a

- Brábmen may fink to a level with Súdras, even
' fo muft it be with him, who fprings from a
${ }^{4}$ Chatriya; even fo with him, who was born ' of a Vaifya.

66. ' Ir there be a doubt, as to the preference
' hetween him, who was begotten by a Brábmen
' for his pleafure, but not in wedlock, on a Súdra
' woman, and him, who was begotten by a

- Súdra on a Brábmení,

67. 'Thus is it removed: he, who was be' gotten by an exalted man on a bafe woman, ' may by his good acts become refpectable; but ' he, who was begotten on an exalted woman ' by a bafe man, mult himfelf continue bafe :
68. 'Neither of the two (as the law is fixed); ' fhall be girt with a facred ftring; not the for' mer, becaufe his mother was low; nor the - fecond, becaufe the order of the claffes was in' verted.

6g. ${ }^{6}$ As good grain, fpringing from good ${ }^{3}$ foil, is in all refpects excellent, thus a man, - fringing from a refpectable father by a refpect' able mother, has a claim to the whole inftitu' tion of the twice born.
70. 'Some fages give a preference to the - grain; others to the field; and others confider - both field and grain; on this point the decifion follows:
71. 'Grain, caft into bad ground, wholly * perifhès, 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 Rinh* yafringa, ind others, have been transformed - into holy men revered and extolled, the pa6 ternal fide, therefore, prevails.
73. *Brahma' himfelf, having compared a - Súdra, who performs the duties of the twice* born, with a twiceborn man, who does the * acts of a Súdra, faid: "Thofe two are neither "equal nor unequal," that is, they are neitber - equal in rank, nor unequal in bad conduct.
74. 'Ler fuch Bráhmens as are intent on the * means of attaining the fupreme godhead, and 'firm in their own duties, completely perform ' in order, the fix following acts:
75. 'Reading the Védas, and teaching otbers ' to read them, facrificing, and affifting otbers to
' facrifice, giving to the poor, if themfelves bave ' enough, and accepting gifts from tbe virtuous, if. 4 themfelves are poor, are the $\mathrm{f} x \mathrm{x}$ prefcribed acts
' of the firftoorn clafs;
76. ' But, among thofe fix acts of a Brḍbmen,
! three are his means of fubfiftence; affifting to

- facrifice, teaching the Veaas, and receiving ' gifts from a purehanded giver.

77. ' Three acts of duty ceafe with the Brábr.
! men, and belong not to the C/Batriya; teaching it the Védas, officiating at a façifice, and, thirdly, - receiving prefents;
78. 'Thofe t tbree are alfo (by the fixed rule 6 of law) forbidden to the Vaifya; fince Menu, © the lord of all men, prefcribed not thofe acts to © the two clafes, military and commercial,
79. 'The means of fubfiftence, peculiar to ' the C/batriya, are bearing arms, either held for - ftriking or miffile; to the Vaifya, merchandize, ? attending on cattle, and agriculture: but witb © a view to the next life the duties of both are - almfgiving, reading, facrificing.
80. ' Among the feveral occupations for gain' ing a livelibood the moft commendable refpect-- ively for the facerdotal, military, and mercan-
' tile claffes, are teaching the $V^{\prime}$ éda, defending
' the people, and commerce or keeping herds
' and flocks.
81. ' Yet a Brạ́bmen, unable tọ fubfift by his
e duties juft mentioned, may live by the duty of - a foldier; for that is the next in rank.
82. ' If it be afked, how he muft live, fhould ' he be unable to get a fufiftence by either of ? thofe employments; the anfwer is, he may - fubfift as a mercantile man, applying himfelf - in perfon to tillage and attendance on cattle:
83. ' But a Bráhmen and a C/batriya, obliged ' to fubfift by the acts of a Vaifya, muft avoid " with care, if they can live by keeping berds, the ' bufinefs of tillage, which gives great pain to - Sentient creatures, and is dependant on the lar - bour of others, as bulls and fo forth.
84. 'Some are of opinion, that agriculture is ' excellent; but it is a mode of fubfiftence, - 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 ' wwealth by felling commodities ufually fold 'by merchants, avoiding what ought to be ' avoided:
85. 'They muft avoid felling liquids of all ! forts, dreffed grain, feeds of tila, ftones, falt, ' cattle and human creatures;
86. 'All woven cloth dyed red, cloth made ' of fana, of c/bumá bark, and of wool, even
' though not red; fruit, roots, and medicinal ' plants;
87. 'Water, iron, poifon, flefhmeat, the ' moonplant, and perfumes of any fort; milk, - honey, buttermilk, clarified butter, vil of tila, - wax, fugar, and blades of cus'a-grafs;
88. 'All beafts of the for ft, as deer and the ' like; ravenous beafts, birds, and fifb; fpi' rituous liquors, nili, or indigo, and lác $/ b a_{2}$ - or lac; and all beafts with uncloven hoofs.
89. 'But the Brábmen hufbandman may at ${ }^{6}$ pleafure fell pure tila feeds for the purpofe of
4 holy rites, if he keep them not long with a bope
' of more gain, and fhall have produced them - by his own culture:
90. ' If he apply feeds of tila to any purpofe ' but food, anointing, and facred oblations, he - Thall be plunged, in the fhape of a worm, to' gether with his parents, into the ordure of dogs. 92. 'By felling flefhmeat, lác/bá'; or falt, a

- Brábmen immediately finks low; by felling ' milk three days, he falls to a level with a - Súdra;

93. 'And by felling the other forbidden ' commodities with his own free will, he affumes - in this world, after feven nights, the nature of ' a mere Vaifya.
94. ' Fluid things may, however, be bartered - for other fluids, but not falt for any thing
© liquid; fo may dreffed grain for grain un-- dreffed, and tila feeds for grain in the hulk, © equal weights or meafures being given and ; taken.
95.     * A military man, in diftrefs, may ? fubfift by all thefe means, but at no time mult s he have recourfe to the higheft, or facerdotal, ' function.
96. 'A man of the loweft clafs; who, ' through covetoufnefs, lives by the acts of the ! higheft, let the king ftrip of all his wealth and s inftantly banifh :
97. 'His own office, though defectively per' formed, is preferable to that of another, ' though performed completely; for he, who ' without nece/fity difcharges the duties of an' other clafs, immediately forfeits his own.
98. ' A mercantile man, unable to fubfift 6 by his own duties, may defcend even to the - fervile 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 ' fervice.
99. ' A man of the fourth clafs, not finding ' employment by waiting on the twiceborn, ' while his wife and fon are tormented with ! hunger, may fubfift by handicrafts:
100. ' Let him principally follow thofe me? chanical occupations, as joinery and mafonry, or

4 thofe various practical arts, as painting and

- zuriting, by following which, he may ferve the 9 twiceborn.

101. 'Should a Bráhmen, afflicted and pin-- ing through want of food, choofe rather to re-- main fixed in the path of his own duty, than - to adopt the practice of Vaifyas, let him ac̣t in 6 this manner:
102. •The Bráhmen, having fallen into dif! trefs, may receive gifts from any perfon what© ever; for by no facred rule can it be fhown, ' that abfofute purity can be fullied.
1०3. ' From interpreting the Véda, from offi! ciating at facrifices, or from taking prefents, © though in mades generally difapproved, no fin - is committed by priefts in diffrefs; for they are - ' pure as fire or water.
ro4. ' He , who receives food, when his life ؛ could not otherwife be fuftained, from any : man whatever, is no more tainted by fin, than ' the fubtil ether by mud;
103. 'Aji'garta, dying with hunger, was - going to deftroy his own fon (named S'UNAB, - s'E'P'HA) by felling him for fome cattle; yet he - was guilty of no çime, fince he only fought a © remedy againft famifhing:
104. 'Va'made'va, who well knew right ! and wrong, was by no means rendered impure, 'though defirous, when oppreffed with hunger,
'of eating the flefh of dogs for the prefervation ' of his life:
105. ' Bharadwa'sa, eminent in devotion,
' when he and his fon were almoft ftarved in a ! dreary foreft, accepted feveral cows from the © carpenter Vrídhu:
fo8. 'Viswa'mitra too, than whom none
'better knew the diftinctions between virtue
! and vice, refolved, when he was perifhing with ' hunger, to eat the haunch of a dog, which he i had received from ạ Cbandála.
106. ' Among the acts generally, difapproved. ! namely, accepting prefents from low men, affift-- ing them to facrifice, and explaining the fcripture © to them, the receipt of prefents is the meaneft ' in tbis world, and the moft blamed in a Bráb; ( men after his prefent life;

110 . 'Becaufe affifting to facrifice and ex' plaining the fcripture are two acts always per! formed for thofe, whofe minds have been im! proved by the facred initiation; but gifts are ؛ alfo received from a fervile man of the loweft〔clafs.
III. 'The guilt, incurred by affifting lozo ! 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 tbem, is exppiated only

- by abandoning the giftrs and by rigorous devotion.

112. ' It were better for a Brábmen, who could not maintain himfelf, to glean ears and - grains after harveft from the field of any perfon ' whatever: gleaning whole ears would be better * than accepting a prefent, and picking up fin'gle grains would be fill more laudable.
113. ' Brábmens, who keep houfe, and are in* want of any metals except gold and filver, or of ' other articles for good ufes, may afk the king - for them, if he be of the military claifs; but a - king, known to be avaricious and unwilling to ${ }^{s}$ gíve, muft not be folicited.

II4. 'The foremoft, in order, of thefe things - may be received more innocently than that,

- which follows it: a field untilled, a tilled field,
- cows, goats, fheep, precious metals or gems,
- new grain, dreffed grain.

115. 'There are feven virtuous means of - acquiring property; fucceffion, occupancy or - donation, and purchafe or exchange, which are - allowed to all clafles; conqueft, wbich is peculiar - to the military clafs; lending at intereft, huf-- bandry or commerce, wbich belong to the mer-- cantile clafs; and acceptance of prefents, by the - Sacerdotal clafs, from refpectable men.

116! 'Learning, except that contained in the
-fcriptures, art, as mixing perfumes and the - like, work for wages, menial fervice, attend' ance on cattle, traffick, agriculture, content ' with -little, alms, and receiving high intereft ' on money, are ten modes of fubfiftence in times ' of diftres.
117. ' Neither a prieft nor a military man, ' thougb difreffed, mult receive intereft on loans; ' but each of them, if he pleafe, may pay the 'fmall intereft permitted by law, on borrowing ' for fome pious ufe, to the finful man, who de-- mands it.
118. ' A military king, who takes even a - fourth part of the crops of bis realm at a time ' of urgent neceflity, as of war or invafion, and ' protects his people to the utmoft of his power, - commits no fin:
119. ' His peculiar duty is conqueft, and he ' mult not recede from battle; fo 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 clafs, which - in times of prosperity muft be only a twelfth part - of tbeir crops, and a fiftieth of their perfonal ' profits, may be an eighth of their crops in a ' time of diftrefs, or a fixth, which is the medium, ' or even a fourth in great publick adverfity; but 'a twentieth of their gains on money, and
' other moveables, is the higheft tax: ferving - men, artifans, and mechanicks muft affift by - their labour, but at no time pay taxes.
121. 'If a Súdra want a fubfiftence and - cannot attend a prief, he may ferve a C/Ja-- triya; or, if be cannot wait on a foldier by birth, - he may gain his livelihood by ferving an opu-- lent Vaifya.
122. 'To him, who ferves Bráhmens with a e view to a heavenly reward, or even with a - view to both this life and tbe next, the union - of the word Bráhmen with his name of fervant - will affuredly bring fuccefs.
123. 'Attendance on Bráhmens' is pro' nounced the beft work of a Súdra: whatever ' elfe he may perform will comparatively avail ${ }^{6}$ him nothing.
124. 'They muft allot him a fit mainte-- nance according to their own circumftances, ' after confidering his ability, his exertions, and - the number of thofe, whom he muft provide - with nourifhment:
125. 'What remains of their dreffed rice - muft be given to him; and apparel which - they have worn, and the refufe of their grain, ' and their old houfehold furniture.
126. 'There is no guilt in a man of the

- fervile clafs, who eats leeks and other forbidden,
- vegetables: he muft not have the facred invef-
' titure: he has no bufinefs with the duty of ' making oblations to fire and the like; but there is ' no prohibition againft bis offering dreffed grain 'as a Sacrifice, by way of difcbarging his own 'duty.

127. 'Even Súdras, who are anxious to ' perform their entire duty, and, knowing what 'they fhould perform, imitate the practice of 'good men in the boufebold facraments, but ' without any holy text, except thofe containing - praife and Salutation, are fo far from finning, ' that they acquire juft applaufe:
128. ' As a Súdra, without injuring another ' man, performs the lareful acts of the twice-- born, even thus, without being cenfured, he ' gains exaltation in this world and in the - next.
129. ' No fuperfluous collection of wealth - muft be made by a Súdra, even though he - has power to make it, fince a fervile man, ' who has amaffed riches, becomes proud, and, ' by bis infolence or neglect, gives pain even to - Brabmens.
130. 'Such, as have been fully declared, ' are the feveral duties of the four claffes in dis-- trefs for fubfiftence; and, if they perform 'them exactly, they fhall attain the higheft - beatitude.
131. 'Thus has been propounded the fy' 'ftem of duties, religious and civil, ordained ' for all claffes: 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 iffue; him, who wifhes to ' make a facifice; him, who travels; him, who ' has given all his wealth at a facred rite; him, ' who defires to maintain his preceptor, his 'father, or his mother; him, who needs a ' maintenance for himfelf, when he firft reads the

- Védas, and him, who is afflicted with illnefs;

2. 'Thefe nine Brábmens let mankind con-
' fider as virtuous mendicants, called fnätacas;
' and, to relieve their wants, let gifts of cattle or 'gold be prefented to them in proportion to 'their learning:
3. 'To thefe moft excellent Bráhmens muft
'rice alfo be given with holy prefents at obla'tions to fire and witbin the confecrated circle; 'but the dreffed rice, which others are to re' ceive, muft be delivered on the outfide of the ' facred hearth: gold and the like may be given - any wobere.
4. 'On fuch Brábmens, as well know the vol. VI.
G

- Vida, let the king beftow, as it becomes him, ' jewels of all forts, and the folemn reward for ' officiating at the facrifice.

5. ' He , who has a wife, and, having beg' ged money to defray bis nuptial expences, mar${ }^{6}$ ries another woman, fhall have no advantage - but fenfual enjoyment: the offspring belongs ' to the beftower of the gift.
6. ' Let every man, according to his ability, ' give wealth to Brábmens detached from the ' world and learned in fcripture: fuch a giver

- fhall attain heaven after this life.

7. ' Hz alone is worthy to drink the juice of ' the moonplant, who keeps a provifion of - grain fufficient to fupply thofe, whom the law ' commands him to nourih, for the term of ' three years or more; -
8. 'But a twiceborn man, who keeps a lefs ' provifion of grain, yet prefumes to tafte the d juice of the moonplant, fhall gather no fruit - from that facrament, even though he tafte it at ' the firft, or folemn, mucb lefs at any occafional, ' ceremony.
9. ' HE, who beftows gifts on ftrangers with 'a viezu to worldly fame, while he fuffers his fa' mily to live in diftrefs, though he has power ' to fupport them, touches his lips with honey, - but fwallows poifon; fuch virtue is counter' feit:
10. 'Even what he does for the fake of his ' future fpiritual body, to the injury of thofe, ' whom he is bound to maintain, fhall bring ' him ultimate mifery both in this life and in ' the next.

1I. 'Should a facrifice, performed by any 'twiceborn facrificer, and by a Bráom $n$ efpe' cially, be imperfect from the want of fome in' gredient, during the reign of a prince, who - knows the law,
12. 'Let him take that article, for the com'pletion of the facrifice, from the houfe of any - Vaifya, who poffeffes confiderable herds, but ' neither facrifices, nor drinks the juice of the ' moonplant :
13. 'If fuch a Vaifya be not near, he may 'take two or three fuch neceffary articles at
' pleafure from the houfe of a Súdra; fince a

- Súdra has no bufinefs with folemn rites.

14. 'Even from the houfe of a Brábmen or 'a C/batriya, who poffeffes a hundred cows, 'but has no confecrated fire, or a thoufand ' cows, but performs no facrifice with the moon'plant, let a prieft without fcruple take the - articles wanted.
15. 'From another Bráhmen. who continu' ally receives prefents but never gives, let him ' take fuch ingredients of the facrifice, if not

- beftowed on requef: fo fhall his fame be fpread ' abroad, and his habits of virtue increafe.

16. 'Thus, likewife, may a Brábmen, who ' has not eaten at the time of fix meals, or has ' fafted tbree wbole days, take at the time of the ' feventh meal, or on the fourth morning, from - the man, who behaves bafely by not offering ' bim food, enough to fupply him till the mor' row:
17. ' He may take it from the floor, where ' the grain is trodden out of the hurk, or from ' the field, or from the houfe, or from any ' place whatever; but, if the owner ank why be ' takes it, the caufe of the taking muft be de-- clared.
18. 'The wealth of a virtuous Bráhmen - muft at no time be feized by a C/batriya; - 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 purpofe before-mentioned, and beftows it ' on the good, transforms himfelf into a boat, ${ }^{6}$ and carries both the good and the bad over a Sea '. of calamities.
20. 'Wealth, poffeffed by men for the per${ }^{6}$ formance of facrifices, the wife 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, wobo - takes by ftealth or by force what he wants to ' make a facrifice perfect; fince it is the king's ' folly, that caufes the hunger or wants of a - Bráhmen:
22. ' Having reckoned up the perfons, whom - the Brábmen is obliged to fupport, having af-- certained his divine knowledge and moral - conduct, let the king allow him a fuitable ' maintenance from his own houfchold;
23. ' And, having appointed him a mainte' nance, let the king protect him on all fides; ' for he gains from the Bráhmen, whom he pro' tects, a fixth 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 fhall, in the next life, be - born a Chandála.
25. 'The Bráhmen, who begs any articles - for a facrifice, and difpofes not of them all for ' that purpofe, fhall become a kite or a crow ' for a hundred years.
26. 'Any evilhearted wretch, who, through - covetoufnefs, thall feize the property of the 'gods or of Brábmens, fhall feed in another ' world on the orts of vultures, -
27.     - The facrifice Vaifwánarí muft be cone ' fantly performed on the firft day of the new ? year, or on the new moon of Cbaitra, as an \& expiation for having omitted tbrough mere for-- getfulnefs the appointed facrifices of cattle and ' the rites of the moonplant:
28. ' But a twiceborn man, who, without ! neceffity, does an act allowed only in a cafe ! of neceffity, reaps no fruit from it hereafter ; © thus has it been decided.
29. : By the Vifwédévas, by the Sádbyas, and - by eminent Rŭjbis of the facerdotal class, the - fubftitute was adopted for the principal act, - when they were apprehenfive of dying in - times of eminent peril;
30. ' But no reward is prepared in a future - ftate for that illminded man, who, when able - to perform the principal facrifice, has recourfe - to the fubftitute.
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 © chaftife thofe, who injure him:
32. • Hiṣ own power, which depends on him-- Jelf alone, is mightier than the royal power, © which depends on other men: by his own might, © therefore, may a Brábmen coerce his foes.
33. ' He may ufe, without hefitation, the pow' erful chares revealed to At'harvan, and
' by him to Angiras; for fpeach is the weapon
' of a Brábmen: with that he may deftroy his - oppreffors.
34. 'A foldier may avert danger from him-- felf by the ftrength 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 prieft, who performs his duties; who - juftly corrects his children and pupils, who ad-- vifes expiations for fin, and who loves all ani-- mated creatures, is truly called a Brábmen : to - him let no man fay any thing unpropitious, ' nor ufe any offenfive language.
35. 'Let not a girl, nor a young womán ' married or unmarried, nor a man with little ' learning, nor a dunce, perform an oblation to - fire; nor a man difeafed, nor one uninvefted - witb the facrificial fring;
36. ' Since any of thofe perfons, who make - fuch an oblation, fhall fall into a region of ' torture, together with him, who fuffers his 'hearth to be ufed: he alone, who perfectly - knows the facred ordinances, and has read all ' the Ve'das, muft officiate at an oblation to holy - fire.
37. ' A Brábmen with abundant wealth, who ' prefents not the prieft, that hallows his fire, 'with a horfe confecrated to Praja'pati,

- becomes equal to one who has no fire hal-- lowed.

37. 'Let him, who believes the fcripture, ' and keeps his organs in fubjection, perform ' all other pious acts; but never in this world - let him offer a facrifice with trifling gifts to ' the officiating prieft:
38. 'The organs of fenfe and action, repu' tation in this life, a heavenly manfion in the ' next, life itfelf, a great name after death, chil' dren, and cattle, are all dettroyed by a facri-

- fice offered with trifling prefents: let no man, ' therefore, facrifice without liberal gifts.

41. 'The prieft, who keeps a facred hearth, - but voluntarily neglects the morning and even-- ing oblations to his fires, muft perform, in the - manner to be defcribed, the penance chándráyana ' for one month; fince that neglect is equally - finful with the flaughter of a fon.
42. 'They, who receive property from a

- Súdra for the performance of rites to confe-
- crated fire, are contemned as minifters of the
' bafe, by all fuch as pronounce texts of the
- Véda:

43. ' Of thofe ignorant priefts, who ferve
' the holy fire for the wealth of a Súdra, the
' giver fhall always tread on the foreheads, and

- thus pafs over miferies in the gloom of deatb.

44. 'Every man, who does not an act pre.

- fcribed, or does an act forbidden, or is guilty
- of excefs even in legal gratifications of the
- fenfes, muft 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 $V \dot{d} d a$, hold it effec-
- tual even in the cafe of a voluntary offence:

46. 'A fin, involuntarily committed, is re-

- moved by repeating certain texts of the fcrip-
- ture; but a fin committed intentionally,
' through ftrange infatuation, by harfh 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 ftate, he muft - hold no intercourfe with the virtuous, while - his penahce remains unperformed.

48. 'Some evilminded perfons, for fins com-

- mitted in this life, and fome for bad actions
- in a preceding ftate, fuffer a morbid change ' in their bodies:

49. 'A ftealer of gold from a Bráhmen has
' whitlows on his nails; a drinker of firits,
' black teeth; the llayer of a Bráhmen, a ma-

- rafmus; the violator of his guru's bed, a de-
- formity in the generative organs;

50. 'A malignant informer, fetid ulcers in

- his noftrils; a falfe detractor, ftinking breath;
- a ftealer of grain, the defect of fome limb; a - mixer of bad wares with good, fome redundant - member;

51. ' A ftealer of dreffed grain, dyfpepfia; b a ftealer of holy words, or an unauthorized - reader of the fcriptures, dumbnefs; a ftealer - of clothes, leprofy; a horfeftealer, lamenefs;
52. 'The ftealer of a lamp, total blindnefs; 'the mifchievous extinguifher of it, blindnefs

- in one eye; a delighter in hurting fentient - creatures, perpetual illnefs; an adulterer, - windy fivelling in his limbs:

53. 'Thus, according to the diverfity of ac-

- tions, are born men defpifed by the good, ftupid, - dumb, blind, deaf, and deformed.

54. ' Penance, therefore, muft invariably be ' performed for the fake of expiation; fince ' they, who have not expiated their fins, will - again fpring to birth with difgraceful marks. 55. 'Killing a Bráhmen, drinking for-- bidden liquor, ftealing gold from a prieft, ${ }^{6}$ adultery with the wife of a father, natural or

- fpiritual, and affociating with fuch as commit
- thofe offences, wife legiflators muft declare to
- be crimes in the higheft degree, in refpect of
- thofe after mentioned, but lefs than inceft in a
' direct line, and fome others.

56. 'False boafting of a high tribe, malig-

- nant information, before the king, of a crimi-
- nal wobo muft fuffer death, and falfely accufing a - fpiritual preceptor, are crimes in the fecond de-- gree, and nearly equal to killing a Bráhmen.

57. ' Forgetting the texts of fcripture, fhow* ing contempt of the $V e d a$, giving falfe evi-- dence without a bad motive, killing a friend - voithout malice, eating thing's prohibited, or, - from their manifeft impurity, unfit to be tafted, * are fix crimes nearly equal to drinking fpirits; - but perjury and bomicide require in atrocious cafes ' the har/beft expiation.
58. 'To appropriate a thing depofited or - lent for a time, a human creature, a horfe, ' precious metals, a field, a diamond, or any - other gem, is nearly equal to ftealing the gold © of a Bráhmen.
59. ' Carnal commerce with fifters by the - fame mother, with little girls, with women ' of the loweft mixed clafs, or with the wives 6 of a friend or of a fon, the wife muft confider * as nearly equal to a violation of the paternal -bed.
60. 'Slaying a bull or cow, facrificing 4 what ought not to be facrificed, adultery, fell-- ing onefelf, deferting a preceptor, a mother, fa father, or a fon, omitting to read the fcrip-- ture, and neglect of the fires prefcribed by the - Dhermafáftra only,
61. 'The marriage of a younger brother be-

- fore the elder, and that elder's omiffion to ' marry before the younger, giving a daughter ' to either of them, and officiating at their - nuptial facrifice,

62. ' Defiling a damfel, ufury, want of per-- fect chaftity in a ftudent, felling a holy pool - or garden, a wife, or a child,
63. ' Omitting the facred inveftiture, aban' doning a kinfman, teaching the Véda for hire, - learning it from a hired teacher, felling com-- modities, that cught not to be fold,
64. ' Working in mines of any fort, engaging - in dykes, bridges, or other great mechanical - works, fpoiling medicinal plants repeatedly, - fubfiiting by the barlotry of a wife, offering - facrifices and preparing charms to deftroy the - innocent,
65. 'Cutting down green trees for firewood, ' performing holy rites with a felfifh view - merely, and eating prohibited food once with' out a previous defign,
66. ' Neglecting to keep up the confecrated - fire, ftealing any valuable tbing befides gold, - nonpayment of the three debts, application to ' the books of a falfe religion, and exceffive at' tention to mufick or dancing,
67. 'Stealing grain, bafe metals, or cattle, - familiarity by the twiceborn with women, who - have drunk inebriating liquor, killing without

- malice, a woman, a Súdra, a Vaifya, or a C'ba-- triya, and denying a future ftate of rewards - and punifhments, are all crimes in the third - degree, but higher or lower according to circum' fances.,'

68. 'Giving pain to a Brábmen, fmelling at
' any fpirituous liquor or any thing extremely ' fetid and unfit to be fmelt, cheating, and un' natural practices with a male, are confidered ' as caufing a lofs of clafs.
69. ' To kill an afs, a horfe, a camel, a deer, ' an elephant, a goat, a fheep, a fifh, a fnake, or ' a buffalo, is declared an offence, which de' grades the killer to a mixed tribe.
70. 'Accepting prefents from defpicable ' men, illegal traffick, attendance on a Súdra - mafter, and fpeaking falfehood, muft be con-- fidered as caufes of exclufion from focial re' pafts.
71. 'Killing an infect, fmall or large, a
' worm, or a bird, eating what has been brought ' in the fame bafket with firituous liquor, fteal-- ing fruit, wood, or flowers, and great pertur-- bation of mind on trifling occafions, are of-- fences which caufe defilement.
72.: - You thall now be completely inftruct' ed in thofe penances, by which all the fins - juft mentioned are expiable.
72. ' If a Bráhmen have killed a man of the

- facerdotal clafs, without malice prepenfe, the - Jlayer being far fuperior to the flain in good qua-- lities, he muft himfelf make a hut in a foreft - and dwell in it twelve whole years, fubfifting c on alms for the purification of his foul, placing - near him, as a token of bis crime, the $\mathrm{k} u$ ll of ' the Jlain, if he can procure it, or, if not, any hu-- man jkull. The time of perance for the three - lower claffes muft be twenty four, thirty fix, and - forty eight, years.

74. © Or, if the glayer be of the military clafs, - he may voluntarily expofe himfelf as a mark ${ }^{6}$. to archers, who know his intention; or, ac-- cording to circumftances, may caft himfelf headc long thrice, or even till he die, into blazing - fire.
75. ' Or, if he be a king, and flew a prieft ${ }^{6}$ without malice or knowledge of bis clafs, he may c perform, with prefents of great wealth, one of 6 the following facrifices; an Afwamédha, or a - Swerjit, or a Gófava, or an Abhijit, or a Vif-- wajit, or a Trivrĭt, or an Agnißbtut.
76. 'Or, to expiate the guilt of killing a ${ }^{6}$ prieft 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 fuftain life, and keeping his - organs in perfect fubjection;
77. ' Or, if in that cafe the llayer be unlearned'

- but rich, he may give all his property to fome
- Brábmen learned in the Véda, or a fufficiency
' of wealth for his life, or a houfe and furniture ' to hold zobile 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 againft the courfe of ' the ftream; or, fubfifting on very little food,
' he may thrice repeat the whole collection of
' Védas, or the Rüch, Yaju/h, and Sáman.

79. ' Or, his hair being fhorn, he may dwell ' near a town, or on paftureground for cows, ' or in fome holy place, or at the root of a fa-- cred tree, taking pleafure in doing good to - cows and to Bráhmens;

8o. ' There, for the prefervation of a cow
' or a Bráhmen, let him inftantly abandon life;
' fince the preferver of a cow or a Bráhmen
' atones for the crime of killing a prieft:
8I. • Or, by attempting at leaft three times ' forcibly to recover from robbers the property
' of a Brábmen, or by recovering it in one of ' his attacks, or even by lofing his life in the ' attempt, he atones for his crime.
82. 'Thus, continually firm in religious ' aufterity, chafte as a ftudent in the firft order,
' with his mind intent on virtue, he may ex-
' piate the guilt of undefignedly killing a Bráb-
' men, after the twelfth year has expired.
83. ' Or, if a virtuous Bráhmen unintention-- ally kill another, who bad no good quality, he - may atone for his guilt by proclaiming it in ' an affembly of priefts and military men, at ' the facrifice of a horfe, and by bathing with - other Brabmens at the clofe of the facrifice:
84. 'Bráhmens are declared to be the bafis, ${ }^{\text {' }}$ and $C /$ batriyas the fummit, of the legal fyftem: - he, therefore, expiates his offence by fully - proclaiming it in fuch an affembly.
85. ' From his high birth alone, a Brábmen ' is an object of veneration even to deities: his - declarations to mankind are decifive evidence; ${ }^{\text {c }}$ and the Véda itfelf confers on him that cha${ }^{6}$ racter.
86. 'Three at leaft, who are learned in the - Véda, hould be affembled to declare the proper - expiation for the fin of a prieft, but, for the ' three other clafjer, the number muft be doubled, ' tripled, and quadrupled: what they declare - fhall be an atonement for finners; fince the

- words of the learned give purity.

87. ' Thus a Bráhmen, who has performed - one of the preceding expiations, according to ' the circumftances of the homicide and the cba-

- racters of the perfons killed and killing, with his ' whole mind fixed on God, purifies his foul, ' and removes the guilt of flaying a man of his ' own clafs:

88. 'He muft perform the fame penance ' for killing an embryo, the fex of which was - unknown, but whofe parents were facerdotal, - or a military or a commercial man employed ' in a facrifice, or a Brábment woman, who has - bathed after temporary uncleannefs;
89.' And the fame for giving falle evidence ' in a caufe concerning land or gold or precious ' commodities, and for accufing his preceptor un-- juftly, and for appropriating a depofit, and ' for killing the wife of a prieft, who keeps' a ' confecrated fire, or for flaying a friend.
go. 'Such is the atonement ordained for - killing a prieft without malice; but for killing ${ }^{\text {' a Brabmen with malice prepenfe, this is no }}$ ' expiation: the term of twelve years muft be ' doubled, or, if the cafe was atrocious, the mur-- derer muft actually die in flames or in battle. 91. ' Any twiceborn man, who has inten' tionally drunk firit of rice, through perverfe 'delufion of mind, may drink more fpirit in ' flame, and atone for his offence by feverely ' burning his body;
89.     - Or he may drink boiling hot, until he - die, the urine of a cow, or pure water, or 'milk, or clarified butter, or juice expreffed ' from cowdung:
90. 'Or, if he taffed it unknowingly, he may ' expiate the fin of drinking firituous liquot, VOL. Vi.
C. 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 ' coarfe vefture of hairs from a cow's tail, or - Fitting unclothed in bis boufe, wearing his locks ' and beard uncut, and puting out the flag of - a tavern-keeper.
91. ' Since the fpirit of rice is difilled fromr

- the Mala, or filthy refufe, of the grain, and - fince Mala is alfo a name for fin, let no Bréb-
- men, C/hatriya, or Vaifya drink that fpirit.

95.     - Inebriatiug liquor may be coilidered ${ }^{4}$ as of three principal forts; that extracted from 'dregs of fugar, that extracted from bruifed ' rice, and that extracted from the flowers of 'the Madhúca: as one, fo are all; they fhall $\therefore$ not be tafted by the chief of the twiceborn. 96. ' Thofe liquors, and eight other forts, ' with the flefh of animals, aird $A f a v a$, the - moft pernicious beverage, prepared zoith nar-- cotick drugs, are fwallowed at the juncates of - Yacßas, Racßbafas, and Pifáchas: they thall ' not, therefore, be tafted by a Bráhmen, who - feeds on clarified butter offered to gods. 97. ' A Brähmen, ftupefied by drunkennefs, - might fall on fomething very impure, or might ' even, when intoxicated, pronounce a fecret ' pbrafe of the Véda, or might do fome other ' act, which ought not to be done.
96. 'When the divine fipirit, or the light of ' holy knowledge, which has been infufed into - his body, has once been sprinkled with any - intoxicating liquor, even his prieftly charac-- ter leaves him, and he finks to the low degree - of a Súdra.
97.     - Thus have been promulgated the va-- rious modes of expiation for drinking fpirits: - I will next propound the atonement for fteal-- ing the gold of a prieft to the amount of a fu'verna.
98. ' HE, who has purloined the gold of a - Brabmen, muft haften to the king, and pro"claim his offence; adding, "Inflict on me " the punifhment due to my crime."
99. 'Then thall the king himfelf, taking - from him an iron mace, wbich the criminal muft - bear on his Jboulder, ftrike him with it once; ' and by that ftroke, wobether he die or be only ' left as dead, the thief is releafed from fin: a ${ }^{\text {a }}$ Brábmen by rigid penance alone can expiate ' that offence; another twiceborn man may alfo - perform fucb a penance at his election.
100. 'The twiceborn man, who defires to ${ }^{6}$ remove by auftere devotion the taint caufed - by ftealing gold, muft perform in a foreft, co' vered with a mantle of rough bark, the pe' nance before ordained for him, who without - malice prepenfe has killed a Brábmen.
101. "By thefe expiations may the twiceborn - atone for the guilt of ftealing gold from. a - prieft; but the fin of adultery with the wife - of a father, natural or Jpiritual, they muft ex-- piate by the following penances.
$104 .{ }^{6} \mathrm{HE}$, who knowingly and actually has - defiled the wife of his father, ghe being of the - Same clafs, muft extend bimfelf on a heated ciron bed, loudly proclaiming his guilt; and, ' there embracing the red-hot iron image of a ' woman, he fhall atone for his crime by death; 105. ' Or, having himfelf amputated his - penis and fcrotum, and holding them in his - fingers, he may walk in a direct path toward - the fouthweft, or the region of Niriitit, un-- til he fall dead on the ground:
102. 'Or, if he had miftaken ber for another

- woman, he may perform for a whole year,
' with intenfe application of mind, the penance - prájápatya, with part of a bed, or a human - bone, in his hand, wrapped in vefture of coarfe - bark, letting his hair and beard grow, and - living in a deferted foreft :

107. 'Or, if Jhe was of a lower clafs and a - corrupt worman, he may expiate the fin of vio-- lating the bed of his father, by continuing the - penance cbándráyasa for three months, al-- ways mortifying his body by eating ouly fo"reft herbs, or wild grains boiled in water.
108. 'By the preceding penances may fin-- ners of the two higher degrees atone for their ' guilt; and the lefs offenders may expiate theirs - by the following aufterities.
109. ' HE , who has committed the fmaller. ' offence of killing a cow zvithout malice, muft ' drink for the firft month barleycorns boiled ' foft in water; his head mult be thaved en-- tirely; and, covered with the hide of the fain ' corv, he muft fix his abode on her late pafture 'ground:

1ro. ' He may eat a moderate quantity of ' wild grains, but without any factitious falt, - for the next two months at the time of each - fourth repaft, on the evening of every fecond ' day; regularly bathing in the urine of cows, - and keeping his members under controul:
111. ' All day he muft wait on the herd, ${ }^{\text {' }}$ and ftand quaffing the duft raifed by their ' hoofs; at night, having fervilely attended and ' ftroked and faluted them, he muft furround 'them with a fence, and fit near to guard - them:
112. 'Pure and free from paffion, he muft - ftand, while they fland; follow them, when - they moye 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 ftick in múd, he - muft relieve her by all poffible means:

114 . 'In heat, in rain, or in cold, or while - the blaft furioully rages, let him not feek his - own fhelter, without firft fheltering the cows ' to the utmoft of his power.
115. 'Neither in his own houfe, or field, or ' floor for treading out grain, nor in thofe of - any other perfon, let him fay a word of a - cow, who eats corn or grafs, or of a calf, who 'drinks milk:
116. 'By waiting on a herd, according to - thefe rules, for three months, the flayer of a - cow atones for his guilt;

117, 'But, his penance being performed, ' he muft give ten cows and a bull, or, his - ftock not being fo large, muft deliver all he ' poffeffes, to fuch as beft know the Véda.

118, 'The preceding penances, or that called ' chándráyana, muft be performed for the abfo' lution of all twiceborn men, who have com-- mitted fins of the lower or third degree; ex-- cept thofe, who have incurred the guilt of an - avacirna;
119. ' But he, who has become Avacirni, muft - facrifice a black or a oneeyed afs, by way of a ' meatoffering to Nirrịiti, patrone/s of the fouth4 wef, by night in a place where four ways meet:
120. "Let him daily offer to her in fire the - fat of that afs, and, at the clofe of the ceremony, - let him offer clarified butter, with the holy - text Sem and fo forth, to Pavana, to Indra, 'to Vrinaspati, and to Agni, regents of ' woird, clouds, a planet, and fire.
121. 'A voluntary effufion, naturally or, - otherwife, of that which may produce a man ' by a twiceborn youth during the time of his ' ftudenthip or before zarriage, has been pro' nounced avacirna, or a violation of the rule ' prefcribed for the firft order, by fages, who ' knew the whole fyftem of duty, and uttered ${ }^{4}$ the words of the Veda.
122. 'To the four deities of purification, - Ma'ruta, Indra, Vrĭhaspati, Agni, ' goes all the divine light, which the Véda had ' imparted, from the ftudent, who commits the 'foul fin avacirna;
123. 'But, this crime having actually been - committed, he mult go begging to feven ' houfes, clothed only with the hide of the $\int a$ 'crificed afs, 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 eacb - day at the three favanas, he fhall be abfolved - from his guilt at the end of one year.
125. ' He , who has voluntarily committed ' any fin, which caufes a lofs of clafs, muft per'form the tormenting penance, thence called - Sántapana; or the prájápatya, if he offended - involuntarily.
126. 'For fins, which degrade to a mixed ${ }^{6}$ clafs, or exclude from fociety, the finner muft - have recourfe to the lunar expiation chándráy-- ana for one month: to atone for acts, which ' occafion defilement, he muft fwallow nothing ' for three days but hot barleygruel.

127, ' Por killing intentionally a virtuous ' man of the military clafs, the penance muft be ${ }^{6}$ a fourth part of that ordained for killing a ' prieft; for killing a Vaifya, only an eighth; - for killing a Súdra, who had been conftant in - difcharging his duties, a fixteenth part:
128. ' But, if a Brábmen kill a C/batriya - without malice, he muft, after a full perform${ }^{6}$ ance of his religious rites, give the priefts one - bull together with a thoufand cows;

129: ' Or he may perform for three years ' the penance for flaying a Brábmen, mortify-- ing his organs of fenfation and action, letting s his hair grow long, and living remote from ' the town, with the root of a tree for his man-- fion,

130, ' If he kill witbout malice a Vaifya, who
' had a good moral character, he may perform ' the fame penance for one year, or give the ' priefts a hundred cows and a bull:
131. ' For fix months muft he perform this ' whole penance, if without intention he kill a $S u ́$ -
' dra; or he may give ten white cows and a ' bull to the priefts.
132. 'If he kill by deffon a cat, or an ich' neumon, the bird Cbá/Ja, or a frog, a dog, a ' lizard, an owl, or a crow, he muft perform ' the ordinary penance required for the death of ' a Súdra, that is, the cbándráyona:
133. 'Or, if be kill one of them undofignedly, ' he may drink nothing but milk for three days - and nights, or each nigbt walk a yógan, or ' tbrice bathe in a river, or filently repeat the ' text on the divinity of water; that is, if he be ' aifabled by real infirmity from performing the - firft mentioned penances, be may bave recourfe to - the next in order.
134. 'A Brábmen, if he kill a fnake, muft ' give to fome prieft a hoe, or ironbeaded ftick; if ' an eunuch, a load of riceftraw, and a máfba 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 fteer two years old; if the waterbird - crauncha, a fteer aged three years:
136. 'If he kill a gooff, or a phenicopteros, 2
' beron, or cormorant, a bittern, a peacock, an ${ }^{6}$ ape, a hawk, or a kite, he muft give a cow to - fome Brábmen :
137. 'If he kill a horfe, he muft give a - mantle; if an elephant, five black bulls; if a ' goat or a fheep, one bull; if an afs, a calf one - year old:
138. ' If he kill a carnivorous wild beaft, he - muft give a cow with abundance of milk; if a ' wild beaft not carnivorous, a fine heifer; and ' a racticí of gold, if he llay a camel :
139. 'If he kill a woman of any clafs caught - in adukery, he muft give as an expiation, in ' the direct order of the four claffes, a leathern ' pouch, a bow, a goat, and a theep.
140. 'Should a Brábmen be unable to expi' ate by gifts the fin of killing a fnake and the ' reft, he muft atone for his guilt by perform-- ing, on each occafion, the penance prájápatya.
141. ' For the flaughter of a thoufand fmall ' animals which have bones, or for that of ' bonelefs animals enow to fill a cart, he muft ' perform the cbándráyana, or common penance - for killing a Súdra;
142. 'But, for killing boned animals, he - muft alfo give fome trifle, as a pana of copper, ' to a Brábmen: for killing thofe without bones, ' he may be abfolved by holding his breath, at - the clofe of bis penance, while he thrice repeats
' the gayatrì with its bead, the pranava, and the - vyábritis.
143. 'For cutting once without malice trees ' yielding fruit, fhrubs with many crowded ' ftems, creeping or climbing plants, or fuch as ' grow again when cut, if they were in bloffom ' when be burt them, he muft repeat a hundred ' texts of the Véda.
144. 'For killing infects of any fort bred in ' rice or other grains, or thofe bred in heney or - otber fluids, or thofe bred in fruit or flowers, ' eating clarificd butter is a full expiation.

145 ' If a man cut, wantonly and for no ' good purpofe, fuch graffes as are cultivated, ' or fuch as rife in the foreft fpontaneoully, he ' mult wait on a cow for one day, nourilhed by' ' milk alone.
$1 ; 6$. 'By thefe penances may mankind atone ' for the fin of injuring fentient creatures, whe' ther committed by defign or through inadvert' ence: hear now what penances are ordained ' for eating or drinking what ought not to be ' taited.
147. ' He, who drinks undefignedly any fpi'rit but that of rice, may be abfolved by a new ' inveftiture with the facrificial ftring: even for ' drinking intentionally the weaker forts of Jpirit, ' a penance extending to death mult not (as the ' law is now fixed) be prefcribed.
148. 'For drinking water which has ftood - in a veffel, where firit of rice or any other ' Ipirituous liquor had been kept, he muft fwal-- low nothing, for five days and nights, but the - plant fanc'bapufbpí boiled in milk:
149. 'If he touch any firituous liquor, or - give any away, or accept any in due form, or - with thanks, or drink water left by a Súdra, - he muft fwallow nothing, for three days and ' nights, but cus'a-grafs' boiled in water.
150. 'Should a Brábmen, who has once taft' ed the holy juice of the moonplant, even fmell ' the breath of a man who has been drinking

- fpirits, he muft remove the taint by thrice re-- peating the gáyatrì, while he fuppreffes his - breath in water, and by eating clarified butter - after that ceremony.

151. ' If any of the three twiceborn claffes - have tafted unknowingly human ordure or ' urine, or any thing that has touched fpirituous ${ }^{6}$ liquor, they muft, after a penance, be girt - anew with the facrificial thread;
152. 'But, in fuch new inveftiture of the ' twiccborn, the partial tonfure, the zone, the - ftaff, the petition of alms, and the frict rules - of abftinence, need not be renewed.
153. 'Should one of them eat the food of ' thofe perfons, with whom he ought never to ' eat, or food left by a woman or a Súdra, or
' any prohibited flefh, he muft drink barleygruel ' only for feven days and nights.
154. 'If a Brábmen drink fweet liquors ' turned acid, or aftringent juices from impure 'fruits, he becomes unclean, as long as thofe - fluids remain undigefted.
155. 'Any twiceborn man, who by accident - has tafted the dung or urine of a tame boar, ' an afs, a camel, a fhakal, an ape or a crow, - muft perform the penance chándráyana:
156. 'If he tafte dried flehmeat, or muhh'rooms rifing from the ground, or any thing ' brought from a flaughter-houfe, though he
' knew not whence it came, he muft perform 'the fame penance.
157. 'For knowingly eating the flefh of car${ }^{4}$ nivorous beafts, of town-boars, of camels, of ' gallinaceous birds, of human creatures, of ' crows, or of affes, the penance taptacricict'bra, ' or burning and fivere, is the only atonement.
158. ' A Brábmen, who, before he has com' pleted his theological ftudies, eats food at ' monthly obfequies to one anceftor, muft falt ' three days and nights, and fit in water a day:
159. 'But a ftudent in theology, who at any ' time unknowingly taftes honey or flefh, muft ' perform the loweft penance, or the prajápatya,
' and proceed to finifh his ftudenthip.
160. 'Having eaten what has been left by a

- cat, a crow, a moule, a dog, or an ichneumon, ' or what has even been touched by a loufe, he - muft drink, boiled in water, the plant brab-- mufuverchalá.

161. • By the man, who feeks purity of foul, ' no forbidden fcod muft be tafted: what he has - undefignedly fwallowed he muft inftantly ' vomit up, or muft purify himfelf with fpeed - by legal expiations.
162. 'Such, as have been declared, are the - vari us penances for eat ng prohibited food: - hear now the law of penance for an expiation ' of theft.
163.     - THE chief of the twiceborn, having - voluntarily ftolen fuch property, as grain, raw - or dreffed, from the houfe of another Bráb' men, fhall be abfolved on performing the pe-- nance prájápatya for a whole year ;
164. 'But the penance cbándráyana muft be ${ }^{6}$ performed for fealing a man, woman, or - child, for feizing a field, or a houfe, or for ' taking the waters of an enclofed pool or well. 165. 'Having taken goods of little value - from the houfe of another man, he muft pro-

- cure abfolution by performing the penance - Sántapana; having firft reftored, as the peni-- tent tbief always muft, the goods that he ftole. 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 fwallowing the five pure' ' things produced from a cow, or milk, curds, - butter, urine, dung:

167. 'For ftealing grafs, wood, or trees, rice ' in the hufk, molaffes, cloth or leather, fifh, or ' other animal food, a ftrict faft muft be kept ' three days and tbree nights.
168. 'For ftealing gems, pearls, coral, cop' per, filver, iron, brafs, or ftone, nothing but 'broken rice muft be fwallowed for twelve - days;
r69. 'And nothing but milk for three days,' ' if cotton, or filk, or wool had been fiolen, or ' a beaft either with cloven or uncloven hoofs, © or a bird, or perfumes, or medicinal herbs, or - cordage.
169. ' By thefe penances may a twiceborn ' man atone for the guilt of theft; but the fol' lowing aufterities only can remove the fin of ' carnally approaching thofe, who muft not be © carnally approached.
170. 'HE, who has wafted his manly ${ }^{6}$ ftrength with fifters by the fame womb, with ' the wives of his friend or of his fon, with girls ! under the age of puberty, or with women of - the loweft claffes, muft perform the penance - ordained for defiling the bed of a preceptor: 172. 'He, who has carnally known the

- daughter of his paternal aunt, wbo is almoff
- equal to a fifter, or the daughter of his mater-
' nal aunt, or the daughter of his maternal
' uncle, who is a near kinfman, muft perform the
- cbándráyana, or lunar penance;

173. ' No man of fenfe would take one of
' thofe three as his wife: they fhall not be taken

- in marriage by reafon of their confang inity;
- and he, who marries any one of them, falls
- deep into fin.

174. ' He , who has wafted, 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, muft ' perform the penance fántapana: for a beftial - act with a cow the penarice muft be far more fe' vere.
175. 'A twiceborn man, dallying lafciviouf' 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, fball be dagraded, and - muft bathe himfelf publickly, with his apparel. 176. 'Should a Brábmen carnally know a ' woman of the Cbandála or Mlécb'ba tribes, or ' tafte their food, or accept a gift from them, ' he lofes his own clafs, if he acted unknowingly, - or, if knowingly, finks to a level with them.
176. 'A wife, exceffively corrupt, let her - hufband 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

6 her own clafs, fhe again be defiled, her expia-

- tion muft be the penance prájápatya added to
- the chándráyana.
1.79. ' The guilt of a Brábmen, who has dal-
- lied a whole night with a Cbandáli woman, he
' may remove in three years by fubfifting on - alms, and inceffantly repeating the gáyatrì
' with other myfterious texts.

180.     - Thefe penances have been declared for - finners of four forts, thofe wbo hurt fentient
'creatures, thofe wbo eat probibited food, thofe
' who commit theft, and thofe wbo are guilty of

- lafcivioufnefs: hear now the prefcribed expia-
- tion for fuch, as hold any intercourfe with de' graded offenders.

181. ' Hz , who affociates himfelf for one ' year with a fallen finner, falls like him; not
' by facrificing, reading the Véda, or contracting
' affinity with him, fince by thofe acts be lofes his

- clafs immediately, but even by ufing the fame - carriage or feat, or by taking his food at the - fame board:

182. That man, who holds an intercourfe
' with any one of thofe degraded offenders,
' muft perform, as an atonement for fuch intervOL. VI.
' courfe, the penance ordained for that finner
' himfelf.
183. 'The fapindas and famánódacas of a man - degraded, for a crime in the firft degree, muft ' offer a libation of water to his manes, as if he ' were naturally dead, out of the town, in the ' evening of fome inaufpicious day, as the nintb ' of the moon, his paternal kinfmen, his officiat${ }^{6}$ ing prieft, and his fpiritual guide being prefent. 184. 'A female flave muft kick down with - her foot an old pot filled with water, whicb ' had for that purpofe been placed towards the ' $\int$ outh, as if it were an oblation for the dead; ' and all the kinfmen, in the nearer and remoter - degrees, muft remain impure for a day and a ' night:
184. 'They muft thenceforth defift from - fpeaking to him; from fitting in his company; - from delivering to him any inherited or other ' property, and from every civil or ufual atten' tion, as inviting bim on the firft day of the year, - and the like.
185. 'His right of primogeniture, if be was ' an elder brother, muft be withholden from ' him, and whatever perquifites arife from pri-
' ority of birth: a younger brother excelling
' him in virtue, mult appropriate the fhare of
' the firftborn.

## $\dagger$

187. 'But, when he has performed his due ' penance, his kinfmen and he mult throw ' down a new veffel full of water, after having - bathed together in a pure pool:
188. 'Then muft he caft that veffel into the ' water; and, having entered his houfe, he may - perform, as before, all the acts incident to his - relation by blood.
189. 'The fame ceremony muft be perform' ed by the kindred even of women degraded, - for whom clothes, dreffed rice, and water muft ' be provided; and they mult dwell in buts near - the family houfe.
190. 'With finners, whofe expiations are ' unperformed, let not a man tranfact bufinefs ' of any kind; but thofe, who have performed ' their expiations, let him at no time re-- proach :
191. Let him not, however, live with thofe, ' who have flain children, or injured their bene' factors, or killed fuppliants for protection, or 'put women to death, even though fuch offend. ' ers have been legally purified.
192. 'Those men of the twiceborn claffes, to ' whom the gáyatri has not been repeated and ' explained, according to law, the affembly muft ' caufe to perform three prájápatya penances, ' and aftercuards to be girt with the facrificial ${ }^{6}$ Atring;
193. 'And the fame penance they muft pre' feribe to fuch twiceborn men, as are anxious 4 to atone for fome illegal act, or a neglect of ' the Veda.
194. 'If priefts have accepted any property - from bafe hands, they may be abfolved by re-- linquifhing the prefents, by repeating myfteri' ous texts, and by acts of devotion :
195. 'By three thoufand repetitions of the - gáyatrì with intenfe application of mind, and ' by fubfifting on milk only for a whole month - in the pafture 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 abfti' nence, and has returned from the pafturage, - let him bend low to the other Brábmens, who ' muft thus interrogate him: " Art thou really "defirous, good man, of readmiffion to an " equality with us?"
197. 'If he anfwer in the affirmative, let ' him give fome grafs to the cows, and in the - place, made pure by their having eaten on it, - let the men of his clafs give their affent to his ' readmiffion.
198. ' HE , who has officiated at a facrifice ' for outcafts, or burned the corpfe of a ftranger, ' or performed rites to deftroy the innocent, or ' made the impure facrifice, called Abima, may
${ }^{\text {© }}$ expiate his guilt by three prájápatya pe' nances.
199. 'A twiceborn man, who has reject' ed a fuppliant for his protection, or taught the - Véda 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 afs, by any carnivorous animal - frequenting a town, by a man, a horfe, a ' camel, or a boar, may be purified by ftop' ping his breath during one repetition of the ' gáyatri.
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 Vedas, and ' to make eight oblations to fire, accompanied ' with eight holy texts, are always an expiation ' for thofe, who are excluded from fociety at ${ }^{6}$ repafts.
202. 'Should a Bráhmen voluntarily afcend ' a carriage borne by camels or drawn by affes, or ' defignedly bathe quite naked, he may be ab-- folved by one fuppreffion of breath, while he ' repeats in his mind the moft holy text.
203. ' HE , who has made any excretion, 'being greatly preffed, either without water ' near bim, or in water, may be purified by

- bathing in his clothes out of town, and by - touching a cow.

204. ' For an omiffion of the acts, which - the Véda commands to be conftantly perform${ }^{6}$ ed, and for a violation of the duties prefcribed ' to a houfekeeper, the atonement is fafting one - day.
205. ' HE , who fays hufh or pifh to a Bráh-- men, or thou to a fuperior, muft immediately ؛ bathe, eat nothing for the reft of the day, and ${ }^{6}$ a appeafe him by clafping his feet with refpeett-- ful falutation.
206. 'For ftriking a Brábmen even with a - blade of grafs, or tying him by the neck with 'a cloth, or overpowering him in argument, - and adding contemptuous words, the offender ' muft foothe him by falling proftrate.
207. 'An affaulter of a Bráhm $n$, with intent ' to kill, fhall remain in hell. a hund ed years; - for actually ftriking him with the like intent, a 'thourand:
208. 'As many fmall pellets of duft as the - blood of a Brábmen collects on the ground; ' for fo many thoufand years muft the fhedder - of that blood be tormented in hell.
209. ' For a fimple affault, the firft or com-- mon penance muft be performed; for a bat6 tery, the third or very fevere penance; but

- for fhedding blood, without killing, both of - thofe penances.

21c. © To remove the fins, for which no - particular penance has been ordained, the ' affembly muft award a fit expiation, confider' 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 defribe 'to you; penances, which have been perform-: ' ed by deities, by holy fages, and by forefathers - of tbe buman race.
212. -When a twiceborn man performs 'the common penance, or that of Praja'pati, ' he muft for three days eat only in the morn' ing; for three days, only in the evening; for ' three days, food unafked but prefented to bim; ' and for three' more days, nothing.
213.' Eating for a wohole day the dung and ' urine of cows mixed with curds, milk, cla-- rified butter, and water boiled with cus'a-grafs, ' and then fafting 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 fevere, in refpect of the com' mon, muft eat, as before, a fingle mouthful, or

- a ball of rice as large as a ben's egg, for threo - times three days; and for the laft three days, ' muft wholly abftain from food.

215.     - A Bráhmen, performing the ardent - penance, murt fwallow nothing but hot water, - hot milk, hot clarified butter, and hot fteam, - each of them for three days fucceffively, per-- forming an ablution, and mortifying all his ${ }^{6}$ members.
216. A total fatt for twelve days and nights, - by a penitent with his organs controlled and - his mind attentive, is the penance named $p a$ -- ráca, which expiates all degrees of guilt.
217. 'If he diminifh his food by one mouth-- ful each day during the dark fortnight, eating - fifteen mouthfuls on the day of the oppofition, and - increafe it in the fame proportion, during the - bright fortnight, fafting entirely on the day of - the conjunction, and perform an ablution regu-- larly at funrife, noon, and funfet, this is the - chaindráyana, or the lunar penance:
218. 'Such is the penance called ant-fhaped - or narrow in the middle; but, if he perform the - barley-fhaped or broad in the middle, he muft - obferve the fame rule, beginning with the - bright halfmonth, and keeping under com' mand his organs of aetion and fenfe.
219. 'To periorm the lunar penance of an

- anchoret, he muft eat only eight mouthfuls
' of foreft grains at noon for a whole month, tak-- ing care to fubdue his mind.

220.     - If a Brábmen eat only four mouthfuls - at funrife, and four at funfet, 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
- grains, as be happens by any means to meet ${ }^{6}$ roith them, keeping his organs in fubjection, ${ }^{6}$ fhall attain the fame abode with the regent of - the moon:

222. 'The eleven Rudras, the twelve $A^{\prime}$ di' tyas, the eight Vafus, the Maruts, or genii of - the winds, and the feven great Ri/bis, have - performed this lunar penance as a fecurity - from all evil,
223.     - The oblation of clarified butter to fire - muft every day be made by the penitent him-- felf, accompanied with the mighty words - earth, $k$ ky, beaven; he muft perfectly abftain , from injury to fentient creatures, from falfe'hood, from wrath, and from all crooked ' ways.
224.     - Or, thrice each day and thrice each - night for a month, the penitent may plunge - into water clothed in his mantle, and at no

- time converfing with a woman, a Súdra, or © an outcaft.

225. ' Let him be always in motion, fitting ' and rifing alternacely, or, if unable to be thus - reftlefs, let him fleep low on the bare ground; - chafte as a fudent of the Veda, bearing the - facred zone and faff, thowing reverence to - his preceptor, to the gods, and to priefts;
226. 'Perpetually muft he repeat the gáyatri, ' and other pure texts to the beft of his know-

- ledge: thus in all penances for abfolution from - fin, muft he vigilantly employ himfelf.

227. ' By thefe expiations are twiceborn
' men abfolved, whofe offences are publickly

- known, and are mifcbievous by their example; - but for fins not publick, the affembly of priefts - muft award them penances, with holy texts ' and oblations to fire.

228. 'By open confeffion, by repentance, - by devotion, and by reading the fcripture, a - finner may be releafed from bis guilt; or by - almfgiving, in cafe of his inability to perform ' the otber acts of religion.
229. 'In proportion as a man, who has

- committed a fin, fhall truly and voluntarily
- confefs it, fo far he is difengaged from that
' offence, like a finake from his ilough;

230. 'And, in proportion as his heart fin-

- cerely loathes his evil deed, fo far thall his - vital fpirit be freed from the taint of it. 231. 'If he commit fin, and actually repent, - that fin fhall be removed from him; but if " he merely fay, "I will fin thus no more," - he can only be .releafed by an actual abfti' nence from guilt.

232. 'Thus revolving in his mind the cer' tainty of retribution in a future fate, let him ' be conftantly good in thoughts, words, and ${ }^{6}$ action.
233. 'If he defire complete remiffion of any - foul act.which he has committed, either igno' rantly or knowingly, let him beware of com' mitting it again: for the fecond fault bis pe-- nance muft be doubled.
234. ' If, having performed any expiation, - he feel not a perfect fatisfaction of confcience, ' let him repeat the fame devout act, until his ' confcience be perfectly fatisfied.
235. 'All the blifs of deities and of men is ' declared by fages, who difcern the fenfe of ' the $V$ 'da, to have in devotion its caufe, in de' votion its continuance, in devotion its full' nefs,
236. ' Devotion is equal to the performance of © all duties; it is divine knowledge in a Brabh' men; it is defence of the people in a C/batriya; ' devotion is the bufinefs of trade and agriculture

- in a Vaifya; devotion is dutiful fervice in a - Súdra.

237. 'Holy fages; with fubdued paffions, - feeding only on fruit, roots, and air, by devo-- tion alone are enabled to furvey the three - worlds, terreftrial, etbereal, and celeftial, peopled - with animal creatures, locomotive and fixed.
238.     - Perfect health, or unfailing medicines, - divine learning, and the various manfions of ${ }^{6}$ deities, are acquired by devotion alone : their - efficient caufe is devotion.
239. ' Whatever is hard to be traverfed, what-- ever is hard to be acquired, whatever is hard - to be vifited, whatever is hard to be perform-- ed, all this may be accomplifhed by true de${ }^{6}$ votion; for the difficulty of devotion is the - greatert of all.
240. 'Even finners in the higheft degree, - and of courfe the other offenders, are abfolved - from guilt by auftere 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 fin has been conceived in - the hearts of men, uttered in their fpeech, or - committed in their bodily acts, they fpeedily - burn it all away by devotion, if they preferve - devotion as their beft wealth.
243. ' Of a prieft, whom devotion has puri-
? fied, the divine firits accept the facrifices, and
' grant the defires with ample increafe.
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 themfelves, obferving ' in this univerfe the incomparable power of - devotion, have proclaimed aloud the tran-- fcendent excellence of pious aufterity.
246. ' By reading each day as much as pof-- fible of the Véda, by performing the five great - facraments, and by forgiving all injuries, even - fins of the higheft degree thall be foon ef-- faced:
247. ' As fire confumes in an inftant with his - bright flame the wood, that has been placed ' on it, thus, with the flame of knowledge, a - Bráhmen, who underftands the Véda, confumes ' all fin.
248.     - Thus has been declared, according to - law, the mode of atoning for open fins: now - learn the mode of obtaining abfolution for - fecret offences.
249. 'Sixteen fuppreffions of the breath, ' while the holieft of texts is repeated with the ' three mighty words, and the triliteral fyllable, ' continued each day for a month, abfolve even

- the nlayer of a Bráhmen from his hidden - faults.

250. 'Even a drinker of fpirituous liquors - is abfolved by repeating each day the text apa - ufed by the fage Cautsa, or that beginning - with preti ufed by Vasisht'ha, or that called - mábitra, or that, of which the firft word is - Juddhavatyab.
251. 'By repeating each day for a month the - text dfyavámiya, or the hymn Sivafancalpa, - the ftealer of gold from a prieft becomes in-- fantly pure.
252. ' He, who has violated the bed of his - preceptor, is cleared from fecret faults by re-- peating fixteen times a day the text bavifhyan' tiya, or that beginning with na tamanbab, or - by revolving in his mind the foxteen holy verfes, - called Pauru/ba.
253. 'The man, who defires to expiate his - hidden fins, great and fmall, muft 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 tarat $\int a-$ - mandíya.
255. 'Though he have committed many - fecret fins, he fhall be purified by repeating

- for a month the text fómáraudra or the three ' texts áryamna, while he bathes in a facred - ftream.

256. 'A grievous offender muft repeat the - feven verfes, beginning with Indra, for half 'a year; and he, who has defiled water with ' any impurity, muft fit a whole year fubfifting ' by alms.
257. 'A twiceborn man, who fhall offer ' clarified butter for a year, with eigbt texts ap' propriated to eigbt feveral oblations, or with ' the text na mé, fhall efface a fin even of an ' extremely high degree.
258. ' He, who had committed a crime of ' the firft degree, fhall be abfolved, if he attend ' a herd of kine for a year, mortify his organs,
'and continually repeat the texts beginning ' with pávamánı̆, living folely on food given in ' charity:
259. 'Or, if he thrice repeat a Sanhitá of 'the Ve'das, or a large portion of them with all ' the mantras and bráhmanas, dwelling in a fo' reft with fubdued organs, and purified by three 'parácas, he fhall be fet free from all fins how ' heinous foever.
260. ' Or he fhall be teleafed from all deadly
' fins, if he faft three days, with his members
' mortified, and twice a day plunge into water,

- thrice repeating the text aghamar/bana:

261. 'As the facrifice of a horfe, the king - of facrifices, removes all fins, thus the text - aghamar/hana deftroys all offences.
262. 'A prieft who thould retain in his me-- mory the whole Rigreda, would be abfolved - from guilt, even if he had flain the inhabitants - of the three worlds, and had eaten food from - the fouleft hands.
263. ' By thrice repeating the mantras and - brábmanas of the Rııch, or thofe of the Yaju/h, - or thofe of the Sáman, with the upanibads, he - Thall perfectly be cleanfed from every poffible ${ }^{6}$ taint :
264. 'As a clod of earth, caft into a great ${ }^{6}$ lake, finks in it, thus is every finful act fub${ }^{4}$ merged in the triple Véda.
265. 'The divifions of the Rı̈cb, the feveral - branches of the $\mathrm{raju} / \mathrm{b}$, and the manifold - Atrains of the Sáman mult be confidered as - forming the triple Véda: he knows the Véda, - who knows them collectively.
266. 'The primary triliteral fyllable, in - which the three Védas themfelves are com-- prifed, muft be kept fecret, as another triple - Veda: he knows the Veda, who difincily ' knows the myftick fenfe of that word.'

## CHAPTER THE TWELFTH.

On Tranfmigration and final Beatitude.

1.     - O THOU, who art free from fin, faid ' the devout fages, thou haft declared the whole - fyftem of duties ordained for the four claffes ' of men: explain to us now, from the firft ' principles, the ultimate retribution for their ' deeds.'
2. Bhrĭgu, whofe heart was the pure effence of virtue, who proceeded from Menu himfelf, thus addreffed the great fages: 'Hear the in-- fallible rules for the fruit of deeds in this, ' univerfc.
3. 'Action, cither mental, verbal, or cor' poreal, bears good or evil fruit, as itfelf is good ' or evil; and from the actions of men proceed 'their various tranfmigrations in the higheft, - the mean, and the loweft degree:
4.     - Of that threefold action, connected with ' bodily functions, difpofed in three claffes, and - confifting of ten orders, be it known in this ' world, that the heart is the inftigator.
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5. ' Devifing means to appropriate the - wealth of other men, refolving on any forbid-- den deed, and conceiving notions of atheifm - or materialifin, are the three bad acts of the - mind:
6. 'Scurrilous language, falfehood, indifcri' minate backbiting, and ufelefs tattle, are the - four bad acts of the tongue:
7. ' Taking effects not given, hurting fentient ' creatures without the fanction of law, and - criminal intercourfe with the wife of another, ' are the three bad acts of the body; and all the - ten bave tbeir oppofites, wobicb are good in an - equal degree.
8. 'A rational creature has a reward or ' a punifhment for mental acts, in his mind; ' for verbal acts, in his organs of fpeech; for ' corporeal acts, in his bodily frame.
9. ' For finful acts moftly corporeal, a man - fhall affume after deatb a vegetable or mi' neral form; for fuch acts moftly verbal, the - form of a bird or a beaft; for acts moftly

- mental, the loweft of human conditions:

10. ' He, whofe firm underftanding obtains - a command over his words, a command over - his thoughts, and a command over his whole - body, may juftly be called a tridandi, or triple - commander; not a mere anchoret, who bears - tbree vifible ftaves.
11. ' The man, who exerts this triple felf' command with refpect to all animated crea' tures, wholly fubduing both luft and wrath, - fhall by thofe means attain beatitude.
12.     - That fubftance, which gives a power ' of motion to the body, the wife call chétra-- jnya, or jivaitman, the vital fpirit; and that - body, which thence derives active functions, - they name bhútaitman, or compofed of elements:
13. 'Another internal fpirit, called mabat, ' or the great foul, attends the birth of all crea' tures imbodied, and thence in all mortal - forms is conveyed a perception either pleafing ' or painful.
14. 'Thofe two, the vital fpirit and reafon'able foul, are clofely united with five ele' ments, but connected with the fupreme fpirit, ' or divine effence, which pervades all beings 'high and low:
${ }^{15}$, 'From the fubftance of that fupreme 'Spirit are diffufed, like Jparks from fire, innu' merable vital fpirits, which perpetually give ' motion to creatures exalted and bafe.
15. 'By the vital fouls of thofe men, who 'have committed fins in the body reduced to 'a/bes, another body, compofed of nerves withs ' five fenfations, in order to be fufceptible of 'torment, fhall certainly be affumed after 'death;

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17. 'And, being intimately united with - thofe minute nervous particles, according to - their diftribution, they fhall feel, in that new - body, the pangs inflicted in each cafe by the - fentence of Yama.
18. 'When the vital foul has gathered the - fruit of fins, which arife from a love of - fenfual pleafure, but muft produce mifery, ' and, when its taint has thus been removed, it ${ }^{6}$ approaches again thofe two moft effulgent - effences the intellectual foul and the divine fpirit:
> 19. ' They two, clofely conjoined, examine

' without remiffion the virtues and vices of that

- fenfitive foul, according to its union with
- which it acquires pleafure or pain in the pre-
- fent and future worlds.

20. 'If the vital fpirit had practifed virtue - for the moft part and vice in a fmall degree, - it enjoys delight in celeftial 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 - Thall it be deferted by thofe pure elements, - and, baving a coarfer body of fenfible nerves, it - feels the painsto which Yama fhall doom it: 22. 'Having endured thofe torments ac-- cording to the fentence, of Yama, and its
' taint being almoft removed, it again reaches
'thofe five pure elements in the order of their ' natural diftribution.
22. 'Let each man, confidering with his ' intellectual powers thefe migrations of the ' foul according to its virtue or vice, into a 'region of blifs or pain, continually fix his heart 'on virtue.
23. ' BE it known, that the three qualities ' of the rational foul are a tendency to goodnefs, ' to paffion, and to darknefs; and, endued with ' one or more of them, it remains inceffantly ' attached to all thefe created fubftances;
24.     - When any one of the tbree qualities ' predominates in a mortal frame, it renders 'the imbodied fpirit eminently diftinguifhed ' for that quality.
25. 'Goodnefs is declared to be true know' ledge; darknefs, grofs ignorance; paffion, an 'emotion of defire or averfion: fuch is the 'compendious defcription of thofe qualities, ' which attend all fouls.
26.     - When a man perceives in the reafon-
'able foul a difpofition tending to virtuous ' love, unclouded with any malignant paffion, ' clear as the pureft light, let him recognife it
' as the quality of goodnefs:
27. 'A temper of mind, which gives un-

- eafinefs and produces difaffection, let him
- confider as the adverfe quality of paffion,
- ever agitating imbodied fpirits:

29. ' That indiftinct, inconceivable, unac-- countable difpofition of a mind naturally - fenfual, fand clouded with infatuation, let - him know to be the quality of darknefs.
30. ' Now will I declare at large the va-- rious acts, in the higheft, middle, and loweft - degrees, which proceed from thofe three dif-- pofitions of mind.
31. 'Study of fcripture, auftere devotion, 'facred knowledge, corporeal purity, com-- mand over the organs, performance of duties, - and meditation on the divine firit, accom ' pany the good quality of the foul:
32. ' Interefted motives for acts of religion or - morality, perturbation of mind on flight oc${ }^{6}$ cafions, commiffion of acts forbidden by law, ' and habitual indulgence in felfifh gratifica-- tions, are attendant on the quality of paf? fion:
33. ' Covetoufnefs, indolence, avarice, de-- traction, atheifm, omiffion of prefcribed acts, - a habit of foliciting favours, and inattention 'to neceffary bufinefs, belong to the dark - quality.
34. ' Of thofe three qualities, as they appear - in the three times, paft, prefent and future, - the following in order from the loweft may be - confidered as a fhort but certain criterion.
35. 'Let the wife confider, as belonging to ' the quality of darknefs, every act which a
' man is afhamed of having done, of doing, or 6 of going to do:
36. 'Let them confider, as proceeding from
' the quality of paffion, every act, by which a
' man feeks exaltation and celebrity in this
' world, though he may not be much afflicted, c if he fail of attaining his object :
37. 'To the quality of goodnefs belongs ' every act, by which he hopes to acquire di-
' vine knowledge, which he is never afhamed ' of doing and which brings placid joy to his - confcience.
38. 'Of the dark quality, as defcribed, the 'principal object is pleafure; of the paffionate, ' worldly profperity; but of the good quality, - the chief object is virtue: the laft mentioned - objeZZs are fuperiour in dignity.
39. 'Such tranfmigrations, as the foul pro'cures in this univerfe by each of thofe quali' ties, I now will declare in order fuccinctly.
40. 'Souls, endued with goodnefs, attain al' ways the ftate of deities; thofe filled with ' ambitious paffions, the condition of men; and - thofe immerfed in darknefs, the nature of 'beafts: this is the triple order of tranfmigra'tion.
41. 'Each of thofe three tranfmigrations, ' caufed by the feveral qualities, muft alfo be ' confidered as threefold, the loweft, the mean',
' and the higheft, according to as many di-

- ftinctions of acts and of knowledge.

42. 'Vegetable and mineral fubftances, ' worms, infects, and reptiles, fome very mi' nute, fome rather larger, filh, finakes, tor-- toifes, cattle, fhakals, are the loweft forms, to - which the dark quality leads:
43. 'Elephants, horfes, men of the fervile - clafs, and contemptible Mlécb'bas, or barbari-
' ans, lions, tigers, and boars, are the mean - ftates procured by the quality of darknefs:
44. 'Dancers and fingers, birds and deceit-- ful men, giants and bloodthirfty favages, are - the higheft conditions, to which the dark - quality can afcend.
45. ' ${ }^{\prime}$ 'ballas, or cudgelplayers, Mallas, or

- ' boxers and wreftlers, Natas, or actors, thofe - who teach the ufe of weapons, and thofe who ! are addicted to gaming or drinking, are the - loweft forms occafioned by the paffionate ! quality:

46. 'Kings, men of the fighting clafs, do-- meftick priefts of kings, and men killed in the - war of controverfy, are the middle fates - caufed by the quality of paffion:
47. ' Gandharvas, or aerial muificians, Guhy.

- acas and $\mathrm{Tac} / \mathrm{bas}$, or fervants and companions
' of Cuve'ra, genii attending fuperiour gods,
- as the Vidyábaras and others, together with
' various companies of Apfarafes, or nymphs, ' are the higheft of thofe forms, which the - quality of paffion attains.

48. ' Hermits, religious mendicants, other

- Bráhmens, fuch orders of demigods as are
' wafted in airy cars, genii of the figns and
- lunar manfions, and Daityas, or the offspring ' of $D_{1 T I}$, are the loweft of ftates procured by ' the quaiity of goodnefs:

49. 'Sacrificers, holy fages, deities of the - lower heaven, genii of the Védas, regents of - ftars not in the patbs of the fun and moon, di-

- vinities of years, Pitrǐs 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 philofophy of ( Capila) mabat, or the migbty, and avyacta, ' or unperceived, are the higheft conditions, to ' which, by the good quality, fouls are exalted. 51. 'This triple fyftem of tranfmigrations, ' in which each clafs has three orders, accord-- ing to actions of three kinds, and which com' prifes all animated beings, has been revealed ' in its full extent:
51. 'Thus, by indulging the fenfual appe-- tites, and by neglecting the performance of - duties, the bafeft of men, iguorant of facred - expiations, affume the bafeft forms.

53: • What particular bodies the vital fuirit - enters in this world, and in confequence of - what fins here committed, now hear at large - and in order.
54. 'Sinners in the firft degree, having ' paffed through terrible regions of torture for - a great number of years, are condemned to - the following births at the clofe of that period - to efface all remains of their Jin.
55. 'The flayer of a Brábmen mult enter - according to the circumftances of bis crime the - body of a dog, a boar, an afs, a camel, a bull, - a goat, a fheep, a ftag, a bird, a Chandíla, or a - Puccafa.
56. 'A prieft, who has drunk fpirituous - liquor, fhall migrate into the form of a ' fmaller or larger worm or infect, of a moth, ' of a fly feeding on ordure, or of fome raven' ous animal.
57. ' He , who fteals the gold of a prieft, - hhall pafs a thoufand times into the bodies of - fpiders, of fuakes and cameleons, of crocodiles - and other aquatick monfters, or of mifchievous - 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 hrubs with - crowded ftems, or of creeping and twining - plants, of vultures and otber carnivorous ani-- mals, of lions and other beafts with Charp teeth, - or of tigers and other cruel brutes.
59. ' They who hurt any fentient beings, ' are born cats and other eaters of raw fleh; ' they, who tafte what ought not to be tafted, ' maggots or fmall flies; they, who fteal ordi' nary things, devourers of each other: they ' who embrace very low women, become reft-- lefs ghoits.
60. ' He, who has held intercourfe with - degraded men, or been criminally connected - with the wife of another, or folen common ' tbings from a prieft, fhall be changed into a - fpirit, called Brabmarác/bafa.
61. 'The wretch, who through covetouf' nefs has ftolen rubies or other gems, pearls, or ' coral, or precious things of which there are ' many forts, fhall be born in the tribe of gold-- Smiths, or among birds called hémacáras, or ' goldmakers.
62. 'If a man fteal grain in the hurk, he - fhall be born a rat; if a yellow mixed metal, ' a gander; if water, a plava, or diver; if - honey, a great ftinging gnat; if milk, a crow; ' if expreffed juice, a dog; if clarified butter, an - ichneumon weafel;
63. 'If he fteal flefhmeat, a vulture; if any - fort of fat, the water-bird madgu; if oil, a - blatta, or oildrinking bectle; if falt, a cicada - or cricket; if curds, the bird valáca;
64. 'If filken clothes, the ṭird tittiri; if - woven flax, a frog; if cotton cloth, the - waterbird crauncba; if a cow, the lizard - gódbá; if molaffes, the bird vágguda;
65. ' If exquifite perfumes, a mulkrat; if pot-- herbs, a peaccek; if dreffed grain in any of - its various forms, a porcupine; if raw grain, - a hedgehog;
66. 'If he fteal fire, the bird vaca; if a - houfehold utefinl, an ichneumon-fly; if dyed - cloth, the bird chacóra;
67. 'If a deer or an elephant, he thall - 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 fmall cattle, a goat.
68. 'That man, who defignedly takes away ' the property of another, or eats any holy ' cakes not firft prefented to the deity at a - folemn rite, fhall inevitably fink to the con-- dition of a brute.
69. ' Women, who have committed fimilar - thefts, incur a fimilar taint, and fhall be - paired with thofe male beafts in the form ' of their females.
'70. ' If any of the four claffes omit, without
'urgent neceffity, the performance of their ' feveral duties, they fhall migrate into finful 'bodies, and become flaves to their foes. 71. 'Should a Bráhmen omit his peculiar 'duty, he thall be changed into a demon called ' Ulcamuc'ba or with a moutb like a firebrand, ' who devours what has been vomited; a C/ka' triya, into a demon called Catapítana, who - feeds on ordure and carrion;
72. 'A Vaifya, into an evil being called - Maitrác/hajyótica, who eats purulent carcaffes; ' and a Súdra, who neglects his occupations, ' becomes a foul imbodied fpirit called Chaila' Jaca, who feeds on lice.
73. 'As far as vital fouls, addicted to fen' fuality, indulge themfelves in forbidden plea'fures, even to the fame degree fhall the acute' nefs of their fenfes be raifed in their future. - bodies, that they may endure analogous pains;
74. ' And, in confequence of their folly, they ' Thall be doomed as often as they repeat their
' criminal acts, to pains more and more intenfe ' in defpicable forms on this earth.
75. 'They hall firf have a fenfation of 'agony in Támifra or utter darknefs, and in ' other feats of horrour; in Afipatravana, or ' the fwordleaved foreft, and in different places
' of binding faft and of rending:
76. 'Multifarious tortures await them: they .

- fhall be mangled by ravens and owls, fhall
- fwallow cakes boiling hot; fhall walk over - inflamed fands; and thall feel the pangs of - being baked like the veffels of a potter:

77. ' They fhall affume the forms of beafts - continually miferable, and fuffer alternate af-

- flictions from extremities of cold and of heat, - furrounded with terrours of various kinds :

78. ' More than once fhall they lie in differ-
${ }^{6}$ ent wombs; and, after agonizing births, be - condemued to fevere captivity, and to fervile - attendance on creatures like themfelves:
79.     - Then fhall follow feparations from kin-- dred and friends, forced refidence with the ' wicked, painful gains and ruinous loffes of - wealth; friendfhips hardly acquired and at - length changed into enmities,
80. ' Old age without refource, difeafes at-- tended with anguifh, pangs of innumerable - forts, and, laftly, unconquerable death.
81. 'With whatever difpofition of mind.a - man hall perform in this life any act religious ' or moral, in a future body endued with the - fame quality, fhall he receive his retribution.
82. 'Thus has been revealed to you the - fyitem of punifhments for evil deeds: next - learn thofe acts of a Brálmen, which lead to ${ }^{6}$ eternal blifs.
83. 'Studying and comprehending the $V e d a$,
'praçtifing pious aufterities, acquiring divine - knowledge of law and pbilofophy, command ' over the organs of fenfe and action, avoiding ' all injury to fentient creatures, and fhowing ' reverence to a natural and Jpiritual father, are 'the chief branches of duty which eufure final ' happinefs.'
84. 'Among all thofe good acts performed ' in this world, faid the fages, is no fingle act ' held more powerful than the reft in leading ' men to beatitude?'
85.'Of all thofe duties, anfwered Bhrĭgu, ' the principal is to acquire from the Upanibads ' a true knowledge of one fupreme GOD; that ' is the moft exalted of all fciences, becaufe it ' enfures immortality:
85. ' In this life, indeed, as well as the next, ' the ftudy of the Véda, to acquire a knowledge ' of GOD, is held the moft efficacious of thofe - fix duties in procuring felicity to man;
86. ' For in the knowledge and adoration of ' one GOD, which the Veda teaches, all the - rules of good conduct, beforementioned in order, ' are fully comprifed.
87. 'The ceremonial duty, preferibed by the ' Véda, is of two kinds; one connected with this ' world, and caufing profperity on earth; the 'other abftracted from it, and procuring blifs ' in heaven.

8g. 'A religious act proceeding from felfifh ${ }^{6}$ 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' terefted; but an act performed with a know-- ledge of God, and without felf love, is called - abftract and difinterefted.
go. ' He , who frequently performs interefted ' rites, attains an equal ftation with the regents - of the lower heaven; but he, who frequently ' performs difinterefted acts of religion, becomes

- for ever exempt from a body compofed of the
- five elements:

91. 'Equally perceiving the fupreme foul - in all beings and all beings in the fupreme - foul, he facrifices his own fpirit by fixing it on - the fpirit of GOD, and approaches the nature ' of that fole divinity, who fhines by his own ' effulgence.
92. 'Thus muft the chief of the twiceborn, ' though he neglect the ceremonial rites men-- tioned in the Sáfras, be diligent alike in at-

- taining a knowledge of God and in repeating ' the Véda:

93. 'Such is the advantageous privilege of ' thofe, who have a double birth from their na-

- tural mothers and from the gáyatrì their Spiritual - motber, efpecially of a Bráhmen; fince the ' twiceborn man by performing this duty but
' not otherwife, may foon acquire endlefs fe-- licity.
94.' To patriarchs, to deities, and to man' kind, the feripture is an eye giving conftant - light; nor could the Véda Sáftra have been ' made by human faculties; nor can it be mea' fured by human reafon unafifted by revealed 'glofes and comments: this is a fure propofition.

95. 'Such codes of law as are not grounded ' on the $V$ eda, and the various heterodox theo' ries of men, produce no good fruit after death; ' for they all are declared to have their bafis on ' darknefs.
96. 'All fyftems, which are repugnant to ' the Véda, muft have been compofed by mor' tals, and fhall foon perifh: their modern date ' proves them vain and falfe.
97. 'The three worlds, the four claffes of ' men, and their four diftinct 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 ' vifible fhape, of tafte, and of odour, the fifth ' object of fenfe, is clearly explained in the V'da 'alone, together with the three qualities of ' mind, the births attended with them, and the ' acts which they occafion.
99. ' All creatures are fuftained by the pri-- meval Véda Sä/tra, which the wife therefore Vol. Vi.

- hold fupreme, becaufe it is the fupreme foarce - of profperity to this creature, man.
roo. 'Command of armies, royal authority,
- power of inflicting punifhment, and fovereign
- dominion over all nations, he only well de-
- ferves, who perfectly underftands the Véda - Sáftra.

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 fenfe - of the Véda Sáftra, while he remains in any - one of the four orders, approaches the divine ' nature, even though he fojourn in this low ' world.
103. ' They, who have read many books, are - more exalted than fuch, as have feldom fu-- died; they, who retain what they have read, - than forgetful readers; they, who fully under-- ftand, than fuch as only remember; and they, ' who perform their known duty, than fuch ' men, as barely know it.
104. ' Devotion and facred knowledge are - the beft means by which a Brábmen can arrive ' at beatitude: by devotion he may deftroy ' guilt; by facred knowledge he may acquire - immortal glory.
105. 'Three modes of proof, ocular demon-

- fration; logical inference, and the authority ' of thofe various books, which are deduced - from the Véda, muft be well underftood by - that man, who feeks a difinct knowledge of - all his duties:

106. 'He alone comprehends the fyftem of - duties religious and civil, who can reafon, by ' rules of logic agreeable to the $V$ 'd $d$, on the ' general heads of that fyftem as revealed by ' the holy fages.
107. ' Thefe rules of conduct, which lead to - fupreme blifs, have been exactly and compre' henfively declared: the more fecret learning - of this Mánava Sáftra thall now be difclofed. 108. $\&$ If it be afked, how the law fhall be ' afcertained, when particular cafes are not ' comprifed under any of the general rules, the 'anfwer is this: " That, which well inftructed " Bráhmens propound, fhall be held inconteftible " law."
108. ' Well inftructed Bráhmens are they, ' who can adduce ocular proof from the fcrip-
' ture itfelf, having ftudied, as the law ordains, 'the Vedas and their extended branches, or 'Védángas, Mimánfà, Nyáya, Dhermafáftra, - Puránas:
109. 'A point of law, before not exprefsly re' vealed, which fhall be decided by an affembly ' of ten fuch virtuous Bráhmens under one chief,
' or, if ten be not procurable, of three fuch un-- der one prefident, let no man controvert.
ini. ' The affembly of ten under a chief - cither the king himfelf or a judge appointed by - him, muft confift of three, each of them pecu-- liarly converfant with one of the three $V e d a s$, ' of a fourth k illed in the Nyáya, and a fifth - in the Mimánfà philofophy; of a fixth, who - has particularly fudied the Niructa; a feventh, ' who has applied himfelf moft affiduoufly to - the Dhermafáftra; and of three univerfal fcho' lars, who are in the three firft orders.

II2. ' One, who has chiefly ftudied the R g g' vêda, a fecond, who principally knows the - $Y_{a j u} /$, and a third beft acquainted with the

- Sáman, are the affembly of three under a head,
' who may remove all doubts both in law and - cafuiftry.
113.' Even the decifion of one prieft, if ' more cannot be affembled, who perfectly knows - the principles of the Védas, muft be confidered - as law of the bigheft authority; not the opinion ' of myriads, who have no facred knowledge.

114. ' Many thoufands of Bráhmens cannot - form a legal affembly for the decifion of con-
' tefts, if they have not performed the duties of

- a regular ftudenthip; are unacquainted with
- fcriptural texts, and fubfift only by the name - of their facerdotal clafs.

115. 'The fin of that man, to whom dunces, ' pervaded by the quality of darknefs, propound ' the law, of which they are themfelves igno'rant, fhall pafs, increafed a hundredfold, to 'the wretches who propound it.
116.     - This comprehenfive fyftem of duties, ' the chief caufe of ultimate felicity, has been ' declared to you; and the Bráhmen, who never 'departs from it, fhall attain a fuperiour ftate ' above.
117. ' Thus did the allwife Menu, who ' poffeffes extenfive dominion, ạnd blazes with ' heavenly fplendour, difclofe to me, from his 'benevolence to mankind, this tranfcendant ' fyftem of law, which muft be kept devoutly ' concealed from perfons unfit to reccive it.
i18. 'Let every Bráhmen with fixed atten' tion confider all nature, both vifible and invi'fible, as exifting in the divine fpirit; for, ' when he contemplates the boundlefs univerfe ؛ exifting in the divine fpirit, he cannot give ' his heart to iniquity:
118. 'The divine fpirit alone is the whole ' affemblage of gods; all worlds are feated in ' the divine fpirit, and the divine fpirit no doubt ' produces by a chain of caufes and effects confft' ent with free will, the connected feries of acts 'performed by imbodied fouls.
119. 'He may contemplate the fubtil ether
' in the cavities of his body; the air in his ' mufcular motion and fenfitive nerves; the fu' preme folar and igneous light, in his digeftive ' heat and his vifual organs; in his corporeal - fluids, water; in the terrene parts of his fa-- brick, earth;
120. ' In his heart, the moon; in his audi-- tory nerves, the guardians of eight regions; - in his progreffive motion, Vishnu; in his ! mufcular force, Hara; in his organs of - fpeech, Agni; in excretion, Mitra; in pro-- creation, Brahma':
121. 'But he muft confider the fupreme - omniprefent intelligence as the fovereign lord ' of them all, by whofe energy alone they exift; a - Spirit, by no means the object of any Jenfe, which - can only be conceived by a mind wholly $a b$ ? - ftracted from matter, and as it were flumbering; - but which for the purpofe of affiting his medi? tation, he may imagine more fubtil than the - fineft conceivable effence, and more bright ' than the pureft gold.
122. Him fome adore as tranfcendently - prefent in elementary fire; others, in Mend, - lord of creatures, or an immediate agent in the - creation; fome, as more diftinctly prefent in - Indra, regent of the clouds and the atmofphere; ' others, in pure air ; others, as the moft High - Eternal Spirit.
123. 'It is He , who, pervading all beings in 'five elemental forms, caufes them by the ' gradations of birth, growth, and diffolution, ' to revolve in this world, until they deferve beati-- tude, like the wheels of a car.
124. 'Thus the man, who perceives in his - own foul the fupreme foul prefent in all crea${ }^{\text {' }}$ tures, acquires equanimity toward them all, 'and Thall be abforbed at laft in the higheft ef' fence, even that of the Almighty himfelf.'
125. Here ended the facred inftructor; and every twiceborn man, who, attentively reading this Mánava Sáftra promulgated by Bhrĭgu, thall become habitually virtuous, will attain the beatitude which he feeks.

## GENERAL NOTE.

THE learned Hindus are unanimoufly of opinion, that many laws enacted by Menu, their oldeft reputed legiflator, were confined to the three firft ages of the world, and have no force in the prefent age, in which a few of them are certainly obfolete; 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 muft not be begotten on a widow by the brother of the deceafed hufband; nor muft a damfel, once given away in marriage, be given a fecond time; nor muft a bull be offered in a facrifice; nor muft a waterpot be carried by a fudent in theology.
II. Vrimaspati: i. Appointments of kinfmen to beget cbildren on widows, or married women, when the bufbands are deceafed or impotent, are mentioned by the fage Menu, but forbidden by himfelf with a view to the order of the
four ages: to fuch act can be legally done in this age by any others than the bufband.
2. In the firft and fecond ages men were endued with true piety and found knowledge; fo tbey were in the third age; but in the fourth, a diminution of their moral and intellectual powers was otdained by their Creator:
3. Thus were fons of many different ferts made by ancient fages, but fuch cannot now be adopted by men deftitute of thofe eminent powers.
III. Para'sara: i.- A man, who bas beld intercourfe with a deadly finner, muft abandon his country in the firf age; he mult leave his town, in the fecond; his family, in the third age; but in the fourth he needs only defert the offender.
2. In the firft age, he is degraded by mere converfation with a degraded man; in the fecond, by touching him; in the third, by receiving food from him ; but in the fourth, the finner alone bears his guilt.
IV. Na'rada: The procreation of a fon by a brother of the decenfed, the flaughter of catthe in the entertainment of a gueft, the repaft on flefhmeat at funeral obfequies, and the order of a hermit are forbidden or obfolete in the fourtb age.
V. A'ditya purána: 1. What was a duty in the
frift age mult not in all cafis be done in the fourth; fince, in the Cali yuga, both men and women are addicted to fin :
2. Such are a fudenthip continued for a very long time, and the neceffity of carrying a waterpot, marriage with a paternal kinfwoman, or with a near maternal relation, and the facrifice of a bull,
3. Or of a man, or of a horfe: and all fpirituous liquor muft in the Cali age be avoided by twiceborn men; fo muft a fecond gift of a married young woman, whofe bufband bas died before confummation, and the larger portion of an eldeft brother, and procreation on a brother's widow or wife.
VI. Smriti: I. 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 flould die while the remains a virgin;
2. The marriage of twiceborn men with damfels not of the fame clafs; the flaughter, in a religious war, of Bráhmens, who are affailants with intent to kill;
3. Any intercourfe with a twiceborn man, who has paffed the fea in a fhip, even though he have performed an expiation: performances of facrifices for all forts of men; and the neceffity 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 firituous 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 firft ages;
6. The diminution of crimes in proportion to the religious acts and facred knowledge of the offenders; the rule of expiation for a Brahmen extending to death;
7. The fin of holding any intercourfe with finners ; the fecret expiation of any great crimes except theft ; the llaughter of cattle in honour of eminent guefts or of anceftors;
8. The filiation of any but a fon legally begotten or given in adoption by bis parents; the defertion of a lawful wife for any offence lefs than actual adultery:
9. Thefe parts of ancient law were abrogated by wife legiflators, as the cafes arofe at the peginning of the Cali age, with an intent of fecuring mạnkind from evil.
On the preceding texts it muft be remarked, that none of them, except that of Vrïhaspati, are cited by Cullu'ca, who never feems to pave confidered any other laws of MENU as reftrained to the three firft ages; that the Smriti,
or facred code, is quoted without the name of the legiflator; and that the prohibition, in any age, of Self-defence, even againft Bráhmens, is repugnant to a text of Sumantu, to the precept and example of $\mathrm{C}_{\text {rishna }}$ himfelf, according to the Mabábbárat, and even to a fentence in the $V e ̀ d a$, by which every man is commanded to defend bis own life from all violent aggreffors.

Calcutta, March 1, 1794.
Sir,
THE Inftitutes of Hindu Law have been very correctly printed, and the whole impreffion has juft been fent to the Governor and Council, who will not fail to tranfmit copies fur the King's library, for yourfelf, and for the Directors. If I had obtained his Majefty's leave to refign my office, nothing would now keep me here, but the Digeft of Indian Laws, confifting of nine large volumes, two of which remain to be collated and ftudied with the lefrned Bráhmen, who affifs me: he is old and infirm; but, fhould he be able to attend me another year, or two years at the very utmoft, the whole work will be finifhed, and I fhall copy it during my voyage, if the King fhall gracioully permit me to leave India.

I, therefore, intreat you, Sir, to lay before his Majefty, my humble fupplication for his gracious permiffion to refign my judgefhip in the year 1795, or (if the Digeft fhould not then be completed) in 1796; it being my anxious wifh to pafs the remainder of my life in ftudious retirement, though devoted, as I ever have been,
to the fervice of my King and my Country, and of that recorded Conftitution, which is the bafis of our national glory and felicity.

I have the honour to be, Sir, your very obedient humble Servant.
The Right Hon. Henry Dundas, F/fq.

THE

## MAHOMEDAN LAW

of
SUCCESSION
то

## THE PRGPERTY OF INTESTATES, <br> IN

## ARABICK, <br> ENGRAVED ON COPPER PLATES <br> prom <br> AN ANCIENT MANUSCRIPT: <br> W174

a VERBAL TRANSLATION, AND EXPLANATORY NOTES

## :

4

## THE

## PREFACE.

Nothing more feems neceffary, in order to explain the object of the following work, than barely to cite the late ftatute concerning the adminittration of juftice in Bengal; by the feventeenth fection of which it is enacted, "That " the Supreme Court of Judicature at Fort Wil" liam fhall have full power to hear and deter" mine all manner of actions and fuits againft "the inhabitants of Calcutta, provided that " their inberitance and fucceffion to lands, rents, "and goods, and all matters of contract and "dealing between party and party, fhall be "determined, in the cafe of Mahomedans, by " tbe laws and ufages of mahomedans, and, " where only one of the parties thall be a Ma"homedan, by the laws and ufages of the de" fendant:" by the twenty-firft fection, the provincial courts of Adálet, or $\oint$ fufice, are exprefsly recognifed, and the powers of the governor and council, as the Sedr Adálct, in determining civil vol. Vi.
caufes on appeals from thofe courts, are fully eftablifhed in conformity to the old Mogul conftitution.

But it may naturally beaked, 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 juftly exercife their feveral powers in fuits between Mabomedan parties, without being at all acquainted with the law, by which they are bound to decide. Perpetual references to native lawyers muft always be inconvenient and precarious; fince the folidity of their anfwers muft depend on their integrity, as well as their learning; and at beft, if they be neither influenced nor ignorant, the court will not in truth bear and determine the caufe, but merely pronounce judgement on the report of other men.

For thefe reafons it appears indubitable, that a knowledge of Mahomedan jurifprudence (I fay nothing here of the Hindú learning,) and confequently of the languages ufed by Mabomedan writers, are effential to a complete adminiftration of juftice in our A/iatick territories; a knowledge I mean, though not equal to that of the mufti at Confantinople, yet fufficient for the purpofe of keeping a check over the native counfellors, of underftanding and examining their opinion, and of rejecting or adopting it, as
it may be oppofed or fupported by their books of allowed authority, to which they fhould conftantly refer.

A confiderable number of thofe books have been brought to England by the curious in different ages, and are now repofited in our Academical libraries: in the Bodleian, efpecially, we have many treatifes and differtations 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 whofe moft valuable manufcripts ( n . 33.) this little work has been traced through tranfparent paper, and engraved with fuch accuracy, that the plates muft have equal authority in $A f a$ with the original pages, which are near five hundred years old.

The author, a native of Alrahaba, in Mefot potamia, was himfelf an imam; and his decifions are, on that account, confidered as binding by the fect of Ali, which the Indian, as well as the Perfan, Mahomedans profefs; but Ibno'lmotakanna informs us, that he drew his knowledge from the fountain head, and has epitomifed the fyftem of Zaid, who was recommended by Mahomed himfelf as the fureft interpreter of his laws, and who had been implicitly followed by Shafiei, the firft writer on Mahomedan jurifprudence, in the eighth cen-
tury of our era, and compofer 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 báhitb may be cited, as a book of authority, in all the Mufleman courts; and the European reader mult not be furprifed, to fee fuch a work written in a kind of loofe metre, and even in rhyme: a lawtract in verfe conveys, indeed, rather a ludicrous idea, fince poetry belongs to imagination, which law, whofe province is pure reafon, wholly excludes; but verfe, as numberlefs inftances prove, is not always poetry; and a regular meafure is fo confiderable an aid to the memory, that, if the metrical abridgement of Cone's. Reports were more accurate, and the couplets a little fmother, every ftudent fhould be advifed to get it by heart. I may add, without enlarging upon the Agatbyrf and the Turdetani, who, as we are told by Arifotle and Strabo, had laws in verfe of the remoteft antiquity, that the Alcoran itfelf, the great fource of Mabomedan law, is compofed in fentences not only modulated with art, but often exactly rhymed; fo that in Afia this apology would have been needlefs. Verbal tranflatious are generally naked and infipid, wholly deftroying all the neatnefs 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 fubject fo delicate as law, muft be facrificed without mercy to exactnefs; and for this reafon I have rendered the Arabian treatife, line for line, and word for word, with a fidelity almoft religiounly fcrupulous.
As it was never my intention to compofe a perfect work upon the law of inheritances among the Mabomedans, it cannot be reafonably expected, that I fhould fubjoin a commentary, or prefix a long difcourfe: very few marginal notes were thought neceffary; but, if the brevity of the original fhould make parts of it rather obfcure, the Britifb lawyers in India, for whofe ufe chiefly this production was defigned, will eafily obtain a clear explanation both of the language and matter from native interpreters.

The fourtb chapter of the Alcoran may throw light, if any be wanted, on the doctrine of the forídb or portions; and, as to the aritbmetical part, it feems of little confequence, as our rules of three, and thofe for the reduction of fractions, are common and familiar to all.

The prefent publication will anfwer, I conceive, another purpofe by no means unimportant; as it will habituate the ftudent of eaftern languages to the reading of old Arabian manufcripts; but, left the hand-writing of the very dearned Saad Al Siváf, for that was the name

- of the tranfcriber, fhould perplex beginners, I have printed the whole tract, for their fake, in Roman letters, diftinguifhing every confonant and long vowel (the fhort ones are too vague and indeterminate) by a character invariably appropriated to it; fo as to give every full found its own Specifick fymbol; an advantage, which hardly any alphabet has, but which all ought to have.

Bigyah'o 'lbahhithi ân jumali 'lmowárithi nadh"mo 'lhhaíkhi álímámi álâálimi mowáffiki 'ldeíni ábeí âbdillahi mohhammedi 'bni âleí íbni 'lhhofaíni árahhabiyyi álmårúfi bi 'bni 'l motakannahíi rahhamaho állaho taâálaí.

## $1$

Bifmi 'llahi álrahhmani álrahheími wabihị - neftaêíno.

## [1]

ảwwalo má neftaftihho 'lmekálả
bidhicri hhamdi rabbiná tadálá
fálhhamdo lillahi âlaí má ánâmá
hhamdán bihi nejl'áa âni 'lâini 'lâmá thomma áls'alwaho bâdo wálfalámo álaí nebiyyin' deínoho álíflamo mohhammedin' khátimi rufli rabbihi waalihi min bâdihi was'ahhbihi wanefalo 'llaha liná 'liáánah'a feímá tawakhkhaíná min álíbánah'a ân medh-hebi 'límámi zaídi 'lfaradh'é ídh cána dháca min áhammi 'lgaradh'i îlmán' biánna 'lîlmo áúfá má foêii' feíhi waáúlá má leho 'lâbdo doêí waánna hadhá 'lìlma makhs'ús'on' bimá kad thââa feíhi înda culli 'lûlemá waánna zaídán' khus's a lá mahhálah
bimá hhabáho s'áhhibo 'Irifálah min kaúlihi feí fadhlihi monabbehá
áfradh'acom zaidon wanáheíca behá facána áúlaí be-íttibầ 'ltábiî
lá fiyyamá wakad nahháho 'lihafiêí faháca feíhi alkaúla bi’leíjázi mobarraán' min kas'mahí 'lálgázi áfbábo meíráthi 'lwaraí theláthah cullon yoféído rabbaho 'lwiráthah wahaí nicáhhon' waweláon' wanafab má bâdahonna lilmawáreíthi fabab.

## [2]

wayamnaô 'lhakhs'a min álmeíráthi wáhhidah'on' min îlalin' theláthi rikkon' wakatlon' waákhtiláfo deíni faáf ham falaífa 'lfhacco cályakeíni wálwárithúno feí 'lrijáli âfharah áfmáwahom mârúfah'on' mufhtaharah álíbno wa'bno 'líbni mahmá nazalá wa'lábo wa'ljeddo leho waḯn âlá wálákho min áyyi ’ljeháti cáná kad ánzela 'llaho bihi 'Kkoráná wábno 'lákhi 'lmodleí ílaíhi bi'lábi fáfmâ mèkálán' laífa bi'lmucadhdhabi wa' lâmmo wábno 'lâmmi min ábeíhi fáfhcor ledheí 'léjáazi wáltanbeíhi wálzaújo wálmôtiko dhú 'liwelái
fajumlah'o 'ldhucúri hawolái
wálwáritháto cullohinnua febồ
lam yâth'i óntheí gaírahonna 'lherô
binton' wabinto 'bnin' wa'mmon' mufhfikah wajaddah'on' wazaújah'on' wamôtikah wál..khto min áyyi 'ljeháti cánat fahadhihi îddatohá kad bánat wáâlam biänna 'lirtha naúâáni homá fardh'on' watâs eíbon' âlaí ma kofimá fálfardho feí nas's'i 'lcitábi fittah lá fardh'o feí 'lirthi fiwáhá bittah nis fon' warubôn' thomma nis'fo 'Irubî wálthultho wálfudfo binas'sí 'lherî wálthulthani wahomá áltemámo fáhhfadh" facullo hháfidh in' imámo

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[3]
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falnis'fo fardh'o khamfáh'in' áfrádi álzaújo wálónthaí min áláúládi wabinto 'libni înda fakdi 'lbinti wálákhto feí medh-hebi culli mufteí wabâdahá 'lákhto 'llati min álábi rinda ánfirádihinna min moâs'sibi wálrubふ̂̀ fardha 'lzaíji ín cána maàh min waladi 'lzaújahí men kad menâ̂h wahú leculli zaí:jah in' aú áctherá mâ âdami 'k̉úladi fệmá kadderá wálthomno lilzaújah i wálzaíjáti má âlbeneína áú mâ álbenáti áú mâa áúládi 'lbeneíni fáâlemé wábek le-ítkári ’ldurúfi wáflemeí waalthúltháni lilbenáti jemâá
mả záda ân wáhhidah'ì fafemâá
wahúa cadháca lebenáti 'líbni
fáfham mekáleí fahma sáfeí 'ldhihni
wahúa liákhtaíni femá yezeído
kadh'aí bihi 'láhbráro wálâbeído
hadhá ídhá cunna liómmi waábi
áú liábi fáâmel bihadhá tos'ibi
wálthultho fardh'o 'lómmi hhaítho lá weled
wela mina 'lákhwahí jemô waâded cáthnaíni áú thintaíni áú theláthi hocmo 'ldhucúri feíhi cálínáthi waï'n yecun zaújon' waómon' waábo fathultho 'lbákíyo lehá morattabo wahacadhai mâ zaújah'in' fasáâdá felá tecun mina 'lûlúmi kâîdá

## [4]

wálthultho liláthnaíni áú thintaíni min weledi 'lómmi bigaíri maíni wahacadhaí in catharúá farádúá fema lehom feímá fiwáho zádo wataftawaí 'línátho wáldhucúro feíhi camá kad áúdh'ahho 'lmefth'úro wálfudfo fardh'o febâh'in' mina 'lâded ábon' waómmon' thomma binto'bni wajedd wálókhto binto 'lábi thomma 'ljeddah waweledo 'lómmi temámo 'lìddah fálábo yeftahhịkkoho mâa 'lweled wahacadbaí 'lómmo betenzeíli 'Is'emed
wahú lehá áydh'án' mâa 'láthnaíní $\min$ íkhwah'i 'lmaíti fakis hadhaini wáljeddo mithlo 'lábi înda fakdihi feí jeza má yes'éboho wameddihi illá ídhá cána honáca íkhwah licaúnahom feí 'lkurbi wahú áfwah wahhucmohim wahhucmoho feyáteí mocammela 'lbayána feí 'lhháláti wabinto 'líbni tákhodh álfudfa ídhá cánat mâá 'lbinti mithálá yahhtadhaí wahacadhaí 'lókhto mâa 'lókhti 'llataí
biálábawaíni yá ókhayyo ádlata faïn tefáwaí nefebo 'ljeddáti wacunna cullahonna wáritháti
fálfudfo baínahonna biálfawiyyah feí 'lkifmah'i 'lâádilah'i 'lherîyyah wacullo men ádlat bigaíri wárithi femá lehá hhadh" ${ }^{\prime}{ }^{\prime \prime}{ }^{\prime}{ }^{\prime}$ mina 'lmawárithi.

## [5]

watafkotho 'lbôdaí bidháti 'lkurbi
feí 'lmedh-hebi 'láulaí fakol leí hharbeí
wakad tenáhat kifmah'o 'Iforúdh'i
bigaíri ífhcáli welá gomúdh'i
wahhokka án nefhraâ feí 'ltâs'ébi
biculli kaúlin' mújizin' mus'ébi
facullo men áhhraza culla 'lmáli
mina 'lkarábáti aú álmawálé́
áú cána má yafdh'olo bâda 'lfardh'i leh
fahú ákhú 'lâsúbahi 'lmofadh'dh'aleh
> cálábi wáljeddi wajeddi 'ljeddi wálíbni înda kurbihi wálbôdi wálakhi wábni ’lákhi wáláâmámi wálfayyidi 'lmêtiki dheí 'línâámi wahacadhaí benı́ohom jeméíáán' facun lemá ádhcoroho femeiâán' wamá ledheí 'lbôdi mâa 'lkareíbi feí 'lírthi min hhadh' ${ }^{\prime}$ ' 'in' wela nes'eíbi wál'ákho wálâmmo li'mmnin' waábi áúlaí mina 'lmodlé bilhathri 'lnafabi wa'líbno wálíkho mâa 'línáthi yoâs'sibínahinna feí 'lmérráthi walaífa feí 'Inifâi th'urrán' âs'abah illá 'llataí mennat bi îtki 'lrakabah wálákhawáto ín yecun benáto fahonna bâdahonna âs'abáto wa'ljeddo mahhjúbon' âni 'Imeíráthi bílábi fé́ áhhwálihi 'Itheláthi wahacadhaí 'bno 'líbni bi'líbni felá tabig âni 'lhhacmi 'lfáhheíhhi mâdilá

## [6]

watarkoth'o 'ljeddáto min culli jiheh bi 'lómmi fáhhfadh"-ho wakis má áfhbeheh watafkoth'o 'líkhwah'o bi'lbeneíná wabi lábi 'ládnaí camá ruweíná áú bibeneí 'lbeneína hhaítho cánúá , fiyyáni féhi 'ljemâ wa'lwahhdáno wayafdh'olo'bno 'lómmi bi'lifkáthí bi'ljeddi fáhhfadh"-ho âlai îhhtiyáth'i

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wabi 'lbenáti wabenáti ' 'íbni
facun bihhifdh"i 'lilmi jiddán' môneí
thomma benáto 'líbni yefkoth'na metaí
hháza 'lbenáto álthulthaína yá fetaí
illá ídhá âs's'abahonna áldhacaro
min welidi 'líbni âlaí má dhacarúá
wabâdahonna 'lákhawáto 'llátaí
yodleína bi'lkurbi min áljiháti
ídhá ákhádna fardh'̌honna wáfiyá
áfkath'na áúláda 'lábi 'lbawáciyá waị n yecun ákho lehonna hhádhirán' áâśabahonna bathínán' wadh"ahirán'
walaífa íbno'lákhi bilmoâs's'abi men mithlaho áú faúkaho fé́ 'Inafabi
waìn tajid zaúján' waómmán' wárithá waïkhwah'an' lilómmi hházúá 'lthulothá waákhwah'an' áydh'án' liómmi waábi waáfturgrika 'lmálo bifardhi' 'lnos'obi fájâlahomo cullohomo liómmi waáhhfib ábáhom hhajarán' feí 'lyammi wákfim âlaí 'líkhwahí thultha 'ltaricah wahadhihi 'lmefelah'o 'Imufhtaracah

## [7]

wálána nebdá bi’lladhaí áradná
feí 'ljeddi wa'líkhwahi ídh waâdná
faálik nahhaú má ákúlo 'lmifmaâá
wájmâ hhawáfhé 'lcelamáti ájmaâá
wââlem biánna 'ljeddo dhú áhhwáli
ónbeíca ânhonna âlaí 'ltawálé
fakáfimo ’líkhwahi feíhonna ídhá
lam yaôdi 'lkafmo âlaíhi bi'ládhai
fatárah'an' yákhodho thulthán' cámilán'
ín cána bi’'kiffnahi'i ânho názilán'
ín lam yecun féhim dhawú fihâmi
fálnâ biáydh áhheí âni íftifhámi
watárah'an' yakhodho thultha 'lbákeí
bâda dhaweí 'lforudhi wa'lárzaki
hadhá ídhá má ádh'-hhati 'lmokáfamah
tenkos'ho âni dháci bi'lmezá'lhamah
watárah'an' yákhodho fudfa 'lmáli
walaífa ânho názilán' bihháli
wahaú mâa 'línáthi înda 'lkafmi
mithlo ákhin' fé fahmihi wa'lhhocmi
wáhhfeb beneí 'lábi ledaí 'lìdádi
wárfodh' beneí 'lómmi mâa 'lájdádi
wáhhcom âlaí 'líkhwah'i bàda 'lâddi
hhocmaca feíhim înda fakdi 'ljeddi
wálókhto lá fardh o mâa 'ljeddi lehá
fcíma âlá mefelah'an' cammalehá zaújon' waómmon' wahromá temámohá
fââlem fakháro ómmahin îllámohá
tôrafo yá s'áhhi bi’lácdariyyah
waheí bián tạhhfadh o-há hhariyyah

## [8]

fayofradh'o 'lnis'fo lehá wa'lfudfo leh
hhataí tâúli bi'lforúdhi 'lmojmeleh
thomma yaûúdáni ilaí 'lmokáfameh
camá madh'aí fáhhfadh"-ho wáfhcor nádh"imeh waïn torid mârifah'a 'lhhirábi letentahal feíhi ílaí 'ls'awábi watârifo 'lkifmah'a wa'ltafs'élá watâlim áls'ahheíhha wa'lós'úlá fáftakhriji 'lós'úla feí 'Imefáyili walá tecun ân hhifdh"ihá bidháhili wahaí idhá fos'silla feíhá 'lkaúlo thelethah'on' yedkholo fé́há 'lâúlo wabâdahá árbaâh'on' temámo
lá âúla yârúhá welá ínthilámo
falfudfo $\min$ fittahí ás-homin' terá wálthultho wa'lrubô min áthnaí âfhará
wálthumno ín dh'omma ílaíhi 'lfudfo
faás'loho 'lsádiko feíhi 'lhhadfo
árbaâh'on' yatbaôhá îhrúná
yârifohá 'lhhufábo ájmaûúná
fahadhihi 'lthelethah'o 'lós'úlo
in caththorat forúdh'ohá taûúlo
fatablogo 'lfittah'o âkda 'lâthareh
feí s'úrah'in' mârúfahin' muftath'areh
watalhhako 'llataí teleíhá fei 'láthar
feí 'lâuli áfrảdán' befebâh'i âfhar
wa'lâdado 'lthálitho kad yaûúlo
bithumnihi ffâmel bimá ákúlo
wa'lnis'fo wa'lbakeí áwi'lnis'fáni
áslohomá feí hucmihom áthnáni

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## [9]

wa'lthultho min thelethah'in' yecúno wa'lrubô min árbaâh'in' mefnúno wa'lthumno ín cána famin themániyah
fahadhihi haí 'lós'úlo 'lthániyah
lá yedkholo 'lâúlo alaíhá fáâlemi
thomma áfloca 'lrás'-hheíhi feíhá wákfini
faï'n tecun min ás lihá tas'îhhhho
fatarco tath'weili 'lhhifábi ribhho
faâth'i cullán' fahmaho min ás'lhi
mocammilán' aú ááyilán' min âúlihi
waïn terai 'lliháma laifa tankafim
âlaí dhaweí 'Imeíráthi fátbâ má rufim wáthlob th'areíka 'likhtis'ári feí 'lâmal bi'ldh'arbi wa'lwafki yojánibca 'lzelel wárdod ilaí 'lwafki 'lladhai yowáfiko wádh'ribho feí 'lás'li waánta 'lhhádiko

- in cána jinfán' wáhhidán' áú áctherá fahhfadh" wadâ ánca 'ljidála wa'lmirá wai'n terai 'lcathra âlaí ájnáfi faï'nnahá feí 'lhucmi înda 'Ináfi tohhs'aro feí árbaâh'in' ákfámi yârifohá 'lmáhiro feí 'láhhcámi momáthilon' min bâdiho monáfibo wabâdaho mowáfikon' mos'ahhibo wa'Irábiô 'lmobáyino 'lmokhálifo yonbeíca ân tafs'élihinna 'laárifo fakhodh mina 'lmomáthilaini wáhhidá
wakhodh mina 'lmonáfibaíni 'lzáyidá wakhodh jemefâ 'lâdadi 'lmobáyini wadh'ribho feí 'ltháneí welá todáhini

> [10]
wádh'rib jeméâa 'lwafki feí 'lmowáfiki wáfloc bidháca ánhaja 'lth'aráyiki wádh'ribho fế 'lásli 'lladhaí taás'silá waáhhsí má ándh'amma wamá tahhas's'alá waákfimho fa'lkafma ídhá s'ahheíhho yârifoho l’ââjemo wa'lfas'eíhho fahadhihi mina 'lhhifábi jumalo yáteí âlaí mithálihinna 'lâmalo min gaíri tath'wélin' welá 'âtifáfi fáknâ bimá feíhinna fahứ cáfi waï n yemut ákharo kabla 'lkifmah fahhakkiki 'lfihámi wâarrif kifmah wájâl leho mefalah'an' ókhraí lemá kad bayyana 'ltafs'eila feímá koddimá' wándh"or faìn wafakati 'lfihámo fakhodh hodeíta wafkohá temáno wádh'ribho áú jemeiâhá feí 'llábikah ín lam yecun baínahomá mowafakah fálás-homo 'lókhraí fafeí 'llihámi todh'rebo áú fé wafkihá temámi wacullo fahmin' fé jemeîir 'lthánìyah yodh'rebo áú feí wafkihá âlániyah fahadhihi th'areíkah'o 'Imonáfakhah
fárka bihá rutbah'a fadthi fhámikhah
waï'n yecun fé muftahhakki 'lmálí
khonthain' s'áhheíhhon bayyana 'lífcáli
fákfim âlaí lákalli wa'lyekeíni
tahhdh"a bihakki 'lkifmah'i 'lmobeíni
wahacadhaí hucmo dhawáti 'lhhàmli
yobnaí âlaí 'lyekeíni wa'lákalli
[11]
waï'n yemut kaúmon' bihadmin' aú garal áú hhádithin' âmma 'ljemeíâ ca'lhharak walam yecun yôlemo hhálo 'lfábiki falá yowarrath ráfikon' min náfiki . taôddohom caï'nnahom ájánibo wahacadhaí 'Iráyyo 'Ifadeído 'Is'áyibo wakad átaí 'lkaúlo âlaí má fheíná min kifmah'i 'lmeíráthi ca yebeíná âlaí th'areíki 'lramzi wa'lífhárah molakhkhas'án' biáújezi 'libárah fa'lhhamdo lillahi âlaí 'ltemámi
hhamdán' catheírán' tomma feí 'ldawámi
wanafalo 'lalafwa âtri 'Itak's'éri
wakhaíra má námolo feí 'lmes'eíri wagafra má cána mina 'ldhonúbi
wafatra má cána mina 'lôyúbi
waáfdh'alo 'ls'alwahi wa'ltanleími
âlaí 'Inebiyyi 'lmus'th'afaí 'Icereími mohhammedin' khaíri 'lánámi 'lâákibi
waálihi 'lgurri dhaweí ${ }^{\prime}$ Imenákibi
was'ahhbihi 'lááádh ïli ’labbrári

## 181

> áls"ifwahỉ 'lámáthili 'lakhyári wahhafboná 'llaho wanîma 'lcáfeí dhú 'lìzzi. 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'ayyibeíni álth'ahereíni
> laílah'o 'ljemaâh liárbaâi liyáli
> khalaúna min fhewáli finnah
> áthneí âfhari wafebâ máyih'i
> yetheki bi'llahi taâálaí fakhro 'ľábikáneí
> affá ’llaho ânho.
-
-

## THE DESIRED OBJECT OF THE NQUIRER

## CONCERNING ALL THE RULES OF INHERITANCE:

Composed by the learned Shaikh, the Imám
Mowaffiko'ddein, father of Abdalla,
Mohammed, son of Ali, son of Hosain,
Al Rababi, commonly called Ibno'l
Motakanna. May God be merciful to him!
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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, Монammed, seal of his Lord's messengers, And his family, after him, and his friends! And let us pray cod for his aid to us In what we have proposed to explain From the system of the Imám, zaid alfaradii ${ }^{*}$, (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 brancb of knowledge peculiarly belongs to what Has been openly declared among all the fearned; And zaid has unquestionably a just titlo 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 shafier takes him for a guide. This then is his doctrine epitomised

[^1]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, wubo imberit, 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. Now the shares, by the declaration of the book, are six : (Besides them is no share in the inheritance)

[^2]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 wbole sister, by the opinion of every murit,
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 him
Any children of the wife, who deprive him of more;
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 $\dagger$, 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,

[^3]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 :ight 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: givẹ 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,

[^4]And thus a sister with a sister, who
Is related, $\mathbf{O} \mathrm{my}$ 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 thie 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 herrshir
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 slare. 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 :

[^5]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 threc cases;
And thus the grandson by the son: (do not then
Turn aside, in deviation from the clear rules).

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 assiduons in committing kiowledge to memory)
Besides, the sen's daughters are excluded, when
The daughters take two thirds, 0 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 cach 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.
[i]
And now we will enter upon what we desire
Concerning the grandfather and the brothers, as we prop mised.
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 dificient 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 entitted 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 themother, and these two are all of them,
(Know then'; for the best of the sect is he who knows bestit
Are called, O friend, the áclariyyalı;
And they deserve to be remembered by thee.
[ s ]
Half then is given to hicr, and a sixth to him;
Until there is a remainder after the entire shares,
Then they return to the distributioni
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 analpsis;
And wilt be acquainted with integers and fractions ?
Extract then the roots in solving problems $\dagger$,
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 $\ddagger$.
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 now root, concerning which the calculation is justy
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 $\|$,

[^6]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 retmains, 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 3
And these are the second roots,
To which no remainder belongs : know this;
Then pursuie 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 proscribed,
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 ruies;
The similar ternh, after it the proportional,
is refers. The suagenary table, which Wallis exhibits in the seventil chapter of his A\%titra, is commonly used in Aria for multiplication and divivion. See Crardix, rolim. p. 155.

[^7]0

And, after that, the concordant accompanying,
And the fourth is the discordant separated;
(The intelligent man will inform thee of their distinctionst
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 ${ }_{\mathrm{p}}$, 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 furactical rules: see his chapter on the Persian Arithmentik.
+ It can only be of use, as an artificial memory, to those who al. ready know the rules, but is insufficient for the teaching of them, These two or three pages are very enigmatical ; but I should not deoptir of explaining them, if I had leisure to read a few arithmetical boble ofutie Atab: cs Perrians.

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.

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

[^8]
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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 spotess, the exalted, the beneficent!
And our sufficient help is cod!' $\mathbf{O}$ allt-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 tweive*

The Transcriber, surnamed fakhról sa'bita'm (or, Excelling his Predecessors) confides in God Most High:
May cod forgive his sins!.

- Y. ©. 132


# ALSIRȦJYYAH: 

OR,

THE MOHAMMEDAN LAW OE
INHEBITANCE:
A COMMENTARX,
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$\rfloor$

GIE W合LILAM JONES

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## PREFACP.

The two Mufelman authors, whom I now introduce to my countrymen in India, are Staikit Sira'ju'ditin, a native of Sejávend, and Sayyad Shari'f, who was born at $\mathfrak{F} u r j a ́ n$ in Kbwárezm near the mouth of the Oxus, and is faid to have died, at the age of feventy-fix years, in the city of Shíráz: their compofitions have equal authority in all the Mobammedan courts, whick follow the fyftem of Abu' Hanifah, with thofe of Littleton and Coke in the courts at Weftiminfter; and there is, indeed, a wonderful analogy between the works of the old Arabian and Englifh lawyers, and between thofe of their feveral commentators; with this difference in favour of our own country, that Litterton is always too clear to need a glofs, and with this difference in favour of the Arabs, that the fole object of Sharif was to explain and illuftrate his text, without an oftentatious dif-
play of his own erudition; by, when it is admitted, that a defire of extreme brevity has often made the Sirajijyyah obfcure, the reader thould in candour allow, that every author mutt appear to great difadvantage in a literal tranflation, efpecially when his own idiom differs totally from that of his tranflator, when his terms of art muft be rendered by new words, which ufe alone can make eafy, and when the fyitem. which he unfolds to his countrymen, has novefemblance to any other, that the world ever knew, In the Sbartfyyah (for that is the popular title of the Arabian comment) we find little or no obfcurity; and, if there be a fault in the book, it is a fcrupulous minuteness of explanation, and a needlefs anxiety to remove every little cloud, which the reader himfelf might difperfe by the dighteft exertion of his intellect. Both works were tranilated into Perfaian by the order of Mr. Hastings; and the tranlation, which bears the name of Maulavi Muhammed Ka'sim, muft appear excellent, and would be really ufeful, to fuch as had not accefs to the Arabick originals; but the text and comment are blended without any dif. crimination, and both are fo intermixed with the notes of the tranflator himfelf, that it is often impoffible to feparate what is fixed law from what is merely his own opinion: he has
alio erred (though it be certainly a pardonable efrour) on the fide of clearnefs, and has made his work fo tedioully perfpicuous, that it fills, inclufively of a turgid and flowery dedication, about fix hundred pages, and a faithful verfion of it in Englifh would occupy a very large volume.

If the pains, which have been taken to render my own work as complete as poffible, be meafused by the fize of it, they muft be thought very inconfiderable; but in truth no greater pains could have been taken with any work; and it would have been a far eafier tank to have dictated or written a verbal tranflation of the two comments on my text, than to have made a careful felection of all that is important in them; for which purpofe I perufed each of them three times with the utmoft attention, and have condenfed in little more than fifty fhort pages the fubftance of them both, without any fuperfluous paffage, that I Mhould wifh to be retrenched, and with as much perfpicuity as I was able to give, in fo thort a compals, to 2 fyftem in fome parts rather abftrufe: left men of bufinefs, for whom the book is intended, thould be alarmed at firft fight by the magnitude of it, I have omitted all the minute criticifm, various readings, and curious Arabian literature; moft of the anecdotes concerning old
lawyers, and all their fubtil controverfies with -the arguments on both fides; together with the demonftrations of arithmetical rules and the - wery long proceffes, after the prolix method of the Arabs, in words inftead of figures. Practical utility being my ultimate object in this work, I had nothing to do with literary curiofities, how agreeable foever they might have been in their proper places; but, in order to attain that object by a full explanation of every thing ufeful in my text, I was under a neceffity of retaining the Arabian phrafeology both in law and arithmetick, and muft requeft the Engli/b reader to difmifs from his mind, while he ftudies the Sirdjizyyab, thofe appropriated fenfes, in which many of our words, as heir, inheritance, root, and the like, are ufed in our own fyftems. One Arabick word I was at a lofs to tranflate precifely in our language without circumlocution : the chief problem, in the diftribution of eftates among Mufelman heirs, is to find the leaft number, by wobich an eftate muft be divided, fo tbat all the fhares and the refidue may be legally dijfributed without a fraction: this they call integration; but, if I could have hazarded fuch a word in Euglifb, the frequent repetition of it would have been extremely harih; and I have generally called it arrangement or verification, which are poputar fenfes of the Arabick verbal noun';

But the number fought, or, to ufe the Arabian exprefing, the integrant of the cafe, I have ufirally named the divifor of the eftate.

It will be feen in the Sindijiygak, that the fyftem of Zaid, though in part exploded by Aby Hanífat, had very powerful fupporters, and its author is always mentioned in terms of refpect: it is the fyftem, which I publifhed at London above ten years ago; and I am not furprifed, that, without a native affiftant or even a marginal glofs, I could not then interpret the many technical words, which no dietionary explains, except in their popular fenfes; but, though my literal verfion of the tract by Almuz tazanna feems for pages together like a ftring of enigmas, yet the following work makes every fentence in it perfectly clear; and the original, which was engraved from a very old manufcript, appears to be a lively and elegant epitome of the law of inheritance according to 2mid; but manifefly defigned to affift the memory of young ftudents, who were to get it by heart, when they had learned the rules from fome longer treatife; or from the mouths of their ppeceptors. This may be no improper place to inform the reader, that, although Abu Hanfrait be the acknowledged head of the prevailing fect, and has given his name to it, yet fo greet veneration is shown to Abu $\mathbf{Y}^{\prime} \neq$ wof and the lawyer Mumanmid, that, when
they both difent from their mafter, the Mufelman judge is at liberty to adopt either of the two decifions, which may feem to him the more confonant to reafon, and founded on the better autharity.

I am ftrongly difpofod to believe, that no poffible queftion could occur on the Mohammedan law of fucceffion, which might not be rapidly and correctly anfwered by the help of this work; but it would be eafy to confirm or invalidate my opinion by the following method. Let one capital letter, or more, if neceffary, séprefent each of the Tharers, refiduaries, and diftant heirs; and let thofe letters be the inicials of the feveral words, in aid of the memory, but fo chofen (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 poffible cafes, in which they can occur, two and two, three and three, and fo forth; let them accordingly be arranged in tables from the loweft number to the higheft; and let the hare. or allotment of each be fet above the letter, in the place of an exponent. If the queftion: then were propofed, in what manner the pro-perty of Hinda mult be diftributed among her: daugbter, her fifter by the fame father onlys and: the daugbter of ber fons the table of the thind.
claff would exhibit this formsia $D \frac{3}{6}+\mathrm{DF}_{\frac{2}{6}}$ + DS $\frac{1}{t}$; or, if Amru had left his wife, two dangbters, and botb bis parents, the formura in the fourth table would be $2 \mathrm{D}_{\frac{1}{27}}^{\frac{6}{7}}+\mathrm{F}_{\frac{4}{2 T}}+\mathrm{M}_{{ }_{2}{ }^{4}}$ $+\mathrm{W}_{\mathrm{j}}^{\mathbf{3}}$; where the denominator of the index would be the integrant, as the Arabs call it, of the cafe, and the numerator would point out the feveral allotments: thos might we confruet a fet of tables, mathematically accurate, in which the legal diftribution, in every pofible cafe, might be feen in a moment without thought and even without learning; and fach a blind facility, though not very confiftent with the dignity of fcience, would certainly be convenient in practice. We might alfo arrange the whole in a fynthetical method (of all the matt luminous and fatisfactory) by beginning with the fentences of the Koràn, as with indubitable axioms, followed by the genuine oral maximes of Murammed; by fubjoining the points, on which all the learned have at length agreed, and by concluding with cafes deduced from thofe three fources of juridical knowledge, to which there thould be conftant references by numbers in the manner of geometricians: this methôd I propofe to adopt in the Digeft, from which I have feparated the Sirdjiyyab, becaufe it feemed worthy of being exhibited entire, and mey be confidered as Inftitutes of Arabiars Law ou the important title, mentioned by the Britiß
legillature, of inberitance and fucceffion to lands, rents, and:goads.
. Unlefs I am: greatly deceived, the work, now prefented to the public, decides the queftion, which has been ftarted; whether, by the Mogul conftitution, the favereign be not the fole proprietor of all the land in bis empire, which he or his predeceffors have not granted to a fubject, 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 fo far is the fovereign from having any right of property in the goods or lands of his people, that even efcheats are never appropriated to his ufe, but fall into a fund for the relief of the poor. Sharif exprefsly mentions fields and boufes as inheritable and alienable property: he fays, that a boufe, on which there is a lien, fhall not be fuld to defray even funeral expenfes; that, if a man dig a well in bis own.field, and another man perifh by falling into it, he incurs no guilt; but, if he had trefpaffed on the field of anotber man, and had been the occafion of death, he muft pay the price of blood; that buildings and trees pafs by a fale of land, though not converfely; and he always expreffes 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 cafe of contrefts, or, by the act of
lazo, as in the cafe of deficnts; and, having obferved, that freedoon is. tbe civil exiftence and life of a man, but lavery, his deatb and annibilation; he adds, becaufe freedom eftablifles bis right af property, which cbiefly diftinguibhes man from other animals and from things inanimate; fo that he would have confidered fubjects without property (which, as he fays in another place, comprifes every tbing that a man may fell, or give, or leava for his beirs) as mere flaves zoithout civil life: yet Sharif was beloved and rewarded by the very conqueror, from whom the imperial houre of Dehli boafted of their defcent. The Kordm allots to certain kindred of the deceafed fpecifick fhares of what he left, without a fyllable in the book, that intimates a thade of diftinction between realty and perfonalty; there is there? fore no fuch diftinction, for interpreters muft make none, where the law has not diftinguifhed: as to Muhammed, he fays in pofitive words, that if a man leave either property, or rigbts, they go to his heirs; and Sharif adds that an heir fucceeds to his anceftor's effate with an abfolute rigbt of owner/bip, right of pofiefionn and power of alienation. Now I am fully perfuaded, that no Mufelman prince; in any age or country, would have harboured a thought of controverting thefe authorities. Had the doctrine lately broached been fuggefted to the ferocious, but politick and religious,

Omar, he would in his beft mood have afked his counfellor fternly, whether he imagined himfelf wifer than God and his Prophet, and, in one of his paffionate fallies, would have fpurned him as a blafphemer from his prefence, had he been even his deareft friend or his ableft general: the placid and benevolent Ali would have given a harfh rebuke to fuch an advifer; and Aurangzís himfelf, the bloodieft of affaffins and the moft avaricious of men, would not have adopted and proclaimed fuch an opinion, whatever his courtiers and flaves might have faid, in their zeal to aggrandize their mafter, to a foreign phyfician and philofopher, who too haftily believed them, and afcribed to fuch a fyftem all the defolation, of which he had been a witnefs. Conqueft could have made no difference; for, either the law of the conquering nation was eftablifhed in India, or that of the conquered was fuffered to remain: if the firft, the Koràn and the dicta of MuhamMed were fountains, too facred to be violated, both of public and private law; if the fecond, there is an end of the debate; for the old Hindus moft affuredly were abfolute proprietors of their land, though they called their fovereigns Lords of the Earth; as they gave the title of Gods on Earth to their Bráhmens, whom they punifhed, neverthelefs, for theft with all due feverity. Should it be urged, that, although a

Indian pritice may have no right, in his executive capacity, to the land of bis fubjects, yet, as the fole legifatioe power, he is above control; I anfwer firmly, that Indian princes never had, not pretended to have, an unlimited legiflative authority, but were always under the control of laws believed to be divine, with which they never claimed any power of difpenfing.
I am happy in an opportunity of advancing thefe arguments againft a doctrine, which I think unjuft, unfounded, and big with ruin; for, in the courfe of bine years, I have feen enough of thefe provinces and of their inhabitants, to be convinced, that, if we hope to make our government a bleffing to them and a durable besefit to ourfelves, we muft realize our hope, not by wringing for the prefent the largeft poffible revenue from our Affatick fubjects, but by taking no more of their wealth than the publick exigencies, and their own fecurity, may actually require; not by diminifhing the intereft, which landlords muft naturally take in their own foit, but by augmenting it to the utmoft, and giving them affurance, that it will defcend to their heirs: when their laws of property, which they literally hold facred, fhall in practice be fecured to them; when the land-tax thall be fo moderate, that they cannot have a colourable pretence to rack their tenants, and VOL. VI.
when they hall have a well grounded confidence, that the proportion of it will never be raifed, except for a time on fome great emergence, which may endanger all they poffefs; when either the performance of every legal contract fhall be enforced, or a certain and adequate compenfation be given for the breach of it; when no wrong thall remain unredreffed, and when redrefs fhall be obtained at little expenfe, and with all the fpeed, that may be confiftent, with neceffary deliberation; then will the population and refources of Bengal and Bahar continually increafe, and our nation will have the glory of conferring happinefs on confiderably more than twenty-four millions (which is at leaft the prefent number) of their native inhabitants, whofe cheerful induftry will enrich their benefactors, and whofe firm attachment will fecure the permanence of our dominion.

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## AL SIRÁJIYYAH.

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## THE

## INTRODUCTION.

## IN THE NAME OF THE MOST MERCIFUL GOD!

PRAISE be to GOD, the Lord of all worlds; the praife of thofe who give Him thanks! And His bleffing on the beft of created beings, MUHAMMED, and his excellent family! The Prophet of GOD (on whom be his bleffing and peace!) faid: "Learn the laws of inheritance, "and teach them to the people; for they are "one half of ufeful knowledge." Our learned in the law (to whom GOD be merciful!) fay: "There belong to the property of "a perfon decealed four fucceffive duties to " be performed by the magiftrate : firf, his fune"ral ceremony and burial without fuperfluity " of expenfe, yet without deficiency; next, the
" difcharge of his juft 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, laftly, the diftri" bution of the refidue among his fucceffors, ac"cording to the Divine Book, to the Traditions, " and to the Affent of the Learned." They begin with the perfons entitled to fhares, who are fuch as have each a fpecifick fhare 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 thofe who are entitled to fhares; and, if there be only refiduaries, they take the whole property: next to refiduaries for fpecial caufe, as the mafter of an enfranchifed Have and his male refiduary heirs; then they return to thofe entitled to fhares according to their refpective rights of confanguinity; then to the more diftant kindred; then to the fucceffor by contract; then to him who was acknowledged as a kiniman through another, fo as not to prove his confanguinity, provided the deceafed perfifted in that acknowledgement even till he died; then to the perfon, to whom the whole property was left by will; and laftly to the publick treafury.

## On Impediments to Succeffion.

Impediments to fucceffion are four; 1 , fervitude, whether it be perfect or imperfect; 2, homicide, whether punifhable 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 ftates: now a ftate differs from another by having different forces and fovereigns, there being no community of protection between them.

On the Doctrine of Sbares, and the Pirfons entitled to them.

The furud, or fhares, appointed in the book of Almighty GOD, are fix: a moiety, a quarter, an eighth, two thirds, one third, and a fixth, fome formed by doubling, and fome by halving. Now thofe entitled to thefe fhares are twelve perfons; four males, who are the father and the true grandfather or other male anceftor, how high foever in the paternal line, the brother by the fame mother, and the hufband; and eight
females, who are the wife, and the daughter, and the fon's daughter, or other female de. fcendant how low foever, the fifter by one father and mother, the fifter by the father's fide, and the fifter by the mother's fide, the mother, and the true grandmother, that is, the who is related to the deceafed without the intervention of a falfe grandfather. (A falfe male anceftor is, where a female anceftor intervenes in the line of afcent.) The father takes in three cafes; 1 , an abfolute fhare, which is 2 fixth, and that with the fon, or fon's fon, how low foever; 2, a legal thare, and a refiduary portion alfo; and that with a daughter, or a fon's daughter, how low foever in the degree of defcent; 3, he has a fimple refiduary title, on failure of children and fon's children, or other low defcendants, The true grandfather has the fame intereft with the father, except in four cafes, which we will mention prefently, if it pleafe 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 alfo take in three cafes: a fixth is the fhate of one only; a third, of two, or of more: males and females have an equal divifion and right; but the mother's children are excluded by children of the deceafed and by fon's children,
how low foever, as well as by the father and the grandfather; as the learned agree. The huiband takes in two cales; half, on failure of children, and fon's children, and a fourth, with chuldren or fon's children, how low foever they defcend,

## On Women.

Wives take in two cafes; 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 defcent. Daughters begotten by the deceafed take in three cafes: 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 refiduaries. The fon's daughters are like the daughters begotten by the deceafed; and they may be in fix cafes: 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 deceafed, they have a fixth, completing (with the daugbter's balf), two thirds; but, with two daughters of the deceafed, they have no thare of the inheritance, undefs there be, in an equal degree with, or in a lower degree than, them, a boy, who makes
them refiduaries. As to the remainder between them, the male has the portion of two females; and all of the fon's daughters are excluded by the fon himfelf.

If a man leave three fon's daughters, fome of them in lower degrees than others, and three daughters of the fon of another fon, fome of them in lower degrees than others, and three daughters of the fon's fon of another fon, fome of them in lower degrees than others, as in the following table, this is called the cafe of ta/bbib.


Here the eldeft of the firf line has none equal in degree with her; the middle one of the firft line is equalled in degree by the eldeft of the fecond; and the youngeft of the firft line is equalled by the middle one of the fecond, and by the eldeft of the third line; the youngeft
of the fecond line is equalled by the middle one of the third line, and the youngeft of the third fet has no equal in degree.-When thou halt comprehended this, then we fay: the eldeft of the firft line has a moiety; the middle one of the firft line has a fixth together with her equal in degree to make up two thirds; and thofe in lower degrees never take any thing, unlefs there be a fon with them, who makes them refiduaries, both her who is equal to him in degree, and her who is above him; but who is not en. titled to a thare: thofe below him are excluded.

Sifters by the fame father and mother may be in five cafes: half goes to one alone; two thirds to two or more; and, if there be brothers by the fame father and mother, the male has the portion of two females; and the females become refiduaries through him by reafon of their equality in the degree of relation to the deceafed; and they take the refidue, when they are with daughters, or with fon's daughters, by the faying of Him, on whom be bleffing and peace! " Make fifters, with daughters, refi"duaries."

Sifters by the fame father only are like fifters by the fame father and mother, and may be in feven cafes: half goes to one, and two thirds to two or more on failure of fifters by the fame father and mother; and with one fifter by
the fame father and mother, they have a fixth, as the complement of two thirds; but they have no inheritance with two fifters by the fame father and mother, unlefs there be with them a brother by the fame father, who makes them refiduaries; and then the refidue is difiributed among them by the facred rule "to the male "what is equal to the thare of two females." The fixth cafe is, where they are refiduaries with daughters or with fon's daughters, as we have before ftated $i t$.

Brothers and fifters by the fame father and mother, and by the fame father only, are all excluded by the fon and the fon's fon, in how low a degree foever, and by the father alfo, as it is agreed amiong the learned, and even by the grandfather according to ABU HANIFAH, on whom be the mercy of ALMIGHTY GOD! And thofe of the half-blood are alfo excluded by the brothers of the whole blood.

The mother takes in three cafes: a fixth with a child, or a fon's child, even in the loweft degree, or with two brothers and fifters or more, by whichever fide they are related; and a third of the whole on failure of thofe juft-mentioned ; and a third of the refidue after the thare of the hutband or wife; and this in two cafes, either when there are the hufband and both parents, or the wife and both parents: if there be a
grandfather inftead 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 cafe alfo the has only a third of the refidue. The grandmother has a fixth, whether fhe 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 anceftors alfo by the father; and in like manner, by the grandfather, except the father's mother, even in the higheft degree; for the takes with the grandfather, fince fhe is not related through him. The neareft grandmother, or female anceftor, on either fide, excludes the more diftant grandmother, on whichever fide the be; whether the nearer grandmother be entitled to a thare of the inheritance, or be herfelf 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 alfo the father's father's mother, according to this table,

Mother


Mother


Father

then a fixth is divided between them, according to ABU YUSUF, in moieties, refpect being had to their perfons; but, according to MUHAMMED (on whom be GOD's mercy!) in thirds, refpect being had to the fides.

## On Refiduaries.

Residuaries by relation to tbe deceafed are three: the refiduary in his own right, the refiduary in another's right, and the refiduary together with another. Now the refiduary in his owr right is every male, in whofe line of relation to the deceafed no female enters; and of this fort there are four claffes; the offspring of the deceafed, and his root; and the offspring of his father and of his neareft 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 firft; then their fons, in how low a degree foever: 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 ftrength
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 fame father " and mother fhall inherit before kinfmen by "the fame 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 fame father and mother, if the become a refiduary 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 fame father only; and the rule is the fame in regard to the paternal uncles of the deceafed; and, after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grandfather.

The refiduaries in another's right are four females; namely, thofe whofe thares are half and two thirds, and who become refiduaries in right of their brothers, as we have before mentioned in their different cafes; but fhe who has no thare among females, and whofe brother is the heir, doth not become a refiduary in his right; as in the cafe of a paternal uncle and a paternal aunt.
As to refiduaries together with others: fuch is every female who becomes a refiduary with
another female; as a fifter with a daughter, as we have mentioned before. The laft refiduary is the mafter of a freedman, and then his refiduary heirs, in the order before ftated; according to the faying of Him, on whom be bleffing and peace! " The mafter 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 themfelves manumitted a llave; or " their freedman has manumitted one, or they " have fold a manumifion to a llave, or their "vendee has fold it to his flave, or they have " promifed manumiffion after their death, or " their promifee has promifed it after his death, " or unlefs their freedman or freedman's freed" man draw a relation to them."

If the freedman leave the father and fon of his manumittor, then a fixth of the right over the property of the freedman vefts in the father, and the refidue in the fon, according to $A B U$ rUSUF; but, according to both ABU HANLFAH and MUHAMMED, the whole right vefts in the fon; and, if a fon and a grandfather of the manumittor be left, the whole right over the freedman goes to the fon $x_{x}$ as all the leamed agree. When a man poffeffes as his lave a
kinfman in a prohibited degree, he manumita him, and his right vefts in him; as if there be three daughters, the youngeft of whom has twenty dinàrs, and the eldeft, thirty; and they two buy their father for fifty dinàrs; and afterwards their father die leavigg fome property; then two thirds of it are divided in thirds among them, as their legal fhares, and the refidue goes in fifths to the two who bought their father; three fifths to the eldeft and two fifths to the youngeft ; which may be fettled by dividing the whole into forty-five parts.

## On Exclufion.

Exclusion is of two forts: 1. Imperfect, or an exclufion from one thare, and an admiffion to another; and this takes place in refpect of five perfons, the hufband or wife, the mother, the fon's daughter, and the fifter by the fame father; and an explanation of it has preceded. 2. Perfect exclufion: there are two fets of perfons having a claim to the inheritance: one of which fets is not excluded entirely in any cafe; and they are fix perfons, the fon, the father, the huiband, the daughter, the mother, and the wife; but the other fet inherit in one cafe and in another cafe. VOL. VI. Q
are excluded. This is grounded on two principles; one of which is, that " whoever is related " to the deceafed through any perfon, ©hall not "inherit, while that perfon is living;" as a fon's fon, with the fon; except the mother's children, for the ginnerit with her; fince the has no title to the whole inheritance: the fecond principle is, " that the neareft of blood muft take,". and who the neareft is, we have explained in the chapter on refiduaries. A perfon incapable of inheriting doth not exclude any one, at leaff 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 perfon 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 deceafed, yet they drive the mother from a third to a fixth.

## On the Divifors of Sbares.

K now, that the fix fhares mentioned in the book of Almighty GOD are of two forts: of the firf are a moiety, a fourth, and an eighth; and of the fecond fort are two thirds, a third, and a fixth, as the fractions are halved and
doubled. Now, when any of thefe Thares occur in cafes fingly, the divifor for each thare 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 fame fort, then each integral number is the proper divifor to produce its fraction, and alfo to produce the double of that fraction, and the double of that, as fix produces a fixth, and likewife a third, and two thirds; but, when half, which is from the firft fort, is mixed with all of the fecond fort or with fome of them, then the divifion of the eftate muft be by fix; when a fourth is mixed with all of the fecond fort or with fome of them, then the divifon muft be into twelve; and when an eighth is mixed with all of the fecond fort, or with fome of them, then it muft be into four and twenty parts.

## On the Increafe.

Aul, or increafe, is, when fome fraction remains above the regular divifor, or when the divifor is too fmall to admit one fhare. Know, that the whole number of divifors is feven, four

$$
Q^{2}
$$

of which have no increafe, namely, two, three, four, and eight; and three of them have an increafe. The divifor, fix, is, therefore, increafed by the aíl to ten, either by odd, or by even, numbers; twelve is raifed to feventeen by odd, not by even, numbers; and twenty-four is raifed to twenty-feven by one increafe only; as in the cafe, called Mimberiyy (or a cafe anfwered 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 increafe, except according to IBN MASÛÚD (may GOD be gracious to him !) for, in his opinion, the divifor twentyfour may be raifed to thirty-one; as if a man leave a wife, his mother, two fifters by the fame parents, two fifters by the fame mother only, and a fon rendered incapable of inheriting.

## On the Equality, Proportion, Agreement, and

Difference of two Numbers.
The temátbul of two numbers is the equality of one to the other ; the tedákhul is, when tho fmaller of two numbers exactly meafures the larger, or exhaufts it; or we call it tedakkbul, when the larger of two numbers is divided ex-
actly by the fmaller; 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 fmaller is an aliquot part of the larger, as three of nine. The tawáfuk, or agreement, of two numbers is, where the fmaller does not exactly meafure the larger, but a third number meafures them both, as eight and twenty, each of which is meafured by four, and they agree in a fourth; fince the number meafuring them is the denominator of a fraetion common to both. The tabáyun of two numbers is, when no third number whatever meafures the two difcordant numbers, as nine and ten. Now the way of knowing the agreement or difagreement between two different quantities is, that the greater be diminifhed by the fmaller quantity on both fides, 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) mutawáfik 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 fo 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 cafes there is need of reven principles; three, between the fhares and the perfons, and four between perfons and perfons. Of the three principles the firft is, that, if the portions of all the claffes be divided among them without a fraction, there is no need of multiplication, as if a man leave both parents and two daughters. The fecond is, that, if the portions of one class be fractional, yet there be an agreement between their portions and their perfons, then the meafure of the number of perfons, whofe fhares are broken, muft be multiplied by the root of the cafe, and its increafe, if it be an increafed cafe, as if a man leave both parents and ten daughters, or a woman leave a hufband, both parents, and fix* daughters. The third principle is, that, if their portions leave a fraction, and there be no agreement between thofe portions and the perfons, then the whole number of the perfons, whofe Chares are broken, mult be multiplied into the root of the cafe, as if a woman leave her hurband and five fifters by the fame father and mother. Ot the four other principles the firft is, that, when there is a fractional divifion between two claffes or more, but an equality between the numbers
of the perfons, then the rule is, that one of the numbers be multiplied into the root of the cafe; as if there be fix daughters, and three grandmothers, and three paternal uncles. The fecond is, when fome of the numbers equally meafure the others; then the rule is, that the greater number be multiplied into the roct of the cafe; as, if a man leave four wives and three grandmothers and twelve paternal uncles. The third is, when fome of the numbers are mutawafik, or compofit, with others; then the rule is, that the meafure of the firft of the numbers be multiplied into the whole of the fecond, and the product into the meafure of the third, if the product of the third be mutawdfik, or, if not, into the whole of the third, and then into the fourth, and fo on, in the fame manner; after which the product muft be multiplied into the root of the cafe: as, if a man leave four wives, cighteen daughters, fifteen female anceitors, and fix paternal uncles. The fourth principle is, when the numbers are mutabáyan, or not agreeing one with another; and then the rule is, that the firft 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 laft product into the root of the cafe; as, if a
man leave two wives, fix female anceftors, ten daughters, and feven paternal uncles.

## Section.

When thou defireft to know the Thare of each clafs by arrangement, multiply what oach clafs has from the root of the cafe by what thou haft already multiplied into the root of the care, and the product is the fhare of that clafs; and, if thou defireft to know the fhare of each individual in that clafs by arrangement, divide what each clafs has from the principle of the cafe by the number of the perfons in it, then multiply the quotient into the multiplicand, and the product will be the fhare of each individual in that clafs. Another method is, to divide the multiplied number by whichever clafs thou thinkeft proper, then to multiply the quotient into the fhare of that fet, by which thou haft divided the multiplied number, and the product will be the hare of each individual in that fet. Another method is by the way of proportion, which is the cleareft; and it is, that a proportion be afcertained for the thare of each clals from the root of the cafe to the number of per-
fons one by one, and that, according to fuch proportion from the multiplied number, a hare be given to each individual of that clafs.

> On the Divifion of the Property left among Heirs and among Creditors.

Ip there be a difagreement between the property left and the number arijing 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 meafure of the property, and divide the product by the meafure 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 clafs of them, multiply what each clafs has, according to the soot of the cafe, into the meature of the property left, then divide the product by the meafure of the cafe, if there be an agreement be-
tween the property left and the cafe; but, if there be a difagreement between them, then multiply into the whole of the property left, and divide the product by the whole number arifing from the verification of the cafe; and the quotient will be the portion of that clafs in both methods. Now, as to the payment of debts, the debts of all the creditors ftand in the place of the arranging number.

## On Subtraction:

When any one agrees to take a part of the property left, fubtract his fhare from the number arifing by the proof, and divide the remainder of the property by the portions of thofe who remain; as if a woman leave her hufband, her mother, and a paternal uncle: now fuppofe that the hurband agrees to take what was in his power of his bridal gift to the wife; this is deducted from among the heirs: then what remains is divided between the mother and the uncle in thirds, according to their legal thares; and thus there will be two parts for the mother, and one for the uncle.

## On the Return.

The return is the converfe of the increafe; and it takes place in what remains above the Thares of thofe entitled to them, when there is no legal claimant of it: this furplus is returned to the fharers according to their rights, except the humband or the wife; and this is the opinion of all the Propbet's companions, as ÂLI and his followers, may GOD be gracious to them! And our mafters (to whom GOD be merciful!) have affented to it: ZAID, the fon of THA'BIT fays, that the furplus doth not revert, but goes to the publick treafury; and to this opinion have affented URWAH and ALZUHRI' and MA'LIC and ALSHA'FIİ, may GOD be merciful to them!

Now the cafes on this head are in four divifions: the firft of them is, when there is in the cafe but one fort of kinfmen, to whom a return muft be made, and none of thofe who are not entitled to a return: then fettle the cafe according to the number of perfons; as, when the deceafed has left two daughters, or two fifters, or two female anceftors; fettle it, therefore, by two. The fecond is, when there are joined in the cafe two or three forts of thofe, to whom a return muft be made, without any of thofe, to
whom there is no return: then fettle the cafe according to their hhares; I mean by two, if there be two fixths in the cafe; 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 firft cafe, there is any one to whom no return can be made: then give the fhare of him or her, to whom there is no return, according to the loweft denominator, and if the refidue exactly quadrate with the number of perfons, who are entitled to a return, it is well; as if there be a hufband and three daughters; but, if they do not agree, then multiply the meafure of the number of the perfons, if there be an agreement between the number of perfons and the refidue, into the denominator of the fhares of thofe, to whom no return is to be made: as if there be a huiband, and fix daughters; if not, multiply the whole number of the perfons into the denominator of the fhare of thofe, to whom there is no return; and the product will fet the cafe right. The fourth is, when, in the fecond cafe, there are any to whom no return is made: then divide what remains from the denominator of the fhare of him or them, who have no return, by the cafe of thofe, to whom a re-
turn muft 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 diftributed in thirds among thofe 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 cafe of thofe, who are entitled to a return, into the denominator of the hare of him or her, who is not entitled to it; and the product will be the denominator of the fhares of both claffes; as if there be four wives, and nine daughters, and fix female anceftors: then multuply the fhares of thofe, to whom no return muft be made, into the cafe of thofe, who are entitled to a return, and the fhares of thofe, to whom a return is to be made, into what remains of the denominator of the fhare of thofe, who are not entitled to a return. If there be a fraction in fome, adjuft the cafe by the beforementioned principles.


## On the Divifion of the Paternal Grandfather.

Abubecr the Juft (on whom be the grace of GOD !) and thofe, who followed him, arnong the companions of the Prophet, fay, "the bre-
"s thren of the whole blood and the brethren by. " the father's fide inherit not with the grand" father:" this is alfo the decifion 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 $A B U$ YUSUF and MUHAMMED, as well as MÁLIC and ALSHAFIÎ. 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 beft in two cafes, from the mukáfamab, or divifion, and from a third of the whole eftate. The meaning of makáfamab is, that the grandfather is placed in the divifion as one of the brethren, and the brethren of the half blood enter into the divifion with thofe 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 reft, as if difinherited, and receive nothing; and the refidue gocs to the brethren of the whole blood; except when among thofe of the whole blood there is a fingle fifter, who receives her legal Thase, 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 cafe, when a man leaves a grandfather, a fifter by the fame father and mother, and two fifters by the fame father only: in this cafe there remains to thofe fifters a tenth of the eitate, and the correct denominator is twenty; but, if there be, in the preceding cafe, ane fifter by the fame father only, nothing remains for her; and if one, entitled to a legal fhare, be mixed with them, then, after he has received his Chare, the grandfather has the beft in three arrangements; either the divifion, when a woman leaves her hufband, 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 fame father and mother. Or a fixth of the whole eftate is given, when a man leaves a grandfather and a grandmother, a daughter, and two brothers; and, when a third of the relidue is better from the grandfather, and the refidue has not a complete third, multiply the denominator of the third into the root of the cafe. If a woman leave a grandfather, her hufband, a daughter, her mother, and a fifter by the fame father and mother, or by the fame father only, then a fixth is beft for the grandfather, and the root of the cale is raifed to thirteen, and the fifter has nothing. Know, that ZAID, the fom of THABIT (ou whrom be GOD's grace!) has
not placed the fifter by the fame father and mother, or by the fame father, as entitled to a thare with the grandfather, except in the cafe, named acdariyyah, and that is, the hufband, the mother, a grandfather, and a fifter by the fame father and mother, or by the fame father only; in whicb cafe the hurband ought to bave a moiety; the mother, a third; the grandfather, a fixth; and the fifter, a moiety; then the grandfather annexes his fhare to that of the fifter, and, a divifion is made between them by the rule " a male has the portion of two females;" and this is, becaufe the divifion is beft for the grandfather. The root is regularly fix, but is increafed to nine; and a correct diftribution is made by twenty-feven. The cafe is called $a c$ dariyyab, becaufe it occurred on the deatb of a woman belonging to the tribe of ACDAR. If, inftead of the fifter, there be a brother or two fifters, there is no increafe, nor is that cafe an acdariyyah.

On Succeffion to Vefted Interefs.
If fome of the fhares become vefted inheritances before the diftribution, as if a woman leave her hufband, a daughter, and her mother,
and the hufband die, before the eftate can be diftributed, 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 hurband and two brothers, the principle in this event is, that the cafe of the firft deceafed be arranged, and that the allotment of each heir be confidered as delivered according to that arrangement; that, next, the cafe of the fecond deceafed be arranged, and that a comparifon be made between what was in his hands, or vefted in intereft, from the firft arrangement, and between the fecond arrangement, in three fituations; and if, on account of equality, what is in his hands from the firft arrangement quadrate with the fecond arrangement, then there is no need of multiplication ; but, if it be not right, then fee whether there be an agreement between the two, and multiply the meafure of the fecond arrangement into the whole of the firft arrangement; and, if there be a difagreement between them, then multiply the whole of the fecond arrangement into the whole of the firft arrangement, and the product will be the denominator of both cafes. The allotments of the heirs of the firft deceafed muft be multiplied into the former multiplicand, I mean into the fecond arrangement or into its meafure; and the allotments
of the heirs of the fecond deceafed muft be multiplied into the whole of what was in his hands, or into its meafure; and, if a third or a fourth die, put the fecond product in the place of the firft arrangement, and the third cafe in the place of the fecond, in working; and thus in the cafe of a fourth and a fifth, and fo on to infinity.

## On Difant Kindred.

A distant kinfman is every relation, who is neither a fharer nor a refiduary. The generality of the Prophet's companions repeat a tradition concerning the inheritance of diftant kinfmen; and, according to this, our mafters 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 diftant kin"dred, but the property undijpofed of is placed " in the publick treafury;" and with him agree MÁLIC and ALSHAFIF, on whom be GOD's mercy! Now thefe diftant kindred are of four claffes: the firf clafs is defcended from the deceafed; and they are the daughter's children, and the children of the fon's daughters. The fecond fort are they, from whom the deceafed defcend; and they are theexcluded grand-
fathers and the excluded grandmothers. The third fort are defcended from the parents of the deceafed; and they are the fifter's children and the brother's daughters, and the fons of brothers by the fame mother only. The fourth fort are defcended from the two grandfathers and two grandmothers of the deceafed; and they are, paternal aunts, and uncles by the famemother only, and maternal uncles and aunts. Thefe, and all who are related to the deceafed through them, are among the diftant kindred. ABU̇ SULAIMẠ̇N reports from MUHAMMED the for of ALHASAN, who reported from ABU HANIFAH (on whom be GOD's mercy!) that the fecond fort are the neareft of the four forts, how high foever they afcend; then the firft, how low foever they defcend; then the third, how low foever; and laftly, the fourth, how diftant foever their degree: but ABU YÚSUF and ALHASAN the fon of ZIYAD, report from ABU HANIFAH (on whom be the mercy of GOD!) that the neareft of the four forts is the firft, then the fecond, then the third, then the fourth, like the order of the refiduaries; and this is taken as a rule for decifion. According to both $A B U$ YUSUF and $M U$ $\dot{H} A M M E D$, the third fort has a preference òver the maternal grandfather.

## On the Firft Clafs.

The beft entitled of them to the fucceffion is the neareft of them in degree to the deceafed; - 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 diftant 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 perfons of the branches are confidered, and the property is diftributed among them equally, whether the condition of the roots, as male or female, agree or difagree ; but MUHAMMED (on whom be GOD's mercy!) confiders the perfons of the.branches, if the fex of the roors agree, in wobich refpect he concurs with the other two; and he confiders the perfons of the roots, if their fexes be different, and he gives to the branches the inheritance of the roots, in oppointion to the two lawyers. For inftance, when a man leaves a daughter's fon, and a daughter's daughter, then, according to ABU YUSUF and ALHASAN, the property is diftributed between them, by the rule "the male has the portion of
" two females," their perfons being confidered; and, according to MUHAMMED, in the fame manner; becaufe the fexes 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 firft mentioned lawyers, the property is divided in thirds between the branches, by confidering the perfons, 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 thofe in the fecond 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 thare 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 firft rank that differs among the roots; then the males are arranged in one clafs, and the females in another clafs, after the divifion, and what goes to the males is collected and diftributed according to the highelt difference that occurs among their children, and, in the fame matner, what goes to the fermales; and thus the operation is continued to the end .aceording to this fcheme :

| S | S | S | I |  | D | D | D |  |  | D | D |  |
| :---: | :---: | :---: | :---: | :---: | :---: | :---: | :---: | :---: | :---: | :---: | :---: | :---: |
| $\bar{D}$ | (1) | D | D | D | D | D | D | D | D | D | 1 |  |
| s | I) | 1 | 5 | 5 | S | D | 1 | D | D | D | D |  |
| D | 1 | D | s | D | D | S | S | S |  | D | D |  |
| D | 5 | D | D |  | D | S | D | 1 | S | D | L |  |
| D | I | D | D | D | 5 | D | D | 5 | D | S |  |  |

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


## The Deceafed,

| Daughter | Daughter | Daughter <br> Son |
| :--- | :--- | :--- |
| Daughter | Daughter |  |
| Daughter | Son | Daughter |
| Two Daughters | Daughter | Two Sons, |

In this cafe according to ABU YUSUF (on whom be GOD's mercy!) the property is divided among the branches in feven parts, by confidering their perfons; but, according to MUHAMMED (to whom GOD be merciful!) the property is diftributed according to the higheft difference of fex, I mean in the fecond rank, in levenths, by the number of branches in the roots; and, according to him, four fevenths of it go to the daughters of the daughter's fon's. daughter; fince that is the fhare of their grand-
father, and three fevenths of it, which are the allotment of the two daughters, are divided between their two children, I mean thofe in the third rank, in moieties; one moiety to the daughter of the daughter's daughter's fon, whicb is the fhare of her father, and the other moiety to the two fons of the daughter's daughter's daughter, being the fhare of their mother: the correat divifor of the property is, in this cafe, 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 decifions concerning the diftant kindred; and this was the firf opinion of ABU YUSUF; then he departed from it, and faid that the roots were by no means to be confidered.

## A Section.

Our learned lawyers (on whom be the mercy of GOD!) confider the different fides in fucceffion; except that ABU YUSUF (may GOD be merciful to him !) confiders the fides in the perfons of the branches, and MUHAMMED (on whom be GOD's mercy!) confiders the fides in the roots; as, when a man leaves two daughters of a daughter's daughter, who are alfo the two daughters of a daughter's fon, and the fon of a daughter's daughter, according to this fcheme:


#### Abstract

The Deceafed. 

In this cafo, according to ABU YUSUF, the property is divided among them in thirds, and then the deceafed is confidered as if he had left four daughters and a fon; two thirds of it, therefore, go to the two daughters, and one third to the fon: but, according to MUHAMMED (to whom GOD be merciful!) the eftate is divided among them in twenty-eight parts, to the two daughters twenty-two Ihares (fixteen in right of their father and fix chares in right of their mother) and to the fon fix thares in right of his mother.


## On the Second Clafs.

He among them, who is preferred in the fucceffion, is the neareft of them to the deceafed, on which fide foever he flands; and, in the cafe of equality in the degrees of proximity, then he, who is related to the deceafed through an heir, is preferred by the opinion of ABU SUHAIL, furnamed ALFERÁIDI, of ABU FUDAIL ALKHASSAF, and of ALI, the fon of ISAI ALBASRI; but, no preference is given to him
according to ABU SULAIMAN ALJURJȦNI, 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 thofe, through whom they are related, agree; and their relation be on the fame fide, the diftribution is according to their perfons, but if the fex of thofe, to whom they are related, be different, the property is diftributed according to the firft rank that differs in fex, as in the firft clafs; and, if their relation differ, then two thirds go to thofe on the father's fide, that being the fhare of the father, and one third goes to thofe on the mother's fide, that being the thare of the mother: then what has been allotted to each fet is diftributed among them, as if their relation were the fame.

## On the Third Clafs.

The rule concerning them is the fame with that concerning the firft clafs; I mean, that he is preferred in the fucceffion, who is neareft to the deceafed: and, if they be equal in relation, then the child of a refiduary is preferred to the child of a more diftant kinfman; as, if a man Leave the daughter of a brother's fon, and the fon of a fifter's daughter, both of them by the fame
father and mother, or by the fame father, or one of them by the fame father and mother, and the other by the fame father only: in tbis cafe the whole eftate goes to the daughter of the brother's fon, because the is the child of a refiduary; and, if it be by the fame mother only, diftribution is made between them by the rule, "A male has " the fhare of two females," and, by the opinion of ABU YUSUF (to whom GOD be merciful!) in thirds, according to the perfons, 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 refiduaries, or if fome of them be children of refiduaries, and fome of them children of thofe entitled to fhares, and their relation differ, then ABU YUSUF (to wborm GOD be merciful!) confiders the ftrongeft in confanguini$t y$; 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 diftributed among their branches, as in the firft clafs: thus, if a man leave the daughter of the daughter of a fifter by the fame father and mother, fhe is preferred to the fon of the daughter of a brother by the fame father only, accord-
ing to ABU YUSUF (to whom GOD be maxciful!) by reafon of the flength of relation; but, according to MUHAAMMED (may God be merciful to him!) the property is divided between them both in moieties by confideration-of the roots. So, when a man leaves three daughters of different brothers, and three fons and three daughters of different fifters, as in this figure :

> Tbe Deceafed.

Sifter_Sifter_Sifter_Brother_Brother_Brother by the fame

Mother--Father-Father--Mother-Father-Father and Mother and Mother $\cdots$ $\underbrace{\sim}$
Son Son Son Daughter Daughter Daughter Daughter Daughter Daughter.
In this cafe, according to ABU YUSUF, the property is divided among the branches of the whole blood, then among the branches by the fame father, then among the branches by the fame mother, according to the rule, " the male has the allotment of two females," in fourths, by confidering the perfons; but, according to MUHAMMED (to whom GOD be merciful!) a third of the eftate is divided equally among the branches by the fame mother, in
thirds, by confidering the equality of their roots in the divifion of the parents, and the remainder among the branches of the whole blood in moieties, by confidering in the roots the namber 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 perfons; and the effate is correctly divided by nine. If a man leave three daughters of different brothers' fons, in this manner :

## Tbe Deceafed.

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 fame father and mother, by the unanimous opinion of the learned, fince She is the child of a refiduary, and hath alfo the ftrength of confanguinity.

## On the Fourth Clafs.

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 obftruct him;
and, when there are feveral, and the fides of their relation are the fame, as paternal aunts and paternal uncles by the fame mother witb the father, or maternal uncles and aunts, then the ftronger of them in confanguinity is preferred, by the general affent; I mean, they, who are related by father and mother, are preferred to thofe, who are related by the father only, and they, who are related by the father, are preferred to thofe, 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 fame father and mother, or by the fame father, or by the fame mother only: and if the fides of their confanguinity be different, then no regard is ßown to the ftrength of relation; as, if there be a paternal aunt by the fame father and mother, and a maternal aunt by the fame mother, or a maternal aunt by the fame 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 fet is divided among them, as if the place of their confanguinity were the fame.

## On their Cbildren; and the Rules concerning tbem:

The rule as to them is like the rule concerning the firft clafs; I mean, that the beft entitled of them to the fucceffion is the neareft of them to the deceafed on whichever fide he is related; and, if they be equal in relation, and the place of their confanguinity be the fame, then he, who has the ftrength 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 fame, then the child of a refiduary 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 fame father and mother, or by the fame father, all the property goes to the daughter of the paternal uncle; and, if one of them be by the fame father and mother, and the other by the fame father only, then all the eftate goes to the claimant, who has the ftrength of confanguinity, according to the clearer tradition; and this by analogy to the maternal aunt by the fame father, for though fhe be the child of a diftant kinfman, yet the is preferred, by the ftrength of confanguinity, to the maternal aunt by the fame mother only, though the be the child of an heir; fince the weight which prevails by itfelf, that
is, the ftrength of confanguinity, is greater than the weight by another, which is the defcent from an heir. Some of them (the learned) fay, that the whole eftate goes to the daughter of the paternal uncle by the fame father, fince fhe is the daughter of a refiduary; and, if they be equal in degree, yet the place of their relation differ, they have no regard /bown to the ftrength of confanguinity, nor to the defcent from a refiduary, according to the clearer tradition; by analogy to the paternal aunt by the fame father and mother, for though the have two bloods, and be the child of an heir on both fides, and her mother be entitled to a legal fhare, yet fhe 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 fhown to the frength of blood; then to the defcent from a refiduary; and one third goes to whoever is related by the mother, and there too regard is fhown to ftrength of confanguinity: then, according to ABU YUSÚF (may GOD be merciful to him !) what belongs to each fet is divided among the perfons of their branches, with attention to the number of fides in the branches; and, according to MUHAMMED (may GOD be merciful to him !) the property is diftributed by the firft line, that differs, with attention to the number of the branches and of the fides in
the roots, as in the firft clafs; then this rule is applied to the fides of the paternal uncles of his parents and their maternal uncles; then to their children; then to the fide of the paternal uncles of the parents of his parents, and to their maternal uncles; then to their children, as in the cafe of refiduaries.

## On Hermaphrodites.

To the hermaphrodite, wbofe fex is quite doubtful, is allotted the fmaller of two Chares, I mean the worfe of two conditions, according to ABU HANI'FAH (may GOD be mercifut 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 decifions given; as, when a man leaves a fon, and a daughter, and an hermaphrodite, then the hermaphrodite has the fhare of a daughter, fince that is afcertained : and, according to $\hat{A} A M I R ~ A L S H A B I ~(a n d ~ t h i s ~ i s ~ t h e ~ o p i n i o n ~ o f ~$ IBNU ÂBBÁS, may GOD be gracious to them both!) the hermaphrodite has a moiety of the two fhares in the controverfy; but tbe two great lawyers differ in putting in praclice the doctrine of ALSHABI: for ABU YUSUF fays, that the fon has one chare, and the daughter half a

Phare, and the hermaphrodite three fourths of a fhare, fince the hermaphrodite would be entitled to a fhare, if he were a male, and to half a fhare, if he were a female, and this is fettled by bis taking half the fum of the two portions; or, we may fay, he takes the moiety which is afcertained, together with half the moiety which is difputed, fo that there come to him three fourths of a chare; for he (ABU YÚSUF) pays attention to the legal thare and to the increafe, and he verifies the cafe by nine: or, we may fay, the fon has two Thares, and the daughter one flare, and the hermaphrodite a moiety of the two allotments, and that is a fhare and half a fhare. But MUHAMMED (may GOD be merciful to him!) fays, that the hermaphrodite would take two fifths of the eftate, if he were a male, and a fourth of the eftate, if he were a female, and that he takes a moiety of the two allotments, and that will give bim one fifth and an eighth by attention to both fexes; and the cafe is rectified by forty; fince that is the product of one of the numbers in the two cafes, which is four, multiplied into the other, which is five, and that product multiplied by two (which is the number of the) cafes; 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

[^9]five; fo that thirteen fhares go to the hermaphrodite, and eighteen to the fon, and nine to the daughter.

On Pregnancy.
The longeft time of pregnancy is two years, according to ABU HANI'FAH (may GOD be merciful to him !) and his companions; and according to LAITH, the fon of SÂD ALFAHMÍ (may GOD be merciful to him !) three years; and, according to ALSHÁFIÎ (may GOD be merciful to him !) four years : but according to ALZUHRI (may GOD be merciful to him!) feven years: and the fhorteft 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 moft; and there is given to the reft of the heirs the fmalleft 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 moft: LAITH, fon of SAD, (may GOD be gracious to him !) reports this opinion from him; but, by another report, there is referved the portion of two fons; and one of
the two opinions is that of ABU YÚSUF (may GOD be merciful to him!) as HISHÁM reports it from him; but ALKHAS'S'A'F reports from ABU YÚSUF (may GOD be merciful to him !) that there fhould be referved the fhare of one fon or of one daughter ; and, according to this, decifions are made; and fecurity muft. be taken, according to his opinion. And, if the preguancy was by the deceafed, and the widow produce a child at the full time of the longeft period allowed for pregnancy, or within it, and the woman hath not confeffed her having broken her legal term of abftinence, that cbild fhall inherit, and others may inherit from him; but, if fhe produce a child after the longeft time of geftation, he fhall not inherit, nor fhall others inherit from him: and if the pregnancy was from another man than the deceafed, and fhe, the kinfowoman, produce a child in fix months or lefs, he fhall inherit; but, if the produce the child after the leaft period of geftation, he fhall 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 fmalleft part of the child come out, and he then die, he thall not inhe-
rit; but if the greater part of him come out, and then he die, he fhall inherit: and, if he come out ftraight (or with bis bead firft) then his breaft is confidered; I mean, if his whole breaft come out, he fhall inherit; but if he come out inverted (or witb his feet firft) then his navel is confidered.

The chief rule in arranging cafes on pregnancy is, that the cafe be arranged by two fuppofitions, I mean by fuppofing, that the child in the womb, is a male, and by fuppofing, that it is a female: then, compare the arrangement of both cafes; and, if the numbers agree, multiply the meafure of one of the two into the whole of the other; and, if they difagree, then multiply the whole of one of the two into the whole of the other, and the product will be the arranger of the cafe : then multiply the allotment of him, who would have fomething from the cafe, which fuppofes a male, into that of the cafe, which fuppofes a female, or into its meafure; and then that of him, who takes on the fuppofition of a female, into the cafe of the male, or into its meafure, as we have directed concerning the hermaphrodite; then examine the two products of that multiplication; and whether of the two is the lefs, that Mhall be given to fuch an heir; and the difference between them mult be referved from the allotment of that

Ireir ; 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 diftributed among the other heirs, and let there be given to each of thore 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 cafe is rectified by twen-ty-four on the fuppofition, that the child in the womb is a male, and by twenty-feven on the fuppofition, 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 cafe verified; and, on the fuppofition of its male fex, the wife takes twenty-feven fhares, and each of the two parents, thirty-fix; but, on the fuppofition of its female fex, the wife has twen-ty-four, and each of the parents, thirty-two; and twenty-four are given to the wife, and three fhares from her allotment are referved; and from the allotment of each of the parents are referved four fhares; and thirteen hares 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 fhare and four ninths of a fhare out of four-and-twenty multiplied into nine, and that makes thirteen fhares; and this belongs to her, and the refidue is referved, which amounts to an hundred and fifteen thares. 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 muft be given to the widow and both parents what was referved from their thares; and what remains muft be divided among the children: and, if the bring forth a dead child, then muft be given to the widow and both parents what was referved from their fhares, and to the daughter a complete moiety, that is, ninetyfive fhares more, and the remainder, which is nine fhares, to the father, fince he is the refiduary.

## On a Loft Perfon.

A lost perfon is confidered as living in regard to his eftate; fo that no one can inherit from him; and his eftate is referved, until his death can be afcertained; or the term for a prefumption of it has paffed 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 ZIYÁD, 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 YÚSUF fays, an hundred and five years; and fome of them, the learned, fay, ninety years; and according to that opinion are decifions made. Some of the learned in the law fay, that the eftate of a loft perfon muft be referved for the final regulation of the Imàm, and the judgement fufpended as to the right of another perfon, fo that his Thare from the eftate of his anceftors muft be kept, as in the cafe of pregnancy; and, when the term is elapfed, and judgement given of his death, then his eftate goes to bis heirs, who are to be found, according to the judgement on his deceafe; and, what was referved on his account from the eftate of his anceftor, is reftored to the heir of his anceftor, from whofe eftate that fhare was referved; fince the loft perfon is dead as to the eftate of another.

The principle in arranging cafes concerning a loft perfon is, that the cafe be arranged on a fuppofition of his life, and then arranged on a fuppofition of his death; and the reft of the uperation is what we have mentioned in the chapter of pregnancy.

## On an Apofate.

When an apotate from the faith has died naturally, or been killed, or paffed into a hontile country, and the Kádi has given judgement on his paffage 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 apoftafy is placed in the publick treafury, according to ABU HANİFAH (may GOD be merciful to him!) but, according to the two lawyers (ABU YÚSUF and MUHAMMED) both the acquifitions go to his believing heirs; and, according to ALSHÁFÎ (may GOD be merciful to him!) both the acquifitions are placed in the publick treafury; and what he gained after his arrival in the hoftile country, that is confifcated by the general confent; and all the property of a female apoftate goes to her heirs, 'wbo are believers, without diverfity of opinion among our mafters, to whom God be merciful! but an apoftate fhall not inherit from any one, neither from a believer nor from an apoftate like himfelf, and fo a female apoftate fhall not inherit from any one; except when the people of a whole diffrict become apoftates altogether, for then they inherit reciprocally.

## On a Captive.

The rule concerning a captive is like the sule 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 apoftate ; but, if his apoftafy be not known, nor his life nor his death, then the rule concerning him is the rule concerning a loft perfon.

On Perfons drowned, or burned, or overwbelmed in Ruins.
When a company of perfons die, and it is not known which of them died firft, they are confidered, as if they had died at the fame moment; and the eftate of each of them goes to his heirs, who are living; and fome of the deceafed fhall not inherit from others: this is the approved opinion. But ÂLI and IBNU MASÛÚD fay, according to one of the traditions from them, that fome of them thall inherit from others, except in what each of them has inherited from the companion of his fate.

## A <br> COMMENTARY

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The Siráyirtah.

In our adminiftration of juftice to Mobammedans according to their own laws, it will be of no ufe to inquire, what their legillator meant by declaring, that the lave of inberitances conftituted one balf of juridical knowledge*: if he intended any thing more than a frong affertion of its importance, he probably bad in contemplation the two general modes of acquiring property, contracts and fucceffion, or the agreement of parties and the operation of law; and this explanation of the phrafe, which bad occurred to rne on my firt perufal of it, is alfo fuggefted by Sayyad SHARIF, together with a more fanciful interpretation, which Máulavi Kásim has adopted, that, life and death being incident to our probationary flate in this world, and the

* Page 213.
law of fucceffion manifeftly relating to the dead, it is properly oppofed to all other laws, which pre cribe the duties and afcertain the rights of the living; but we merely take notice of the fentence, that no part of the Sirájíyyab may be unexplained, and proceed to the four acts, which, on the deceale of a Mohammedan, are to be fucceffively perforned by the magiftrate, 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 deceafed per!ons be removed out of fight, with all due fpeed and folemnity, at a moderate expenfe to be defrayed, even before the payment of their juft debts, out of the property left by them, on which no legal claim, from hypothecation or otherwife, had previoully attached : but the Mufelman lawyers, who admit, that the funeral charges muft in the firft place be defrayed, affign a very whimfical reafon for fuch a priority; becaufe, they fay, the windingJbeet and other clothes of the dead are analogous to fuitable apiparel soorn by the living, and confiquently Jould not be liable to the claims of a criditor. The legal expenfes of burying a Mobammedan are very moderate, both in the number and value of the clothes, in which the deceafed 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 fuperfluity, and lefs than thofe, a niggardly deficiency, of expenfe, fo, if the funeral clothes of Amru or Hinda were dearer than the vefture ufually worn by them, when alive, it would be a culpable excefs; and if cheaper, a blameable defect; but, if in fact they had been ufed to wear one fort of apparel on folemn feftivals, another in vifiting their friends, and a third, in their own houfes, the value of their vifiting drefs muft 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 expenfe of the funeral muft be reduced to the fufficient expenfe, as it is called; that is, to two pieces of cluth for Amru and to tbree for Hinda : the names, dimenfions, and ufes of all the cloths ufed in funerals, both for men and for women, are enumerated in Perfian by Máulaví Kásim; but it would be ufelefs to mention them; and it feems only neceffary to add on this article, that if deceafed perfons leave no property whatever, or none without a fpecial lien on it, the funeral expenfes muft be paid by fuch 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 trea-
fury, in which there is always an ample fund arifing from forfeitures and efcheats.
II. After the burial, all the juft debts of the deceafed muft be paid out of his remaining affets, as.far as they extend; and, if there be many creditors, they muft be fatisfied in equal proportion, except that a debt of bealth, to ufe the Arabian phrafe, mult be difcharged before a debt of fickne/s; that is, a debt contracted or acknowledged, while the party was of found underftanding and body, is preferred, when legally proved, to one acknowledged in ficknels, but of which no other evidence is produced. A religious vow, or promife of a charitable donation, as an atonement for fin, conftitutes a debt in confcience only; and the fum thus promifed mult be paid out of a third part of the affets, after the legal creditors have been fatisfied, provided that it was bequeathed by will; but, if no will was made, the temporal eftate fhall not be charged with a mere debt of religion.
III. The legacies of a Mufelman, to the prejudice of his heirs, mult not exceed a third part of the property left by him, and remaining after the diicharge of his debts: over a third of fuch refidue he has abfolute power; and his legatee fhall receive it immediately, whether a fpecifick thing or certain fum of money, or only a fractional part of his eftate, was be-
queathed. This is the opinion of Sharif; though a diftinction, which the text by no means implies, has been taken between a determinate and an indeterminate legacy.
IV. We come now to the diftribution of his eftate, remaining after the payment of debts and legacies, among his beirs (for fo we may call them, although real and perfonal property are undiftinguifhed in the laws of the Arabs) according to certain rules derived from three fources, the Korán, the genuine fyftem of oral traditions from the legillator, and thofe opinions in which the learned and orthodox have generally concurred *: the order, and proportions, in which the property of AMRU or HINDA muft be diftributed, conftitute the principal fubject of the work, which we have undertaken to explain.
i. The firft clafs of beirs are they, who may be called Jbarers, becaufe a certain fbare of the eftate is exprefsly allotted to each of them in the 'Korann, and particularly in the fourth chapter of it.

2. Next come they, who may be diftinguifhed by the name of refiduaries, becaufe they take the refidue after the Jhares have been duly diftributed; and they are of two forts, refidu-

[^10]aries by confanguinity and refiduaries for fpecial caufe, the former of whom are preferred in the order of fucceffion; the latter are the mafters or miftreffes of enfranchifed llaves, or their male refiduary heirs. If no faarers be living, the refiduaries take the whole; but, if there be fharers by confanguinity and no refiduaries, 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 claffes, the diftribution is made among thofe next of kin, who are neither ßharers nor refiduaries: they may be called the difant kindred.
4. Should none of the diftant kindred be living and capable of inheriting, the eftate goes (unlefs there be a widow or a widower, who is firft entitled to a /laare) to him, who may be called the fucceffor by contract; and of that fucceffion it is neceffary to give an example: if Amru, a man of an unknown defcent, fay to Zaid, "Thou art my kinfman, and fhalt be " my fucceffor after my death, paying for me any " fine and ranfom, to which I may become " liable," and Zaid accept the condition, it is a valid contract by the Arabian law ; and, if Zaid alfo be a man whofe defcent is unknown, and make the fame propofal to Amru, who likewife accepts it, the contract is mutual and
fimilar, and they are fucceffors by contraEt reciprocally.
5. If no fuch agreement had been made, but if Amru in his life time had acknowledged Zaid, a man of an unknown pedigree, to be his brotber or his uncle, that is, to be related to him by his father or by his grandfatber, though in truth he had no fuch 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 kinfman by a common ancefor, and ftands in the fifth clafs of fucceffors, but takes the eftate before the general divifee.
6. Laft of all comes the perfon, to whom the deceafed had left the whole of his property by a will duly made and proved; for, though the law fecures to his heirs of the five preceding claffes two thirds of his eftate, yet it fo far refpects his dominion, while he lived, over his own property, and his will as to the difpofal of it after his deceafe, that it will rather give effect to an intention not ftrictly conformable to law (for the Korán feems to allow pious bequefts only), than fuffer his eftate to efcheat; which muft be the confequence of his dying without a reprefentative. All fuch efcheats to the fovereign go towards a fund for charitable ufes; and according to the fyftem of ZAid, the fon of Tha-:

BIT, which has been fhortly explained in a former publication, that fund, if it be regularly eftablifbed, is entitled to the whole eftate on failure of refiduary heirs, without any return to the fharers, and to the entire exclufion of the four laft clafies; but this doctrine feems quite exploded.

Before we proceed to the law of fbares, it is proper to take notice of the four impediments to fucceffion; which are flavery, homicide, difference of religion, and difference of country, or of allegiance; the laft of which difabilities relates only to fuch as are not Mu Jelmans.

1. Slavery, by the Mobammedan law, is either' perfect and abfolute, as when the llave and all, that he can poffefs, are wholly at the difpofal. of his mafter, or imperfect and privileged, as when the mafter has promifed the llave his freedom on his paying a certain fum of money by eafy inftalments, or, without any payment, after the death of the mafter: a female fave, who has borne a child to her mafter, is alfo privileged; but in both forts of llavery, as long as it continues, the flave can acquire no property; and confequently cannot inherit. The Arabian cuftom of allowing a flave to cultivate a piece of land, or fet up a trade, on his own account, fo that he may work out his manuVOL. VI.
miffion by prudence and induftry, and by degrees pay the price of his freedom, may fuggeft an excellent mode of enfranchifing the black llaves in our plantations, with great advantage to our country and without lofs to their. proprietors.
2. Homicide is either with malice prepenfe and punifhable with death, or without proof of malice, and expiable by redeeming a Muselman Ilave, or by fafting two entire months, and by paying the price of blood; or, thirdly, it is accidental, for which an expiation is neceflary. Malicious bomicide, or murder (for, by the beft opinions, the Arabian law on this head nearly refembles our own) is committed, when a human creature is unjuftly killed with a weapon, or any dangerous inftrument likely to occafion death, as with a fharp ftick or a large ftone, or with fire, which has the effect, fays Ka'sim, of the moft dangerous inffrument, and, by parity of reafon, with poifon or by drowoning; but thofe two modes of killing are not fpecified by him; and there is a ftrange diverfity of opinion concerning them : killing avitbout proof of malice is, when death enfues from a beating or blow with a llight 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 thoot an arrow at a wild beaft, and the arrow by accident were to kill Zaid, or if Mázin were to fall from his terrace upon Zuhair and kill him by his fall; in which cafes the llayer would not be permitted to inherit from the flain. If, however, a man were to dig a pit, or fix a large ftone, on the field of another, and the owner of the field were to be killed by falling at night into the pit, or running againft the tone, the doer of the illegal act, which was the primary occafion (but not the caufe) of the death, muft pay the price of blood, but would not, it feems, be difabled from fucceeding to the property of the deceafed, whom he could not in ftrictnefs be faid to have killed.
3. An unbeliever fhall never be heir to a believer, nor converfely; but infidel fubjects may inherit from infidels.
4. The difference between two fates or countries confifts in the difference of fovereigns, by whom protection is given to their refpective fubjects, and to whom allegiance is refpectively due from them : this difference is particularly marked between a country governed by a Mobammedan power and a country ruled by a prince of any other religion; for they are always, virtually at leaft, in a ftate of warfare, the firt being called by lawyers the feat of peace,
and the fecond, the feat of bofility. A difference of country, therefore, which excludes from the right of inheriting, is either actual and unqualifed, as when an alien enemy refides in the feat of bofility, or when an alien has chofen his domicil in the feat of peace, and pays the tribute exacted from infidels, in which cafe the tributary fhall not be heir to the alien enemy dying abroad, nor converfely, becaure each of them owed a feparate allegiance; or the difference is qualifed*, 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 hoftile sountries: now, although the tributary and the fugitive actually live in the fame kingdom, yet, fince the fugitive continues a fubject of the hoftile power, he remains, as it were, under a different government, and there is no mutual right of fucceffion between him and the tributary; nor, by fimilarity of reafon, between two fugitives, who leave two diftinct hoftile governments, and obtain quarter for a time in the land of believers, but without any intention of making it their conftant abode.

If none of thefe four incapacities preclude the heirs of Amru from the legal fucceffion to his eftate, which we will fuppofe already fold and

[^11]reduced to money of one denomination, the magiftrate, or his officer, muft proceed to the diftribution of the fbares; and, as they are a moiety, a fourth, an eigbth, two thirds, one tbird, and a fixtb, of the aggregate fum, it will be convenient at firt to confider that fum as confifting of $t$ wenty-four equal parts, fo that the fhares will be, in whole numbers, twelve, fix, tbree, fixteen, eigbt, and four:

The fbarers are twelve perfons, four males and eigbt females; but, before we fpecify their refpective allotments, it is neceffary to premife that a grandfather and a grandmotber, according to the Arabian idiom, fignify a male, and a female, anceftor in any degree; that a true grandfather is he, between whom and the deceafed no female anceftor intervened; that a falfe. grandfather is, where the paternal line of afcent was broken by the intervention of a female; and that a grandmother alfo is called true, when no falfe grandfatber intervened between her and the deceafed: in fhort, the only true line of ancefiry, according to the Arabs, is an uninterrupted fucceffion of paternal forefathers. The male fharers then are the fatber, the true grandfather, the brother by the fame mother only, and the widower: the females are the widow, the daugbter, the female ifue of the fon, the fifter of tbe whole blood, the fifter by the fame fatber only,
the fffer by the fame mother only, the mother herfelf, and the true grandmotber.

We begin with the males in the order of the Gares before enumerated; and, I. The father of Amru or Hinda takes* a faxth abfolutely, though a fon of the deceafed be living, or any male defcendant, who claims wholly through males; but, if there be no fuch male defcendant, he becomes a refduary beir; and, if there be only a daughter of the deceafed, or a female defcendant from the fon, he firft has his legal fhare, or a fixth, and, when her fhare alfo has been allotted, he claims the refidue. 2. The true grandfather is excluded from any thare by the living father, through whom alone the grandfather bore a relation to the deceafed; and, although a fimilar reafon might afterwards be applied to the mother, and operate to the exclufion of her children, yet the father has the additional ftrength of a double title, both as a fbarer and a refiduary: but, if the father alfo be dead, bis father, or true paternal anceftor, has exactly the fame intereft, except in four cafes, which will be prefently mentioned. 3 . A fingle half-brother, by the fame mother only, takes a fxtb , and two or more fuch half . brothers, a tbird; provided that the deceafed

[^12]left neither children, nor male iffue of a fon, nor a father, nor a true grandfather ; by any of whom the brothers by the fame mother are excluded; and this article brings us neceffarily to one clafs of female fharers; for, in this inftance, there is no diftinction of fex; both brothers and Jifers by the fame mother only having an equal right and an equal thare in the diftribution. 4. A moiety of Hinda's eftate, if the die without children, or the iffue of a deceafed fon, goes to her widower Amru, who, if ihe leave fuch iffue, has no more than a fourth.

As examples of the father's rights, let us fuppofe 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 cafe the four hundred pieces are the thare of Zaid, and Omar takes the remaining two thoufand; but, if Amku leave only his father ZAID and either a daughter, or fon's daughter, Laila, the father is firf entitled to the four hundred pieces, or fixtb part; and, after Laila has received twelve hundred, or a moiety of the eftate (which, as we fhall fee, is her flare in this cafe), he takes, as refiduary, 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
deceafed, Lebid is excluded; and the whole eftate goes to $\mathbf{Z}_{\text {Aid. }}$. If, in the three preceding cafes, the paternal grandfather Sixim had been left inftead 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. I. The paternal grandmother would be excluded by Zaid her fon, but not by his father, her hurband, Sálim. 2. If Amru or Hinda leave a father Zaid, a mother Solma, and a widow Zaineb, or widower Háreth, the mother takes a third part of what remains after Zaineb or Hareth has received the legal fhare; but, if SAlim be fubftituted for Zaid, The would have a right to a third of the whole afets, according to the prevailing opinion, although Abú Yusúf thought her entitled, even in that cafe, to no more than a third of the remainder. 3. The brothers of the whole blood, and thofe by the fame father only, are excluded from the inheritance by Zaid the father, but not by the grandfather Salim, as the beft law-: yers agree, diffenting on this point from their mafter Abú Hanifah. 4. If Amru had manumitted his flave Yásmin, and died, leaving his father Zaid and a fon Omar, a fixth part
of the right of fucceffion to Ya'smin would have vefted, according to $A_{B}{ }^{\prime} U$ Yu'sur; in Zaid, but, if the paternal grandfather $\mathrm{Sa}^{\prime} \mathrm{lim}$ had been left inftead of the father, the whole intereft would have vefted in the fon: in this cafe that illuftrious lawyer ultimately diffented from his mafter and from his fellow-ftudent Muhammed, who were both very juftly of opinion, that, whether Zaid or Sa'lim were alive on the death of the manumittor, the whole right of fucceffion to the manumittee vefted in Omar.

Let us proceed to the fhares of the females; and i. If Amru die without children, and without any iffue of a deceafed fon, his widow Hinda muft receive a fourtb of his alfets; but her thare is an eigbth only ${ }^{*}$, if any fuch iffue be living: fhould he leave more widows than one, they take equal parts of fuch fourth or eigbth; fo that the legal fhare of the widower is always in a double ratio to that of the widow or widows: as, if Hinda die worth twentyfour thonfand zecchins, her furviving hurband Amru muft be entitled either to twelve or to $f x$ thoufand; and if Amru die with the fame eftate, his widow Hinda muft have either $/$ ix or three thoufand for her fole fhare; or, if Zaineb and Abla had alfo been legally married to Amru, the three widows muft receive

[^13]'either two or one thoufand zecchins each, as the cafe may happen. 2. One daughter takes a moiety, and two or more daughters have two thirds, of their father's eftate; but, if the deceafed left a fon, the rule, expreffed in the Koràn, is this: "to one male give the portion of two "females;" and the daughters in that cafe are not properly Sarers, but refiduary beirs with the fon, their part of the inheritance being always in a fubduple ratio to kis part. Thus, if Amru die worth twenty-four thouland pieces of gold, his only child Fatima takes twelve thoufand as her Bare; but, if the have three fifters, Azza, Latifa, and Zubaida, two thirds of the affets, or fixteen thoufand pieces, are equally divided between the four girls; and if there be a fon OMAR, he muft receive, in the firft cafe, fixteen thoufand, while Fa'tima $^{\prime}$ has eight; and, in the fecond, eight thoufand, while fhe and her fifters take each four thoufand, pieces. 3. If Omar had died before his father, leaving female iffue, and his father had then died without any daughter of his own, the daughters of Omar would have had precifely the fame fhares, to which thofe of Amru himfelf would have been entitled; but, had $\mathrm{F}_{\mathrm{A}^{\prime} \mathrm{T} \text { I- }}$ ma been living, the would have taken half the eftate, or twelve thoufand pieces of gold, and a fixtb only, or four thoufand, the complement of two thirds or fixteen thoufand, would have
been equally diftributed among her nieces. Had Fa'tima and Azza been at that time alive, they would have taken their legal thare, to the exclufion of their brother's female iffue, unlefs the right of that iffue had been fuftained 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 higber degree would not bave given them that advantage; and, if Omar himfelf had furvived, his daughters would have been wholly excluded. The $f x$ cafes, therefore, or different fituations, of the female iffue of Omar may be thus recapitulated: 1. A fingle female takes a moiety. 2. Two or more have two thirds. 3. A male in the fame, or a lower, degree than themfelves, gives them a refiduary right in a fubduple 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 thare of the female iffue. 5 . They are excluded, if Amru left more daughters than one, but no male iffue in any equal, or a lower, degree. 6. A fon alfo of Amru wholly excludes them. In the three firft cafes, their legal claims correfpond with thofe of daughters: but in the three laft their rights are weaker, becaufe they are in a remoter degree from the deceafed.

The pedigree exhibited in the text* is called by the Arabs the $t a / b b i b$, becaufe, in their opinion, it fharpens the underftanding, and captivates the fancy as much as the compofition 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 perficicuous, and that no comment, after what has been premifed, could render it clearer. An example, however, will how more diftinctly than an abftract rule, in what manner an eftate is divifible, when a male defcendant gives a refiduary title to a female in the fame, or in a higber, degree. Call the only furviving male defcendant Omar, and fuppofe him to be the brother of Amina, who ftands loweft in the firft fet of females: here the higheft female in that fet muft receive a moiety of the affets; the next below her takes a $f$ ixth together with the highert of the fecond fet, as the complement of two thirds; and the refidue muft be divided into five portions, of which Omar claims two and each of the females in the fame degree, one; but the three females below them are excluded. If $O_{\text {mar }}$ be thebrother of Zarifa, whom we fuppofe the loweft of the middle fet, the remaining tbird of the eftate muft be diftributed in Seventbs,
becaufe there are five females, three in a higher, and two in an equal, degree with Omar, who muft always have a double portion; and, if he be the brother of Unaiza, the loweft female of the third fet (who, on the former fuppofition, 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 thoufand ducats, the daughter of his fon takes tweelve thoufand of them; the two daughters of his fons' fons receive each two thoufand; and, the refidue being eigbt, Omar is entitled alfo to two thoufand ducats, while Unaiza and the five women, who remain, have each one thoufand, which they owe to the fortunate exiftence of Omar. 4. * The rights of fifters by the fame father and mother, and (5.) thofe of fifters by the fame father only, are explained in the text with fufficient clearnefs, but it is proper to obferve, that the fifth cafe of the firft clafs is comprifed in the feventb cafe of the fecond; and that (6.) the fifters by the fame mother have been mentioned in a former fection. There will be no ufe in repeating the ingenious arguments of Ibnu Abbás in fupport of his diffent on many points from other old lawyers, nor the

[^14]folid anfwers, which have been given to his objections; but a ftory, told by Sharif, may here be repeated, becaufe it conveys an idea of the traditionary Arabian law, and fhows from what fources our excellent author derived his doctrine: •Hudhail ufed to relate, that Abu - MúsA, being confulted on the diftribution of ' an heritage among a daughter, a fon's daugh-- ter, and a fifter, anfwered, the firft muft bave - a moiety; the fecond a fixth; and the third, - what remains; but "Confult Ibnu Masúud, " added he, and apprize me of his anfwer:" ' when Ibnu Masúd, was confulted, he faid, ' that he was prefent, when Muhammed him-- felf gave the fame decifion;' and, when that anfwer was reported to Abu Musi, he faid, " you muft put no queftions to me, as long as "that illuftrious lawyer remains with you." 7.* Although the different rights of the mother in different cafes be very clearly explained, yet her title to a third of the refidue may be illuftrated by two examples: firf, if Adhra leave only her hurband WAmix, her mother SôAda, and her father MAzin, half of her eftate goes to WAMIK, a third of the other half, or a fixth of the whole, to SôÁda, and the remainder to

* Page 220.

Mazin; but, fecondly, if Wamir 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 divifion between two great grandmothers *, we may anticipate in fome degree the arithmetical part of the work, which will be found extremely clear and ingenious. The pedigree exhibited by Sharif is in this form : ,


Father
Now the paternal grandmother's mother, and the mother of the paterral grandfather, are together entitled to a fixth, and the paternal grandfather's father to the refidue, of the eftate, which ought, by the general rule, to be divided into $f x$ parts, becaufe fix is the denominator of the Thare; but, to aroid a fraction, we muft

* Page 221.
obferve the proportion of one, or the fixth part, to two, or the number of perfons entitled to it; and, fince one and two are prime to each other, we muft multiply two into $f i x$, and the product is the number of parts into which the property muft be divided; fo that of twelve cows or horfes the great grandfather will have ten, and each of the great grandmothers, one.

The great grandfathers are called anceftors in the fecond, and their fathers, anceftors in the third, degree, and fo forth; and it muft be remarked that in thefe tables the number of female anceftors, who inherit with the males, is equal to the number of fuch degrees: thus in the following,

there are tbree great great grandmothers, and the eftate muft be divided into eigbteen parts, becaufe one and three are prime to each other. We fuppofe in both pedigrees, that the higheft line only are left by the deceafed Amru; for, by the text, the neareft female anceftor excludes the more diftant; and, if he leave his father Zuhair, and his paternal grandmother Azza, ${ }_{\boldsymbol{r}}$ with Laila his maternal grandmother's mother,

Zumair takes the whole inheritance; for he excludes $\mathrm{Azza}_{\text {a }}$ and fhe, being nearer in degree, excludes Laila.

Let us conclude the fubject with a cafe put by Sharif in illuftration of the pedigree in the text: ZUBAIDA gave her daughter's daughter Mayya in marriage to her fon's fon Bashar, and the young pair had a fon Amru, who acquired an eftate, 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 Sulma to Fáred, who was the fon of Zubaida, brother of Abla, and father of Bashar; fo that Zuhra was Amru's paternal grandmother's mother, and had only a fingle relation; as it will appear by the following arrangement of the family :


The cafe of a triple relation will be no lefs evident from the following pedigree :


For, if Amru, whom in the former cafe we fuppofed to be dead without iffue, had lived and married his coufin Fátima, by whom he had a fon Zaid, who died leaving property, Zubaida would have a triple relation to the deceafed ; firft, as his maternal great grandmother's mother; fecondly, as his paternal grandmother's grandmother; and thirdly, as the mother of his paternal great grandfather; but Zuhra has only a fingle relation to Zaid, as grandmother of his paternal grandfather Bashar.
In both thefe cafes a fixtb of the affets is divided equally between the two female anceftors, by the opinion of Abu Yusuf, and, according to one authority, by that of his great mafter alfo; but his fellow-ftudent MuhamMED (whofe arguments, and the anfwers to them, it is needlefs to add) contended, that

Zubaida would be entitled in the firft cafe to two-tbirds, and in the fecond, to tbree-fourtbs, of that $\delta_{i x} x t b$ part, according to the number of modes, in which the was related to Amru or Zaid.

No comment could add perfpicuity to the chapter on refiduary beirs*, until we come to the cafes of inheritance from enfranchifed flaves $\dagger$, where a fhort elucidation of the text appears neceffary. If Amru enfranchife Nercis, 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, fuppofe Laila herfelf to manumit her black flave, Súsen, who then purchafes a llave Misc, and gives him freedom; and fuppofe Súsen firt, and Misc afterwards, to die without refiduary heirs, in this cafe the eftate 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 cafe of a manumiffion promifed on the death of the miftrefs, has rather more difficulty; but an example will make it clear: Laila promifes Nergis, that, on her death, he fhall

[^15]$$
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$$
be free; but, by the perfuafion of a Cbrifian friend, the renounces her faith, and feeks refuge in a hoftile country: now a believer cannot be the flave of an infidel; and the Mobammedan judge pronounces accordingly, that Nergis has gained his freedom; but Laila, repenting of her apoftafy, returns to her native country and her former belief; after which Nergis dies without heirs: Laila fucceede as refiduary to her promifee, as fhe would have fucceeded to a llave of Nergis purchafed after the decifion of the judge, if a fimilar promife of manumiffion at his death had been made by the mafter; and if that fecond promifee had died without heirs after her repentance and return. Should Cáfúr, a flave of Laila, marry, with her confent, Merjána, the freedwoman of Amru, the fon of that couple would be born free, becaufe, in refpect of freedom or llavery, a cbild bas the condition of its motber, and he bears a relation to Amru her manumittor; but fhould Laila give Cáfúr his freedom, he would draw that relation from Amru, through himfelf, to Laila, fo that the would fucceed to the fon of Cáfur and Merjána, if he died after his parents and without other heirs of the firft or fecond clafs: the cafe would be fimilar, if CÁfúr being enfranchifed, had
bought a llave Misc, and given him in marriage to the freedwoman of $\mathrm{Z}_{\mathrm{AID}}$; 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 $\mathrm{Z}_{\text {aid }}$ the relation of his freedman's child, and transferred it, through himfelf, to Laila his former miftrefs. This doctrine of a relation (as the Arabs call it) firf veffed through the mother and then deveffed through the father, is founded on a decifion of Othman in the cafe of Zubair and Rafi.

We had occalion before, to mention the difference (according to Abu Yusuf) between the fatber, and the grandfatber, of the manumittor in regard to their fucceffion, with his fon, 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 cafe in the chapter of refiduaries, which proves, that the relation of enfranchifement may arife by the aCZ of law as well as by the aEt of the party. Let it be premifed, that marriage is prohibited between kindred of two claffes; firt, between all thofe in afcending or defcending lines of confanguinity, who are called near; fecondly, between brothers and fifters, and their iffue, or between nephews or nieces and aunts or uncles, paternal
or maternal, who are called intermediate; but, between thofe of the third, or diftant, clais, as the firft or other coufins, there is no prohibition: now, if Amru or Hinda purchafe a kinfwoman or kinfman within either of the probibited degrees, the flave becomes inftantly free, and a right of fucceffion vefts in the purchafor, though the mafterhip began and ended in one moment. Call the three daughters of Hareth a llave, Zubaida, Safiya, Amina, who derived freedom from their mother, and twe of whom, the firft and third, purchafe HARETH for fifty pieces of gold: he becomes in that inftant free; and, if he die leaving property, two thirds of it go to his three daughters as their legal fhares, and the refidue 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$t y$, pieces. To arrange the diftribution without fractions, begin with three, the denominator of the legal fhare: now two, its numerator, is prime to the number of fharers; and one is prime allo to five, the number of refiduary portions; but thirty and twenty are compofed to one another, fince ten meafures thirty by three and twenty by $t$ two; and five, the fum of thofe tenths, may be confidered as ftanding in the place of the
number of refiduaries: again, five and three are prime to each other, and their product is fifteen, which, being multiplied into tbree, the firftmentioned denominater, produces forty-five, the number of equal parcels, into which Hareth's eftate muft be divided; fo that thirty, or two tbirds, may be diftributed in tens to the three daughters, and fifteen or the refidue, in tbrees to the $t w o$, who redeemed their father; Zubaida taking in all nineteen, Amina fixteen, and SAfiyA, only ten, portions of the inheritance. This is the calculation of Sharif, and the grounds of it will prefently appear; but the operation might have been fhortened thus: multiply the denominator of the legal 乃bare into the number of fharers, and then multiply the product into the denominator of the refiduary portions.

The chapter of exclufion* is very perfpicuous; but the cafe of an unbelieving heir having really occurred in the time of AlI, we may infert it as a monument of early Arabian jurifprudence. Solma had embraced the new faith, and died, leaving her hufband, and two brothers by the fame mother, who were all three believers, with a $\rho j n$, who continued an infidel: on a difpute concerning the inheritance, Ali and Zaid

[^16]gave a moicty to the widower, confidering the fon as actually dcad, a third to the half-brothers, and the reft to fuch of the refiduaries as believed in the Korán; while Ibnu's 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 eftate; but the former opinion has prevailed, and in a curious book (for which there muft have been abundant materials) entitled The Diffinfions of the Learned, it is admitted, that, by univerfal affent, if Amru leave a father, who is either a flave or an infidel, and a paternal grandfather, who is bath free and a believer, the father is confidered as dead in law to all purpofes, and the grandfather is heir to Amru.

We come now to the Arabian method of afcertaining the fmalleft number of parcels, into which an eftate can be divided, fo as to avoid fractions in the legal diftribution of it: that number we call the dcnominator, or devifor, of the eftate, though the Arabick word mean literally the place of coming out; and the problem is eafily folved by the following rules: if the two numbers in queftion be prime, multiply one of them into the other ; if they be compofit to each other, multiply the meafure of one into the fecond, and the product will be the number
fought. The whole fection * is as clear as it could be made in a verbal tranflation; and it would be fuperfluous to add examples of all the cafes, which mult occur to every one, who has attentively perufed the preceding parts of the work.

A cafe, which arofe in the reign of Omar, has given occafion to fome debate $\dagger$ : Laila died, leaving only Amru her hufband, 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 eftablifhed, could be divided into $f x$ parts only; but Abbas, a companion of Muhammed, being confulted by the Caliph, propofed, that the regular divifor fhould be fo increafed, that of eigbt parts Amru and Abla might each take tbree, and Hinda two. The fon of Abbas, whofe opinions were always rather ingenious than folid, was prefent at the decifion; but, fearing the bad temper of the Caliph, fuppreffed at that time his own fentiments: he thought, that the fifter, having (as we have feen) a weaker right, fhould bear the lofs, becaufe, where different rights concur, tbe weakeft invariably yields; and he faid, that if an arithmetician

[^17]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, becaufe, although the fifter may in fome cafes be removed into a diftinct clafs of heirs, yet, with a hufband and a mother of the deceafed, her fhare is fixed by pofitive law, and the cannot by any means be deprived of it; fo that the fhares of all the claimants muft be diminifhed in exact proportion; for inftance, if the property had been twenty-four pieces of gold, the mother would claim eigbt, and each of the other heirs, twelve; now thofe claims cannot all be fatisfied, but eight is to twelve, as $\sqrt{2} x$ to nine, which will be the refpective fhares, according to the decifion of Аbвas.

Examples of the divifor $f x$ increafed to feven and to nine, or of twelve to thirteen, fifteen, and feventeen, would appear equally ingenious, but would fwell this commentary to an immoderate fize : there are two decilions, however, deferving particular notice, becaufe they were made in real caufes, and have been univerfally approved. Zubaida left her hurband Adnan, with two iffers of the whole blood, two Jifters by the fame motber only, and the mother herfelf; whofe legal fhares, in order as they are mentioned, were a moiety, two thirds, a tbird, and a fixtb: it was impoffible, therefore, to diftribute them out of
tbirty pieces, for inftance, divided into $f x$ equal parcels; but the judge, named Shurain, divided the whole eftate into ten parcels, each confifting of three pieces, and allotted them to the claimants in the proportion of their fhares; that is, to the hufband, three parcels, to the fifters of the whole blood, four; to the half-fifters, two; and to the mother, one; affuring AdnAn, who at frft complained of the judgement, that Omar had made a fimilar decifion; and this cafe acquired celebrity among the Arabs by the name of Shuraihiyya. The next cafe, which was anfwered at once by Ali, while he was haranguing the people in the mimbar, or pulpit, at Cufa, is fully fated in the text: the fhare of the widow was, regularly, an eigbth; that of the daughters, two thirds; and that of each parent, a /ixth, all which cannot be diftributed out of twenty-four parcels; but Ali pronounced, that the property of the deceafed fhould be divided into twenty-feven equal parts, of which the widow fhould have three; the daughters fixteen; and the two parents, eight. It is recorded, that, when the perfon, who confulted Ali, was much diffatisfied with his anfwer, and afked whether the widow was not legally entitled to an eigbth, the Caliph faid rapidly, " it is become a ninth," and proceeded in his harangue with his ufual eloquence.

The arithmetical part of the Sirájizya ${ }^{*}$ is very fimple, and may be found in the firft pages of all our elementary books; but the difference of the Arabian idiom occafions a little obfcurity. The chapter on primes and meafures is founded on a fimple analyfis: when two numbers are compared, they are either equal or unequal ; if unequal, either the fmaller is an aliquot part of the greater, or they have a common meafure, which muft either be unit alone, or fome number, which the Arabs define a multitude compofed of units. When the greateft common meafure is found by the rule, they confider the two numbers as agreeing in a fraction, which has that common meafure for its denominator and unit for its numerator; but the nature of the Arabick language makes it impoffible to exprefs in a fingle word the fractions lefs than a tenth: thus twenty-feven and twenty-four agree, as they exprefs it, in a third; and a third of each number is called its wafk, or meafure, as nine of twen-ty-feven, and eight of twenty-four. After this explanation of the word, which is tranflated the meafure, there will be no difficulty in the following cafes.
I. † Amru leaves only his father and mother and ten daughters: now, by the rule, his eftate

[^18]Thould be divided into $f_{i} x$ parts, becaufe the fhare of each parent is a $\sqrt{ }$ ixth, and that of all the daughters two thirds; but four parts cannot be diftributed, without a fraction, among ter perfons; for which reafon we muft multiply five, which is the meafure of ten, into $\mathcal{j i x}$, which is the firft number of parcels, and the product thirty is the number of lots, into which the property of Amru muft in fact be divided; each of his parents taking five lots, and each of his daughters $t w o$.
II. Hinda leaves her hufband, both her parents, and fix daughters; whofe legal fhares are a fourth, two fixths, and two thirds, of the inheritance: now the regular denominator of the lots would be twelve, but it is raifed to fifteen; and fince eight parcels cannot be diftributed equally among $\sqrt{2} x$ daughters, the meafure of fix, or three, is multiplied by fifteen; fo that of forty-five lots nine may go to the hufband, tweloe to the parents, and twenty-four to the daughters, in exact proportion to their firf diftributive fhares.

It will be very eafy to apply the remaining rules to all the other examples given by SiraJ'uddin*; but fince, in the two laft cafes, which are not likely to occur, the inheritance

[^19]muft be divided into 4320 and 5040 parcels, the calculation, after the Arabian mode, in words at length, would be infufferably tedious, and the reader may make it in figures with little or no trouble. The latter of thofe two cafes* is, however, fubjoined; becaufe it will fully explain the fection, in which no examples are given. SAAD leaves two wives, $f x$ female anceftors, capable of inheriting together, ten daughters, and feven paternal uncles, whofe fhares of twenty-four (the root, as they call it, of this cafe) are tbree, four, fixteen, and one; for the uncles can only take what the others leave. Now by obferving the primes and meafures, and working according to the rule, we come to 210 , which muft be multiplied by twenty-four, and the product gives the fmalleft number of parcels, into which SAAD's eftate 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 anceftors, and daugbters; and the allotment of each fharer appears at once from the following proportions:

| Persons. | First Shares. |  | Multiplicand. |  | Sharbs of each. |
| :---: | :---: | :---: | :---: | :---: | :---: |
| 2 | : 3 | 1: | 210 | : | 531. |
| 6 | 4 | : | 210 | : | 140. |
| 10 | : 16 | : | 210 | : | 336. |

The laft act of the Mufelman judge is to make an actual divifion of the ftate ${ }^{*}$; and we will fuppofe that Laila, in the cafe anfwered by by Abbas, had left Zaineb and Abla, tro fifters of the whole blood, with Amru, her hufband, and Hinda, her mother; and that her property amounted only to twenty-five gold mobrs: now the root of the cafe is increafed, as we have feen, from $\delta i x$ to eigbt, which is prime to twenty-five; and the products of two, the fhare of each fifter, of three, the fhare of the hufband, and of one, the fhare of the mother, multiplied by the number of gold mobrs, are 50,75 , and 25 , which, divided by eight, give the following fhares: to each fifter, 6 mokrs, 4 rupees; to Amru, 9 m. 6 r.; to Hinda, 3 m. $2 r$. Had Laila's eftate been fifty gold mobrs, the diftribution would have been thus:


It feems needlefs to give examples of the fimple rules for afcertaining the dividends of each clafs; but the paffage concerning creditors,

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\text { * Page } 233 .
$$

at the clofe of the chapter, is made obfcure by extreme brevity, and requires a fhort illuftration. Suppofe 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 compofit to nine, and their meafures are five, and tbree; fo that, by the rule before-mentioned of diftribution among beirs, Ahmed will receive $f x$, and SAAD, three pieces; but, had the debtor left thirteen, which would have been prime to the amount of both debts, then fifteen, ftanding in the place of the verification, as they call it, muft be the devifor of the feveral products, arifing from the multiplication of ten and five into thirteen, and the quotients $8^{\frac{2}{5}}$ and $4^{\frac{1}{5}}$ will be the refpective dividends of Ahmed and SAAd.

The practice of fubtraction * arofe from the cafe of Abdur'rahman and his four wives, decided in the reign of Othman; and the fection concerning it will be made clear by a fuller explanation of the example in the text. We have feen, that the widower is entitled to a moiety, the mother to a tbird, and the uncle, to the refidue ; fo that, if Laila's eftate be divided into $f x$ parcels, the diftribution may be made without a fraction : but if the widower agree to
keep the mabr, or nuptial prefent to his wife, which he had never actually paid, inftead of his tbree fixtbs of the whole, the remainder, after deducting the mahr, muft be divided into tbree parts, of which the mother will have two, and the uncle one. So, if the mother agree to take a jewel, or other fpecifick thing, in lieu of her $t w o$ fixtbs; or the uncle, a llave or a carriage, in the place of his fixtb part, the remainder, which would be four parts in the firft cafe, and five in the fecond, muft go to the other claimants in proportion to their fhares. 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 alfo the inheritance muft be divided, by the rule, into $f i x$ parts: now, if the deceafed left a female llave and thirty gold mohrs, and, if Solma confented to keep the flave inftead of her legal fhare, or a $f i x t h$, the remainder of the property muft then be divided into five parcels, fix gold mobrs in each, of which Fátima and Latifa muft receive each one parcel, and Selim, the three parcels, which remain. It is obvious, that, if the firft calculation were made, in the preceding cafes, on a fuppofition, that the taker of the fpecifick thing was dead or incapable of inheriting, there would be either a defect or an exVOL. VI.
cefs in fome of the allotments to the other claimants.

There is no difficulty in the chapter on the return*, except what arifes from the Arabick idiom, to which the reader is probably by this time habituated; but it is neceffary to remark, that, although, by the letter of the Korán and the frict rules of law, no return can be made to the zoidower or widow, yet an equitable practice has prevailed, in modern times, of returning to them on failure of 乃barers by blood and of diftant kindred. The laft cafe in the chapter can rarely occur; and the refult of the calculation (which fills ten pages in the Perfian work of Maulaví Kásim) is, that, of 1440 parcels, the four widows take ( $36 \times 5=$ ) 180 ; the nine daughters ( $36 \times 28=$ ) 1008; and the $\int 1 x$ female anceftors $(36 \times 7=) 252$; fo that 45 parts go to each widow, 112 to each daugbter, and 42 ta each fermale anceftor.

- The rights of the paternal grandfatber have been more difputed than any other point of Arabian law ; no fewer than Seventy contradictory decifions having been made concerning them in the reign of Omar; but the difpute isnow fettled among the Sunnis according to the opinion of Abu Hanifa; and the chapter on

[^20]divifion feems to have been inferted merely from refpect to Abu Yusuf and Muhammed, who diffented on this point from their mafter *: it is one of the cleareft chapters in the Sirájiyyab, and will be ufeful to us, if the queftion fhould arife in a family of Shiâbs, who follow, no doubt, the opinions of Ali and Zaid. The cafe called acdariyya, which was decided by the fon of Thabit, and has acquired fuch celebrity in Irák, that it is diftinguifhed among the lawyers of that country by the epithet of algharrd, or the luminous, is a perfpicuous example of the grandfather's divifion in a double ratio with the fifter: the conjecture, formerly hazarded by myfelf, that it was named acdariyya, becaufe the rules of inheritance are difurbed by it in favour of the grandfather, had occurred, I fee, to fome Arabs, and is mentioned by Sharif without difapprobation.
It will be neceffary to illuftrate by examples the chapter on fucceffion to vefted bereditary interefts $\dagger$ : and, firft, we may fuppofe, that Zaid had two wives, named Zaineb and Latifa, and that Zaineb died poffeffed of feparate property, leaving her hufband, her mother Zuhra, and Hinda, her daughter by her former hufband: now the legal fhares, in order as the

[^21]Tharers are named, would be a fourth, a $\mathcal{A x t h}$, and a moiety ; fo that regularly the eftate fhould be divided into twelve parts, but it is here divided into four, becaufe there muft be a return to Zuhra and Hinda, in the proportion of their Chares, that is as one to tbree; but, when Zaid has taken his fourth, the three fourths, which remain, cannot be diftributed in that proportion; and, fince tbree and four are prime to each other, we therefore multiply four, confidered as the number of perfons entitled to a return, into four, the denominator of the hufband's fbare, and the fquare number anfwers the purpofe of integral diftribution; for of fixteen parcels $\mathrm{Z}_{\text {Aid }}$ will be entitled to four, $\mathrm{ZuH}-$ ra to three, and Hinda to nine.

Suppofe next, that Zaid himfelf dies, before any diftribution actually made, leaving only Latifa before-mentioned, his mother Basira, and his father Abid: here four parts of the former inheritance having vefted in him, the diftribution is eafy; one part going to Latifa, as her fourth, one alfo to Basira, as her third of the refidue, and two parts to Ábid; in exact proportion to their feveral claims on his own eftate.

Thirdly, fuppofe Hinda to die before any actual diftribution, leaving the before-named

Zubra, her grandmother, Zubaida her daughter, and two fons, Ha'tif and Bashar: now the had a vefted intereft in nine parts out of the $f_{i x t e e n, ~ a n d, ~ h e r ~ o w n ~ e f t a t e ~ b e i n g ~ d i v i f i b l e ~}^{\text {a }}$ into $f x$ parts, we obferve, that nine and $f x$ are compofit to each other, or agree, as the Arabian phrafe is, in a tbird; fo that a third of fix, or two, muft be multiplied into fixteen, and the product thirty-two will be the denominator for both cafes; for of thirty-two parts nine will veft in Zuhra (fix as mother to Zaineb, and three as grandmother to Hinda), twelve in the two fons, tbree in Zubaida, and eigbt in Zaid's reprefentatives; fince, to afcertain the fhare of each individual, the juft-mentioned fhares out of $f_{\text {ixteen muft be multiplied by two, }}^{\text {m }}$ and thofe out of $f x$, by three, which is here called the meafure of Hinda's vefted intereft.

Let us fourthly fuppofe, that Zuhra alfo dies before any diftribution, leaving her hufband $\hat{C A A B}$, and two brothers CÁlib and TArif. Now her own eftate is arranged by four, the hurband taking a moiety, and each of the refiduaries one fourtb; but four and nine are prime to each other; and four, therefore, multiplied by thirty-two, produces an bundred and twenty-eigbt, the denominator of both cafes: we muft then multiply by four the fhares out of tbirty-two, and by nine the fhares out of four,
and the products will be lots of the feveral claimants; eigbt parcels going to Laitifa, fixteen to Abid, eigbt to Basira, forty-eight in moieties to Hátif and Bashar, twelve to Zu baidA, eighteen to $\widehat{\mathrm{CAAB}}$, and eigbteen in moieties to Cálib and Tárif.

We need only add, that, although the conclufion of the chapter before us be obfcured by its extreme concifenefs, yet it plainly means, that, "when any number of heirs die fuc" ceffively before the diftribution, if the 乃bares "vefted in the laft deceafed do not quadrate " with the arrangement of his own eftate, we " muft confider all thofe, who died before him, " as one deceafed beir, and himielf as the fecond, " and then work by the preceding rules;" to give' more examples would be very eafy, but the reader would find them infupportably tedious.

All controverfies on the claims of the next of kin, who are neither fbarers nor refiduaries, are now at an end *; for it feems to be fettled, that they fucceed according to the order prefcribed in our text.
I. On the firgt clafs of diftant kindred the doctrine of Abu Yusur has far more fimplicity

[^22]than that of Muhammed, in which there is an appearance of intricacy; but an attentive reader will find no difficulty in the cafe reduced to the form of a table, in which the loweft of the fix ranks are fuppofed to be the claimants of Amry's eftate *: he will fee, that Abu Yusur would divide that eftate into fifteen parts, giving one to each of the female, and $t w o$, by the rule in the Koràn, to each of the male, defcendants; but that Muhammed would arrange it in $\rho x x^{2}$ y parcels, twenty-four of which would go to the reprefentatives of the three fons, and tbirty- $/ 2 x$ to thofe of the nine daughters; due regard being paid to the double portion of the male defcendants, fo as to bring the fhares of the twelve claimants to the following order from the left hand, twelve, eigbt, four; nine, tbree, fix; fix, two, four; thrce, two, one. The correctnefs of this method has, it feems, obtained it a preference over that of Abu YUSUF, whofe practice, however, is followed, on account of its facility, in Bokhára and fome 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 unneceffarily fatigued,

[^23]if we were to exhibit every ftep of the arithmetical procefs, by which the eftate of Amru muft be diftributed, according to the opinion of Muhammed, between his great grandfon by females only, and his two great granddaughters, who have the advantage of a male in the line of defcent *; nor does the fection concerning the difference of $\mathcal{f}$ des require elucidation.
II. On the fecond clafs, or the grandfathers and grandmotbers, who are excluded from /bares, we need only fum up the doctrine of our author in the words of Sharif:-".The degrees " ${ }^{6}$ in this cafe are either equal or unequal ; if " unequal, the nearer is preferred; if equal, the " preference is given to the perfon claiming "tbrougb a Barer; if there be an equality in " that refpect, the fides muft be the fame or dif" ferent; if different, the diftribution muft be " made in tbirds, the paternal fide having a "double allotment; if the fame, the fexes of the " roots, or anceftors, muft agree, or not; if " they agree, the eftate muft be diftributed ac"cording to the perfons of the brancbes, or " claimants; if not, according to the firft rank " that differs, as in the preceding clafs $\dagger$."
III. There feems no difficulty in the chapter $\ddagger$ on the third clafs of diftant kindred ; but

[^24]it muft be remarked, that although the brothers and fifters by the fame motber only take equally, according to the Koràn, without any diftinction of fex, yet that exception to the general rule by no means extends to the ifue of fuch brothers and fifters,
IV. Although the claims of uncles and aunts, in three cafes, be clearly explained in the text ${ }^{*}$, yet it may not be improper to fubjoin an example from the commentary of Maulaví Kisim, which the following pedigree will make more intelligible than his dry ftate of the cafe:

Hinda-Amru-Sulma(-Suhaif)-Umar


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 fhe produced $\mathrm{Azza}^{2}$, and after his death, fhe married Umar, by whom the became the mother of Becr: now Zaid was the fon of Lebid and Azza; and he died; leaving qо heirs but

* Page 253.

Becr the brother, by the fame motber; of his mother Azza, and Zaineb, who was his paternal aunt by the fame father Amru, and his maternal aunt by the fame motber Sulma. In this cafe; the property of Zaid muft 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; fo that Zaineb, in her two characters, will be entitled to feven ninths.

There feems no neceffity to expatiate on the children of uncles and aunts, or on the coufins, as we fhould call them, in different degrees *; becaufe the text will be fufficiently perficuous to thofe, who perfectly underftand the preceding fections: but, fince a curious cafe is put by Sharif, I am unwilling to fupprefs it; efpecially as it will throw light on the whole fubject before us. The father of Amru had a brother, Zaid, and two fifters, Zaineb and Aaisha, by the fame father only: his mother alfo had a brother, Hareth, and two fifters by the fame father, named Hinda and Asima: firf, his father and mother died; then, all his uncles and aunts, leaving the following iffue: Zaid left two daughter's daughters, who were alfo the daughters of Zaineb's fons; Aisha, two fons

[^25]of her daughter; H'AREth, two daughter's fons, who were alfo the fons of the fon of Hinda; and Asima, two daughter's daughters; as in this pedigree:

Zaid. Zaineb. Aa'isha. Ha'reth. Hinda. Asima.


Amru himfelf afterwards died, with no heirs but the grandchildren of his uncles and aunts: In this cafe $A_{b u}$ Yusur would have divided the inheritance into thirty parts; twenty for the paternal fide ; that is, five for each of the fons, 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 eftate into thirty-fix allotments, would have given twenty-four to the paternal, and twelve to the maternal fide; that is, $f x$ to each of Zaid's granddaughters, as fuch, and four to each of them, as granddaughters of Zaineb; two to each of Aaisha's grandfons; three to each grandfon of Hareth, as fuch; and two more to each of them, as grandfons of Hinda;
while one thirty-fixth part would have gone to each of Asima's female defcendants. The reafon of thefe different diffributions will appear from what has preceded; but the arithmetical proceffes would fill many pages, and would be thought, I am perfuaded, unneceffarily prolix.

On the chapter concerning hermaphrodites*, I fhall make no particular obfervation; fipce monftrous births are, I truft, extremely rare in all countries, and the fubject is too fhocking to be difcuffed without actual neceffity; nor will it anfwer, I imagine, any ufeful purpofe to reelate the old Arabian ftories, and ftrange opinions of fome lawyers, concerning the longeft poffible time of geftation $\dagger$; which is now limited, on the authority of AAisha, one of Монammed's wives, to two years; and, though the Mufelmans have traditionary accounts of tbree, four, or even five children produced at one birth, yet the practice, we find, is to referve the fhare of one fon; or that of one daughter, if, on fuppofition of her birth, the fum referved would be larger $\ddagger$. The practice of refervation for the unborn child is well explained by the cafe in the text, to which we may now proceed, fince the reft of the chapter needs no illuftration; unlefs it be neceffary to inform

[^26]the reader, that a widow ought by law to abftain for a certain time after her hufband's death, from the careffes of any other man; and, if the freely confefs that the has not abftained, it cannot be certain, that her hurband was the father of a child born more than fix months after his death. Let us then fuppofe Amru to die, leaving a daughter Zaineb, his mother Asuma, his father Lebid, and his wife Hinda enfeint *. So that, if a male child be born, Amrd's eftate ought regularly to be divided into twenty-four parts, but, on the birth of a female, into twenty-feven; becaufe, in the firf cafe, the 乃hares are an eigbth, for the widow, and a fixtb for each of the parents; but, in the fecond, befides the fhares juft mentioned, the daughters would have two-thirds between them, and it would be the cafe of Mimberiyya $\dagger$. Now three is the common meafure of twenty-four and twenty-feven, and the feveral meafures of thofe numbers are eigbt 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 fhares into which the inheritance muft be actually divided. In the firft cafe Hinda would have twenty-feven fhares; Lebid

[^27]and Asuma, each tbirty- $f x$; the pofthumous fon Seventy-eigbt, and Zaineb, his fifter, tbirtynine; but, in the fecond, the widow would have twenty-four; and each of the parents, thirty-two; while the pofthumous daughter and her fifter would divide the remainder between them, each taking /ixty-four fhares. Should four pofthumous fons be born, ninety-nine fhares 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- $\int x$; but, in the cafe of a mifcarriage, the daughter would be entitled to $a$ bundred and eigbt parts, or a moiety of the whole eftate, and the nine parts remaining would go to Lebid as refiduary heir.

The time, at which an abfent perfon is pre-* fumed in law to be dead, has varied, we fee, in different ages*; but the modern practice I underftand to be this: if Zaid has been fo long abfent, that no man can tell whether he be dead or alive, and if Seventy years have elapfed from the day of his birth, he is prefumed 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 abfence;

[^28]fo that, in the firft cafe, no perfon, dying within the feventy years, could have inherited any part of bis eftate; nor, in the fecond, could he inherit from any one, who died after the day, when he firft was miffed. Though the arrangement of an inheritance, on which an abfent perfon may have a claim, be fufficiently clear from what has juft preceded, yet a feigned cafe in illuftration of it will not, perhaps, be thought wholly fuperfluous. If Hinda then die at Murfbedabád, leaving Amru her hufband, with two fifters of the whole blood, $\mathrm{Na}^{\prime}$ dira and $\mathrm{Saci}^{\prime} \mathrm{na}$, all refiding in that city, and a whole brother Zaid, who has long been abfent and unheard of, we muft confider what effect his life or his death would have on the inheritance: if he be dead, Amru muft have a moiety of the eftate, and the fifters two thirds between them; and, if he be living, the widower will ftill have a right to his half, but Zaid will take twice as much as either of the fifters. Now, on the firf fuppofition, the affets of Hinda muft be divided, as we have fhown, into feven fhares, of which Amru muft have tbree, and each of the fifters, two; but, on the fecond, into eigbt parts, four of which go to the hufband, and two to the brother, while Na'dira and Sacína can only have one a piece; fo that the widower has an intereft in fuppofing Zaid alive, and the fifters, in fuppofing him dead: fifty-fix, therefore, or the
product of feven and eigbt, which are prime to one another, is the number of fhares, into which the eftate muft be divided; twenty-four of them being delivered to Amru, and feven to each of the females, as the leaft fhares to which they can in either event be feverally entitled; if Zaid then return to the city, four fhares more go to Amru, and fourteen are the right of the brother; but, if his death be proved, or prefumed by lapfe of time, the eigbteen referved thares muft be divided equally between Sacína and Na'dira, to complete their two feventbs, which the law gives, in that cafe, to each of them. The Perfian commentator has added three cafes, in one of which the two firt divifors of the affets are compofit to each other; but the operation in all of them is too eafy to require an example.

In the fections concerning apoftates and prifoners of war*, there feems to be no obfcurity; but it is proper to add, that, as the law is now fettled, the heirs of an apoftate, who were in being at the time of his death, are entitled to their legal fhares, whether they were born before or after his apoftafy; though a hufbasd or wife cannot fucceed to an apoftate, becaufe a change of religion is an immediate diffolution of the marriage.

[^29]We are now come to the concluding fection, which cannot be better illuftrated than by two feigned cafes from the Perfian and Arabian comments. I. Zaid and his daughter Abla were at fea in the fame fhip, together with BAShAR, his brother's fon, and his great nephew Amro, fon of Bashar: the fhip was loft, and all, who were in it, perifhed; fo that which of them firft died, could never be clearly afcertained. Now Amru left behind him a wife and a daughter; and Abla had an only fon: in this cafe, by the opinion of Abu Hanifah and his followers, the four drowned perfons are fuppofed to have perifhed in the fame inftant, and their feveral eftates go to their furviving heirs refpectively, 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 fuppofed to have outlived her father, the fon takes one moiety in her right, while the other moiety is conceived at firft to have vefted in BAshar, and then in Amru, between whofe widow and daughter it is diftributable according to law. 2. Ka'sim and his younger half-brother Hasan were drowned in the fame 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 thore, the provol. vi.
perty of each muft be feverally diftributed, according to the Hanifeans; the daughter of each taking balf, or forty-five pieces; the mother a fixth, or fifteen, and the manumittor, as refiduary, the tbirty pieces which remain; but according to Al i, the younger brother Hasan being firft confidered as the furvivor, that refidue vefts in him, and is then diftributed, in the juft mentioned ratio; balf of it, or fifteen, going to his daughter; a fixth, or five pieces, to his mother ; and ten, the refidue, to his patron; next, Ka'sim being fuppofed to have furvived, the fame rule is applied to him; fo that the daughter of each takes on the whole $\int$ ixty; the mother, twenty; and the manumittor, ten pieces of gold.

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## ESSAY

ON

## THE LAW OF BAILMENTS.

In tutelis, societatibus, fiduciis, mandatis, rebus emptis-venditis, conductis-locatis, quibus vitz societas continetur, magni est judicis statuere (presertim cùm in plorisque sint judicia contraria), quid quemque cuique prestare oporteat.
Q. Scevola, apud Cic. de Offic. lit. III.


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## ESSAY

ON

## THE LAW OF BAILMENTS.

HAVING lately had occafion to examine with fome attention the nature and properties of that contract, which lawyers call bailment, or, A delivery of goods on a condition, exprefled or implied, tbat they fball be reftored by the bailee' to the bailor, or according to bis directions, as foon as the purpofe, for which they were bailed, fball be anfwered, I could not but obferve with furprife, that a title in our English law, which feems the moft generally interefting, fhould be the leaft generally underfood, and the leaft precifely afcertained. Hundreds and thoufands of men pafs through life, without knowing, or caring to know, any of the numberlefs niceties, which attend our abftrufe, though elegant, fytem of real property, and without being at all acquainted with that exquifite logick, on
which our rules of feecial pleading are founded; but there 'is hardly a man of any age or ftation, who does not every week and almoft 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 depofitary or a perfon depofiting, of a commiffioner 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 juft idea? Nor muft 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 caufe, were to weaken them or obftruct their motion, the whole machine would inftantly be difordered or broken to pieces: prefervé them, and various accidents may ftill deprive men of happinefs; but deftroy them, and the whole fpecies muft infallibly be miferable. It feems therefore aftonifhing, that fo important a branch of jurifprudence fhould have been fo long and fo ftrangely unfettled in a great commercial country; and that, from the reign of Elizabeth to the reign of Anne, the doetrine of bailments fhould have produced more contradictions and confufion, more diverfity of opinion and inconfiftency of argument, than any
other part, perhaps, of juridical learning; at leaft, than any other part equally fimple.

Such being the cafe, I could not help imagining, that a fhort and perfpicuous difcuffion of this title, an expofition of all our ancient and modern decifions concerning it, an attempt to reconcile judgments apparently difcordant, and to illuftrate our laws by a comparifon of them with thofe of other nations, together with an inveftigation of their true firit and reafon, would not be wholly unacceptable to the fudent of Engli/b law; efpecially as our excellent Blackstone, who of all men was beft able to throw the cleareft light on this, as on every other, fubject, has comprifed the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may fafely pronounce the leaft fatisfactory part of it; for he reprefents lending and letting to bire, which are bailments by his own definition, as contracts of a difinct . $\int$ pecies; he fays nothing of employment by commi/fion; he introduces the doctrine of a diftrefs, which has an analogy to a pazen, but is not properly bailed; and, on the great queftion of reSponfibility for neglect, he fpeaks fo loofely and indeterminately, that no fixed ideas can be collected from his words*. His commentaries are .

[^30]the moft correct and beautiful outline, that ever was exhibited of any human fcience; 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 profeffed only to $\mathbf{f k e t c h}$ in elementary difcourfes, were filled up with exactnefs and perfpicuity, Englifbmen might hope at length to poffefs a digeft of their laws, which would leave but little room for controverfy, except in cafes depending on their particular circumftances; a work, which every lover of humanity and peace muft anxioufly wifh to fee accomplifhed. The following effay (for it afpires to no higher name) will explain my idea of fupplying the omiffions, whether defigned or involuntary, in the Commentaries on the Laws of England.

I propofe to begin with treating the fubject analytically, and, having traced every part of it up to the firft principles of natural reafon, fhall proceed biftorically, to fhow with what perfect harmony thofe principles are recognifed and eftablifhed by other nations, efpecially the Romans, as well as by our English courts, when their decifions are properly underfood and clearly diftinguifhed; after which I fhall refume $\sqrt{ } \mathrm{y} n$ thetically the whole learning of bailments, and expound fuch rules, as, in my humble appre-
henfion, will prevent any farther perplexity on this interefting title, except in cafes very peculiarly circumftanced.

From the obligation, contained in the definition of bailment, to refore the tbing bailed at a certain time, it follows, that the bailee muft keep it, and be refponfible to the bailor, if it be loft or damaged; but, as the bounds of juftice would in moft cafes be tranfgreffed, if he were made anfwerable for the lofs of it witbout bis fault, he can only be obliged to keep it with a degree of care proportioned to the nature of the bailment; and the inveftigation of this degree in every par-. ticular contract is the problem, which involves the principal difficulty.

There are infinite fhades of care or diligence from the flighteft momentary thought, or tranfient glance of attention, to the moft vigilant anxiety and folicitude; but extremes in this cafe, as in moft others, are inapplicable to practice: the firft extreme would feldom enable the bailee to perform the condition, and the fecond ought not in juftice to be demanded; fince it would be harf and abfurd to exact the fame anxious care, which the greateft mifer takes of his treafure, from every man, who borrows a book or a feal. The degrees then of care, for which we are feeking, muft lie fomewhere between thefe extremes;
and, by obferving the different manners and characters of men, we may find a certain ftandard, which will greatly facilitate our inquiry; for, although fome are exceffively carelefs, and others exceffively vigilant, and fome through life, others only at particular times, yet we may perceive, that the generality of rational men ufe nearly the fame degree of diligence in the conduct of their own affairs; and this care, therefore, which every perfon of common prudence and capable of governing a family takes of bis own concerns, is a proper meafure of that, which would uniformly be required in performing every contract, if there were not ftrong reafons for exacting in fome of them a greater, and permitting in others a lefs, degree of attention. Here then we may fix a conftant 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 conftruction be favourable, a degree of care lefs than the ftandard will be fufficient; if rigorous, a degree more will be required; and, in the firft cafe, the meafure will be that care, which every man of common Senfe, thougb abfent and inattentive, applies to his own affairs; in the fecond, the meafure will be that
attention, which a man remarkably exact and tbougbtful gives to the fecuring of his perfonal property.

The fixed mode or ftandard of diligence I fhall (for want of an apter epithet) invariably call Ordinary; although that word is equivocal, and fometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried ufe of the word in one fenfe will prevent the leaft obfcurity. The degrees on each fide of the ftandard, being indeterminate, need not be diftinguifhed by any precife denomination : the firf may be called less, and the fecond, more, than ordinary diligence.

Superlatives are exactly true in mathematicks; they approach to truth in abftract morality ; but in practice and actual life they are commonly falfe : they are often, indeed, ufed for mere intenfives, as the most diligent for very diligent; but this is a rhetorical figure; and, as rhetorick, like her fifter poetry, delights in fiction, her language ought never to be adopted in fober inveftigations of truth : for this reafon I would reject from the prefent inquiry all fuch expreffions as the utmoft care, all polfible, or all imaginable, diligence, and the like, which have been the caufe of many errors in the code of ancient Rome, whence, as it will foon be demonftrated,
they have been introduced into our books even of high authority.

Juft in the fame manner, there are infinite thades of defoult or neglect, from the llighteft inattention or momentary abfence of mind to the moft reprehenfible fupinenefs and ftupidity: thefe are the omiffions of the before-mentioned degrees of diligence, and are exactly correfpondent with them. Thus the omiffion of that care, which every prudent man takes of bis own property, is the determinate point of negligence, on each fide of which is a feries of variable modes of default infinitely diminifhing, in proportion as their oppofite modes of care infinitely increafe; for the want of extremely great care is an extremely little fault, and the want of the flighteft attention is fo confiderable a fault, that it almoft changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of truft-and a deviation from common honefty. This known, or fixed, point of negligence is therefore a mean between fraud and accident; and, as the increafing feries continually approaches to the firft extreme, without ever becoming precifely equal to it, until the laft term melts into it or vanifhes, fo the decreafing feries continually approximates to the fecond extreme, and at length becomes nearer to it than any affignable difference: but the laft terms be-
ing, as before, excluded, we muft look within them for modes applicable to practice; and thefe we fhall find to be the omiffions of fuch care as a man of common Senfe, bowever inattentive, and of fuch as a very cautious: and vigilant man, refpectively take of their own polfelfions.

The conftant, or fixed, mode of default I likewife call ordinary, not meaning by that epithet to diminifh the culpability of it, but wanting a more appofite word, and intending to ufe this word uniformly_in the fame fenfe: of the two variable modes the firft may be called GREATER, and the fecond, less, than ordinary, or the firf gross, and the other, slight neglect.

It is obvious, that a bailee of common honefty, if he alfo have common prudence, would not be more negligent than ordinary in keeping the thing bailed: fuch 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 lefs obvious, though lefs pertinent to the fubject, that infinite degrees of fraud may be conceived increafing in a feries from the term where grofs nëglect ends, to a term, where pofitive crime begins; as crimes likewife proceed gradually from the lighteft to the moft atrocious; and, in the fame manner, there are infinite degrees of accident from the limit of extremely light ne-
glect to a force irrefffible by any human power. Law, as a practical fcience, cannot take notice of melting lines, nice difcriminations, and evanefcent quantities; but it does not follow, that neglect, deceit, and accident, are to be confidered as indivifible points, and that no degrees whatever on either fide of the ftandard are admiffible in legal difquifitions.

Having difcovered the feveral modes of diligence, which may juftly be demanded of contracting parties, let us inquire in what particular cafes a bailee is by natural law bound to ufe them, or to be anfwerable for the omiffion of them.

When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance; and there can be no reafon to recede from the ftandard: nothing more, therefore, ought in that cafe to be required than ordinary diligence, and the bailee fhould be refponfible for no more than ordinary neglect; but it is very different, both in reafon 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 unjuft to require any.particular trouble from the bailee, who ought not to be molefted unneceffarily for his obliging conduct : if more, therefore, than
good faith were exacted from fuch a perfon, that is, if he were to be made anfwerable for lefs than $\mathrm{gro} / \mathrm{s}$ neglect, few men after one or two examples, would accept goods on fuch terms, and focial comfort would be proportionably impaired.

On the other hand, when the bailee alone is benefited or accommodated by his contract, it is not only reafonable, that he, zobo receives the benefit, Jbould bear the burden, but, if he were not obliged to be more than ordinarily careful, and bound to anfwer even for llight neglect, few men (for acts of pure generofity and friendfhip are not here to be fuppofed) would part with their goods for the mere advantage of another, and much convenience would confequently be loft in civil fociety.

This diftinction is conformable not only to natural reafon, but alfo, by a fair prefumption, to the intention of the parties, which conftitutes the genuine law of all contracts, when it contravenes no maxim of morals of good government; but, when a different intention is $e x$ preffed, the rule (as in devifes) yields to it; and a bailee without benefit may, by a fpecial undertaking, make himfelf liable for ordinary, or ligbt, neglect, or even for inevitable accident: hence, as an agreement, tbat a man may fafely be di/boneft, is repugnant to decency and morality, and, as no
man . hhall be prefumed to bind himfelf againft irrefftible force, it is a juft rule, that every bailee is refponfible for fraud, even though the contrary be ftipulated, but that no bailee is refponfible for accident, unlefs it be moft exprefsly fo agreed.

The plain elements of natural law, on the fubject of refponfibility for neglect, having been traced by this fhort analyfis, I come to the fecond, or biftorical, part of my effay; in which I fhall demonftrate, after a few introductory remarks, that a perfect harmony fubfifts on this intereftíng branch of jurifprudence in the codes of nations moft eminent for legal wifdom, particularly of the Romans and the English.

Of all known laws the moft ancient and venerable are thofe of the Jews; and among the Mofaick inftitutions we have fome curious rules on the very fubject before us; but, as they are not numerous enough to compofe a fyftem, it will be fufficient to interweave them as we go along, and explain them in their proper places: for a fimilar reafon, I fhall fay nothing here of the Attick laws on this title, but fhall proceed at once to that nation, by which the wifdom of Athens was eclipfed, and her glory extinguifhed.

The decifions 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 ftill are, in bad odour among $\boldsymbol{E}_{n-}$ glifbmen: this is an honeft prejudice, and flows from a laudable fource; but a prejudice, moft certainly, it is, and, like all others, may be carried to a culpable excels.
The conftitution of Rome was originally excellent; but, when it was Settled, as hiforians write, by Augustus, or, in truer words, when that bafe diffembler and cold-blooded affaffin $C$. Octavius gave law to millions of honefter, wifer, and braver men than himfelf by the help of a profligate army and an abandoned fenate, the new form of government was in itfelf abfurd and unnatural; and the lex regia, which concentrated in the prince all the powers of the ftate both executive and legiflative, 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 thofe who confented to it; for " a renunciation of perfonal rights, efpe"cially rights of the higheft nature, can have "ino operation beyond the perfons of thofe, who "renounce them." Yet, iniquitous and odious as the fettlement of the conftitution was, Ulpian only fpoke in conformity to it, when he faid that "the will of the prince had the force

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" of law ;" that is, as he afterwards explains himfelf, in the Roman empire; for he neither meaned, nor could be mad enough to mean, that the propofition was juft or true as a general maxim. So congenial, however, was this rule or fentence, ill underftood and worfe 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 themfelves to introduce the civil laws " of Rome into the government of England";" and fo hateful was it to our fturdy anceftors, that, if Joun of Salisbury be credited, "they burned " and tore all fuch books of civil and canon law " as fell into their hands $\uparrow=$ :" but this was intemperate zeal; and it would have been fufficient to improbate the publick, or confitutional, maxims of the Roman imperial law, as abfurd in themfelves as well as inapplicable to our free government, without rejecting the whole fyftem of private jurifprudence as incapable of anfwering even the purpofe of illuftration. Many pofitive inftitutions of the Liomans are demonftrated by Fortescue, with great force, to be far furpaffed in juftice and fenfe by our own inmemorial cuftoms; and the refcripts of Severus or Carac.inla, which were laws, it feems, at Rome,

[^31]have certainly no kind of authority at Weftminfler; but, in queftions of rational law, no caufe can be affigned, why we fhould not fhorten our own labour by reforting occafionally to the wif. dom of ancient jurifts, many of whom were the mof ingenious and fagacious of men. What is good fenfe, in one age, muft be good fenfe, all circumftances remaining, in another; and pure unfophifticated reafon is the fame in Italy and in England, in the mind of a Papinian and of a Blackstone.

Without undertaking, therefore, in all in ftances, to reconcile Nerva with Proculus, Labeo with Julian, and Gaius either with Celsus or with himfelf, I fhall proceed to exhibit a fummary of the Roman law on the fubject of refponfibility for neglect.

The two great fources, whence all the decifions of civilians in this matter muft be derived, are two laws of Ulpian; the firft of which is taken from his work on Sabinus, and the fecond from his tract on the Edict: of both thefe laws I fhall give a verbal tranflation according to my apprehenfion of their obvious meaning, and fhall then ftate a very learned and interefting controverfy concerning them, with the principal arguments on each fide, as far as they tend to elucidate the queftion before us.
"Somecontracts, fays the great writeron Sabinus,
" make the party refponfible for deceit only; " fome, for both deceit and neglect. No"thing more than refponfibility 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; alfo in portions, guar"dianships, voluntary work: (among " thefe some require even more than ordinary "diligence). Partnership and undi" vided property make the partner and joint"proprietor anfwerable for both deceit and " negligence*."
"In contracte, fays the fame author in his * other work, we are fometimes refponfible for " deceit alone; fometimes, for neglect "also; for deceit only in deposits; be"caufe, fince no benefit accrues to the de" pofitary, he can juftly be anfwerable for no " more than deceit; but, if a reward hap" pen to be given, then a refponfibility for ne" glect also is required; or, if it be agreed

[^32]" at the time of the contract, that the depofitary " thall anfwer both for negiect and for Acci"dent: but, where a benefit accrues to "both parties, as in keeping a thinc " 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 moft " part beneficial to the borrower only; " and, for this reafon, the better opinion is that " of Q.Mucius, who thought, that he fhould " be refponfible not only for neglect, but " even for the omiffion of more than ordinary "diligence*."

One would fcarce have believed it poffible, that there could have been two opinions on laws fo perficicuous and precife, compofed by the fame writer, who was indubitably the beft expofitor

* In contractibus interdum dolum solum, interdum et culpam, preftamus; dolum in deposito; nam, quia nulla otilitas ejus verfatur, apud quem deponitur, merito dolus preftatur solus; nifi forte et merces acceffit, tunc enim, ut eft et conflitutum, etiam culpa exhibetur; aut, fi hoc ab initio convenit, ut et culpan et periculum preftet is, penes quem deponitur: fed, ubi otriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa preftatur. Commodatum autem plerumque solam utilitatem continet ejus, cui commodatur; et ideò verior eft $Q$. Muciı fententia exiftimantis et CULPAM praftandam et diligen. тімх. D. 13.6.5.2.
of his own doctrine, and apparently written in illuftration of each other ; the firft comprifing the rule, and the fecond containing the reafon of it: yet the fingle paffage extracted from the book on Sabinus has had no fewer than twelve particular commentaries in Latin*, one or two in Greek $\dagger$, and fome in the modern languages of Europe; befides the general expofitions of that important part of the digeft, in which it is preferved. Moft of thefe I have perufed with more admiration of human fagacity and induftry than either folid inftruction or rational entertainment; for thefe authors, like the generality of commentators, treat one another very roughly on verylittle provocation, and have the art rather of clouding texts in themfelves clear, than of elucidating paffages, which have any obfcurity in the words or the fenfe of them. Campanas, indeed, who was both a lawyer and a poet, has turned the firt law of Ulpian into Latin hexameters; and his authority, both in profe and verfe, confirms the interpretation, which I have juft given.

The chief caufes of all this perplexity have been, firf, the vague and indiftinct manner in which the old Roman lawyers, even the moft

[^33]eminent, have written on the fubject; fecondly, the loofe and equivocal fenfe of the words diligentia and culpa; laftly and principally, the darknefs of the parenthetical claufe in wis Quidam et dilioentiam, which has produced more doubt, as to its true reading and fignification, than any fentence of equal length in any author Greek or Latin. Minute as the queftion concerning this claufe may feem, and dry as it certainly is, a fhort examination of it appears abfolutely neceffary.

The vulgate editions of the pandects, and the manufcripts, 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 moft others, as giving a fenfe both perficuous in itfelf and confiftent with the fecond law; but the Florentine: copy has quidem, and the copies, from which the Bafilica were tranflated three centuries after Justinian, appear to have contained the fame 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 fpeech, a more tban 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 Fiorentine 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 manufcript preferved at Florence; for, although few civilians, I believe, agree with Politian, in fuppofing it to be one of the originals, which were fent by Fuftinian himfelf to the principal towns of Italy*, yet it may po/fibly be the very book, which the, Emperor Lotharius II. is Said to have found at Amalfi about the year in 30 , 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 fuperftitious reverence $\dagger$ : be that as it may, the copy deferves the higheft refpect; but, if any proof be requifite, that it is no faultlefs tranfcript, we may obferve, that, in the very law before us, accedunt is erroneoully written for accidunt; and the whole phrafe, indeed, in which that word occurs, is different from the copy ufed by the Greek interpreters, and conveys a meaning, as Bocerus and others have remarked, not fupportable by any principle or analogy.

[^34]This, too, is indifputably clear ; that the fentence in bis eurdem et diligentiam, is ungrammatical, and cannot be conftrued according to the interpretation, which fome contend for. What verb is underftood? Recipiunt. What. noun? Contractus. What then becomes of the words in bis, namely contractibus, unlefs in fignify among? And, in that cafe, the difference between QUIr dem and euidam vanifhes; for the claufe may fill import, that " among the preceding con" tracts (that is, in some of them), more than " ufual diligence is exacted :" in this fenfe the Greek prepofition feems to have been taken by the fcholiaft on Harmenopulus; and it may here be mentioned, that diligentia, in the nominative, appears in fome old copies, as the Greeks have rendered it; but Accursius, Del Rio, and a few others, confider the word as implying no more than diligence in general, and diftinguinh 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 jurifconfulti et diligentiam requirunt," but this interpretation, if it could be admitted, would entirely deftroy the authority of the claufe, and imply, that Ulpian was of a different opinion. As to the laft conjecture, that only certain cafes and circumftances are meaned by the word quidam, it farce de-
ferves to be repeated. On the whole, I ftrongly incline to prefer the vulgate reading, efpecially as it is not conjectural, but has the authority of manufcripts to fupport it; and the miftake of a letter might eafily have been made by a tranfcriber, whom the prefaces, the epigram prefixed, and other circumftances, prove to have been, as Taurelli himfelf admits, a Greek.Whatever, in fhort, be the genuine words of this much-controverted claufe, I am perfuaded, that it ought by no means to be ftrained into an inconfiftency with the fecond law; and this has been the opinion of moft foreign jurifts from Azo and Alciat down to Heineccius and Huber; who, let their diffenfion be, on other points, ever fo great, think alike in diftinguifhing tbree degrees of neglect, which we may term gro/s, ordinary, and ligbt, and in demanding refponfibility for thofe degrees according to the rule before expounded.

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

Grofs neglect, lata culpa, or, as the Roman law yers moft accurately call it, dolo proxima, is in practice confidered as equivalent to dolus, or fraud, itfelf; and confifts, according to the beft interpreters, in the omi/ficn of that care,
which even inattentive and thoughtle/s men never fail to take of their own property: this fault they jufly hold a violation of good faith.

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

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

Now, in order to afcertain the degree of neglect, for which a man, who has in his poffeffion the goods of another, is made refponfible by his contract, either exprefs or implied, civilians eftablifh three principles, which they deduce from the law of Ulpian on the Edict ; and here it may be obferved, that they frequently diftinguifh this law by the name of Si ut certo, and the other by that of Contractus*; as many poems and hiftories in ancient languages are denominated from their initial words.

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

[^35]no more is demanded of the holder than gaod faith, and he is confequently refponfible for nothing lefs than grofs 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 geforum, a certain care is requifite from tbe nature of the thing; and, as good faith itfelf demands, that fuch care be proportioned to the exigence of each particular cafe, the law pre--fumes, that the mandatary or commiffioner, and, by parity of reafon, the negotiorum gefor, engaged at the time of contracting to ufe a degree of diligence adequate to the performance of tbe ${ }^{\circ}$ work undertaken*.

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

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

[^36]cuftody, as in that of lending for use, an extraordinary degree of care is demanded; and the borrower is, therefore, refponfible for flight negligence.

This had been the learning generally, and almoft unanimoufly, 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 publifhed two ample volumes De Erroribus Interpretum, and whom Gravina juftly calls the boldeft of expofitors and the keeneft adverfary of the practifers*, difcovered no error in the common interpretation of two celebrated laws, which have fo direct and fo powerful an influence over focial life, and which he muft repeatedly have confidered: but the younger Godefroi of Geneva, a lawyer confeffedly of eminent learning, who died about the middle of the laft century, left behind him a regular commentary on the law Contractus, in which he boldly combats the fentiments of all his predeceffors, and even of the ancient Romans, and endeavours to fupport a new fyftem of bis own.

He adopts, in the firft place, the Florentine reading, of which the ftudent, I hope, has

[^37]formed by this time a decided opinion from a preceding page of this effay.

He cenfures the rule comprifed in the law Si ut certo as weak and fallacious, yet admits, that the rule, which He condemns, had the approbation and fupport of Modestinus, of Paulus, of Africanus, of Gaius, and of the great Papinian himfelf; nor does he fatisfactorily prove the fallacioufne/s, to which he objects, unlefs every rule be fallacious, to which there are fome exceptions. He underftands by diligentia that care, which a very attentive end vigilant man takes of his own property; and he demands this care in all the eight contracts, which immediately precede the difputed. claufe: in the troo, which follow it, he requires no more than ordinary diligence. He admits, however, the three degrees of neglect above ftated, and ufes the common epithets levis and. levifima; but, in order to reconcile his fyftem with many laws, which evidently oppore it, he afcribes to the old law yers the wildeft mutability of opinion, and is even forced to contend, that Ulpian himfelf muft bave cbanged bis mind.

Since his work was not publifhed, I believe, in his life-time, there may be reafon to fufpect, that he had not completely fettled his own mind; and he concludes, indeed, with referring the decifion of every cafe on this head to that moft
dangerous and moft tremendous power, the difcretion of the judge*.

The triple divifion of neglects had alfo been highly cenfured by fome lawyers of reputation. Zasius had very juftly remarked, that neglects differed in degree, but not in Jpecies; adding, " that he had no objection to ufe the words " levis and levifima, merely as terms of practice " adopted in courts, for the more eafy diftinction " between the different degrees of care ex" acted in the performance of different con" tracts†:" but Donellus, in oppofition to his mafter Duaren, infifted that levis and leviffima differed in found only, not in fenfe; and attempted to prove his affertion triumphantly by a regular fyllogifm $\ddagger$; the minor propofition of which is raifed on the figurative and inaccurate manner, in which pofitives are often ufed for fuperlatives, and converfely, even by the beft of the old Roman lawyers. True it is, that, in the law Contractus, the divifion appears to be

[^38]troo-fold only, dolus antid culpa; which differ in Jpecies, when the firft means patual fraud and malice, but in degree merely, when it denotes no more than grofs neglect; and, in either care, the fecond branch, being capable of more and lefs, may be fubdivided into ordinary and light; a fubdivifion, which the law Siut certo obvioufly requires: and thus are both laws perfectly reconciled.

We may apply the fame reafoning, changing what fhould be changed, to the triple divifion of diligence; for, when good faith is confidered as implying at leaft the exertion of fligbt attention, the other branch, Care, is fubdivifible into ordinary and extraordinary; which brings us back to the number of degrees already eftablifhed both by the analyfis and by authority.

Neverthelefs, a fyftem, in one part entirely new, was broached in the prefent century by an advocate in the parliament of Paris, who may, probably, be now living, and, poffibly, in that profeffional ftation, to which his learning and acutenefs juftly entitle him. I feak of M. Le Brun, who publifhed, not many years ago, an Effay on Refponfibility for Neglect*, which he

[^39]had nearly fivifhed, before he had feen the commentary of Godefroi, and, in all probability, without ever being acquainted with the opinion of Donellus.

This author fharply 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 clearnefs in his ideas, and with a palpable mifinterpretation of feveral laws. He reads in his quidem et diligentiam; and that with an air of triumph; infinuating, that quid ${ }_{\mathrm{A} m}$ was only an artful conjecture of Cujas and Le Conte, for the purpofe of eftablifhing their fyftem; and he fupports his owen reading by the authority of the Basilica; an authonty, which, on another occafion, he depreciates. He derides the abfurdity of permitting negligence in any contract, and urges, that fuch permiffion, as he calls it, is againft exprefs law: " now, " fays he, where a contract is beneficial to both " parties, the doctors permit flight negligence, " which, how dight foever, is ftill negligence, " and ought always to be inhibited." He warmly contends, that the Roman laws, properly underftood, admit only two degrees of diligence; one, meafured by that, which a provident and attentive father of a family ufes in his own concerns; another, by that care, which
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the individual party, of whom it is required, is accuftomed to take of bis own poffeflions; and he, very ingenioully, fubftitutes a new rule in the place of that, which he rejects; namely, that ${ }_{3}$ zuben the things in queftion are the sole property of the perfon, to wbom they muft be refored, the holder of them is obliged to keep them with the firft degree of diligence; whence he decides, that a borrower and a birer are refponfible for precifely the fame neglect ; that a vendor, who retains for a time the cuftody of the goods fold, is under the fame obligation, in refpect of care, with a man, who undertakes to manage the affairs of another, , either without his requeft, as a negotiorum gefor, or wuitb it, as a mandatary: " but, fays he, when " the things are the joint proper ty of the parties " contracting, no higher diligence can be required " than the fecond degree, or that, which the " acting party commonly ufes in bis owon affairs; " and it is fufficient, if lbe keep tbem, as be keeps " bis own." This he conceives to be the diftinction between the eigbt contracts, which precede, and the $t w o$, which follow, the words in bis quidem et diligentiam.

Throughout his work he difplays no fmall fagacity and erudition, but fpeaks with too much confidence of his own decifions, and with too much afperity or contempt of all other interpreters from Bartolus to Vinnius.

At the time when this author wrote, the learned M. Pothier was compofing fome of his admirable treatifes on all the different fpecies of exprefs, or implied, contracts; and here I feize with pleafure an opportunity of recommending thofe treatifes to the Englifb lawyer, exhorting him to read them again and again; for, if his great mafter Littleton has given him, as it muft be prefumed, a tafte for luminous method, appofite examples, and a clear manly ftyle, in which nofhing is redundant, nothing deficient, he will furely be delighted with works, in which all thofe advantages are combined, and the greateft portion of which is law at Weftminfter as well as at Orleans*: for my own part, I am fo charmed with them, that, if my undiffembled fondnefs for the ftudy of jurifprudence were never to produce any greater benefit to the publick, than barely the introduction of Pothier to the acquaintance of my countrymen, I fhould think that I had in fome meafure difcharged the debt, which évery man, according to lord Coke, ozves to bis profeflion.

To this venerable profeffor and judge, for he had fuftained both characters with deferved applaufe, Le Brun fent a copy of his little work;

[^40]and M. Pothier honoured it with a hort, but complete, anfwer in the form of a General ObServation on bis Treatifes*; declaring, at the fame time, that be would not enter into a literary conteft, and apologizing for his fixed adhereace to the ancient fyftem, which he politely afcribes to the natural bias of an old man in favour of opinions formerly imbibed. This is the fubitance of his anfwer: " that he can difcover no kind of ab"furdity in the ufual divifion of neglect and di" ligence, nor in the rule, by which different de"grees of them are applied to different con"tracts; that to fpeak with ftrict propriety, " negligence is not permitted in any contract, "but a lefs rigorous conftruction prevails in fome "than in others; that a birer, for inftance, is " not confidered as negligent, when he takes the "fame care of the goods hired, which the ge" nerálity of mankind take of their own; that " the letter to bire, who has his reward, muft be "prefumed to havedemanded at firft no higher " degree of diligence, and cannot jufly complain " of that inattention, which in another cafe might " have been culpable; for a lender, who has no " reward, may fairly exact from the borrower " that eatraordinary degree of care, which a very

[^41]"attentive perfon of bis age and quality would "certainly have taken; that the diligence, which " the individual party commonly ufes in bis " own affairs, cannot properly be the object of " judicial inquiry; for every truftee, adminiftra" tor, partmer, or co-proprietor, muft be pre« fumed by the court, auditors, or commiffioners, " before whom an account is taken, or a diftri-
" bution or partition made, to ufe in their ozen "concerns fuch diligence, as is commonly ufed " by all prudent men; that it is a violation of " good faitb for any man to take lefs care of an" other's property, which has beenintrufted to him, " than of bis own; that, confequently, the author " of the new fyftem demands no more of a " partner or a joint-owner than of a depofitary, " who is bound to keep the goods depofited as " be keeps bis own; which is direclly repugnant " to the indifputable and undifpuced fenfe of the " law Contractus."

I cannot learn whether M. Le Brun ever publifhed a reply, but am inclined to believe that his fyftem has gained very little ground in France, and that the old interpretation continues univerfally admitted on the continent both by theorifts and practifers.

Nothing material can be added to Pothier's argument, which, in my humble opinion, is unanfwerable; but it may not be wholly ufelefs to
fet down a few general remarks on the controverfy: particular obfervations might be multiplied without end.

The only effential difference between the fyftems of Godefroi and Le Brun relates to the two contracts, which follow the much-difputed claufe; for the Swifs lawyer makes the partner and co-proprietor anfwerable for ordinary neglect, and the French advocate demands no more from them than common bonefty: now, in this refpect, the error of the fecond fyftem has been proved to demonftration; and the author of it himfelf confeffes ingenuoully, that the other part of it fails in the article of Marriage-portions*.

In regard to the divifion of neglect and care into tbree degrees or twa, the difpute appears to be merely verbal; yet, even on this head, Le Brun feems'to be felf-confuted: he begins with engaging to prove " that only two degrees of "fault are diftinguifhed by the laws of Rome," and ends with drawing a conclufion, that they acknowledge but one degree: now, though this might be only a flip, yet the whole tenor of his book eftablifhes two modes of diligence, the omiffions of which are as many neglects; exclufively of grofs neglect, which he likewife admits, for the culpa levifima only is that, which he repu-

[^42]diates. It is true, that he gives no epithet or name to the omiffion of his fecond mode of care; and, had he fearched for an epithet, he could have found no other than grofs; which would have demonftrated the weaknefs of his whole fyttem*.

The difquifition amounts, in fact, to this: from the barrennefs or poverty, as Lucretius calls it, of the Latin language, the fingle word culpa includes, as a generick term, various degrees or fhades of fault, which are fometimes diftinguifhed by epithets, and fometimes left without any diftinction; but the Greek, which is rich and flexible, has a term expreffive of almoft every fhade, and the tranflators of the law Contractus actually ufe the words $j_{x} \neq 0 \mu i a$ and $\varepsilon^{\prime} \mu_{i}^{\prime} \varepsilon_{\varepsilon \varepsilon \alpha}$, which are by no means fynonymous, the former implying a certain eafinefs of mind or remiffnefs of attention, while the fecond imports a higher and more culpable degree of negligence $\dagger$. This obfervation, indeed, feems to favour the fyftem of Godefroi; but I lay no great

[^43]ftrefs on the mere words of the tranflation, as I cannot perfuade myfelf, that the Greek jurifts under Basilius and Leo were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reafons, as, I hope, it has been proved, for rejecting all fyftems but that, which Pothiér has recommended and illuftrated.

I come now to the laws of our own country, in which the fame diftinctions and the fame rules, notwithftanding a few clafhing authorities, will be found to prevail; and here I might proceed chronologically from the oldeft Year-book or Treatife to the lateft adjudged Cafe; but, as there would be a moft unpleafing drynefs in that method, I think it better to examine feparately every diftinct Jpecies of bailment, obferving at the fame time, under each head, a kind of hiftorical order. It muft have occurred to the reader, that I might eafily have taken a wider field, and have extended my inquiry to every poffible cafe, in which a man polfeles for a time the goods of another; but I chofe to confine myfelf within certain limits, left, by grafping at too vaft a fubject, I fhould at laft be compelled, as it frequently happens, by accident or want of leifure, to leave the whole work unfinifhed: it will be fufficient to remark, that the rules are in general the fame, by whatever means the goods are legally in the hands of
the poffeffor, whether by delivery from the owner, which is a proper bailnent, or from any other perfon, by finding*, or in confequence of fome diftinct contract.

Sir John Holt, whom every Englifbman fhould mention with refpect, and from whom no Englifb lawyer fhould venture to diffent without extreme diffidence, has taken a comprehenfive view of this whole fubject in his judgment on a celebrated cafe, which fhall foon be ciied at length ; but, highly as I venerate his deep learning and fingular fagacity, I fhall find myfelf conftrained, in fome few inftances, to differ from him, and fhall be prefumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the courfe of his argument $\dagger$.

His divifion of bailments into fix forts appears, in the firt place, a little inaccurate; for, in truth, his fifth fort is no more than a branch of his tbird, and he might, with equal reafon, have added a feventh, fince the fifth is capable of another fubdivifion. I acknowledge, therefore, but five fpecies of bailment; which I fhall now enumerate and define, with all the

[^44]Latin names, one or two of which lord Holr has omitted. I. Depositum, which is a naked bailment, without reward, of goods to be kept for the bailor. 2. Mandatum, or commifion; when the mandatary undertakes, without recompence, to do fome 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. Сомmodatum, or loan for ufe; when goods are bailed, without pay, to be $u f e d$ for a certain time by the bailee. 4 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 reweard; and this bailment is either, I. locatio rei, by which the hirer gains the temporary ufe of the thing; or, 2. locatio operis faciendi, when work and labour, or care and pains, are to be performed or beftowed on the thing delivered: or, 3 . locatio operis mercium vebendarum, when goods are bailed for the purpofe of being carried from place to place, either to a publick carrier, or to a private perfon.
I. The moft ancient cafe, 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

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\text { * Law, b. 2. ch. } 18 .
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the eighth of Edward II. and is abridged by Fitzherbrrt*. It may be called Bonion's cafe, from the name of the plaintiff, and was, in fubftance, this: An action of detinue was brought for Seals, plate, and jewels, and the defendant pleaded, " that the plaintiff had bailed " to him a cheft to be kept, which cheft was " locked; that the bailor himfelf took away the " key, without informing the bailee of tbe contents; "that robbers came in the Night, broke open " the defendant's chamber, and carried off the " cheft into the fields, where they forced the " lock, and took out the contents; that the defend" ant was robbed at the fame time of his own " goods." The plaintiff replied; " that the " jewels were delivered, in a cheft not locked, to " be reftored at the pleafure of the bailor," and on tbis, it is faid, iffue was joined.

Upon this cafe lord Holt obferves, "that " he cannot fee, why the bailee fhould not be " charged with goods in a cheft as well as with " goods out of a cheft; for," fays he, "the 4" bailee 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 cafe as " in the other $\dagger$." The very learned judge was

[^45]diffatisfied, we fee, with Sir Edward Coke's reafon, "' that, when the jewels were locked up" in a cheft, the bailee was not, in fact, trufted " with them*." Now there was a diverfity of opinion, upon this very point, among the greateft lawyers of Rome; for "it was a queftion, " whether, if a box fealed up had been depofived, " the box only fhould be demanded in the ac" tion, or the clothes, which it contained, fhould " alfo be fpecified; and Trebatius infifts, that " the box only, not the particular contents of it, " muft be fued for; unlefs the things were pre" vicufly fhewn, and then depofited: but Labeo " afferts, that he, who depofits the box, depofitsthe " contents of it; and ought, therefore, to demand " the clothes themfelves. 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 $\dagger$." This relates chiefly to the form of the libel; but, furely, cafes 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

[^46]would, thesefore, be grofs negligence in a depofitary to leave fuch a depofit in an open antichamber, and ordinary neglect, at leaft, to let them remain on his table, where they might poffibly 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 $\Omega$ ight negleet, to leave out of a drawer a box or cafket, which was neither known, nor could juftly be fufpected, to contain diamonds; and Domat, who prefers the opinion of Trebatius, decides, "that, in fuch a cafe, the de" pofitary would only be obliged to reftore the " cafket, as it was delivered, without being re" fponfible for the contents of it." I confefs, however, that, anxioully as I wifh on all occafions to fee authorities refpected, and judgment holden facred, Bonion's cafe appears to me wholly incomprehenfible; for the defendant, inftead of having been gro/sly negligent (which alone could have expofed him to an action), feems to have ufed at leaft ordinary diligence; and, after all, the lofs was occafioned by a burglary, for which no bailee can be refponfible without a very fpecial undertaking. The plea, therefore, in this cafe was good, and the replication, idle; nor could I evier help fufpecting a miftake in the laft words alii quid non; although - Richard de Winchedon, or whiever was the
compiler of the table to this Year-book, makes a diftinction, that, "if jewels be bailed to me, and " I put them into a carket, and thieves rob me of " them in the nigbt-time, I am anfwerable; not, " if they be delivered to me in a cheft fealed "up;" which could never have been law, for the next oldeft cafe, in the book of $A / j f e$, contains the opinion of chief juftice Thorpe, that "a general bailee to keep is not refponfible, "if the goods be folen, without his grofs ne"glect*;" and it appears, indeed, from Fitzherbert, that the party was driven to this iffue, " whether the goods were taken away by " robbers."

By the Mofaick inftitutions, "if a man deli" vered to his neighbour money or stuff to " keep, and it was folen out of his houfe, and the " thief could not be found, the mafter of the " houfe was to be brought before the judge, and " to be difcharged, if he could fwear, that he " had not put bis band unto his neighbour's " goodst," or, as the Roman author of the Lex Dei tranflates it, Nibil fe nequiter geffle $\ddagger$; but a diftinction feems to have been made between a

[^47]ftealing by day and a ftealing by nigbt*; and " if cattle were bailed and folen (by da., I " prefume), the perfon, who had the care of "them, was bound to make reftitution to the " owner $\dagger$;" for which the reafon feems to be, that, when cattle are delivered to be kept, the bailee is rather a mandatary than a depofitary, and is, confequently, obliged to ufe a degree of diligence adequate to the charge: now theep can hardly be ftolen in the day-time without fome neglect of the fhepherd; and we find that, when Jacob, who was, for a long time at leaft, a bailee of a different fort, as be bad a reward, loft any of the beafts intrufted to his care, Laban made him anfwer for them " whether folen by " day or ftolen by night $\ddagger$."

Notwithftanding the high antiquity, as well as the manifeft good fenfe, of the rule, a contrary doctrine was advanced by Sir Edward Coke, in his Reports, and afterwards deliberately inferted in his Commentary on Littleton, the great refult of all his experience and learning; namely, " that a depofitary is refponfible, if the "goods be ftolen from him, unlefs he accept " them fpecially to keep as bis own," whence he advifes all depofitaries to make fuch a fpe-

[^48]cial acceptance*. This opinion, fo repugnant to natural reafon and the laws of all other nations, he grounded partly on fome broken cafes in the Year-books, mere converfations on the bench, or loofe arguments at the bar; and partly on Southcote's cafe, which he has reported, and which by no means warrants his deduction from it. As I humbly conceive that cafe to be law, though the doctrine of the learned reporter cannot in all points be maintained, I fhall offer a few remarks on the pleadings in the caufe, and the judgement given on them.

South cote declared in detinue, that he had delivered goods to Bennet, to be by bim safely $k e p t$ : the defendant confeffed such delivery, but pleaded in bar, that a certain perfon stole them out of his poffeffion; the plaintiff replied, protefting that he had not been robbed, that the perfon named in the plea was a servant of the defendant, and demanded judgement; which, on a general demurrer to the replication, he obtained. "The reafon of the judgement, fays lord " Coкв, was, becaufe the plaintiff had delivered " the goods to be saprely kept, and the defend" ant had taken the charge of them upon him" felf, by accepting them on such a delivery." Had the reporter flopped here, I do not fee

[^49]what poffible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit, which has occafioned fo many reflections on the cafe itfelf; namely, " that to keep and to keep safely are one and the fame thing;" a notion which was denied to be law by the whole court in the time of chief juftice Hol ${ }^{*}$.

It is far from my intent to feak in derogation of the great commentator on Littieton; fince it may truly be afferted of him, as Quintilian faid of Cicero, that an admiration of bis works is a fure mark of Jome proficiency in the fudy of the law; but it muft be allowed, that his profufe learning often ran wild, and that he has injured many a good cafe by the vanity of thinking to improve them.

The pleader, who drew the replication in Southcote's cafe, muft have entertained an idea, that the blame was greater, if a Servant of the depofitary fole the goods, than if a mere franger had purloined them; fince the defendant ought to have been more on his guard againft a perfon, who had fo many opportunities of ftealing; and it was his own fault, if he gave thofe opportunities to a man, of whofe honefty he was not morally certain : the court, we find,

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& \text { * Lord Raym. 911. margin. } \\
& \text { VOL. VI. } \\
& \text { B B }
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rejected this diftinction, and alfo held the replication informal, but agreed, that no advantage could bet aken on a general demurrer of fuch informality, and gave judgement on the fubftantial badnefs of the plea*. If the plaintiff, inftead of replying, had demurred to the plea in bar, he might have infifted in argument, with reafon and law on his fide, "that, although "a general bailee to keep be refponfible for "gross neglect only, yet Bennet had, by a " Special acceptance, made himfelf anfwerable "for ordinary neglect at leaft; that it was " ordinary neglect, to let the goods be folen out " of his poffeffion, and he had not averred, that " they were ftolen without bis default; that he " ought to have put them into a Jafe place, ac"cording to his undertaking, and have kept " the key of it himfelf; that the $\int_{\text {pecial bailee }}$ " was reduced to the clafs 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 folen, " to reftore the value of it $\dagger$." This reafoning

[^50]would not have been juft, if the bailee had pleaded, as in Bonion's cafe, that he had been robbed by violence, for no degree of care can in general prevent an open robbery: impetús predonum, fays Ulpian, à mullo praftantur.

Mr. Juftice Powele; fpeaking of Southcote's cafe, which he denies to be law, admits, that, " if a man does undertake fpecially to keep " goods safely, that is a warranty, and will " oblige the bailee to keep them fafely againft " perils, where be bas a remedy over, but not " againft thofe where he has no remedy over*." One is unwilling to fuppofe, that this learned judge had not read lord Coke's report with attention; yet the cafe, which he puts, is precifely that which he oppofes, for Bennet did undertake " to keep the goods safely;" and, with fubmiffion, the degree of care demanded, not the remedy over, is the true meafure of the obligation; for the bailee might have his appeal of robbery, yet he is not bound to keep the goods againft robbers without a moft exprefs agreement+. This, I apprehend, is all that was meaned by St. German, when he fays, "that,
tefmore, " Si jeo grante byens a un home a garder a mon oeps, '' $f_{i}$ les byens per fon mefgarde font embles, il fera charge a moy "de mefmes les byens, mez s'il foit robbe de mefmes les byens, "il eft excufable per le ley." 10 Hen. VI. 21.

[^51]"if a man bave notbing for keeping the goods " bailed, and promife, at the time of the delivery, " to reftore them fafe at bis peril, he is not re" fponfible for mere cafualties*;" but the rule extracted from this paffage, " that a special ac" ceptance to keep sapely will not charge the "bailee againft the acts of wrongdoers $\dagger$," to which purport Hobart alfo and Croke are cited, is too general, and muft be confined to acts of violence.

I cannot leave this point, without remarking, that a tenant at will, whofe intereft, when he has it rentfree, the Romans called PRECARIU M, ftands in a fituation exactly parallel to that of a depofitary ; for, although the contract be for bis bene$f i t$, and, in fome inftances, for bis benefit onty, yet he has an intereft in the land till the will is determined, " and, our law adds, it is the folly of " the leffor, if he do not reftrain him by a fpecial "condition:" thence it was adjudged, in the Countefs of Sbrewfbury's cafe, "that an action " will not lie againt a tenant at will generally, if "the houfe be burned through his neglect;"; but, fays juftice Powell, "had the action been " founded on a Special undertaking, as that, in "confideration that the leffor would let him live

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& \text { DoA. and Stud. dial. 2. chap. } 38 . \\
& + \text { Com. } 135 . \text { Ld. Raym. } 915 . \\
& \ddagger 5 \text { Rep. 13. b. }
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" in the houfe, he would deliver it up in as good "repair as it then was in, fuch an action would " have been maintainable.*"

It being then eftablifhed, that a bailee of the firft fort is anfwerable only for a froud, or for grofs neglect, which is confidered as evidence of it, and not for fuch ordinary inattentions as may be compatible with good faith, if the depofitary be himfelf a careless and inattentive man; a queftion may arife, whether, if proof be given, that he is, in truth, very tbougbtful and vigilant in bis own concerns, he is not bound to reftitution, if the depofit be loft through his neglect, either ordinary or ligbt; and it feems eafy to fupport the affirmative; fince in this cafe the meafure of diligence is that, which the bailee. ufes in bis own affairs. It muft however be confeffed, that the character of the individual depofitary can hardly be an object of judicial difcuffion: if he be Jigbtly or even ordinarily negligent in keeping the goods depofited, the favourable prefumption is, that he is equally neglectul of his own property; but this prefumption, like all others, may be repelled; and, if it be proved, for inftance, that, his houfe being on fire, he faved his own goods, and, having time and power to fave alfo thofe depofited, fuffered them to be burned, he

[^52]fhall reftore the worth of them to the owner*. If, indeed, he have time to fave only one of two chefts, and one be a depofit, the other his own property, he may juftly prefer his own; unlefs that contain things of fmall comparative value, and the other be full of much more precious goods, as fine linen or filks; in which cafe he ought to fave the more valuable cheft, and has a right to claim indemnification from the depofitor for the lofs of his own. Still farther; if he commit even a grofs neglect in regard to his own goods as well as thofe bailed, by which botb are loft or damaged, be cannot be faid to bave violated good faith, and the bailor muft impute to his own folly the confidence which he repofed in fo improvident and thoughtlefs a perfon $\dagger$.

To this principle, that a depofitary is anfwerable only for grofs negligence, there are fome exceptions.
Firft, as in Sou theote's cafe, where the bailee, by a Special agreement, has engaged to anfwer for lefs: "Si quid nominatim convenit," fays the Roman lawyer, " vel plus vel minus in fingulis " contractibus, hoc fervabitur quod initiò con" venit; legem enim contractui dedit $\ddagger$;" but the

[^53]opinion of Celsus, that an agreement to difpenfe with deceit is void, as being contrary to good morals and decency, has the affent both of ULPIAN and our Englijh courts*.

Secondly; when a man fpontaneoully and officioully propofes to keep the goods of another, be may prevent the owner from intrufting them with a perfon of more approved vigilance; for which reafon be takes upon bimfelf, according to Julian, the rijk of the depofit, and becomes responjible at leaft for ordinary neglect, but not for mere cafualties $\dagger$.

Where things are depofited through neceffity on any fudden emergence, as afire or a fhipwreck, M. Le Brun infifts, " that the depofitary muft " anfwer for lefs tban grofs neglect, how carelefs " foever he may be in his own affairs; fince the " preceding remark, that a man, wbo repofes con" fidence in an improvident perfon, muft impute " any lofs to bis own folly, is inapplicable to a "cafe, where the depofit was not optional; and " the law ceafes with the reafon of it $\ddagger$;" but that is not the only reafon; and, though it is an additional misfortune, for a man in extreme hafte and deep diftrefs to light upon a ftupid or inat-

[^54]tentive depofitary, yet I can hardly perfuade myfelf, that more than perfect good faith is demanded in this cafe, although a violation of that faith be certainly more criminal than in other cales, and was therefore punifhed at Rame by a forfeiture of the double value of the goods depofited.

In thefe circumftances, however, a benevolent offer of keeping another's property for a time would not, I think, bring the cafe within JUlian's rule before-mentioned, fo as to make the perfon offering anfwerable for fligbt, or even ordinary, negligence; and my opinion is confirmed by the authority of Labeo, who requires no more than good faith of a negotiorum geftor, when " affectione coactus, ne bona mea diftrahantur, " negotiis fe meis obtulerit."

Thirdly; when the bailee, improperly called a depofitary, either directly demands and receives a reward for bis care, or takes the charge of goods in confequence of fome lucrative contract, he becomes anfwerable for ordinary neglect; fince, in truth, he is in both cafes a conductor operis, and lets out his mental labour at a juft price: thus, when clothes are left with a man, who is paid for the ufe of his bath, or a trunk with an innkeeper or his fervants, or with a ferryman, the bailees are as much bound to indemnify the owners if the goods be loft or damaged through
their want of ordinary circumfpection, as if they were to receive a flipulated recompenfe 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 depofit, as, if a thing be borrowed on a future event, and depofited with the intended borrower, until the event happens, becaufe the owner, perhaps, is likely to be abfent at the time, fuch a depofitary muft anfwer even for תligbt negligence; and this bailment, indeed, is rather a loan than a depofit, in whatever light it may be confidered by the parties. Suppofe, for example, that Cbarles, intending to appear at a mafked ball expected to be given on a future night, requefts George to lend him a drefs and jewels for that purpofe, and that George, being obliged to go immediately into the country, defires Cbarles to keep the drefs 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 purpofe of borrowing be future and contingent.

Since, therefore, the two laft cafes are not, in ftrict propriety, depofits, the exceptions to the general rule are reduced to two only; and the fecond of them, I conceive, will not be rejected by the Englifh lawyer, although I recollect no de-
cifion or dictum exactly conformable to the opinion of Julian.

Clearly as the obligation to reftore a depofit flows from the nature and definition of this contract, yet, in the reign of Elizabeth, when it had been adjudged, confiftently with common fenfe and common honefly, "that an action on " the cafe lay againft a man, who had not per" formed his promife of redelivering, or deliver" ing over, things bailed to him," that judgement was reverfed; and, in the fixth year of James, judgement for the plaintiff was arrefted in a cafe exactly fimilar*: it is no wonder, that the profeffion grumbled, as lord Holt fays, at fo abfurd a reverfal; which was itfelf moft jufly reverfed a few years after, and the firf decifion folemnly eftablifhed $\dagger$.

Among the other curious remains of Attick law, which philologers have collected, very little relates to the contracts, which are the fubject of this efflay; but I remember to have read of $\mathrm{De}_{\mathrm{E}}$ mosthenes, that he was advocate for a perfon, with whom tbree men had depofited fome valuable utenfil, of which they were joint-owners; and the depofitary had delivered it to ore of them, of whofe knavery he had no fufpicion;

[^55]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 bis client could not legally reftore the depofit, unlefs all tbree proprietors were ready to receive it; and this doctrine was good at home as well as at Atbens, when the thing depofited was in its nature incapable of partition: it is alfo law, I apprehend, in Wert-minfter-hall*.

The obligation to return a depofit faithfully was, in very early times, holden facred by the Greeks, as we learn from the ftory of Glaucus, who, on confulting the oracle, received this anfwer "that it was criminal even to barbour a " tbought of with-holding depofited goods from " the owners, who claimed them $\dagger$;" and a fine application of this univerfal law is made by an Arabian poet contemporary with Justinian, who remarks, " that life and wealth are only "depofited with us by our creator, and, like all " other depofits, muft in due time be reftored."
II. Employment by commission wasalfo known to our ancient lawyers; and Bracton, the beft writer of them all, expreffes it by the Roman

[^56]word, Mandatum; now, as the very effence of this contract is the gratuitous performance of it by the bailee, and as the term commifion is alfo pretty generally applied to bailees, who receive bire or compenfation for their attention and trouble, I fhall not fcruple to adopt the word mandate as appropriated in a limited fenfe to the fpecies of bailment now before us; nor will any confufion arife from the common acceptation of the word in the fenfe of a judicial command or precept, which is in truth only a fecondary and inaccurate ufage of it. The great diftinction then between one fort of mandate and a depofit is, that the former lies in fefance, and the latter, fimply in cuftody: whence, as we have already intimated, a difference often arifes between the degrees of care demanded in the one contract and in the other; for, the mandatary being confidered as having engaged himfelf, to ufe a degree of diligence and attention adequate to the performance of bis undertaking, the omiffion of fuch diligence may be, according to the nature of the bufinefs, either ordinary, or תlight, neglect ; although a bailee of this fpecies ought regularly to be anfwerable only for a violation of good faith. This is the common doctrine taken from the law of Ulpian; but there feems, in reality, to be no exception in the prefent cafe from the general rule; for, fince good faitb itfelf
obliges every man to perform bis actual engagements, it of courfe obliges the mandatary to exert himfelf 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 impolible tbings, yet it may juftly require, that every man Chall know his own ftrength, before he undertakes to do an act, and that, if he delude another by falfe pretenfions to fkill, he fhall be refponfible for any injury, that may be occafioned by fuch delufion. If, indeed, an unkilful man yield to the preffing inftances of his friend, who could not otherwife have his work performed, and engage reluctantly in the bufinefs, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almoft needlefs to add, that a mandatary, as well as a depofitary, may bind himielf by a Special agreement to be anfwerable even for cafualties; but that neither the one nor the other can exempt himfelf by any ftipulation from refponfibility for fraud, or, its equivalent, grofs neglect.

[^57]A diftinction feems very early to have been made in our law between the nonfefance, and the misfefance, of a conductor operis, and, by equal reafon, 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 cafe was brought againft a carpenter, who, having undertaken to build a new houfe 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 houfe negligently and fpoiled the timber, an action againft him would have been maintainable*. However, in a fubfequent reign, when a fimilar action was commenced againft one Watkins for not building a mill according to his undertaking, there was a long converfation between the judges and the bar, which chief juftice Babington at length interrupted by ordering the defendant's counfel either to plead or to demur ; but ferjeant Rolf chofe to plead feecially, and iffue was taken on a difcbarge of the agreement. $\dagger$ Juftice Martin objected to the action, becaufe no tort was alledged; and he perfifted warmly in his opinion,

* Yearb. 11. Hen. IV. 33.
+ Yearb. 3. Hen. VI. 36. b. 37. a. Stath. Abr. tit. Accions fur le cas, pl. 20.
which feems not wholly irreconcilable to that of his two brethren; for in the cafes, which they put, a fpecial injury was fuppofed to be occafioned by the non-performance of the contract.

Authority and reafon both convince me, that Martin, into whofe opinion the reporter recommends an inquiry, was wrong in his objection, if he meaned, as juftice Cokain and the chief juftice feem to have underfood him, that no fuch action would lie for nonfefance, even tbougb Special damage bad been fated. His argument was, that the action before them founded in covenant merely, and required a feccialty to fupport it; but that, if the covenant had been changed into a tort, a good writ of trefpafs on the cafe might have been maintained: he gave, indeed, an example of misfefance, but did not controvert the inftances, which were given by the other judges.

It was not alledged in either of the cafes juft cited, that the defendant was to receive pay for the fefance of his work; but, fince both defendants were defcribed as actually in trade, it was not perhaps intended, that they were to work for nothing : I cannot however perfuade myfelf, that there would have been any difference, had the promifes been purely gratuitous, and had a fecial injury been caufed by the breach of them. Suppofe, for inftance, that Robert's corn-fields are fur-
rounded by a ditch or trench, in which the water from a certain fpring ufed to have a free courfe, but which has of late been obftructed by foil and rubbifh; and that, Robert informing his neighbour Henry of his intention fpeedily to clear the ditch, Henry offers and undertakes immediately to remove the obftruction and repair the banks without reward, he having bufinefs of the fame kind to perform on his own grounds: if, in this cafe, Henry neglect to do the work undertaken, " and the water, not having its na" tural courfe, overllow the fields of Robert and " fpoil his corn," may not Robert maintain his action on the cafe? Moft affuredly; and fo in a thoufand inftances of proper bailments, that might be fuppofed; where a juft reliance on the promife of the defendant prevented the plaintiff from employing another perfon, and was confequently the caufe of the lofs, which he fuftained*; for it is, as it ought to be, a general rule, that, for every dammum injurid datum, an action of fome fort, which it is the province of the pleader to advife, may be maintained; and, although the gratuitous performance of an act be a benefit conferred, yet, according to the juft maxim of Paulus, Adjuvari nos, non decipi, beneficio oportet $\dagger$ : but the $\int$ pecial da-

[^58]mage, not the affumption, is the caufe of this action; and, if notice be given by the mandatary, before any damage incurred, and wobile anotber perfon may be employed, that he cannot perform the work, no procefs of law can enforce the performance of it.

A cafe in Вrook, made complece from the Year-book, to which he refers, feems directly in point; for, by chief juftice Fineux, it had been adjudged, that, "if a man affume to build a " houfe for me by a certain day, and do not " build it, and I fuffer damage by his nonfefance, "I thall have an action on the cafe, as well as if " he had done it ami/s:" but it is poffible, that Fineux might fuppofe a confideration, though none be mentioned*.

Actions on this contrac̣t are, indeed, very uncommon, for a reafon not extremely flattering to human nature; becaufe it is very uncommon to undertake any office of trouble without compenfation; but, whether the cafe really happened, or the reward, which has actually been ftipulated, was omitted in the declaration, the queftion, " whether a man was refponfible for damage to " certain goods occafioned by his negligence in " performing a gratuitous promife," came before the court, in which lord Hol prefided, fo lately as the fecond year of queen Anne; and

[^59]a point, which the firf elements of the Roman law have fo fully decided, that no court of judicature on the continent would fuffer it to be debated, was thought in England to deferve, what it certainly received, very great confideration*.

The cafe was this: Bernard had affumed without pay fafely to remove feveral cafks of brandy from one cellar, and lay them down Jafely in another, but managed them fo negligently, that one of the cafks was ftaved. After the general iffue joined, and a verdict for the plaintiff Coggs, a motion was made in arreft of judgement on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have any recompenfe for bis pains, nor that he was a common porter: but the court were unanimoully of opinion, that the action lay; and, as it was thought a matter of great confequence, each of the judges delivered his opinion feparately.

The chief juftice, as it has before been intimated $\dagger$, pronounced a clear, methodical, elaborate argument; in which he diftinguifhed bailments into $f x$ forts, and gave a hiftory of the principal authorities concerning each of them.

[^60]This argument is juftly reprefented by my learned friend, the annotator on the Firft Inftitute, as " a moft mafterly view of the whole fubject of " bailment*;" and, if my little work be confidered merely as a commentary on it, the fudent may perhaps think, that my time and attention have not been unufefully beftowed.

For the decifion of the principal cafe, it would have been fufficient, I imagine, to infift, that the point was not new, but had already been determined; that the writ in the Register, called, in the ftrange dialect of our forefathers, De pipa vini cariand $\bar{\dagger}+$, was not fimilar, but identical; for, had the reward been the efence of the action, it muft have been inferted in the writ, and nothing would have been left for the declaration but the fating of the day, the year, and other circumftances; 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 raife, without any confideration alledged; and iffue was joined on a traverfe of the negligence

[^61]C C 2
and improvidence*. How any anfwer could have been given to thefe authorities, I am at 2 lofs even to conceive: but, although it is needlefs to prove the fame thing twice, yet other authorities, equally unanfwerable, were adduced by the court, and fupported with reaions io lefs cogent; for nothing, faid Mr. Juftice Powell emphatically, is law, that is not reafon; a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abftract, are falfe in the concrete; for, fince the reafon of Titius may, and frequently does, differ from the reafon of Septimius, no man, who is not a lawyer, would ever know how to act, and no men, who is a lawyer, would in many inftances know what to advife, unlefs courts were bound by authority, as firmly as the pagan deities were fuppofed to be bound by the decrees of fate.

Now the reafon affigned by the learned judge for the cafes in the Regifter and Year-books, which were the fame with Coggs and Bernard, namely, "that the party's special af" filmp/it and undertakjng obliged him fo to do " the thing, that the bailor came to no damage by his neglect," feems to intimate, that the omiffion of the words falvò et fecure would have made a difference in this cafe, as in that of a depofit; but I humbly contend, that thofe words are implied,

[^62]by the nature of a contract which lies in fefance, agreeably to the diftinction with which I began this article. As judgement, indeed, was to be given on the record merely, it was unneceffary, and might have been improper, to have extended the propofition beyond the point then before the court; but I cannot think, that the narrownefs of the propofition in this inftance affects the general doctrine, which I have prefumed to lay down; and, in the ftrong cafe of the fhepherd, who bad aflock to keep, whi. h he fuffered through negligence to be drowned, neither a reward nor a special undertaking are ftated*: that cale, in the opinion of juftice Townsend, depended upon the diftinction between a bargain executed and executory; but I cannot doubt the relevancy of an action in the fecond cafe, as well as the firft, whenever actual damage is occafioned by the nonfefance $\dagger$.

There feems little neceffity after this, to mention the cafe of Powtuary and Walton, the reafon of which applies directly to the prefent fubject; and, though it may be orjected that the defendant was ftated as a farrier, and mult be

[^63]prefumed to have acted in bis trade, yet chief juftice Rolle intimates no fuch prefumption; but fays exprefsly, that "an action on the cafe " lies upon this matter, withouit alledging any con" fideration: for the negligence is the caufe of "action, and not the aflumpfit*."

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 refponfible for lefs than grofs neglect, unlefs there be a fpecial acceptance: for inftance, if Stepben defire Pbilip to carry a dia-mond-ring from Brifol to a perfon in London, and he put it with bank-notes of bis own into a letter-cafe, out of which it is folen at an inn, or feized by a robber on the road, Pbilip fhall not be anfwerable for it; although a very careful, or perhaps a commonly prudent, man would have kept it in his purfe at the inin, and have concealed it fomewhere in the carriage; but, if he were to fecrete 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 cafe of a lofs by ftealth or robbery, to reftore the value of it to Stepben: every thing, therefore, that has been expounded

[^64]in the preceding article concerning depofits, may be applied exactly to this fort of bailment, which may be confidered as a fubdivifion of the fecond fpecies.

Since we have nothing in thefe cafes analogous to the judgements of infamy, which were often pronounced at Rome and Atbens, it is hardly neceffary to add, what appears from the fpeech of Cicero for S. Roscius of Ameria, that" the " ancient Romans confidered a mandatary as in" famous, if he broke his engagement, not only " by actual fraud, but even by more than ordi" nary negligence*."

As to exceptions from the rule concerning the degree of neglect, for which a mandatary is refponfible, almoft all, that has been advanced before in the article of depofits, in regard to a fpecial convention, a voluntary offer, and an intereft accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an abfent perfon, and witbout bis knowledge, is the negotiorum geftor of the civilians, and the obligation refulting from

[^65]his implied contract has been incidentally mentioned in a preceding page.
III. On the third feccies of bailment, which is one of the moft ufual and moft convenient in civil fociety, little remains to be obferved; becaufe our own, and the Roman, law are on this head perfectly coincident. I call it, after the French lawyers, loan for ufe, to dittinguifh it from their loan for confumption, or the MUTUUM of the Romans; by which is underfood the lending of money, wine, corn, and other things, that may be valued by number, weight, or meafure, and are to be reftored only in equal value or quantity*: this latter contraC, which, according to St. German, is moft properly called a loan, does not belong to the prefent fubject; but it may be right to remark, that, as the Specifick things are not to be returned, the abfolute pro-

-     * Doct. and Stud. dial. 2. ch. $3^{8 .}$ Bract. 99. a. b. In Ld. Raym. 916. where this paflage from Bracton is cited by the chief juftice, mutuom is printed for commodatam; but what then can be made of the words ad IPSAM refituendam? There is certainly fome miftake in the paffage, which muft be very ancient, for the oldeft MJ. that I have feen, is conformable to Tottel's edition. I furpect the omiffion of a whole line after the word precium, where the manufcript has a full point; and poffibly the fentence omitted may be thus fupplied from $\mathcal{F} u f$. tinian, whom Brafion copied: "At is, qui mutuum accepit; " obligatus remanet," fi forte incendio, \&c. Inft. 3. 13. 3.
perty of them is transferred to the borrovier; who muft bear the lofs of them, if they be deftroyed by wreck, pillage, fire, or other inevitable misfortune. Very different is the nature of the bailment in queftion; for a horfe, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the ufe of the bailee, ought to be redelivered Specifically; and the owner mult abide the lofs, if they perifh 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 conftrued rigoroully, and, although flight, makes him liable to indemnify the lender: nor will his incapacity to exert more tban ordinary attention avail him on the ground of an impol/2bility, " which the law, fays the rule, never de" mands;" for that maxim relates merely to things abfolutely impoffible; and it was not only very folfible, 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 muft be fuppofed to have demanded no higher care, than that of which Jucb a perfon was capable; as, if Paul lend a fine horfe to a raw youth, he cannot exact the fame degree of management and cir-
cumfpection, which he would expect from a riding mafter or an officer of dragoons*.

From the rule, that a borrower is anfwerable for light neglect, compared with the diftinction before made between fimple theft and robbery $\dagger$, it follows, that, if the borrowed goods be fiten out of his poffeffion by any perfon whatever, he muft pay the worth of them to the lender, unlefs he prove, that they were purloined notwithftanding his extiaordinary care. The example, given by Julian, is the firf and beft that occurs : Caius borrows a filver ewer of Titius, and afterwards delivers it, that it may be fafely reftored, to a bearer of fuch approved fidelity and warinefs, that no event could be lefs expected than its being folen; if, after all, the bearer be met in the way by fcoundrels, who contrive to fteal it, Caius appears to be wholly blamelefs, and Titius has fuffered damnum fine injuriä. It feems hardly neceffary to add, that the fame care, which the bailee is bound to take of the principal thing bailed, muft be extended to fuch acceffory things, as belong to it, and were delivered with it: thus a man, who borrows a watch, is refponfible for figbt neglect of the chain and feals.

Although the laws of Rome, with which thofe

[^66]of England in this refpect agree, moft exprefsly decide, that a borrower, ufing more than ordinary diligence, Jball not be chargeable, if there be a force wbich be cannot refift*, yet PupenDORf employs much idle reafoning, which $I$ am not idle enough to tranfcribe, in fupport of a new opinion; namely, " that the borrower ought to " indemnify the lender, if the goods leni be de" ftroyed by fire, hipwreck, or other inevitable " accident, and without bis foult, unlefs bis own "perifh with them:" for example, if Paul lend William a horfe 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 juftice and good fenfe of the contrary decifion are evinced beyond a doubt by M. Pothier, who makes a diftinction between thofe cafes, where the loan was the occafion merely of damage to the lender, who might in the mean time have fuftained a lofs from other accidents, and thofe, where the loan was the fole efficient cause of his damage $\dagger$; as if Paul, having lent his horfe, fhould be forced in the interval by fome preffing bufinefs to bire an-

[^67]other for himfelf; in this cafe the borrower ought, indeed, to pay for the hired horfe, unlefs the lender had voluntarily fubmitted to bear the inconvenience caufed by the loan; for, in this fenfe and in this inftance, a benefit conferred flould not he injurious to the benefaiior. As to a condition prefurmed to be impofed by the lender, that he wo ald not abide by any lois eccafioned by the lending, it feems the wildeit and moft unreafonable of prefumptions: if $F$ acl really intended to impofe fuch a condition, he fhould have declared his mind; and I perfuade myfelf, that Williane twoald bave declined a favour fo hardly obtained.

Had the borrower, indeed, been imprudent enough to leave the high road and pafs through fome thicket, where robbers might be fuppofed to lurk, or had he travelled in the dark at a very unfeafonable hour, and had the horfe, in either cafe, been taken from him or killed, he muft have indemnified the owner; for irreffitible force is no excufe, if a man put himfelf in the way of it by his own rafhnefs. This is nearly the cafe, cited by St. German from the Summa Lafella, where a loan muft be meaned, though the word depofitum be erroneoully ufed*; and it is there decided, that, if the borrower of a horfe will im-

[^68]prudently ride by a rainous boufe in manifeft danger of falling, and part of it actually fall on the horfe's head, and kill him, the lender is entitled to the price of him; but that, if the houfe were in good condition and fell by the violence of a fudden hurricane, the bailee thall be difcharged. For the fame, or a ftronger, reafon, if William, inftead of coming to London, for which purpofe the horfe was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes refponfible for any accident, that may befall the horfe in his journey to Batb, or after the expiration of the week*.

Thus, if Cbarles, in a cafe before put $\dagger$, wear the maiked habit and jewels of George at the ball, for which they were borrowed, and be robbed of them in his return home at the ufual time and by the ufual way, he cannot be compelled to pay George the value of them; but it would be otherwife, if he were to go with the jewels from the theatre to a gaming-houfe, and were there to lofe them by any cafualty whatever. So, in the inftance propofed by Gaius in the digeft, if filver utenfils be lent to a man for the purpofe of entertaining a party of friends at fupper in the metropolis, and he carry them into the country, there can be no doubt of his ob-

[^69]ligation to indemnify the lender, if the plate be loft by accident however irrefiftible.

There are other cafes, in which a borrower is chargeable for inevitable mifcbance, even when he has not, as he legally may, taken the whole rifk upon himfelf by exprefs agreement. For example, if the houfe of Caius be in flames, and he, being able to fecure one thing only, fave an urn of his own in preference to the filver ewer, which he had borrowed of Titius, he fhall make the lender a compenfation for the lofs; efpecially 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 muft either leave it, and bring away the borrowed veffel, or pay Titius the value of that, which he has loft; unlefs the alarm was fo fudden, and the fire fo violent, that no deliberation or felection could be juftly expected, and Caius had time only to fnatch up the firft utenfil, that prefented itfelf.

Since opennefs and honefty are the foul of contracts, and fince " a fuppreffion of truth is often " as culpable as an exprefs falfehood," I accede to the opinion of M. Ротhier, that, if a foldier were to borrow a horfe of his friend for a battle expected to be fought the next morning, and were to conceal from bien, that bis own borfe was as fit for the fervice, and if the horfe, fo bor-
rowed, were fain in the engagement, the lender ought to be imdemnified; for probably the diffimulation of the borrower induced him to lend the horfe; but, had the foldier openly and frankly acknowledged, that be was unwilling to expofe bis own borfe, fince, in cafe of a lofs, he was unable to purchafe another, and his friend, neverthelefs, had generoufly lent him one, the lender would have run, as in other inftances, the rifk of the day.

If the bailee, to ufe the Roman expreffion, be in mora, that is, if a legal demand have been made by the bailor, he muft anfwer for any cafualty that happens after the demand; unlefs in cafes, where it may be ftrongly prefumed, that the fame accident would have befallen the thing bailed, even if it had been reftored at the proper time; or unlefs the bailee have legally tendered the thing, and the bailor have put himfelf in mora by refufing to accept it: this rule extends of courfe to every fpecies of bailment.
" Whether, in cafe of a valued loan, or, where "the goods lent are eftimated at a certain price, " the borrower mult be confidered as bound in " all events to reftore either the things lent or " the value of them," is a queftion, upon which thecivilians are as much divided, as they are upon the celebrated claufe in the law Contractus: five or fix commentators of high reputation enter
the lifts againft as many of equal fame, and each fide difplays great ingenuity and addrefs in this juridical tournament. D'Avezan fupports the affirmative; and Pothier, the negative; but the fecond opinion feems the more reafonable. The word periculum, ufed by Ulpian, is in itfelf equivocal : it means bazardin general, proceeding either from accident or from neglect; and in this latter fenfe it appears to have been taken by the Roman lawyer in the paffage, which gave birth to the difpute. But, whatever be the true interpretation of that paffage, I cannot fatisfy myfelf, that, either in the Cuftomary Provinces of France, or in England, a borrower can be chargeable for all events witbout bis confent unequivocally given: if William, indeed, had faid to Paul alternatively, "I promife, on my return to "Oaford, either to reftore your horfe or to pay " you thirty guineas," he muft in all events have performed one part of this disjunctive obligation*; but, if Paul had only faid, "the horfe, " which I lend you for this journey, is fairly " worth thirty guineas," no more could be implied from thofe words, than a defign of preventing any future difficulty about the price, if the horfe fhould be killed or injured through an omiffion of that extraordinary diligence, which the nature of the contract required.

Befides 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 ufe, in which the lender has a common intereft with the borrower: in this cafe, as in other bailinents reciprocally advantageous, the bailee can be refponfible for no more than ordinary negligence; as, if Stepben and Pbilip invite fome common friends to an entertainment prepared at their joint expence, for which purpofe Pbilip lends a fervice of plate to his companion, who undertakes the whole management of the feaft, Stepben is obliged only to take ordinary care of the plate; but this, in truth, is rather the innominate contrast do ut facias, than a proper loan.

Agreeably to this principle, it mult be decided, that, if goods be lent for the fole advantage of the lender, the borrower is anfwerable for grofs neglect only; as, if a paffionate lover of mufick were to lend his own inftrument to a player in a concert, merely to augment his pleafure from the performance; but here again, the bailment is not fo much a loan, as a mandate; and, if the mufician were to play with all due fkill and exertion, but were to break or hurt the inftrument without any malice or very culpable negligence, he would not be bound to indemnify the amateur, as he was not in want of the iuftrument, vol. vi.

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and had no particular defire to ufe it. If, indeed, a poor artift, having loft or fpoiled his violin or flute, be much diftreffed by this lofs, and a brothermufician obligingly, though voluntarily, offer to lend him his own, I cannot agree with Despeisses, a learned advocate of Montpellier and writer on Roman law, that the player may be lefs careful of it than any other borrower : on the contrary, he is bound, in confcience at leaft, to raife his attention exen to a higher degree; and his negligence ought to be conftrued with rigour.

By the law of Moses, as it is commonly tranflated, a remarkable diftinction was made be. tween the lofs of borrowed cattle or goods, happening in the abfence, or the prefence, of the Owner; for, fays the divine legiflator, "if a " man borrow aught of his neighbour, and it be " hurt or die, the owner thereof not being with it, " he fhall furely make it good; but, if the owner " thereof be with it, he fhall not make it good*:" now it is by no means certain, that the original word fignifies the ozener, for it may fignify the polfeffor, and the law may import, that the borrower ought not to lofe fight, when he can poffibly avoid it, of the thing borrowed; but, if it was intended, that the borrower fhould always,

[^70]anfwer for cafualties, except in the cafe, which muft rarely happen, of the ouener's prefence, this exception feems to prove, that no cafualties were meaned, but fuch as extraordinary care might have prevented; for I cannot fee, what difference could be made by the prefence of the owner, if the force, productive of the injury, were wholly irrefiftible, or the accident inevitable.

An old Atbenian law is preferved by $\mathrm{De}_{\mathrm{E}}$ mosthenes, from which little can be gathered on account of its generality and the ufe of an ambiguous word*; it is underftood by Petit as relating to guardians, mandataries, and commiffioners; and it is cited by the orator in the care of a guardianfhip. The Atbenians were, probably, fatisfied with fpeaking very generally in theit laws, and left their juries, for juries they certainly had, to decide favourably or feverely, according to the circumftances of each particular cafe.
IV. As to the degree of diligence, which the law requires from a pazunee, I find myfelf again obliged to diffent from fir Edward Coke, with whofeopinion afimilar liberty hasbefore been taken in regard to a depofitury; for that very learned man.

[^71]lays it down, that, "if goods be delivered to "one as a gage or pledge, and they be folen, " he fhall be difcharged, becaufe be batb a pro" perty in them; and, therefore, he ought to " keep them no otherwife tban bis owun*:" I deny the firf propofition, the reafon, and the conclufion.

Since the bailment, which is the fubject of the prefent article, is beneficial to the pawnee by fecuring the payment of his debt, and to the pazenor by procuring him credit, the rule, which natural reafon prefcribes, and which the wifdom of nations has confirmed, makes it requifite for the perfon, to whom a gage or pledge is bailed, to take ordinary care of it; and he muft confequently be refponfible for ordinary neglect $\dagger$. This is exprefsly holden by Bracton; and, when I rely on his authority, I am perfectly aware, that he copied Justinian almoft word for word, and that lord Holt, who makes confiderable afe of his treatife, obferves three or four times, "that " he was an old author $\ddagger$;" but, although he had been a civilian, yet he was alfo a great com-mon-lawyer, and never, I believe, adopted the sules and expreffions of the liomans, except when they coincided with the laws of England

[^72]in his time: he is certainly the beft of our juridical clafficks; and, as to our ancient authors, if their doctrine be not law, it muft be left to mere hiftorians and antiquaries; but, if it remain unimpeached by any later decifion, it is not only equally binding with the moft recent law, but has the advantage of being matured and approved by the collected fagacity and experience of ages. The doctrine in queftion has the full affent of lord Holt himfelf, who declares it to be " Jufficient, if the pawnee ufe true, and ordi" nary, diligence for reftoring the goods, and " that, fo doing, he will be indemnified, and, " notwithftanding the lofs, fhall refort to the "pawnor for his debt." Now it has been proved, that " a bailee cannot be confidered " as ufing ordinary diligence, who fuffers the " goods bailed to be taken by feallls out of his " cuftody*;" and it follows, that " a pawnee " fhall not be difcharged, if the pawn be fimply "folen from him; but if he be forcibly robbed " of it without bis fault, his debt fhall not be " extinguifhed.

The paffage in the Roman inftitutes, which Bracton has nearly tranfcribed, by no means convinces M. Le Brun, that a pazuce and a borrower are not refponfible for one and the fame degree of negligence; and it is very certain, that

[^73]Ulpian, fpeaking of the Aifio pignoratitia, ufes thefe remarkable words! "Venit in bac actione "et dolus et culpa UT in commodato, venit et cui" todia; vis major non venit." To folve this difficulty, Noodt has recourfe to a conjectural emendation, and fuppofes ut to have been inadvertently written for AT; but, if this was a miftake, it muft have been pretty ancient, for the Greek tranflators of this fentence ufe a particle of fimilitude, not an adverfative: there feems, however, no occafion for fo hazardous a mode of criticifm. Ulpian has not faid, " tatis culpa qualis in commodato;" nor does the word ut imply an exact refemblance: he meaned, that a pawnee was anfwerable for neglect, and gave the firft inftance, that occurred, of another contract, in which the party was likewife anfwerable for neglect, but left the fort or degree of negligence to be determined by his general rule; conformably to which he himfelf exprefsly mentions pignus among other contracts reciprocally ufeful, and diftinguifhes it from commodatum, whence the borrower folely derives advantage*.

It is rather lefs eafy to anfwer the cafe in the book of $\Lambda_{\mathbb{L}}\left(\frac{1}{} f_{\text {, }}\right.$ which feems wholly fubverfive of my reafoning, and, if it ftand unexplained, will break the harmony of my fyftemt; for there, in

[^74]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 folen 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 fteal" ing, and that the creditor refufed to accept it," on which fact iffue was joined; and the reafon, affigned by the chief juftice, was, that, "if a " man bail goods to me to keep, and I put them " among my own, I hall not be charged, if they " be folen." To this cafe I anfwer : firft, that, if the court really made no difference between a pazunee and a depofitary, they were indubitably miftaken; for which affertion I have the authority of Bracton, lord Holt, and St. German, who ranks the taker of a pledge in the fame clafs with a birer of goods*; next, that in. a much later cafe, in the reign of Hen. VI. where a biring of cuftody feems to be meaned, the diftinction between a $t$ beft and a robbery is taken agreeably to the Roman law $\dagger$; and, laftly, that, although in the ftrict propriety of our Engli/blanguage, to fteal is to take clandeftinely, and to rob

[^75]is to feize by violence, correfponding with the Norman verbs embleer and robber, yet thofe words are fometimes ufed inaccurately; and I always fufpected, that the cafe in the book of $A / j \int e$ related to a robbery, or a taking with force; a furpicion confirmed beyond any doubt by the judicious Brook, who abridges this very cafe with the following title in the margin, "Que ferra " al perde, quant les biens font robbes*:" and, in a modern work, where the old cafes are referred to, it appears to have been fettled, in conformity to them and to reafon, " that if the pawn be laid "up, and the pawnee be robbed, he fhall not be " anfwerable $\dagger: "$ but lord Core feems to have ufed the word folen in its proper fenfe, becaufe he plainly compares a pawn with a depofit.

If, indeed, the thing pledged be taken openly and violently through the fault of the pledgee, he fhall be refponfible for it; and, after a tender and refufal of the money owed, which are equivalent to actual payment, the whole property is inftantly revefted in the pledror, and he may confequently maintain an action of trover $\ddagger$ : it is faid in a moft ufeful work, that by fuch tender and refufal the thing pawned "ceafes to be a pledge and "becomes a depofit§;" but this muft be an error

[^76]of impreffion; for there can never be a depofit without the owner's confent, and a depofitary would be chargeable only for grofs negligence, whereas the pawnee, whofe feccial property is determined by the wrongful detainer, becomes liable in all poffible events to make good the thing loft, or to relinquifh his debt*.

The reafon, given by Coke for his doctrine, namely, " becaufe 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 fpecies; for every bailee has a temporary qualified property in the things, of which poffeffion is delivered to him by the bailor, and has, therefore, a poffeffory action or an appeal in his own name againft any ftranger, who may damage or purloin them $\dagger$. By the Roman law, indeed, "even the poffeffion of the "depofitary was holden to be that of the perfon "depofiting;" but with us the general bailee has unqueftionably a limited property in the goods intrufted to his care: he may not, however, ufe them on any account without the confent of the owner, either exprefsly given, if it can poffibly be obtained, or at leaft ftrongly prefumed; and this prefumption varies, as the thing is likely to be better, or worfe, or not at all af-

[^77]fected, by ufage; fince, if Caius depofit a Settingdog with Titius, he can hardly be fuppofed unwilling, that the dog fhould be ufed for par-uridge-fhooting, and thus be confirmed in thofe habits, which make him valuable; but, if clotbes or linen be depofited by him, one can fcarce imagine, that he would fuffer them to be worn; and, on the other hand, it may juftly be inferred, that he would gladly indulge Titius in the liberty of ufing the books, of which he had the cuftody, 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 ufage, cannot ufe them; but it would be otherwife, I apprehend; if the things pawned actually required exercife. and a continuance of habits, as fporting-dogs and horfes: if they cannot be hurt by being worn, they may be ufed, but at the peril of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and fhe wear them at a publick place, and be robbed of them on her re--: turn, fle muft make them good: " if fhe keeps " them in a bag," fays a learned and refpectable writer, "and they are folen, fhe fhall not be " charged*;" but the bag could hardly be taken privately and quietly without her omiffion of ar-

[^78]dinary diligence; and the manner, in which lord Holt puts the cafe, eftablifhes my fy ftem, and confirms the anfwer juft offered to the cafe from the Year-book; for, " if fhe keep the jewels," fays he, "lockedup in her cabinet, and " her cabinet be broken open, and the jewels takeq "thence, fhe will not be anfwerable*." Again; it is faid, that, where the pawnee is at any expenfe to maintain the thing given in pledge as, if it be a horfe or a cow, he may ride the horfe moderately, and milk the cow regularly, by way of compenfation for the charget; and this doctrine muft be equally applicable to a general bailee, who ought neither to be injured nor benefited in any refpect by the truft undertaken by him; but the Roman and Frencb law, more agreeably to principle and analogy, permits in. deed both the pawnee and the depofitary to milk the cows delivered to them, but requires them to account with the refpective owners for the value of the milk and calves, deducting the rear fonable charges of their nourifinment $\ddagger$. It fol, lows from thefe remarks, that lord Сокв has afm figned an inadequate reafon for the degree of diligence, which is demanded of a pawnee; and the true reafon is, that the law requires nothing extraordinary of him.

[^79]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 bis "own:" for, even if Caius have an abfolute undivided property in goods, jointly or in common with Septimius, he is bound by rational, as well as pofitive, law to take more care of them tban of bis own, unlefs he be in fact a prudent and thoughtful manager of his own concerns; fince every man ought to ufe ordinary diligence in affairs, which intereft another as well as himfelf: "Aliena negotia," fays the emperor ConstanTine, "exacto officio geruntur*."

The conclufion, therefore, drawn by fir Edward Coke, is no lefs illogical than his premiffes are weak; but here I muft do M. Le BRUN the juftice to obferve, that the argument, on which his whole fyftem is founded, occurred likewife to the great oracle of Englifb law; namely, that a perfon, who had a property in things committed to his charge, was only obliged to be as careful of them as of bis ozon goods; which may be very true, if the fentence be predicated of a man ordinarily careful of his own; and, if that was Le Brun's hypotheris, he has done little more than adopt the fyftem of Gode-

* C. 4. 35. 21.
kroi, who exacts ordinary diligence from a partner and a co-proprietor, but requires a bigber degree in eight of the ten preceding contracts. Pledges for debt are of the higheft antiquity: they were ufed 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 Deftiny;" and the falutary laws of Moses, which forbade certain implements of hufbandry and a widow's raiment to be given in pawn, deferve to be imitated as well as admired. The diftinction between pledging, where poffeffion is transferred to the creditor, and bypotbecation, where it remains with the debtor, was originally Attick; but fcarce any part of the Atbenian laws on this fubject can be gleaned from the ancient orators, except what relates to bottomry in five fpeeches of Demosthenes.

I cannot end this article, without mentioning a fingular cafe from a curious manufcript preferved at Cambridge, which contains a collection of queries in Turki/h, together with the decifions or concife anfwers of the MuFTi at Conftantinople: it is commonly imagined, that the Turks have a tranflation in their own language of the Greek code, from which they have fupplied the defects of their Tartarian and Arabian jurifprudence*;

[^80]but I have not met with any fuch tranlation, although I admit the conjecture to be highly probable, and am perfuaded, that their numerous treatifes on Mabomedan law are worthy on many accounts of an attentive examination. The cafe was this: "Zaid had left with Amra divers " goods in pledge for a certain fum of money, " and fome ruffians, having entered the houfe of "Amrn, took away his own goods together " with thofe pawned by Zaid." Now we mult neceflarily fuppofe, that the creditor had by bis own fault given occafion 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 juftice; for the party proceeds to afk, "whether, fince the debt became " extinct by the lofs 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 queftion the great law-officer of the Otbman court anfwered with the brevity ufual on fuch occafions, $\mathrm{Ol}_{\mathrm{L}}$ maz, It cannot be*. This cuftom, we muft con-

[^81]fefs, of propofing cafes both of law and contifience under feigned names to the fupreme judge, whofe anfwers are confidered as folemn decrees, is admirably calculated to prevent partiality and to fave the charges of litigation.
V. The laft fpecies of bailment is by no means the leaf important of the five, whether we confider the infinite convenience and daily. ufe of the contract itfelf, or the variety of its branches, each of which fhall now be fuccinctly, but accurately, examined.

1. Locatio, or locatio-conductio, REI, is a contract, by which the hirer gains a tranfient qualified property in the thing hired, and the owner acquires an abfolute propetty in the ftipend, or price, of the hiring; fo that, in truth, it bears a frong refemblance 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 effay defeated, if the laws of England fhall be found, on a fair inquiry, to demand of the hirer a more tban ordinary degree of diligence. In the moft recent publication, that I have read on any legal fubject, it is exprefsly faid, " that the hirer is to take all imaginable "care of the goods delivered for hire*:" the

[^82]words all imaginable, if the principles before eftablifhed be juft, are too ftrong for practice even in the ftrict cafe of borrowing; but, if we take them in the mildeft fenfe, they muft imply an extraordinary degree of care; and this doctrine, I prefume, is founded on that of lord Holt in the cafe of Coges 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 fatber of "a family ufes"." It may feem bold to controvert fo refpectable an opinion; but, without infifting on the palpable injuftice of making a borrozver and a birer anfwerable for precifely the fame degree of neglect, and without urging, that the point was not then before the court, I will engage to fhow, by tracing the doctrine up to its real fource, that the dictum of the chief juftice was entirely grounded on a grammatical miftake in the tranflation of a fingle Latin word.

In the firf place, it is indubitable, that his lordfhip relied folely on the authority of Bracton ; whofe words he cites at large, and immediately fubjoins, "whence it appears, छcc." now the words, " talis ab eo defideratur cuftodia, " qualem diligentissimus paterfamilias fuis

[^83]" rebus adhibit," on which the whole queftion depends, are copied exactly from Justinian*, who informs us in the proeme to his Inflitutes, that his decifions in that work were extracted principally from the Commentaries of Gaius; and the epithet diligentiffimus is in fact ufed by this ancient lawjer $\dagger$, and by bim alone, on the fubject of hiring: but Gaius is remarked for writing with energy, and for being fond of ufing fuperlatives, where all other writers are fatisfied with pofitives+ + ; fo that his forcible manner of expreffing himfelf, in this inftance as in fome others, milled the compilers employed by the Emperor, whofe words Theophilus rendered more than literally, and Bracton tranfcribed; and thus an epithet, which ought to have been tranflated ordinarily diligent, has been fuppofed to mean extremely careful. By rectifying this miftake, we reftore the broken harmony of the pandects with the inflitutes, which, together with the code, form one connected work§, and, when properly underfood, explain and illuftrate each other; nor is it neceffary, I conceive, to adopt the interpretation of M. De Ferriere, who ima-

[^84]gines, that both Justinian and Gaius are fpeaking only of cafés, which from their nature demand extraordinary care *.

There is no authority then againft the rule, which requires of a birer the fame degree of diligence, that all prudent men, that is, the gencrality of mankind, ufe in keeping their own goods; and the juft diftinction between borrozuing and hiring, which the Jewifh lawgiver -emphatically makes, by faying, "if it be an hired thing, it came for its bire $\dagger$," remains eftablifhed by the concurrent wifdom of nations in all ages.

If Caits therefore hire a horfe, he is bound to ride it as moderately and treat it as carefully, as any man of common difcretion would ride and treat his own horfe; and if, through his negligence, as by leaving the door of his fable open at night, the horfe be ftolen, he muft anfwer for it; but not if he be robbed of it by highwaymen, unless by his imprudence he gave occafion to the robbery, as by travelling at unufual hours, or by taking an unufual road: if, indeed, he hire a carriage and any number of horfes, and the owner fend with them his poftilion or corchman, Caius is difcharged from all attenion to the horfes, and remains obliged only to

[^85]take ordinary care of the glaffes and infide of the carriage, while he fits in it.

Since the negligence of a fervant, acting under bis mafter's directions exprefs or implied, is the negligence of the mafter, it follows, that, if the fervant of Caius injure or kill the horfe by riding it immoderately, or, by leaving the ftable= door open, fuffer thieves to fteal it, Caius must make the owner a compenfation for his lofs*; and it is juft the fame, if he take a ready-furnifhed lodging, and his guefts, or fervants, while they act under the authority given by him, damage the furniture by the omiffion of ordinary care. At Rome the law was not quite fo rigid; for Pomponius, whofe opinion on this point was generally adopted, made the mafter liable, only quben he was culpably negligent in admitting carelefs guefts or fervants, whofe bad qualities he ought to have known $\dagger$ : but this diftinction muft have been perplexing enough in practice; and the rule, which, by making the head of a family anfwerable indifcriminately for the faults of thofe, whom he receives or employs, compels him to keep a vigilant eye on all his domefticks, is not only more fimple, but more conducive to the publick fecurity, although, it may be rather harfh

[^86]iǹ fome particular inftances *. It may here be obferved, that this is the only contract, to which the French, from whom our word bailment was borrowed, apply a word of the fame origin; for the letting of a houfe 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 fubject of this eflay, 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 ftipulation than for the price or rent, the leffee is bound to ufe the fame diligence in preferving the trees, plants, or implements, that every prudent perfan would ufe, if the orchard, garden, or farm, were his own.
2. Locatio operis, which is properly fubdivifible into two branches, namely, faciendi, and mercium vehendarum, has a moft extenfive influence in civil life; but the principles, by which the obligations of the contracting parties may be afcertained, are no lefs obvious and rational, than the objects of the contract are often vaft and important $\dagger$.

[^87]If Titius deliver frlk or velvet to a tailor for a fuit of clothes, or a gem to a jeweller to bè fet or engraved, or timber to à carpenter for the rafters of his houfe, the tailor, 'the engraver, and the builder, are not only obliged to perform their feveral undertakings in a work: manly manner* : but, fince they are entitled to a rezoard, either by exprefs bargain or by implieation, they mult alfo take ordinary care of the things refpectively bailed to them : and thus, if a horfe be delivered either to an agifting farmer for the purpofe of depafturing in his meadows, or to an hoftler to be dreffed and fed in his ftable, the bailees are anfwerable for the lols of the horfe, if it be occafioned by the ordinary neglect of ${ }^{!}$themfelves or their fervants. - It has, indeed, been adjudged, that, if the horfe of a gueft be fent to pafture by the owoner's defire, the innholder is not, as fuch, refponfible for the lofs
ployer, who gives the reward, is iocator operis, but conduclor operurum; while the party employed, who receives the pay, is locutor operarum, but conductor operis. Heinecc. in Pand. par. 3. $\oint$ 320. So, in Horace,

> " Tu fecanda marmora
"Locas"-
which the fonehewer or mafon conduxit.

* i' Ventr. 268. erroneoufly printed i Vern. 268. in all the editions of Bl. Comm. II. 452. The innumerable multitude of inaccurate or idle references, in our beft reports and law-tracte, is the bane of the fludent and of the practifer.
of him by theft or accident *; and, in the cafe of Mosley and Fosset, an action againt an agifter for keeping a horfe fo negligently tbat it was ffolen, is faid to have been held maintainable only by reafon of a special affumption $\dagger$; but the cafe is differently reported by Rolle, who mentions no fuch reafon; and, according to him, chief juftice Popham advanced generally, in conformity to the principles before eftablifhed, that, "if a man, to whom horfes are "bailed for agifment, leave open the gates of " his field, in confequence of which neglect " they Itray and are folen, the owner has an "action againf him:" it is the fame, if the innkeeper fend his gueft's horfe to a meadow of bis own accord, for he is bound to keep fafely all fuch things as his guefts depofit witbin bis inn, and fhall not difcharge himfelf by his own act from that obligation; and, even when he turns out the horfe by order of the owner, and receives pay for his grafs and care, he is chargeable, furely, for ordinary negligence, as a bailee for hire, though not as an innkeeper by the general cuftom of the realm. It may be worth while to inveftigate the reafons of this general cuftom, which in truth means no more than common law, concerning innholders*.

[^88]Although a ftipend or reward in money be the effence of the contract called locatio, yet the fame refponfibility for neglét is juftly demanded in any of the innominate contracts, or, whenever a valuable confideration of any kind is given or ftipulated. This is the cafe, where the contract do ut des is formed by a reciprocal bailment for. ufe, as if Robert permit Henry to ufe his plea-fure-boat for a day, in confideration that Henry will give him the ufe of his chariot for the fame time; and fo in ten thoufand inftances, that might be imagined, of double bailments: this too is the cafe, if the abfolute property of one thing be given as an equivalent for the temporary or Himited property of another, as if Cbarles give George a brace of pointers for the ufe of his bunter during the feafon. The fame rule is applicable to the contract facio ut facias, where two perfons agree to perform reciprocal works; as if a mafon and a carpenter have each re/pectively undertaken to build an edifice, and they mutually agree, that the firft chall finifh all the mafonry, and the fecond all the wood-work, in their refpective buildings; but, if a goldfmith make a bargain with an architect to give him a quantity of wrought plate for building his houfe, this is the contract do ut facias, or facio ut des; and, in all thefe cafes, the bailees muft anfwer for the omiffion of ordinary diligence in preferv-
ing the things, with which they are intrufted: fo, when $\mathfrak{F a c o b}$ undertook the care of Laban's flocks and herds for no lefs a reward than his younger daughter, whom he loved fo paffionately, that Seven years were in his ayes like a few days, he was bound to be juft as xigilant, as if he had been paid in fhekels of filver.

Now the obligation is precifely the fame, as we have already hinted*, when a man takes upon himfelf the cuftody of goods in confequence and confideration of anotber gainful contract; and, though an innholder be not paid in money for fecuring the traveller's trunk, yet the guelt facit ut faciat, and alights at the inn, not folely for his own refrefhment, but alfo that his goods may be fafe: independently of this reafoning, the cuftody of the goods may be confidered as acceffary 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 mafter of a lhip receive their fare for " the paffage of travellers, and an innkeeper " his pay for the accommodation and enter" tainment of them, but have no pecuniary re" ward for the mere cuftody of the goods be-

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\text { * P. } 375,376 .
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" longing to the paffengers or guefts, yet they
" are obdiged to take ordinary care of thofe " goods;' as a fuller and a mender are paid for
" their fkill only, yet are anfwerable, ex locatc,
" for ordinary neglect, if the clothes be loft or
"d 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 reftitution, if the trunks or parcels of his guefts, committed to him either perfonally or through one of his agents, be damaged in his inn, or ftolen out of it; by any perfon whatever $\dagger$; nor thall he difcharge himfelf from this refponfibility by a refufal to take any care of the goods, becaufe there are fufpected perfons in the houfe, for whofe conduat he cannot be anfwerable $\ddagger$ : it is otherwife, indeed, if he refufe admiffion to a traveller, becaufe he really has no room for him, and the traveller, neverthelefs, infift upon entering, and place his baggage in a chamber without the kecper's confent $\S$.

Add to this, that, if he fail to provide honeft fervants and honeft inmates, according to the confidence repofed in him by the publick, his

> * D. 4.9. 5. and 12 Mod. 487.
> + Yearb. 10 Hen. VII. 26.2 Cro. 189.
> $\ddagger$ Mo. $78 . \quad$ \& Dy. 158. b. 1 And. 29.
negligence in that refpect is highly culpable, and he ought to anfwer civilly for their acts, even if they fhould rob the guefts, who fleep in his chambers*. Rigorous as this law may feem, and hard as it may actually be in one or two particular inftances, it is founded on the great principle of publick utility, to which all private confiderations ought to yield; for travellers, who muft be numerous in a rich and commercial country, are obliged to rely almoft implicitly on the good faith of innholders, whofe education and morals are ufually none of the beft, and who might have frequent opportunities of affociating with ruffians or pilferers, while the injured gueft could feldom or never obtain legal proof of fuch combinations, or even of their negligence, if no actual fraud had been committed by them. Hence the Protor declared, according to Pomponius, bis defire of fecuring the public from the dibonefty of fuch men, and by his edict gave an action againft them, if the gotds of travellers or paffengers were loft or hurt by any means, except damno fatali, or by inevitable accident; and Ulpian intimates, that even this feverity could not refrain them from knavilh practices or fufpicious neglect $\dagger$.

[^89]In all fuch cafes, however, it is competent for the innholder to repel the prefumption of his knavery or default, by proving that he took ordinary care, or that the force, which occafioned the lofs or damage, was truly irrefifitible.

When a private man demands and receives a compenfation for the bare cuftody of goads in his warehoufe or fore-room, this is not properly a depogit, but a biring of care and attention: it may be called locatio.cuffodio, and might have been made a diftinct branch of this laft fort of bailment, if it had not feemed ufelefs to multiply fubdivifions; and the bailee may ftill 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 Englifb or Latin, he is clearly refponfible, like other interefted bailees, for ordinary ncgligence; and, although St. German feems to make no difference in this refpect between $a$ keeper of goods for bire and a fimple depjfitary, yet he ufes the word default, like the culpa of the Romans, as a generical term, and leaves the degree of it to be afcertained by the rules of law*.

In the fentence immediately following, he makes a very material diftinction between the two contracts; for, " if a man, fays he, have

[^90]" a certain recompenfe for the keeping of goods, " and promife, at the time of the delivery, to " redeliver them fafe at bis peril, then he fhall " be charged with all cbances, that may befall; " but, if he make that promife, and have a notbing for keeping them, he is bound to no "cafualties, but fuch as are wilful, and happen " by bis owun default:" now the word perid, like periculum, from which it is derived, is in infelf ambiguous, and fometimes denotes the $r i k$ of inevitable mijchance, fometimes the danger arifing, from a want of due circum/pection; and the ftronger Jenfe of the word was taken in the firft cafe againft bim, who uttered it; but, in the fecond,: where the conftruction is favourable, the milder fenfe was juftly preferred*. Thus, when a perfon, who, if he were wholly uninterefed, would be a mandatary, undertakes for a reward to perform any work, he muft be confidered as bound ftill more ftrongly, to ufe a degree of diligence adequate to the performance of it: his obligation muft be rigoroufly conftrued, and he would, perhaps, be anfwerable for Jight neglect, where no more could be required of a mandatary than ordinary exertions. This is the cafe of commiffioners, factors, and bailiffs, when their undertaking lies in fefance, and not fimply

[^91]in cuftody: hence, as peculiar care is demanded in removing and raifing a fine column of gtanate or porphyry, without injuring the fhaft or the capital, Gaius feems to exact more than ordinary diligence from the undertaker of fuch a work for a ftipulated compenfation*. Lord Coke confiders a factor in the light of a fervant, and thence deduces his obligation; but, with great fubmiffion, his reward is the true reafon, and the nature of the bufinefs is the juft meafure, of his duty $\dagger$; which cannot, however, extend to a refponfibility for mere accident or open robbery $\ddagger$; and, even in the cafe of theft, a factor has been holden excufed, when he fhowed, '" that he had laid up the goods of his principal " in a warehoufe, out of which they were " folen by certain malefactors to him un" known §乌."

Where kill is required, as well as care, in performing the work undertaken, the bailee for bire muft be fuppofed to have engaged himfelf for a due application of the neceflary art: it is his own fault, if he undertake a work above his ftrength ; and all, that has before been advanced on this head eoncerning a mandatary, may be applied with much greater force to a conduction
*D. 19. 2. 7. +4 Rep. 84. Ld. Raym. 9:8.
$\ddagger$ I Inft. 89. a. § 1 Vent. 12 I. Vere and Smith.
operis faciendı*. I conceive, however, that, where the bailor has not been deluded by any but himfelf, and voluntarily employs in one art a man, who openly exercifes another, his folly has no claim to indulgence; and that, unlefs the bailee make falfe pretenfions, or a Special undertaking, no more can fairly be demanded of him than the beft of his ability $\dagger$. The cafe, which Sądi relates with elegance and humour in his Guliftan or Rofe-Garden, and which Pufendorf cites with approbation $\ddagger$, is not inapplicable to the prefent fubject, and may ferve as a fpecimen of Mabomedan law, which is not fo different from ours, as we are taught to imagine: 'A man, who had a dif-- order in his eyes, calied on a farrier fer a re-- medy; and he applied to them a medicine - commonly ufed for bis patients: the man loft

- his fight, and brought an action for damages; - but the judge faid, "No action lies, for, if " the complainant had not himfelf been an $a f s$, " he would never have employed a farrier;" ${ }^{6}$ and Sadi proceeds to intimate, that, " if a " perfon will employ a common mat-maker to " weave or embroider a fine carpet, he mult " impute the bad workmanhip to bis own " folly §."
* Spondet, fay the Roman lawyers, peritiam artis.
$\dagger$ P. 381. $\ddagger$ De Jure Nat. et Gent. lib. 5. cap. 5. $\$ 3$.
§ Rofar. Polit. cap. 7. There are numberless tracts in

In regard to the diftinction before-mentioned between the nonfefance and the misfefance of a workman*, it is indifputably clear, that an action lies in both cafes for a reparation in damages, whenever the work was undertaken for a rezward, either actually paid, exprefsly ftipulated, or, in the cafe of a common trader, ftrongly implied; of which Blackstone gives the following inftance: "If a builder promifes, " undertakes, or affumes to Caius, tbat he will " build and cover his houfe within a time li" mited, and fails to do it, Caius has an action " on the cafe againft the builder for this breach " of his exprefs promife, and thall recover a " pecuniary fatisfaction for the injuly fuftained " by fuch delay $\dagger$." The learned author meaned, I prefume, a common builder, or fuppofed a confderation to be given; and for this reafon I forbore to cite his doctrine as in point on the fubject of an action for the nonperformance of a mandatary $\ddagger$.

Before we leave this article, it feems proper to remark, that every bailee for pay, whether
Arabick, Perfian, and $\Psi_{\text {urkijb, on every branch of jarif- }}$ prudence; from the beft of which it would not be difficult to extrad a complete fytem, and to compare it with our own; nor would it be lefs eafy, to explain in Perfian or Arabick fuch parts of our Englijb law, as either coincide with that of the Afaticks, or are manifefly preferable to it.
*P. 382, \&cc. +3 Comm. $157 . \ddagger$ P. 385, $3^{84}$, 385.
conduitor rei or conductor operis; muft be fuppofed to know, that the goods and chattels of his bailor are in many cafes diftrainable for rent, if his landlord, who might otherwife be fhamefully defrauded, find them on the premiffes*; and, as they cannot be diftrained and foid without his ordinary default at leaf, the owner has a remedy over againft him, and muft receive a compenfation for his lofs $\dagger$ : even if a depofitary were to remove or conceal bis own goods, and thofe of his depofitor were to be feized for rentarrere, he would unqueftionably be bound to make reftitution; but there is no obligation in' the bailce to fuggeft wife precautions againft inevitable accident; and he cannot, therefore, be obliged to advié infurance from fixe; much less to infure the things bailed without an authority from the bailor.

It may be right allo to mention, that the diftinction, before taken in regard to loans $\ddagger$, between an obligation to reftore the /pecifick things, and a power or neceffity of returning others equal in value, holds good likewife in the contracts of biring and depofiting: in the firft cafe; it is a regular boilment; in the fecond, it becomes a debt. Thus, accolding to Alfenus in his famous law, on which the judicious

[^92]Bynxershoek has learnedly commented, "if " an ingot of filver be delivered to a filver" fmith to make an urn, the whole property is " trausferred, and the employer is only a credi"tor of metal equally valuable, which the " workman engages to pay in a certain flape*:" the fmith may confequently apply it to his own ufe; but, if it perifh, even by unavoidable mifo chance or irrefiftible violence, he, as owner of it, muft abide the lofs, and the creditor muft have his urn in due time. It would be otherwife, no doubt, if the fame filver, on account of its peculiar finenefs, or any uncommon metal, according to the whim of the owner, were agreed to be Jpecifically redelivered in the form of a cup or a ftandifh.
3. Locatio operis mercium vehendarum is a contract, which admits of many varieties in form, but of none, as it feems at length to be fettled, in the fubftantial obligations of the bailee.

A carrier for bire ought, by the rule, to be refponfible 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 cafe of a lofs by robberys ": only when he had travelled by ways danger.

[^93]vol. vi.
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" ous for robbing, or driven by nigbt, or at any " inconvenient hour*:" but, in the commercial reign of Elizabeth, it was refolved, upon the fame broad principles of policy and convenience that have been mentioned in the cafe of innholders, "that, if a common carrier be robbed " of the goods delivered to him, he fhall an" fwer for the value of them $\dagger$."

Now the rezvard or hire, which is confidered by fir Edward Coki as the reafon of this decifion, and on which the principal ftrefs is often laid in our own times, makes the carrier liable, indeed, for the omiffion of ordinary care, but cannot extend to irreffitible force; and, though fome other bailees have a recompenfe, as factors and workmen for pay, yet, even in Woodliefe's cafe; the chief juftice admitted, that robbery was a good plea for a factor, though it was a bad one for a carrier : the true ground of that refolution is the publick employment exercifed by the carrier, and the danger of his combining with robbers to the infinite injury of commerce and extreme inconvenience of fociety $\ddagger$.

The modern rule concerning a common carries is, that " nothing will excufe him, except the

[^94]"act of God, or of the King's enemies*;" but a momentary attention to the principles muft convince us, that this exception is in truth part. of the rule itfelf, and that the refponfibility for a lofs by robbers is only an exception to it: a carrier is regularly anfwerable for neglect, but not, regularly, for damage occafioned by the attacks of ruffians, any more than for hoftile violence, or unavoidable misfortune; but the great maxims of policy and good government make it neceffary to except from this rule the cafe of robbery, left confederacies chould be formed between carriers and defperate villains with little or no chance of detection.

Although the AEI of God, which the ancients too called Өiz̈ Gíav and Vim divinam, be an expreffion, 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 fubftitute in its place inevitable accident: religion and reafon, which can never be at variance without certain injury to one of them, affure us, that " not a guft of wind blows, nor, " a flafh of lightning gleams, without the " knowledge and guidance of a fuperintending " mind;" but this doctrine lofes its dignity and fublimity by a technical application of it,

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\text { * Law of Nifi Prius, } 70,71 \text {. }
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[^95]which may in fome inftances border even upon profanenefs; and law, which is merely a practical fcience, cannot ufe terms too popular and perfpicuons.

In a recent cafe of an aftion againft a carrier, it was holden to be no excufe, " that the flip ${ }^{*}$ was tight, when the goods were placed on " board, but that a rat, by gnawing out the " oakum, had made a fmall hole, through " which the water had gurhed*;" but the true reafon of this decifion is not mentioned by the reporter: it was in fact at leaft ordinary negligence, to let a rat do fuch mifchief in the veffel ; and the Roman law has, on this principle, decided, that, "fi fullo veftimenta polienda " acceperit, eaque mures roferint, ex locato te" netur, quia debuit ab hac re caveref."

Whatever doubt there may be, among civilians and common-lawyers, in regard to a cafket, the contents of which are concealed from the DEpositary + , it feems to be generally underftood, that a common carrier is anfwerable for the lofs of a box or parcel, be he ever fo ignorant of its contents, or be thofe contents ever fo valuable, unlefs he make a Special acceptance $\oint:$ but grofs fraud and impofition by the bailor will deprive.

[^96]him of his action, and if there be proof, that the parties were apprized of each other's intentions, although there was no perfonal commurnication, the bailee may be confidered as a $\int p e-$ cial accepkor: this was adjudged in a very modern cafe particularly circumftanced, in which the former cafes in Ventris, Alleyne, and Carthew, are examined with liberality and wifdom; but, in all of them ${ }_{2}$ too great Arefs is laid on the reward, and too little on the important motives of public utility, which alone diftinguifh a'carrier from other baitees for hire**.

Though no fubftantial difference is affignable between carriage by land and carriage by water, or, in other words, between a waggon and a barge, yet it foon became neceffary for the courts to declare, as they did in the reign of James I., that a common hoymar, like a common waggoner, is refponfible for goods committed to his cuftody, even if he be robbed of them $\dagger$; but the reafon faid to have been given for this judgement, namely, becaufe be had his kire, is not the trie one; fince, as we have before fuggefted, the recompenfe could only make

[^97]him liable for temerity and imprudence, as if a bargemafter were rafhly to thoot a bridge, wben the bent of the weather is tempeftuous; but not for a mere cafualty, as if a hoy in good condition, fhooting a bridge at a proper time, were driven againft a pier by a fudden breeze, and overfet by the violence of the fhock*; nor, by parity of reafon, for any other force too great to be refifted $\dagger$ : the publick employment of the hoyman, and that dijtruft, which an ancient writer juftly calls the finerv of wifdom, are the real grounds of the law's rigour in making fuch a perfon refponfible for a lofs by robbery.

All, that has juft been advanced concerning a land-carrier, may, therefore, be applied to a bargemafter or boatman; but, in cafe of a tempeft, it may fometimes happen, that the law of jetfon and average may occafion a difference. Barcroft's cafe, as it is cited by chief juftice Rolle, has fome appearance of hardihip: "a " box of jewels had been delivered to a ferry" man, who knew not what it contained, and, a " fudden ftorm arifing in the paffage, he threw " the box into the fea; yet it was refolved, that " he fould anfwer for it $\ddagger:$ " now I cannot help

[^98]falpecting, that there was proof in this cafe of culpable negligence, and probably the cafket was both fmall and ligbt enough, to have been kept longer on board than other goods; for, in the cafe of Gravefend barge, cited on the bench by lord Coke, it appears, that the pack, which was thrown overboard in a tempeft, and for which the bargeman was holden not anfwerable, was of great value and great weigbt; although this laft circumftance be omitted by Rolle, who fays only, that the mafter of the veffel had no information of its contents*.

The fubtilty of the human mind, in finding diftinctions, has no bounds; and it was imagined by fome, that, whatever might be the obligation of a barge-mafter, there was no reafon to be equally rigorous in regard to the mafter of a $\int b i p$; who, if he carry goods for profit, muft indubitably anfwer for the ordinary neglect of himfelf or his mariners, but ought not, they faid, to be chargeable for the violence of robbers: it was, however, otherwife decided in the great cafe of Mors and Slew, where "eleven perfons armed " came on board the fhip in the river, under " pretence of impreffing feamen, and forcibly " took the chefts, which the defendant had en ${ }_{T}$ " gaged to carry;" and, though the mafter was

[^99]entirely blamelefs, yet fir Matthew Hale and his brethren, having heard both civitians and common-lawyers, and, among them, Mr. Hol t for the plaintiff, determined, on the principles juft before eftablifhed, that the bailor ought to recover*. This cafe was frequently mentioned afterwards by lord Hol t , who faid, that " the "declaration was drawn by the greateft pleader " in England of his time $\dagger$."

Still farther: fince neither the element, on which goods are carried, nor the magnitude and form of the carriage, make any difference in the refponfibility of the bailee, one would hardly have conceived, that a diverfity could have been taken between a letter and any other thing. Our comnon law, indeed, was acquainted with no fuch diverfity; and a private poft-mafter was precifely in the fituation of another carrier; but the fatute of Charles II. having eftablifhed a general poit-office, and taken away the liberty of fending letters by a private poft $\dagger$, it was thought, that an alteration was made in the obligation of the poft-mafter general; and, in the cafe of Lane and Cotton, three judges determined, againft the fixed and well-fupported opinion of chief juftice Holt, " that the poil-mafter was not

> * I Ventr. 190. 238. Raym. 220.
> + Id. Raym. 920.
> $\ddagger 12$ Cha. II. ch. 35. See the fubfequent ftatutes.

* anfwerable for the lofs of a letter with exche" quer-bills in it*:" now this was a cafe of ordinary neglect, for the bills were folen out of the plaintiff's letter in the defendant's office†; and, as the mafter has a great falary for the difcharge of his truft; as he ought clearly to anfwer for the acts of his clerks and agents; as the ftatute, profeffedly enacted for fafety as well as difpatcit, could not have been intended to deprive the fubject of any benefit, which he before enjoyed; for thefe reafons, and for many others, I believe that Cicero would have faid, what he wrote on a fimilar occafion to Trebatius, " Ego tamen "scevole affentiorł." It would, perhaps, have been different under the flatute, if the polt had been robbed, either by day or by nigbt,
* Carth. 487. 12 Mod. 482.
$\dagger$ In addition to the authorities, before cited, p. 370. note $(\dagger)$, for the diftinction between a lofs by fealth and by robbery, fee Dumiulin, tract. De eo quod intereff, note 184. and Rosella casuum, 28. b. This laft is the book, which St. German improperly calls Summa Rofella, and by mifquoting which he milled me in the paffage concerning the fall of a boufe, p. 396. The words of the author, Trovamata, are thefe: "Domus tua minabatur ruinam; domus corruit, et in" terficitequum tibi commodatum; certè non potelt dici cafusfor" tuitus; quia diligentifımus reparâfet domum, vel ibi non ha" bitâffet ; fi autem domus non minabatur ruinam, fed impetu "tempeffatis validx corruit, non eft tibi imputandum."
$\ddagger$ Epif. ad Fam. VII. 22.
when there is a neceffity of travelling, but even that queftion would have been difputable; and here I may conclude this divifion of my effay, with obferving, in the plain but emphatical language of St. German, " that all the former diverfities be " granted by fecondary conclufions derived upon " the law of reafon, witbout any ftatute made in " that bebalf; and, peradventure, laws and the "conclufions therein be the more plain and the " more open; for if any ftatute were made there"c in, I think verily, more doubts and queftions " would arife upon tbe ftatute, than doth now, "when they be only argued and judged after "t the common law*."

Before I finifh the biftorical part of my effay, in which I undertook to demonftrate, " that a " perfect harmony fubfifted on the interefting " branch of jurifprudence in the codes of nations " moft eminent for legal wifdom $\dagger$," I cannot forbear adding a few remarks on the inftitutions of thofe nations, who are generally called barbarous, and who feem in many inflances to have deferved that epithet: although traces of found reafoning and folid judgement appear in moft of their ordinances.

By the ancient laws of the Wisicoths, which are indeed rather obfcure, the "keeper of

[^100]" a horfe or an ox for bire, as well as a birer for " ufe, was obliged, if the animal peribbed, to re" turn another of equal worth:" the law of the Baiuvarians on this head is nearly in the fame words; and the rule is adopted with little alteration in the capitularies of Charlemagne and Lewis the Pious*, where the Mofaick law before cited concerning a borrower may alfo be found $\dagger$. In all thefe codes a depofitary of gold, filver, or valuable trinkets, is made chargeable, if they are deftroyed by fire, and bis own goods perifh not with them; a circumftance, which fome other legiflators have confidered as conclufive evidence of grofs neglect or fraud : thus, by the old Britifbtract, called the book of Cynawg, a perfon, who had been robbed of a depofit, was allowed to clear himfelf by making oath, with compurgators, that he had no concern in the robbery, unlefs be bad faved bis own goods; and it was the fame, I believe, among the Britons in the cafe of a lofs by fire, which happened without the fault of the bailee; although Howel the Good feems to have been rigorous in this cafe; for the fake of publick fecurity $\ddagger$. There was

[^101]one regulation in the northern code, which I have not feen in that of any other nation: if precious things were depofited and $/$ Bolen, time was given to fearch for the thief ${ }_{3}$ and, if he could not be found within the time limited, a moiety of the value was to be paid by the depofitary to the owner, "ut damnum ex medio uterque " fuftineret*."

Now I can fcarce perfuade myfelf, that the phrafe ufed in thefe laws, $\sqrt{6}$ id perierit, extends to a perihing by inevitable accident; nor can I think, that the old Gotbick law, cited by Stiernноок, fully proves his affertion, that "a de. " pofitary was refponfible for irreffitible force;" but I obferve, that the military law-givers of the north, who entertained very high notions of good faith and honour, were more Atrict than the Romans in the duties, by which depofitaries and other truftees were bound: an exact conformity could hardly be expected between the ordinances of polifhed flates, and thofe of a people, who could fuffer difputes concerning bailments to be decided by combat; for it was the Emperor Frederick II., who abolifhed the trial by battle in cafes of contefted depofits, and fubftituted a more rational mode of proof $\dagger$.

* LL. Wifigotb, lib. 5. tit. 5. §3.
+ LL. Longsbard. Lib. 2. tit. 55-§ 35. Confit. Nenpal. Lib. 2. tit. 34 -

I purpofely referved to the laft the mention of the Hindu, or Indian code, which the learning and induftry of my much-efteemed friend Mr. Halhed has made acceffible to Europeans, and the Persian tranflation of which I have had the pleafure of feeing: thefe laws, which muft in all times be a fingular object of curiofity, are now of infinite importance; fince the happinefs of millions, whom a feries of amazing events has fubjected to a Britifb power, depends on a ftrict obfervance of them.

It is pleafing to remark the fimilarity, or rather identity, of thofe conclufions, which pure unbiaffed reafon in all ages and nations feldom fails to draw, in fuch juridical inquiries as are not fettered and manacled by pofitive inftitution; and, although the rules of the Pundits concerning facceffion to property, the punibment of offences, and the ceremonies of religion, are widely different from ours, yet, in the great fyftem of contracts and the common intercourfe between man and man, the Pootee of the Indians and the Digest of the Romans are by no means diffimilar*.

[^102]Thus, it is ordained by the fages of Hinduffín, that " a depofitor thall carefully inquire into "6 the character of his intended depofitary; who, " if he undertake to keep the goods, fhall pre" ferve them with care and attention; but fhall " not be bound to reftore the value of them', if " they be /poiled by unforefeen accident, or burned, " or Aolen; unless he conceal any part of them, "t that has been faved, or unlefs his own effects "، be fecured, or unlefs the accident happen after " his refufal to redeliver the goods on a de" mand made by the depofitor, or while the de" pofitary, againft the nature of the truft, pre" fumes to make ufe of them :" in other words, " the bailee is made anfwerable 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 bufinefs, for which he borrowed it; but not, if it be accidentally loft or forcibly feized, before the expiration of the time, or the conclufion of the affair, for which it was lent $\dagger$ : in another place, it is provided, that, if a pledge be damaged or loft by unforefeen accident, the creditor thall neverthelefs recover his debt with intereft, but the

[^103]debtor thall not be entitled to the value of his pawn*; and that, if the pledgee ufe the thing pledged, he thall pay the value of it to the pledgor in cafe of its lofs or damage, whilft he ufes it $\dagger$.

In the fame manner, if a perfon bire a thing for ufe, or if any metal be delivered to a workman, for the purpofe of making veffels or ornaments, the bailees are holden to be difcharged, if the thing bailed be deftroyed or fpoiled by natural misfortune or the injuftice of the ruling power, unless it be kept after the time limited for the return of the goods, or the performance of the work $\ddagger$.

All thefe provifions are confonant to the principles eftablifhed in this efflay; and I cannot help thinking, that a clear and concife treatife, written in the Perfian or Arabian languagt, on the law of ContraCts, and evincing the general conformity between the Afatick and European fyftems, would contribute, as much as any regulation whatever, to bring our Englifb law into good odour among thofe, whofe fate it is to be under our dominion, and whofe happinefs ought to be a ferious and continual object of our care.

[^104]Thus have I proved, agreeably to my undertaking, that the plain elements of natural law, on the fubject of Bailments, which have been traced by a fiort analyfis, are recoguifed and confirmed by the wifdom of nations*; and I hatten to the third, or Jjnthetical, part of my work, in which, from the nature of it, moft of the defmitions and rules, already given, muft be repeated with little variation in form, and none in fubm flance: it was at firft my defign, to fubjoin, with a few alterations, the Synop/is of Delrio; but finding, that, as Bynkershoek expreffes himfelf with an honeft pride, I bad leifire fometimes to write, but never to copy, and thinking it unjuift to embellifh any production of mine with the inventions of another, I changed my plan; and thall barely recapitulate the doctrine expounded in the preceding pages, obferving the method, which logicians call Synthefis, and in which all fciences ought to be explained.
I. To begin then with definitions: i. Bailment is a delivery of goods in truft, on a contract expreffed or implied, that the truft Jball be duly executed, and tbe goods redelivered, as foon as the time or ufe, for wohich they were bailed, Joall bave elapsed or be performed.
2. Deposit is a bailment of goods to be kept for the bailor without a recompenfe.

[^105]3. Mandate is a bailment of goods, without reward, to be carried from place to place, or to bave fome act performed about them:
4. Lending for use is a bailment of a tbing for a certain time to be ufed by the borrower woithout paying for it.
5. Piedging is a bailment of goods by a debtor to his creditor to be kept till the debt be difcbarged.
6. Letting to hire is i. a bailment of $A$ thing to be ufed by the hirer for a compenfation in money; or, 2. a letting out of work and labofr to be done, or care and attention to be beftowed, by the bailee, on the goods bailed, and that for a pecuniary recompenfe; or, 3. of CARE and Pains in carrying the tbings delivered from one place to anotber for a Jipulated or implied reward.
7. Innominate bailments are thofe, where the compenfation for the ufe of a thing, or for labour and attention, is not pecuniary, but either 1. the reciprocal ufe or the gift of fome other thing; or, 2. work and pains, reciprocally undertaken; or, 3. the $u f e$ or gift of another thing in confideration of care and labour, and converfely.
8. Ordinary neglect is the omifion of that care, which every man of common prudence, and
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capable of governing a family, takes of his own concerns.
9. Grass neglect is the want of that care, which every man of common fenfe, bow inattentive foever, takes of bis own property.
10. Slight neglect is the omifion of that diligence, which very circumppect and thoughtful perfons ufe in fecuring their own goods and chattels.
$\therefore$ il. A naked contract is a contract made without confideration or recompenfe.
H. The rules, which may be coufidered as axioms flowing from natural reafon, good morals, and found policy, are thefe :

1. A bailee, who derives no benefit from his undertaking, is refponfible only for gross neglect.
2. A bailee, who alone receives benefit from the bailment, is refponfible for slight neglect.
3. When the bailment is beneficial to botb parties, the bailee muft anfwer for ordinary neglect.
4. A spegial agreement of any baidee to anfwer for more or $l e f f_{5}$ is in general valid.
5. Alc bailees are anfwerable for actualFRAUD, even though the contrary be fripulated.
6. No bailec thall be charged for a lofs by
inevitable accident or irreffitible force; ex= cept by $\int$ pecial agreement.
7. Robbery by force is confidered as irrefifitible; but a lofs 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 occafioned by an injury.
II. The negligence of a servant, acting by his mafter's exprefs or implied order, is the negligence of the master.
III. From thefe rules the following propgizcions are evidently deducible:
11. A depositary is refponfible only for gross neglect ; or, in other words, for a violation of good faith.
12. A depositary, whofe character is known to his depofitor, fhall not anfwer for mere neglect, if he take no better care of his own goods; and they alfo be fpoiled or deftroyed.
13. A mandatary to carry is refponfible only for oross neglect, or a breach of good faith.
14. A mandatari to perform a work is bound to ufe a degree of diligence adequate to the performance of it.
15. A man cannot be compelled by action

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to perform his promife of engaging in a deposit or a mandate.
6. A reparation may be obtained by fuit for damage occalioned by the nonperformance of a promife to become a depositary or a mandatary.

- 7. A borrower for use is refponfible for sLight negligence.

8. A pawnee is anfwerable for ordinary neglect.
9. The hirer of a thing is anfwerable for ordinary neglect.
io. A workman for hire muft anfwer for ordinary neglect of the goods bailed, and apply a degree of skill equal to bis undertaking.

1i. Aletter to hire of his care and attention is refponfible for ordinary negligence.
12. A carrier for hire, by land or by water, is anfwerable for ordinary negleet.
IV. To thefe rules and propofitions there are fome exceptions:

1. A man, who Spontaneoufly and officioufly engages to keep, or to carry, the goods of another, though without reward, mult anfwer for slight neglect.
2. If a man, through firong perfuafion and with reluctance, undertake the execution of a
mandate, no more can be required of him than a fair exertion of his ability.
3. Arl bailees become refponfible for loffes by casualty or violence, after their refufal to return the things bailed on a lawful deMAND.
4.' A borrower and a hirer are anfwerable in ale events, if they keep the things borrowed or hired after the fipulated time; or ufe them differently from their agreement.
4. A depositary and a pawnee are anfwerable in all events, if they $u f e$ the things depofited or pawned.
5. An innkeeper is' chargeable for the goods of his gueft within bis inn, if the gueft be robbed by the fervants or inmates 'of the keeper.
6. A common carrier, by land or by rocter, muft 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 refponfible for a " lofs by accident or force, however inevi"table or irreffitible, if it be occafioned by that "degree of negligence, for which the nature of " his contract makes him generally anfwera" ble s" and I may here conclude my difcuffion of this important title in jurifprudence with a general and obvious remark; that "all the pre-
" ceding rules and propofitions may be diverí $\rightarrow$ " fied to infinity by the circumftances of every "s particular cafe;" on which circumftances it is on the continent the province of a jutde appointed by the fovereign, and in England, to our conftant honour and happinefs, of a jury freely chofen by the parties, finally to decide: thus, when a painted cartoon, pafted on canvas, had been depofited, and the bailee kept it fo near a damp wall, that it peeled and was much injured, the queftion " whether the depofitary " 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 refufed to grant a new trial*; but it was the judge, who determined, that the defendant was by law refponfible for grofs. negligence anly; and, if it had been proved, that the bailee had kept his own pictures of tbe fame fort in the fame place and manner, and that they too had been fpoiled, a new trial would, I conceive, bave been granted; and fo, if no more than si.igup neglect had been committed, and the jury had, neverthelefs, taken upon themfelves to decide againft law, that a bailee withbout reward was refponfible for it.

Should the metbod ufed in this little tract be approved, I may poffibly not want inclination,

[^106]if I do not want leifure, to difcufs in the fame form every branch of Englif law, civil and criminal, private and publick; after which it will be eafy to feparate and mould into diftinet works, the three principal divifions, or the analytical, the biftorical, and the fyntbetical, parts.

The great fyftem of jurifprudence, like that of the Univerfe, confifts of many fubordinate fyftems, 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 pofitive rules of our forefathers, which are feldom deficient in wifdom or utility: if Law be a fcience, and really deferve fo fublime a name, it muft be founded on principle, and claim an exalted rank in the empire of reafon; but, if it be merely an unconnected feries of decrees and ordinances, its ufe may remain, though its dignity be leffened, and He will become the greateft lawyer, who has the ftrongeft habitual, or artificial, memory. In practice, law certainly employs two of the mental faculties; reafon, in the primary inveftigation and decifion of points entirely new; and memory, in tranfmitting to us the reafon of fage and learned men, to which our own ought invariably to
yield, if not from a bectoming modefty, at leaft from a juft attention to that object, for which all laws are framed, and all focieties inftituted, THE GOQD OF MANKIND.

## ADVERTISEMENT.

AFTER I had finifhed the preceding tract, to the fatisfaction of feveral friends, but not to mp own, I was informed, that the learned Christian Thómasius had publifhed a differtation on the fame fubject with the following title: De Ufu Practico Doctrina diffcillima yuris Romani de Culparum Praffatione in Contractibus; Hale, mdccy. The fame of the author, and the high applaufe, which the very fenfible Bynker/hoek beftows on him, impreffed me with a moft favourable idea of his work, and with a frong defire to procure it; but, to my extreme difappointment, I cannot find it in any library, publick or private, in the Metropolis or in either of our Univerfities : I have fent for it, however, to Germany, and, when I receive it, fhall take a fincere. pleafure, either in correcting fuch errors, as it may enable me to detect in my effay, or in confirming the fyftem, which I have adopted, by fo refpectable an authority.

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## AN INQUIRT

INTO
THE LEGAL MODE

08

## SUPPRESSING RIOTS,

WITH
a CONSTITUTIONAL PLAN

07

## FUTURE DEFENCE.

Res videas quo modo fe habeant: orbem terrarum, imperiis diftributis, ardere bello; urbem fine legibus, fine judiciis, fine jure, fine fide, relictam direptioni et incendiis.

C I C. Epif. ad Fam. 4. 1.

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AN INQUIRX
into
    THE LEGAL MODE
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    SUPPRESSING RIOTS.
    IT has long been my opinion, that, in times of national adverfity, thofe citizens are entitled to the higheft praife, who, by perfonal exertions and active valour, promote at their private hazard the general welfare; that the fecond rank in the fcale of honour is due to thofe, who, in the great council of the nation, or in other affemblies, legally convened, propofe and enforce with manly eloquence what they conceive to be falutary or expedient on the occafion; and that the third place remains for thofe perfons, who, when they have neither a neceffity to act, nor a fair opportunity to féeak, impart in writing to their countrymen fuch opinions as their reafon approves, and fuch knowlege as their painful refearches have enabled them to acquire.

With thefe reftrictions, the fword, the tongue, and the pen, which have too often been employed by the worft paffions to the worft purpofes, may become the inftruments of exalted virtue; inftruments, which it is not the right only, but the duty, of every man to ufe, who can ufe them; paying always a facred regard to the laws of that country, which he undertakes to defend, to advife, or to enlighten. .

A fenfe of this duty and a confcioufnefs of this right have impelled me, with no views, as it will be readily believed, of ambition or intereft, much lefs from any factious motive, to take up that inftrument, which I have ftated as the leaft honourable of the three, and to prefent the publick with a few confiderations on a fubject no lefs interefting at the prefent hour than important to all future ages.

Having unhappily been a vigilant and indignant fpectator of the late abominable enormities; having feen the fenate befieged, and the fenators, infulted; the laws of our country defied, and the law of nations violated; having beheld the houfes of our trueft patriots and moft refpectable magiftrates either deftroyed, affailed, or menaced; having paffed a whole night encircled by the blazing habitations of unoffending individuals, and by the flames of thofe edifices which pub. lick juftice had allotted to various claffee of of-
fenders; having lamented over a great metropolis expofed for many days to the fury of a licentious rabble; having believed the noblett commercial City in the world to be in danger of a fecond conflagration; having in vain fought accefs to the courts at Weftminfter in full term, and to the houfes of parliament in full feffion; having, in a word, been witnefs to horrors, all the concurrent caufes of which are not eafy to be known, and all the confequences of which are lefs eafy to be predicted; I could not but fee at length, with a mixed fenfation, between anguilh and joy, the vigorous and triumphant exertions of the executive power; and I admitted the noceflity of thofe exertions, whilf I deplored it.

Every well-difpofed man, and lover of tranquility, muft have rejoiced, that, on the ninth of June, the peaceable and terrified inhabitants of this noble Capital might enjoy repofe; that the valuable effects, which many had removed, and fome had even buried, might be replaced; that the artifan might refume his implements, and the ftudent, his books; that juftice had reafcended her feat; and that order was fucceeding to confufion, harmony to difcord; but every honeft man and lover of his country muft have grieved, that a whole week was then before us, in which the neceffary adjournment of the Commons, who would otherwife have been deliberating on
the fate 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 fubftance, dictatorial.

In this awful interval a queftion occurred to me, which muft naturally have prefented itfelf to many others: "" Whether the fill-fubfifting " laws and genuine conftitution of England " had not armed the civil flate with a power " fufficient, if it had been previoully underftood " and prepared, to have fuppreffed ever fo for" midable a riot without the intervention of the " military."

If no fuch power legally exifted in the ftate, our fyftem, I thought, muft be defective in a moft effential point; fince no people can be really and fubftantially free, whofe freedom is fo precarious, in the true fenfe of the word, as to depend on the protection of the foldiery; and even our protectors, who for feveral days poffibly could not, but certainly did not, act at all, might have been neceffarily called away, in the moft dangerous moment, to defend our coafts and maritime towns: if, on the other hand, fuch a power of felf-protection did exift, our laws, I concluded, muft have been difgracefully neglected, and ought to be reftored to full vigour and energy.

A very fhort inquiry enabled me to anfwer
the queftion, at leaft to my own fatisfaction, in the affirmative; and it is the refult of this inquiry, which I now requeft the public to accept with the indulgence due to an occafional production, and with the attention due to a fubject of general importance.

This then is the propofition, which I undertake to demonftrate: "That the common, and " ftatute, laws of the realm, in force at this day, " give the eivil ftate in every county a power, " which, if it were perfectly underfood and " continually prepared, would effectually quell" any riot or infurrection, without affiftance from " the military, and even without the modern " riot-act."

To this propofition I fhall ftrictly, and, as far as I am able, logically confine myfelf; avoiding all parade of legal or antiquarian learning, and omitting all fuch difquifitions as might anfwer the purpofe of oftentation, which I difdain, but not of utility, which alone I feek: fhould the curious and intelligent reader be defirous of inveftigating the powers of magiftrates and of courts in recording riots and punifhing rioters, and of tracing the hiftory of our ancient and modern laws for the prefervation of publick tranquillity, from that of king Ina to that of Geonge the Firf, he will receive ample information from the various books of authority, which I fhall

[^107]have occafion to cite in the courfe of my argument.

It is in every one's mouth, that, on all violent breaches of the peace, the fheriff of the county is not only authorized but commanded to raife the Poffe Comitatas, and forcibly to fupprefs the tumult ; but, if moft of thofe, who ufe this expreffion, will examine their own minds, they will prefently perceive, that they utter words, which convey to them no diflinct idea, and that the power of the county, like many other powers in nature and jurifprudence, is very ill afcertained, and very imperfectly comprehended. Logicians give us an admirable rule, "that we fbould feek " after a clear, precife and complete conception of " things, as they really exift in their own nature " and in all their parts, and Jould not always " imagine that there are ideas, becaufe tbere are " words*:" let us apply this rule to the cafe before us, and endeavour to form a luminous, fixed, comprehenfive notion of the power in queftion; without fuppofing that we comprehend it, merely becaufe we know, that, befides its Latin name, it is called in Norman French, Poiar del Countee, and fometimes, Aide del pais $\dagger$.

We cannot begin our inveftigation under a

[^108]more certain or more refpectable guide, than Chief Juftice Fineux, whofe words I thall tranfcribe from that moft venerable repofitory of genuine Englifh wifdom, the Year books*: "At the beginning," fays that learned Judge, "all the adminiltration of juftice was in one " hand, namely, in the Crown; then, after the " multiplication of the people, that adminiftra$\approx$ tion was diftribured into counties, and the " pozver was committed to a deputy in each "county, namely, the Vifcount, or Sheriff; who " was the King's deputy to preferve the peace; " and thus it is, that all people muft, in obe" dience to him, be ready in defence of the " realm, when enemies come: thus too was he " affigned to be a confervator of the peace, to " punifh malefacfors, to defend the realm when " enemies invade it, to be attendant on the King "in war-time, and to caufe all penple in his "county to go with the King to defend the " land againft enemies."

Who the people are, that the laws of England required, and ftill require, to be ready and obedient to the fheriff on all occafions of publick difturbance, we learn from the judicious antiquary, Lambard, who cites and adopts the opinion of Mr. Marrow delivered in a work,

[^109]which I fuppofe to have been a reading on the ftatute $I_{3}$ Hen. IV. His opinion was, "that the " juftices of the peace, fheriff or under fheriff, " ought to have the aid and affiftance of all " knights, gentlemen, yeomen, labourers, fer" vants, apprentices, and likewife of wards, and " of other young men above the age of fifteen " years; becaufe all of that age are bound to " have barnefs, or armour, by the ftatute of "Winchefter*.'.

What effect the fubfequent repeal of the ftatutes of armour might have on the reafon affigned by Mr. Marrow for his opinion, it is needlefs to inquire; for it feems obvious, that the ftatutes of James I. removed the nece/fity only, and not the propriety, of having arms, or, to ufe the very words of the old act, armure pur la pees garder; and the doctrine in Lambard is generally underftood to be law $\dagger$. The paffage abovecited appears, however, to have mifled the great commentator on the laws of England, who feems to have collected from it, that none were bound to obey the fummons of the fheriff, but perfons under the degree of nobility $\ddagger$; whereas the patent of affiftance, cited by Dalton $\|$, commands barons, earls, and dukes, to be auxiliantes et re.

[^110]spondentes to the fheriff in all things belonging to his office.

The power of the county, therefore, includes the whole civil fate, from the duke to the peafant; while the military ftate, 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 fame time a citizen, he is authorized and perhaps bound, when under no particular orders or at no particular ftation, to exert himfelf, like any other good fubject, in the fuppreffion of tumults, the prevention of felony, and the apprehenfion of the rioters or felons. This I mean : when the foldiery, not being upon military duty, happen to be prefent at a riot, and in their civil capacity forcibly fupprefs 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 truitb called out by the executive magiftrate, and are in fact no more than inftruments in the hands of their commanders, their acts can only be juftified by that Necessity which always defends what it compels, which for the time fuperfedes all pofitive law, but of the real exiftence of which their country muft afterwards judge, unlefs the legiflature fhould, in their wifdom, be pleafed to declare it. For this diftinction I can produce no written au-'
thority; bit it feems confonant to reafon as well as truth.

This power of the county, of which we may now begin to form a diftinct idea, is mentioned, as well known and well underfood, in a varriety of fatutes, which were confirmatory of the common law ; and fome parts of which I fhall cite in the original languages, how barbarous or inelegant foever they may appear to a claffical cye.

The ftat. Weftm. i. c. 17. ordains "qe le vif "counte ou le bailiff, prife ove luy poyer de fon "countee, ou de fa baille, voit effayer de faire le " plevin des averes a celuy qe prit les averes." And that of Weftm. 2. c. 3.9. is more peremptory in cafes of refiftance to the execution of civil procefs: "Multoties etiam dant refponfum, " quod non potuerunt profequi proceptum regis " propter refiftentiam poteftatis alicujus magna" tis, de quo caveant vicecomites de catero, quia " hujufmodi refponfio multum redundat in de" decus domini regis; et, quam citò ballivi fui " teftificantur, quòd invenerunt hujufmodi re"fiftentiam, ftatim omnibus omiffis, affumpto " fecum poffe comitatús fui, eant in propriâ per" fonâ ad faciendam executionem." By the 17 Rich. II. c. 8. it is enacted, that, in cafe of any tumult or diforder, "a pluis toft qe vifconta " et autres miniffires le roi poent ent avoig
" coniffance, ove la force del countee et pais, ou " tiel cas aviegne, ilz mettent deftourbance en"contre tiel malice ove tout lour poair, et " preignent tielx meflefours, et les mettent en " prifone tanqe due execution de leie foit fait "de eux, et qe touz feignurs et aucres liges du " roialme foient entendantz et aidantz, de tout " lour force et poair, as vifcontz et miniftres avant "ditz."

Again: by the 13 Hen. IV. c. 7. "Ordeig" nez eft et eftabliz, qe, fi aucun riot affemblee " ou rout des gentz encontre la loie fe face en " aucune partie del roialme, les juifices de paix, " trois ou deux de eux a meyns, et le vifcont " ou fouth vifcont del countee, ou tiel riot affem" blee ou rout fe ferra enapres, veignent ove le " poair del countee, fi befoigne ferra, pur eux " arefter, et eux areftent." In the conftruction of this laft ftatute it has been holden*, that, although it fpeak of tbree or two juftices at leaft, yet one juftice may raife the power and fupprefs a riot; for it is a beneficial law, faid Fineux, and was enacted for the prevention of mifcbief, which might enfue, if a juftice wicre to wait for others. It has alfo been adjudged, that, under the word minifters, in the ftat. 17 Rich. II. c. 8. juftices of peace are comprifed + ; and to are conftables,

[^111]by the opinion of Fitzberbert cited by Crompton, and confirmed by the Year book i Hen. VII. 10; where it is laid down, that "conftabularii " villæ fuper affraiam poffunt letare populum."

We may therefore conclude, that, in all cafes of tumult and infurrection, the fheriff, or other minifter, may and ought to make proclamation, commanding all fuch perfons, as conftitute the power of the county, to affemble and affift him*; or he may fend a particular warning or fummons, for the fame purpofe, to every individual of the polfe, who muft attend fuch fummons under pain of a heavy fine and imprifonment; for, by the ftat. 2 Hen. V. c. 8. it is provided, "qe " les lieges du roi efteantz fufficeantz pur tra" vailler en le countee, ou tielx routes affemblez " ou riotes font, foient affiftantz as juftices, com" miffioners, vifcont, et foutz-vifcont, de mefme "le countee, qant ilz Jerront reafonablement " garniz, pur chivacher, ove les ditz juftices, "commiffioners, et vifcont ou foutz-vifcont en " aide de refiftence de tielx riotes routes et af" femblez fur peine demprifonement et faire fyn "et ranceon al roi:" And the offence of neglecting to join the power of the county, after fuch reafonable warning, is ranked by Sir William

[^112]Blackfone under the clafs of contempts againft the king's prerogative*.

Having fixed our ideas concerning the nature of this legal power, the mode of raifing it, and the punifhment of a criminal neglect to join it, let us confider, firft, by the help of reafon only, what corollaries neceffarily follow the doctrine, which we have expounded; and, next, inquire whether authority and reafon, which lord Coke juftly calls the two faithful witnefles in matter of lawt, coincide on the queftion before us; as they indubitably will, unlefs either our previous ratiocination be illogical, or the minds of ancient and modern lawyers have taken a bent from the prejudices of their refpective ages.

From the obligation of the fheriff, or other minifter, to affemble the power of his county for the fuppreffion of any rebellion, infurrection, riot, or affray, and for the repelling of invading enemies; from the duty incumbent on every man of fufficient years and ftrength to affociate himfelf with the power fo affembled, and from the principles of natural juftice, which will neither requitire men to do impo/jble things, nor refufe them the means of performing what they are commanded to perform; from thefe obligations and thefe principles it inftantaneoufly follows: Firft;

[^113]That the fheriff or other peace-officer is bound to raife $\int_{i c}$ a power as will effectually quell the tumult either really exifting or juftly feared.

Secondly; That the power fo raifed may and muft be armed with fuch weapons, and act in fuch order, as fhall enable them totally to fupprefs the riot or infurrection, or to repel the invaders.

Thirdly; That, in the ufe of fuch weapons, the power may juftify the cbarging, wounding, or even killing, the rioters or infurgents, who perfift in their outrages, and refufe to furrender themfelves.

Fourthly; That the power of every county ought at all times, but efpecially in times of danger, to be prepared for attending the magiftrate, and to know the $u f e$ of fuch weapons, as are beft adapted to the fuppreffion of tumults.

Fifthiy; That, fince the mufliet and bayonet are found by experience to be the moft effectual arms, all perfons, who conftitute the power of a county, are bound to be competently fkilled in the ufe of them.

Sixthly; That, fince the only fafe and certain mode of ufing them with effeet is by acting in a body, it is the duty of the whole civil fate to know the platoon-exercife, and to learn it in companies.

As no autbority, according to Charron, can fland witbout reafon, fo we find, by conftant experience, that no reafon can furmount the paffions and prejudices of men without the aid of authority; and I am happy in believing, that both of them perfectly coincide in fupport of the foregoing propofitions: firt, therefore, I fhall prove them by citing cafes, which have been folemnly adj dged, together with the opinions of learned lawyers, whofe works are much refpected in our courts of juftice; and, next, I fhall inquire, whethet thofe cafes and opinions have been over-ruled or fhaken by any fubfequent decifions, or acts of the legiffature.

The earlieft refolution upon the fubject, that has occurred to me, was in a cafe, which the very learned and judicious Brook thought worthy of note* in his time, and which, in the prefent time, deferves peculiar attention. It is reported in French in the firt page of the Year book 3 Hen. VII. and it is manifefly the fame with that afterwards abridged in an imperfect Latin note printed, out of its place, in the tenth page of the fame book; though Brook feems to have confidered them as different, or rather not to have obferved their identity; for, in the title of his Abridgement juft alluded to, he gives them

[^114]in feparate articles, without melting both parts of the Year book together, as I propofe to do; by which means I fhall extract the whole cafe and form one confiftent fate of it.

Jame Deins had been outlawed in the county of Suffolk for felony; and, having brought a writ of error to reverfe the outlawry, had obtained a Non Moleftando, which he delivered to the efcheator, Fobn Lentborp; who, neverthelefs, feifed and took away his effects. Upon this, Deins replevied; and Edmund Bedingfield, the fheriff, iffued 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 efcheator's poffeffion: accordingly, the bailiff and his party took forcibly from Lentborp an hundred fheep, 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 tbree hundred, arrayed in a warlike manner, and armed witb brigandines, jackets of mail, and guns, united and afociated themfelves, and marcbed* to the place where the cattle were detained ; but did not proceed to any other act of violence.

[^115]For this imagined breach of the peace, and military array, an indictment was preferred in the King's Bench againft the plaintiff in replevin, the fheriff and his bailiff, and the perfons who had affifted them; but the court unanimoufly adjudged, that the indictment was void; founding their judgement, as it feems, on the reafons advanced by ferjeant Keble, whofe argument it may be proper to ftate at large.
"As to the plaintiff in replevin, faid he, no " wrong was committed by him; for the efchea" tor, when he took the goods, after the Non " Moleftando had been delivered to him, acted " unlike an officer ; fince it was his duty, in that " inftant, to furceafe his procefs: Deins, there" fore, was perfectly juftified in complaining to " the fheriff, and muft confequently be dif" charged from this indictment.
" Nor did the fherifftranfgrefs 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 efcheator " had feifed the cattle in the King's right; which " ought to have been fhown by the King's offi"cer. The bailiff too muft be difcharged; for' " the fervant is in the fame condition with the " mafter; and, as the fheriff cannot do every " thing himfelf, his deputy muft have the fame " power with him.
"In regard to his affembling three hundred " men, that was no illegal aEI*; for every man is " bound to affilt the fheriff and his bailiff; to "fupport him in executing the King $s$ writs; " and to give him aid in all cafes of need; and " tbis by common lawo and common reafon, not" withftanding the flatutes of Weftminfter the " firft and fecond. So, if any man refufe to af" fift the fheriff at his requeft, he fhall be fined, "? whether it be to execute procefs, or to appre" hend felons."
The Court agreed, that the bailiff had as good a right to raife the power as the fheriff himfelf; becaufe it is all one office and one authority.

It was urged, " that, if men affemble with " arms and do nothing. it fhall be intended, that " they affembled with a bad defign;" but it was anfwered, that in fome cafes the prefumption might be juft; in others, not: thus the ufe of armour on particular occafions, as on Midfummer eve in London, and at other times for fport, is not punifhable; and, here, the caufe of the affermbly appears, namely to execute a replevin. Even if they had acted, yet their affembly was lawful in the beginning; and fuch affernblies are not illegal as are not to the terror of the people of

[^116]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 fheriff cannot take with " him fo many armed men, but only a reafonable " party;" to which it was anfwered, that, if he were fo reftrained, he might be in great jeopardy and peril of his life; and for this reafon, be may take as many as be pleafes at bis own difcretion.

Laftly, it was argued on the ftatute of Weftm. 2. c. $39^{*}$, that the fheriff might raife the power of his county after complaint made, and not before; but the judges held, that he might raife it before by the common law.

This cafe (which, for convenience in citation, I. fhall call Bedingfield's Cafe), is irrefiftibly ftrong in fupport of my firft and Second corollaries; for, although there feems to have been fome doubt at firft in the minds of the judges, as it was merely the execution of civil procefs, yet, if the armed men had marched in array for the purpofe of apprebending 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.

[^117]The next is the cafe of a riot at Drayton Baffet in Staffordfbire, determined in the Star-chamber in the twenty-fourth of Elizabeth, and cited more than once by Crompton*; who fays that the court refolved, I. That, if the two juftices, neareft to the place where the riot is committed, do not act as they are required by ftat. 13 Hen. IV. c. 17. each of them fhall pay an bundred pounds; and the other juftices of the fame county, where the tumult was, fhall be fined for not fuppreffing it, if there was any default in them. 2. That the fheriff and juftices of peace may take as many men in armour as are neceffary, with guns, and fo forth, and kill the rioters, if they will not yield themfelves; for the ftat. 13 Hen. IV. c. 17. fays, that they must arreft them; and, if the juftices, or any of their company, kill any of the rioters, who will not furrender themfelves, it is no offence in them.

This cafe of Drayton Baffet, which is alfo cited and approved by Sir Mattbew Hale $\dagger$, inconteftably demonftrates my third corollary.

In the $34^{\text {th }}$ or $43^{\text {d }}$ of Elizabeth (for the date is differently reported by fome tranfpofition of the figures) the doctrine in Bedingfield's cafe

[^118]was fully recognized and eftablifhed by the decifion in the cafe of St. fobn*, or Gardenert; which, being fubfequent to the ftat. 33 Hen. VIII. c. 6. prohibiting the ufe of band-guns, clearly fhows, that no alteration in the ancient law was made by that prohibition.

The cafe was this: Gardener had obtained a judgement againft St. Jobn, and procured a writ of execution directed to the fheriff of Bedford, who made a warrant to Gardener's own brother as a fpecial bailiff; but, refiftance being jufly feared, the bailiff armed himfelf with a dagge, or fhort gun. It happened that St. Yobn was a juftice of peace for Bedford/bire, and feems to have had that little learning, which, in law rather more than in poetry, is a dangerous thing, efpecially when it is coupled with knavery; for, having notice how the bailiff was armed, he contrived to have him feifed by his fervants, and brought before himfelf as the next juftice; when, by colour of his office and the ftatute of Henry VIII. he committed the officer, who came to arreft him, until he should pay ten pounds, one moiety to the queen, and another to the informant. The bailiff having removed himfelf by babeas corpus, and the whole matter being difclofed to the court, it was refolved, "that the fheriff or any of his mi-

| 5. Rep. 71.72. | †Cro. Eliz. 821, 822. |
| :---: | :---: |
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" nifters, in execution of juftice, may carry " dagges or band-guns, or other weapons inva" five or defenfive, the fame not being reftrained * by the general prohibition of the fatute; for, " if it were, no juftice would be adminiftered."

By ftronger reafon fuch weaponis may be carried for the purpofe of fuppreffing riots, apprehending felons, or repelling invaders. It may here be obferved, that the ftatute of Hen. VIII. was enacted for the prevention of mifchief, that might be occafioned by the ufe of little bandguns, which might be carried fecretly and kill on a fudden; but guns of a proper length were not prohibited:

The Cafe of Arms, or Burton's cafe, next prefents itfelf to our examination : it is of very high authority, and fo appofite to the object of our inquiry, that I fhall make no apology for citing it in the very words of the learned reporter*: "Upon an affembly of all the juftices " and barons at Serjeant's Inn this Eafter term " (39 Eliz.), on Monday the I 5 th of April, this " queftion was moved by Anderfon, Chief Juf" tice of the Common Bench; Wbetber men may "arm themfelves to fupprefs riots and rebellions, " or to refif enemies, and endeavour of themfelves "to fupprefs or refift fuch difturbers of the peace " and quiet of the realun; and, upon good deli-

[^119]" beration, it was refolved by them all, that every " juftice of peace, fheriff, and other minifter, or "' other subject of the king, where fuch " accident happens, may do it; and, to fortify
" this their refolution, they perufed the ftatute of " Nortbampton, 2 Edw. III.c. 3. which enacts, " that none be Jo bardy as to come before tbe king's " juftices or otber minifters 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 "c armed by night or day, except the fervants of " the king in bis prefence, or the minifters of the " king in the execution of bis precepts, or of tbeir "office, and thofe who are in their company alfift"ing them, or upon cry made for wea" pons to keep the peace, and this in "places where accidents bappen, upon the pe" nalty in the fame flatute 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 againft fuch evil-doers; " but they took it to be the more difcrete way for " every one in fuch a cafe to be affiftant to the " juftices, fheriffs, or other minifters of the king " in the doing of it."

Highly as the authority of Sir Fobn Popham deferves to be refpected, it is to be wifhed, that Lord Anderfonhimfelf had given us a full account
of his own opinion with that of the other judges ; tut he has left us no more than a fhort note* to the fame effect with the preceding report. This cale alfo is cited by Hale $\dagger$, and the very words in Popham are tranfcribed by Sir Fobn Kelyng in his report of Lymerick's cafe $\ddagger$. I think it a ftrong proof of my fourth corollary, refpecting the neceffity 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 ftatute of Weftm. I.c. 9. by which, as it is cited by Crompton§, " purveu eft, qe touz con" tinualment foient preftez et apparaillez al maun" dement et al fomons des vifcountes, et al crye "del pais de fuire et darefter felons, qant meftier " Serra, auxibien dedeins fraunchifes come de" hors; et ceux, qe ceo ne ferront, et de ceo " foient atteintz, le roi prendra a eux grave" ment;" whence it fhould feem, that all subjects, who are not continually preft, or ready, for the orders of the fheriff on an alarm in the country, are expofed to the royal difpleafure and to a fevere penalty; and the word preft (which in modern times has been either ignorantly or intentionàlly confounded with the participle parfive of the verb to prefs) is ufed for prepared by Chief Juftice Finieux in a paffage beforecited:

[^120]I am aware, however; that communialment is the ufual reading; which will give a fenfe rather lefs forcible, "that all men generally fhall be " ready and accoutred at the fummons of the " fheriff;" but this amounts to the fame thing; for how can a man be armed and apparelled in an inftant on a fudden alarm, unlefs his weapons and accoutrements were previoufly at hand?

The opinions of the learned, which form the fecond branch of my proofs, can add little weight to four cafes of fuch authority, as thofe of Bedingfield, Drayton Baflet, St. Fobn, and the Cafe of Arms: indeed, thefe cafes feem to have been the guides of Lambard and Dalton, Hale and Hawkins; who all agree, that "it is referred to " the difcretion of the fheriff, under-fheriff, or " other perfon authorized to raife the polfe, how " many men they will affemble, and how they " Shall be armed, weaponed, or otherwife furnihed " for the bufinefs*;" that " private perfons may " arm themfelves in order to fupprefs a riot, and " that all, who attend the juftices in order to " quell a tumult, may take with them fuch wea" pons as faall enable them to do it effectually†; " that, laftly, in executing procefs or apprehend" ing rioters, they may, by the common law,

[^121]" beat, wound, or kill, any of the opponents or " infurgents, who fhall refift them*;" all which opinions are fupported by folemn decifions, and are, in truth, the conclufions of natural reafon from the fimpleft and fureft premiffes.

The fiftb and fixtb propofitions, which I confider as fimple corollaries, are founded in part on extrinfick affumptions, drawn from hiftory and - experience: they may therefore, even by the rules of law, admit of proof from the authority of men, " quibus in arte fuâ credendum eft;" and the following citation from Mr . 'Windham's elegant introduction to his Plan of Difcipline for the Norfolk Militia will be thought as convincing as any paffage in Fitzherbert or Brook. "About the beginning of this century, "'fays he, the troops in Europe were univerfally " armed with firelocks; to wobich, much about " the fame time, the bayonet being added, pikes " alfo were laid afide. When the ufe of fire" arms began to be generally eftablifhed, the ne"ceffity of a great regulirity and uniformity, in " the manner of ufing thofe arms, became appa" rent: it was foon diffovered, that thofe troops, " $w$ hich could make the brikkeft fire, and fuftain " it longeft, had a great fuperiority over others "lefs expert; and, likewife, that the efficacy and

[^122]" power of fire did not confift in random and fcat" tering /bots made witbout order, but in the fire " of a body of men at once, and that properly timed " and directed. It was therefore neceflary to ex" ercife the troops in loading quick, and firing to" gether by the word of command; but, as the
"s aukwardnefs, careleffnefs, and rafhnefs, of " young foldiers (if left to themfelves) muft oc"cafion frequent accidents, and the lo/s of many " of tbeir own party, by the unkkilful manner of " ufing their fire-arms, efpecially in the hurry of " an engagement, it became a matter of indi/pen" Sable neceffity to teach foldiers an uniform me" thod of performing every action that was to be " done with the murket, that they might all do " it in the moft expeditious and Safeft manner."

Should any doubt be raifed as to the legality of afiembling for this purpofe, and hould the words of Sir Matthew Hale, whom of all men I refpect the moft, be oppofed to me, that, " where people are affembled in great numbers " armed with weapons offenfive, or weapons of " war, if they march thus armed in a body, if " they have chofen commanders or officers, if "they march cum vexillis explicatis or with " drums or trumpets, and the like, it may be "confiderable, whether the greatnefs of their " numbers, and their continuance together doing
" thefe acts, may not amount to more guerrino
" arraiati, or a levying of war*," which may be conftrued an encroachment on the prerogative of the crown $\dagger$; the anfwer is no lefs obvious than decifive, in the language of Bracton, that, Voluntas et propofitum diftinguunt maleficia $\ddagger$; that, the intent being good, the act cannot be bad; and that Beding field's cafe is an exprefs authority for the legality of " marching armed in a body " more guerrino arraiati," even for the purpofe of executing a civil procefs, to which there is juft expectation of violent refiftance. So neceffary, indeed, is order and difcipline in directing the exertions of an armed affembly, that the ftatutes 3 and 4 Edw. VI. c. 5. and I Mary, c. 12. (which are no longer in force, but were the models of the well-known riot-act) exprefsly authorize the fheriffs, juftices, mayors, and bailiffs, " to raife power and array tbem in manner of war " againft the rioters:" and here I may again apply thofe found maxims, to which I before alluded: 1. That the law requires no impo/fible things; but it is impoffible to join the power and fupprefs a riot effectually, without being at leaft moderately fkilled in the ufe of fire-arms, and ready in the common evolutions. 2. That, qoben the lawo permits or enjoins the performance of any act, all the means of ferforming it are alfo

[^123]permitted or enjoined; but the law doth permit and command every fubject of tbis realm to arm himfelf and ufe his arms with effect for the fuppreffion of tumults : the conclufion, in both forms of reafoning, follows too clofely and too evidently to admit of a doubt.

That the four cafes, on which I have relied, have never been thaken by any later decifion, appears from the uniform recognition of their authority by the beft modern writers: indeed, nothing lefs than an act of the legiflature could juftly over-rule unanimous and well-confidered refolutions; but no act whatever has in any degree affected them; and the common law, which in general is the perfection of human wifdom, happily in this inftance has food like a rock amid the conflict of ftatutes rolling upon ftatutes.

Neither of the ftatutes of Weftminfter had any effect on the decifion in Beding field's cafe; nor was that of St. Yobn at all influenced by the fubfequent prohibition of hand-gury; nor the Cafe of Arms by the fatute of Nortbampton; and though the act of queen Mary was continued during the life of Elizabeth, yet Sir Mattbew Hale obferves, that, " the cafe of Drayton "Baffet was not within that ftatute, nor de" pending on it*." In the fame manner ferjeant

[^124]Harwkins remarks, in conformity to Hale and to reafon, which will very feldom be found at variance, "that the ftat. I. Geo. I. c. 5. commonly " called the riot-act, being wholly in the affirm*ative, cannot be thought to take away any part " of the autbority in the fuppreffing of a riot, " which was before that time given either to " officers, or prizute perfons, by the common law " or by ftatute*."

Having fhown the nature and extent of the Paffe Comitatuum, and proved that it is required by law to be equal in its exertion to a well-difciplined army, I have eftablifhed the propofition, which I undertook to demonftrate $\dagger$ : "That the "common and ftatute laws of the realm, in force " at this day, give the civil fate in every county " a power, which, if it were perfeclly underfood "and continually prepared, would effectually " quell any riot or infurrection, without affift" ance from the military, and even without the " modern riot-act."

One fide, therefore, of the diftreffing alternative, to which I was reduced, concerning the precarioufne/s of Englifb Freedom $\ddagger$, is happily removed; but the other fide remains, "that our c. laws have been difgracefully neglected, and "ought to be reftored to full vigour and " energy."

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\text { * P. C. c. } 65 . \quad+\text { P. } 466 . \quad \ddagger \text { P. } 464 .
$$

To what fatal caufe muft we afcribe a neglect fo fhameful and fo dangerous? I anfwer boldly, yet, I hope, without arrogance, fince I ufe the very words of Blackstone," to the vaft ac" quifition of force arifing from the riot-act and " the annual expedience of a ftanding army*;" which has induced a difpofition, chetifhed by the indolence natural to man, and promoted by the exceffive voluptuoufnefs of the age, to look up folely for protection to the executive power and the foldiery; a difpofition, which muft inftantly be fhaken off, if any fpark of virtue remain in our bofoms; for, although we are happy in a prince, who " will never harbour a thought or " adopt a perfuafion in any the remoteft degree "detrimental to the liberty of Britain $\dagger$," yet in free ftates a military power muft ever be an object of jealoufy; and, fince our excellent conftitution will be claimed by our pofterity as their beft inheritance, we muft act with a provident care, left, two centuries hence, the fable of the horfe fhould be verified in our defcendants, who may be in need of protection againft their protectors, and be forced to carry barne/s, notwithftanding the repeal of the flatute of Wischefter.

For the hiftory of the riot-act, fo laboured and -

[^125]fo ineffectual, I muft refer my reader to the incomparable author, whom I fo frequently cite, the commentator on the laws of England; who expreffes his jealoufy and difapprobation of it with no lefs delicacy than wifdom*: in refpect to the number of capital felonies created by it, which Blackfone feems highly to have difapproved, I fhall fay nothing, as it is not my prefent fubject; but I may, with all due reverence for the legiflature in the firf year of Georae the Firft, obferve, that the act was a bad copy of a bad model, the ftatute of Mary; that there feems to have been no occafion to make it perpetual, much lefs to enlarge it; that it is in fome parts liable to dangerous mifinterpretation; that it has been found wholly inadequate to the end propofed by it; and that the third claufe of it was in great meafure unneceffary, as it only affirms " our ancient law, which had pretty well guarded " againft any violent breach of the peace $\dagger$." Confirmatory ftatutes are always attended with the danger of fuperfeding the ufe, and obliterating the remembrance, of the common law, which they confirm, and which the wifdom of ages had before fufficiently eftablifhed.

As to the beft mode of reforing our laws to their full vigour and energy, and of providing for

[^126]our future defence, I fhall certainly fubmit it to the difcretion of my countrymen who are bound by thofe laws; and fhall only fuggeft to them the following plan; after premifing, in the words of ferjeant Hawkins, " that, although " private perfons may arm themfelves in order to " fupprefs a riot, and may confequently ufe arms " in the fuppreffing of it, if there be a neceffity " for their fo doing; yet it feems to be extremely " hazardous for private perfons to proceed to " thofe extremities in common cafes, left, under " the pretence of keeping the peace, they caufe a " more enormous breach of it; and, therefore, " fuch violent methods feem only proper againft " such riots as savour of rebellion, for " the fuppreffing of which no remedies can be " roo fevere*."

## THE PLAN.

I.

Let all fuch perfons in every county of Encland as are included in the power of that county, and are of ability to provide themfelves with arms, and pay for learning the ufe of them, be furnifhed each with his mukket and bayonet, and their neceffary appendages.

[^127]
## II.

Let feveral companies be formed, in every county, of fixty fuch men or more, voluntarily affociated for the fole purpofe of joining the power, when legally fummoned, and, with that view, of learning the proper ufe of their weapons, Areet-firing, and the various evolutions neceffary in action.

## III.

Let the companies be taught, in the moft private and orderly manner, for two or three hours early every morning, until they are competently fkilled in the ufe of their arms: let them not, unneceffarily, march through ftreets or highroads, nor make any the leaft military parade, but confider themfelves entirely as part of the civil ftate.

## IV.

Let each member of a company, when he has learned the ufe of his arms, keep them for the defence of his houfe and perfon, and be ready to join his company in ufing them for the fuppreffion of riots, whenever the fheriff, under-fheriff, or peace officer fhall raife the power, or there Thall be a cry made for weapons to keep the peace.
V.

Let the caution, prefixed to this plan, be di-
ligently obferved, and the law, contained in the precedingcitations, be held ever facred: nor letany private perfon prefume to raife the power of the county*, which is the province of the fheriff, under-fheriff or magiftrate; although a cry for weapons to keep the peace may be made in cafes of extreme nece/fity, and in them only, by private perfons.

## VI.

If any mark of diftinction in drefs thall be thought expedient, that the feveral companies may know each other, in the forcible fuppreffion of a riot, let fuch a regulation be feverally referred, with any other rules that may be neceffary, to a committee chofen out of each company.

The great advantages of fuch affociations are fo apparent, that ! hall forbear at prefent to expatiate on them; but fhall be fatisfied with applying to them what Pulton fays of the old tilts and jufts, "that the caufe, beginning, and " end thereof do tend do the laudable exercife of " true valour and manhood, and to the encou" ragement and enabling of the actors therein to "defend the realm and the peace thereof $\dagger$;" and with obferving, in the words of the ftat. 33.

[^128]Hen. VIII. c. 6, that the mulket may now be made, what the long bow was formerly, "the " furety, fafeguard, and continual defence, of " this realm of England, and an ineftimable " dread and terror to the enemies of the fame."

Objections will certainly be raifed; for who can propofe a meafure, however falutary, to which no man will object? I expect them, however, chiefly from thofe, whofe indolence may induce them rather to feek protection from a power able to crufh them, than to protect themfelves by joining a power provided by free and equal laws; or from thofe, who, as Militon fays, " have betaken themfelves to ftate-affairs " with fouls fo unprincipled in virtue and true " generous breeding, that flattery, and court" fhifts, and tyrannous aphorifms, appear to " them the higheft points of wifdom." To fuch men it will be fufficient to give this general anfwer; that, as there is no neceffity of applying either to the executive, or to the legiflative, power for permiffion to obey the laws, we are not to debate on vague notions of expedience, groundlefs jealoufies, or imaginary confequences: the fole queftion is, " whether the doctrine ex" pounded in thefe pages be law;" if it be, there is no room for deliberation, fince it is a maxim, that no man muft think bimfelf wifer than the law, which is the gathered wifdom of many ages; and
fo favourable is the common law of England to the rights of our fpecies, which it is unhappily become the farhion to deride and vilify, that, if any man will broach a pofition in favour of genuine, rational, manly freedom, I will engage to fupply him with abundant authorities in fupport of it.

I perfuade myfelf, that infinite good muft refult from the gencral adoption of my plan; and that no poffible evil can be mixed with it, as long as the cautions and reftrictions before fuggefted fhall be duly obferved, and our excellent conftitution be kept in its juft balance at that nice point, which is equally removed from the pernicious extremes of republican madnefs, ariftocratical pride, and monarchical folly; nor have I any fcruple to confefs, that, as every foldier in England is at the fame time a citizen, I wifh to fee every citizen able at leaft,for the prefervation of publick peace, to act as a foldier: when that fhall be the cafe, the liberty of Britain will ever be unaffailed; for this plain reafon-it will be unaffailable.

The fecurity, and confequently the happinefs, of a free people do not confift in their belief, however firm, that the executive power will not attempt to invade their juft rights, but in their confcioufnefs that any fuch attempt would be wholly ineffectual.

VOL. VI. K K

## S P E E C H

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TIIE aSSEmbled inhabitants of
the colnties of
MIDDLESEX AND SURRY,

THE CITIES OF
LONDON AND WESTMINSTER,

AND THE BOROUGH OF SOUTHWARK.

XXVII MAY, M.DCC.LXXXII.

## ADVERTISEMENT.

HAVING been informed, that parts of my Speecb on the 28 th of May at the London Tavern were thought obfcure, yet important, I bave endeavoured to recollect webat I then took the liberty to fay, and bave confented to let the argument go abroad in its rude and unpolijbed fate. What offence this publication may give, either in parts or in the webole, is the loft and leaft of my cares: my firft and greateft is, to Jpeak on all occafions webat I conceive to be juft and true.

## A

## S P E E C H

ON

## THE REFORMATION OF PARLIAMENT.

## MY LORD MAYOR,

SU far am I from rifing to intimate the flighteft fhade of diffent from this refpectable and unani-' mous affembly, or the minuteft difapprobation of the two refolutions propofed, that I defpair of finding words fufficiently ftrong to exprefs my joy and triumph at the perfect harmony, with which the firft of them has already paffed, and to which the fecond will, I truft, be thought equally entitled: but, on the laft reading of the propofition now before you, it fruck me, that, although it was in fubftance unexceptionable, yet it might eafily be improved in form by the infertion of two or three words referring to the preceding refolution, and thus be rendered more conducive to our great object of generally declaring our concurrent fenfe, and avoiding any chance of difunion upon fpecifick points. Every
propofition, intended to meet with univerfal concurrence, ought to have three diftinguifhing properties; it fhould be juft, fimple, comprehenfive: without juftice, it will be rejected by the wife and good; without fimplicity, it will involve complex matter, on which the wifelt and the beft may naturally differ; and without comprehenfivenefs, it will never anfwer any purpofe of confequence and extent. The firft refolution, " that petitions ought to be prepared for a more " complete reprefentation of the people," has all of thefe properties in an eminent degree : it is fo juft, that, if this meeting had been ten times as large, there would not have been one diffent:ent voice on that ground; fo fimple, that it affords no fcope or fubject for cavil; fo comprehenfive, that, when the houfe of commons have the petitions before them, it will give room for every particular plan, which the ingenuity of any member, duly tempered by wifdom, yet actuated by true patriotifm, can fuggef.

Ought not the fecond propofition, "that the "Senfe of the people fhould be taken this fum" mer in order to prepare their feveral petitions," to be fomewhat reftrained in the generality of the expreffion? It is juft, but rather too comprehenfive: the fenfe of the people is a phrafe of meafurelefs compafs, and may include their feveral opinions, however fpecifick, however dif-
cordant. This is the very evil, which we are anxious to prevent; fince we all agree, that no particular mode of reformation fhould be prefcribed to the houfe, left they fhould reject, for no other reafon, fome good plan, which, if left to the operation of their own minds, they may probably adopt. Might not the fentence be thus corrected, " that the fenfe of the people fhould " be taken on the preceding refolution?" But this I offer as a mere fuggeftion to wifer heads, and will not trouble the affembly by fhaping it into a motion: indeed, if both refolutions be taken together, and it be underftood, that we mean to recommend petitions on the general ground, in order to fhun that fatal rock, diverfity of Sentiment on particulars, I defire no more, and am very little folicitous about accuracy of expreffion; hoping at the fame time, although the five circles here affembled have no right or pretenfion to take the lead in the nation, yet that the other counties, diftricts, and towns in Great Britain will approve our idea, and not difdain to follow our example: in that event I finile at the thought of a mifcarriage, and am confident, that, with concurrence, perfeverance, and moderation, the people of England muft prevail in a claim fo effential to their liberty, and to the permanence of an adminiftration, who profefs to govern with their confidence.

* Here I fhould regularly ceafe; efpecially, as I now labour under the preffure of the epidemical complaint, which alone can have prevented this meeting from being as numerous as it is refpectable: it could not prevent my attendance, for, in health or in ficknefs, I am devoted to your fervice ; and I fhall 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 thofe liberties was condoling with him on his illnefs at fo critical a time, raifed himfelf on his couch, feifed the hand of his friend, and faid, If you bave any bufine/s worthy of yourfelves, I am well.

It was not in truth my defign to have fpoken at all this evening; but, fince I have rifen to explain a fudden thought, I will avail myfelf of your favourable attention, and hazard a few words upon the general queftion itfelf: on the finalleft intimation of your wifhes, I will be filent. Numbers will have patience to hear, who have not time to read; befides, that it is always eafier to fpeak than to write; and, as to myfelf, a very particular and urgent occafion, which calls me for fome months from England, will deprive me of another opportunity to communicate my fentiments in either form, until the momentous object before us fhall be made certainly attainable through the concord, or for ever loft
and irrecoverable through the difagreement, of the nation.

The only /pecious argument, that I have anywhere heard, againft a change in the parliamentary repreientation of the people, is, that, " a conflitution, which has ftuod for ages, ought " not to be altered."

This objection appears on a fuperficial view fo plaufible, and applies itfelf fo winningly to the hearts of Englifomen, who have an honeft prejudice for their eftabliihed fyfem, without having in general very diftinct ideas of it, that a detection of the Jophifm, for fuch I engage to prove it, becomes abfolutely neceffary for the promotion of your glorious enterprife.

I will rifk your impatience; for, though I am aware, that allufions to hift ry and interpretations of old ftatutes are not very proper in addreffes to popular affemblies; yet, when popular affemblics take upon them, as they juftly may, to act and refolve upon conftitutional points, they are bound to feek or to receive information, left their actions fhould be rath and their refolutions ill-founded, A power exerted through paffion or caprice, without a deep knowledge of the bufinefs in hand, and a fair application of the in:ellectual faculties, is a tyrunnical power, whether it be regal, ariftocratical, or popular; and the prevalence of any fuch power, by the overbearing
ftrength of king, nobles, or people, would form an immediate tyranny, and in a moment fubvert the conftitution.

That conftitution, which, I perfuade myfelf, will not be fubverted, confifts of form and firit, of body (if I may fo exprefs myfelf), and of foul: but, in a courfe of years, the form is apt to deviate fo widely from the fpirit, that it becomes expedient almoft évery century to reftore its genuine purity and lovelinefs. The objection, which I undertake to remove, is fophiftical, either by defign or through ignorance; for the propofition is true in one fenfe of the word conflitution, and falfe in the other; and the fenfe, in which it is true, is inapplicable to the queftion. It is true, that the $\int$ pirit of the conftitution ought not to be changed: it is falfe, that the form ought not to becorre ted; and I will now demonftrate, " that the fpirit of our conftitution requires a "reprefentation of the people, nearly equal and " nearly univerfal." Such as cannot or will not follow me in the premiffes, 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 conftitution of England between two jarring principles; the evil principle of the feudal fyftem with his dark auxiliaries, ignorance and falfe philofo-
phy; and the good principle of increafing commerce, with her liberal allies, true learning and found reafon. The firft is the poifoned fource of all the abominations, which hiftory too faithfully records: it has blemifhed and polluted, wherever it has touched, the fair form of our conftitution, and for ages even contaminated the fpirit. While any dregs of this baneful fyftem remain, you cannot juftly boaft of general freedom: it was a fyttem 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 bafe as it was, and confined exclufively to landed property, it admitted the loweft freeboiders to the due enjoyment of that ineftimable right, without which it is a banter to call a man firee; the right of voting in the choice of deputies to affift in making thofe 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 impofed on him without his fuffrage given in perfon or by deputation. This l conceive to have been the right of every freeholder, even by the feudal polity, from the earlieft time; and the ftatute of llenry IV. I believe to have been merely diclaratory: an aft which paffed in the feventh year of that prince, near
four hundred years ago, ordains, that, " all "they, who are prefent at the county court, as " well fuitors duly fummoned for the fame caufe, "as others, fhall proceed to the election of their " knights for the parliament." All fuitors, you fee, had the right; and all freebolders were fuitors in the court, however low the value of their freeholds. Obferve all along, that one pound in thofe days was equal to ten at leaft in the prefent time. Here then is a plain declaration, that minutenefs of real property created no harfh fufpicion of a dependent mind; for a harfh fufpicion it is, and, by proving too much, proves nothing.

What caufed the abfurd, yet fatal, diftinction between property, perfonal and real? The feudal principle. What created another odious diftinction between free and bafe holdings, and thus excluded copyholds of any value? The feudal principle. What introduced an order of men, called villains, transferable, like cattle, with the land which they focked? The feudal principle. What excludes the holders of beneficial leafes? The feudal principle. What made perfonalty, in thofe times, of little or no eftimation? The feudal principle. What raifed the filly notion, that the property, not the perfon, of the fubject, was to be reptefented? The feudal principle. What prevented the large provifion in
the act of Henry IV. by which all freebolders were declared electors, from being extended to all holders of property, however denominated, however inconfiderable? The fame infernal principle, which then fubdued and ftifled the genuine equalifing fpirit of our conftitution. Now, if we find that this demon was himfelf in procefs of time fubdued, as he certainly was by the extenfion of commerce under Elizabetb, and the enlarged conceptions which extended commerce always produces, by the revival of learning, which difpelled the darknefs of Gothick ignorance, and by the great tranfactions of the laft century, when the true theory and genuine principles of freedom were unfolded and illuftrated, we fhall not hefitate to pronounce, that, by the Spirit of our conftitution, all Englifhmen, having property of any kind or quantity, are entitled to votes in chufing parliamentary delegates. The form foon reccived a cruel blemih; for, in the eigleth of Henry VI. the property of fuitors qualified to vote, was ieftrained to "forty fhil" lings a year above all charges," that is, to twenty pounds at leaft by the prefent value of money. I agree with thofe, who confider this act as bafely ariftocratical, as a wicked invation of clear popular rights, and therefore in a high degree unconftitutional: it is alfo a difgraceful confeffion of legifative weaknefs; for the evil,
pretended to be remedied by it, was, that the county elections were tumultuary. What! could not the wifdom of the legiflature fuggeit a mode of preventing tumult, if the laws already fubfifting had been infufficient for that purpofe, without fhaking the obligation of all future laws, by narrowing the circle of thofe, who, being affected by them, ought by natural equity to affift in framing them? Ridiculous and indefenfible!

In the troclfth of Chardes II. the mighty fabrick of the feudal fytem was halen from its bafis; but, though its ramparts were overfet, its connexions and covered ways deftroyed, and its very foundations convulfed, yet the ruins of it have been found replete with mifchief, and the mifchief operates, even while I fpeak.

At the Revolution, indeed, the good fpirit of the conftitution was called forth, and its fair principles expanded: it is only fince that aufpicious event, that, although we may laugh, when lawyers call their vaft affemblage of fenfe and fubtilty the perfection of buman wifdom, yet we fhall deride no man, who afferts the conftitution of England to be in theory the moft perfect of human fyftems-in theory, not in practice; for, although you are clearly entitled to all the advantages, which the princindes of the conftitution give you, whil: you claim thofe advantages by
cool and decent petition, yet, either from fome unaccountable narrownefs in the managers of the Revolution, or from the novelty and difficulty of their fituation, they left their noble work fo unfinifhed, and the feudal poifon fo little exterminated, that, to ufe the words of your favourite poet, " they fcotched the fnake, not killed it." Who could have imagined, that, in the eighteenth of George II. the ftatute of Henry VI. would have been adopted and almoft tranfcribed? Who could have dreamed, that, in the thirty-firft of the fame king, the laft act would have been recited and approved, with a declaration added, that no tenant by copy of court roll fhould vote at an election for knights of the fhire under penalty of fifty pounds? It was the accurfed feudal principle, which fuggefted thefe laws, when the faireft opportunity prefented itfelf of renovating the conflitution. Another gale has now fprung up; and, unlefs you catch it while it blows, it will be gone for ever.

I have proved, unlefs I delude myfelf, " that the " ${ }^{\text {spirit of ourconftitution requires a reprefentation }}$ " of the people nearly equal and nearly univer" fal." Carry this propofition home with you, and keep it as an anfwer to thofe, who exclaim " that " the conftitution ought not to be changed." I faid nearly univerfal; for I admit, that our conftitution, both in form and fpirit, requires fome pro-
perty in electors, either real or perfonal, in poffeffion or in action; but I confider a fair trade or profefion as valuable property, and an Englif)man, who can fupport himfelf by honeft induftry, though in a low fation, has often a more independent mind than the prodigal owner of a large encumbered eftate.' When Prynne fpeaks of every inbabitanit and commoner, to whom he fuppofes that the right of voting originally belonged, I cannot perfuade myfelf, that he meaned to include fuch as, having nothing at all, and being unable or unwilling to gain any thing by art or labour, were fupported by alms.

If modern authorities be demanded in aid of my opinions, I fhall only mention the great judge, Sir William Blackftone, and I mention him the more willingly, becaufe he never profeffed democratical fentiments, and, though we admire him as the fyftematical arranger of our laws, yet we may failly doubt the popularity of his political notions: neverthelefs, he openly allows in his Commentary, " that the fpirit of our confti" 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 fhould be greatly advanced above what " is now required by law to give the proprietor " a voice in county elections." I told you, that
all reafoning from the ftatute of Henry VI. proved too much, and, confequently, nothing; for, who now would bear the idea of difqualifying thofe electors of Surry and Middlefex, whofe 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 defcend; but let me not be mifapprehended. I do not propofe to conclude with a fpecifick motion: it is my deliberate opinion, confirmed by my obfervations on the event of your affociations to reduce the influence of the Crown, that your petitions and refolutions muft be very general. In my own mind I go along with you to the full length of your wifhes. If the prefent fyftem of reprefentation be juftly compared to a tree rotten at the heart, I wifh to fee removed every particle of its rottennefs, that a microfcopick eye could difcern. I deride many of the 'fafhionable doctrines: that of virtual reprefentation I hold to be actual folly; as childifh, as if they were to talk of negative reprefentation, and to contend, that it involved any pofitive idea. Subititute the word delegation or deputation, inftead of reprefentation, and you will inftantly fee the abfurdity of the conceit. Does a man, who is virtually, not aEtually, re-
VOL. VI. L L
prefented, delegate or depute any jerfon to make thofe 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 conftitution? As well might a Roman tyrant have urged, that all his vaffals were reprefented in his perfon: he was augur and high prieft; the religious ftate was, therefore, reprefented by him: he was tribune of the people; the popular part of the nation were, therefore, reprefented: he was conful, dictator, mafter of the horfe, every thing he pleafed; the civil and military ftates were, therefore, concentrated in him; the next deduction would have been, that the flaves 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 addrefs to you, which has been too long for the place and occafion, but too fhort for the fubject, I refume my feat with a full conviction, that, if united, and dependent on Yourfelves alone, you muft fucceed; if difunited, or too confident in others, you muft fail. Be perfuaded alfo, that the people of England can only expect to be the happielt and moft

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glorious, while they are the freeft, and can only become the freeft, when they thall be the moft virtuous, and moft enlightened, of nations.

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## TO ****

London, May 14, 1782.

## SIR,

I TAKE the liberty of fubmitting to your ferious attention the Plan of National Defence lately fuggefted by government, compared with a different plan now approved, though fubject to revifion, by a Company of Loyal Englifomen, of which I have the honour to be One. You will inftantly fee, that the firft plan was nobly conceived by fome great mind, and intended for the nobleft purpofes; but that, in the detail, it appears to be innovating, harfh, unconftitutional, and big with alarming confequences; too expenfive for the treafury, who have no treafures to lavih, and too diftrufful of a generous and fpirited people, who would vigoroufly fupport a government that fincerely 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 Conftitution, and calculated to preferve it; not too expenfive to real patriots, who will hardly be niggards at fuch a moment as this; and not at all dangerous to fo wife and juft a
government as the prefent. If nothing can raife a manly fpirit, and excite a liberal emulation, in Englijb gentlemen, yeomen, and traders, but the actual defcent of three united armies on our coafts, they will then vainly folicit that protection for their houfes and families, which they now have in their own hands, on a glorious invitation from the Firft and Beft of Magiftrates.

> I am, \&c.

## A VOLUNTEER.

P. S. Give me leave to obferve, that the Lords-Lieutenants, as fuch, have no more to do with this great bufinefs than the bench of Bifhops.

## HEADS OF A PLAN

For raijing Corps in Several principal Yowns in Great Britain, inclofed in a Letter from the Earl of Shelburne to the Chief Magistrates of feveral Cities and Towns.
rf. THE principal towns in Great Britain to furnifh 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 faid towns, either by commiffion from his Majefty, or from the Lord-Lieutenant of the County, upon the recommendation of the Chief Magiftrate of the town in which the Corps are raifed.

3d. They are to be poffeffed of fome certain eftate in land or money, in proportion to their rank.

4th. An Adjutant or Town-Major in each town to be appointed by bis Majefty.
$5^{\text {th. A }}$ 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.

7 th. The men to exercife frequently, either in battalions, or by companies, on Sundays, and on Holidays, and alfo after their work is over in the evenings.

8th. Arms, accoutrements, and ammunition, to be furnifhed at the expence of Government, if required.
9th. Proper magazines, or ftorehoufes, to be chofen or erected in each town, for keeping the faid arms, \&c.
roth. The arms and accoutrements to be delivered out at times of exercife only, and to be returned into the ftorehoufes as foon as the exercife is finifhed.
irth. The Adjutant or Town-Major to be always prefent at exercife, and to fee that the men afterwards march regularly, and lodge their arms in the ftorehoufes.

12th. Proper penalties to be inflicted on fuch as abfent themfelves from exercifes, as alfo for difobedience of orders, infolence to their officers, and other diforderly behaviour.
$1^{3}$ th. The above Corps not to be obliged, on any acequnt, or by any authority whatever, to move from their refpective towns, except in times of actual invafion or rebellion.

14th. His Majefty fhall then have power to order the faid corps to march to any part of Great Britain, as his fervices may require.

1 th. They are, on fuch occafions, to att either feparately, or in conjunction with his Mar jefty's regular forces, and be under the command of fuch General officers as his Majefty fhall think proper to appoint.

16th. Both officers and men to receive full pay as his Majefty's other regiments of foot from the day of their march, and as long as they fhall continue on fervice out of their towns.
${ }^{1} 7^{\text {th }}$. They are to be fubject to military difcipline, in the fame manner as his Majefty's regular forces, during the faid time of their being called out, and receiving government pay.

18th. All officers who fhould be difabled in actual fervice to be entitled to half-pay, and all non-commiffioned officers and private men, difabled, to receive the benefit of Chelfea Hofpital.

19th. The widows of officers killed in the fervice to have a penfion for life.

20th. The time of fervice to be named.

## SKETCH OF A PLAN

For raifing a Conftitutional Force in the Towns, Cities, and Counties of Great Britain; being an Anfwer, Article by Article, to the Plan annexed.
ift. AGREED, witb this addition-And other Battalions, or Companies, to be alfo voluntarily formed out of the Hundreds, Tytbings, and Hamlets, of each county, in proportion to its extent and populoufnefs.

2d. The Officers, and, in fome companies, the men, to enrol themfelves, from among the Gentry, Yeomanry, and Subftantial Houfebolders, and the Officers to be commiffioned refpectively by the High Sberiff; and Chief Magiftrate, of each county and town.

3 d . The ranks of the Officers to be proportioned to their contributions to a fund raifed for purpofes mentioned in fubfequent articles.
$4^{\text {th. An Adjutant or Town-Major in each }}$ county or town, to be elected by the Officers.

5 th. Agreed, for the purpofe of drilling the men, until a certain number of the volunteers can be qualified to act as Serjeants and Corporals.

6th. The faid 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 defire pay, out of a fund voluntarily raifed for that purpofe in the feveral counties and towns.

7th. Agreed.
8th. Arms, Accoutrements, and Ammunition, to be furnifhed at the expenfe of the counties and towns, if required; or of the officers, if they are generoully difpofer.

9th. The faid arms, \&c. to be kept by each man, in bis own boufe, for his legal protection. 10th. Rejected.
1 ith. The officers to take care, after exercife, that the men march regularly, and return home with their arms.

12th. Agreed, with tbis addition-A fet of Laws, or Articles, to be drawn up by the Offcers, and fubfcribed or openly confented to by the men, after a diftinct reading and explanation of each article. "Confenfus facit Legem."

13 th. Agreed, the words counties or being inferted after the word refpective.

14th. The bigb Seriff of each county, and cbief magiftrate of each town, fhall then (on due notice to government) have power to order the faid corps to march to any part of

Great Britain, as the publick fervice may require.

15th. Agreed, in cafe of actual invafion; but in riots the magiftrates to call out their refpective corps: and, as to rebellion, or civil war, (which God avert!) no fpecifick provifions can be made for fo dreadful and improbable an event.

16th. The counties and towns to pay the men who require it; but fuch, as enrol themfelves witbout pay, to wear fome mark of diftinction, and the officers to ferve at their own expenfe.

17th. Agreed, in cafe of actual invafion only; but the words, and receiving government pay, to be omitted.

18th. Officers difabled in actual fervice to be rewarded by a new order (as a ftar and ribband, orange coloured or mixed), or by an eulogium priclaimed and recorded by the heriffs of their feveral counties, or the cbief magiftrates of their corporate towrs; and the men to receive a comfortable fubfiftence at their own homes, with a fixed annuity for life out of the voluntary fund.

1gth. The widows and children of Officers and Men killed in the fervice againfl invaders to have alfo penfions for life.

524 PLAN OF NATIONAL DEFENCE.
20th. The companies called out as above to be difcharged ipfo facto, as foon as the invaders are repelled, or the particular fervice terminated.

A Company of Loyal Englisil Gentlemen.

# PRINCIPLES OF GOVERNMENT, 

IN

A DIALOGUE

## eetween

a gevtleman and a farmer.

## ADVERTISEMENT.

A SHORT defence hath been thought neceffary, againft a violent and groundlefs attack upon the Flintshire Committee, for having teftified their approbation of the following Dialogue, which hath been publickly branded with the moft injurious epithets; and it is conceived, that the fure way, to vindicate this little Tract from fo unjuft a character, will be as publickly to produce it. - The friends of the Revolution will inftantly fee, that it contains no principle, which has not the fupport of the higheft authority, as well as the cleareft reafon.

If the doctrines which it flightly touches, in a manner fuited to the nature of the Dialogue, be " feditious, treafonable, and diabolical," Lord Somers was an incendiary, Locke a traitor, and the Convention-parliament a pandæmonium; but, if thofe names are the glory and boaft of $E_{n g}$ land, and if that convention fecured our liberty and happinefs, then the doctrines in queftion are not only juft and rational but confitutional and falutary; and the reproachful epithets belong wholly to the fyftem of thofe, who fo grofsly mifapplied them.

## THE

## PRINCIPLES OF GOVERNMENT.

F. W'HY fhould humble men, like me, fign or fet marks to petitions of this nature? It is better for us Farmers to mind our hurbandry, 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 flate, have higher things to mind than you may conceive.
$F$. If by free you mean out of prifon, I hope to continue fo, as long as I can pay my rent to the 'fquire's bailiff; but what is meant by a free ftate?
G. Tell me firft what is meant by a club in the village, of which 1 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 2 few hours in the week.
G. Have you no other object but mirth?
F. Yes; we have a box, into which we con-
tribute equally from our monthly or weekly favings, and out of which any members of the club are to be relieved in ficknefs-or poverty; for the parifh officers are focruel and infolent, that it were better to ftarve than apply to them for relief.
G. Did they, or the 'fquire, or the parfon, or all together, compel you to form this fociety?
F. Oh! no-we could not be compelled; we formed it by our own choice.
G. You did right-But have you not fome head or prefident of your club?
$F$. The mafter for each night is chofen by all the company prefent the week before.
G. Does he make laws to bind you in cafe of ill temperor mifbehaviour?
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 ftrange hand by young Spelman, the lawyer's clerk, whofe uncle is a member.
G. What fhould you do, if any one member were to infift on becoming perpetual mafter, and on altering your rules at his arbitrary will and pleafure?
$F$. We fhould expel him.
G. What, if he were to bring a ferjeant's guard, when the militia are quartered in your
neighboarhood, and infift upon your obeying him?
F. Wee fhould refift, if we could; if not, the fociety would be broken up.
G. Suppofe that, with his ferjeant's guard, he were to take the money out of the box or out of your pockets?
F. Would not that be a robibery?
G. I am feeking information from you. How fhould you act on fuch an occafion?
F. We fhould fubmit, perhaps, at that time; but fhould afterwards try to apprehend the robbers.
G. What, if you could not apprehend them?
F. We might kill them, I fhould think; and, if the King would not pardon us, God would.
G. How could you either apprehend them, or, if they refifted, kill them, without a fufficient force in your own hands?
F. Oh! we are all good players at fingle ftick, and each of us has a ftout cudgel or quarter-ftaff in the corner of his room.
G. Suppofe that a few of the club were to domineer over the reft, and infift upon making laws. for them -
F. We muft take the fame courfe; except that it would be eafier to reftrain one man, than

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a number; but we fhould be the majority with juftice on our fide.
G. A word or two on another head. Some of you, I prefume, are no great accountants.
$F$. Few of us underftand accounts; but we truft old Lilly the fchoolmafter, whom we believe to be an honeft man; and he keeps the key of our box.
G. If your money fhould in time amount to a large fum, it might not perhaps be fafe, to keep it at his houfe or in any private houfe.
F. Where elfe thould we keep it?
G. You might chufe to put it into the funds, or to lend it the 'fquire; who has loft fo much lately at Newmarket, taking his bond or fome of his fields as your fecurity for payment with interef.
F. We muft in that cafe confide in young Spelman, who will foon fet up for himfelf, and, if a lawyer can be honeft, will be an honeft lawyer.
G. What power do you give to Lilly, or fhould you give to Spelman in the cafe fuppofed?
F. No power. We fhould give them both a due allowance for their trouble, and thould expect a faithful account of all they had done for us.
G. Honeft men may change their nature. What, if both or either of them were to deceive you.
F. We fhould remove them, put our truft in better men, and try to repair our lofs.
G. Did it never occur to you, that every ftate or nation was only a great club?
$F$. Nothing ever occurred to me on the fubject; 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 fuppofe men to have affembled, and to have formed nations, communities, or fates, which all mean the fame thing.
$F$. In order, I hould 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 themfelves or their neighbours, but chielly to fecure themfelves from danger, and to relieve their wants.
G. Do you believe, that any King or Emperor compelled them fo to affociate?
$F$. How could one man compel a multitude? A King or an Emperor, I prefume, is not born with a hundred hands.
G. When a prince ofthe blood fhall in any coustry be fo diftinguifhed by nature, I fhall then, and
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 aremble ?
$F$. Yes; but the atmy muft have been formed by theit own choice. One man or a few can never govern many without their confent.
G. Suppofe, however, that a multitude of men; affembled in a town or city, were to chufe 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 lawes.
G. Who elfe fhould make them?
F. The whole nation or people.
G. What, if they difagreed ?
$F$. The opinion of the greater number, as in our village-clubs, muft 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 mưt chure a lefs.
G. Who fhould be the chufers?
F. All, who are not upon the parib. In our club, if a man alks relief of the overfeer, he ceafes to be one of us, becaufe he muft depend on the overfeer:
G. Could not a few men, one in feven for inftance, chufe the affembly of law-makers as well as a larger number?
F. As conveniently, perhaps; but I would not fuffer any man to chufe 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 Ihillings a year?
F. I have nothing in the world but my cattle, implements of hulbandry, and houfehold 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 honeft labour to fupport my wife and four children; and, whilft I act honeflly, 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 ypu and your family may be ftripped of your goods, thrown into prifon, and even deprived of life?
F. A dreadful power! I never made inquiries, having bufinefs of my own, concerning the bufinefs of Parliament, but imagined, that the laws had been fixed for many hundred years,
G. The common laws, to which you refer, are equal, juft, and humane; but the King and Parliament may alter them, when they pleafe.
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 muft judge the goodnefs of Parliament-men ?
$F$. All thofe whofe property, freedom, and lives may be affected by their laws.
G. Yet fix men in feven, who inhabit this kingdom, have, like you, no votes; and the petition, which I defired you to fign, has nothing for its object, but the reftoration of you all to the right of chufing thofe law-makers, by whom your money or your lives may be taken from you. Attend, while I read it diftinctly.
$F$. Give me your pen-I never wrote my name, ill as it may be written, with greater eagernefs.
G. I applaud you, and truft, 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 confequence, if the King alone were to infift on making laws, or on altering them at his will and pleafure.
$F$. He too muft be expelled.
G. Oh! but think of his ftanding army and of the militia, which now are his in fubftance, though ours in form.
F. If he were to employ that force againft the nation, they would and ought to refift him, or the ftate would ceafe to be a ftate.
G. What, if the great accountants and great lawyers, the Lillys and Spelmans, of the nation were to abufe their truft, and cruelly injure, inftead of faithfully ferving, the publick?
$F$. We muft requeft the King to remove them, and make trial of others, but none fhould implicitly be trufted.
G. But what, if a few great lords or wealthy men were to keep the king himfelf in fubjection; yet exert his force, lavifh his treafure, and mifufe his name, fo as to domineer over the people, and manage the Parliament.
$F$. We muft fight for the King and ourfelves.
G. You talk of fighting, as if you were fpeaking of fome ruftick engagement at a wake; but your quarter-ftaffs would avail you little againft bayonets.
$F$. We might eafily provide ourfelves with better arms.
G. Not fo eafily; when the moment of refiftance came, you would be deprived of all arms; and thofe who fhould furnih 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 ftrong firelock in the corner of his bed-room.
G. That would be legal as well as rational. Are you, my honeft friend, provided with a mulket?
F. I will contribute no more to the club, and purchafe a firelock with my favings.
G. It is not neceflary -I have two, and will make you a prefent of one with complete accoutrements.
F. I accept it thankfully, and will converfe with you at your leifure on other fubjacts of this kind:
G. In the mean while, fpend an hour every morning in the next fortnight in learning ta prime and load expeditiounly, and to fire and charge with bayonet firmly and regularly. I fay every marning; becaufe, if you exercife too late in the evening, you may fall into fome of the legal fnares, which have been fpread for you by thofe gentlemen, who would rather fecure game for their table, than lliberty for the nation.
$F$. Some of my neighbqurs, 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 exercife.
G. It cannot be expected, that the villagers fhould purchafe arms, but they might eafily be fupplied, if the gentry of the nation would fpare a liftle from their vices and luxury.
F. May they turn to fome fenfe of honour and virtue!
G. Farewell, at prefent; and remember, " that a free ftate is only a more numerous and " more powerful club, and that he only is a free " man, who is member of fuch a ftate."
$F$. Good morning, Sir! You have made me wifer and better than I was yefterday; and yet, methinks, I had fome knowledge in my own mind of this great fubject, and have been a polifician all my life without perceiving it.

# THE CHARACTER 

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O F
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## JOHN LORD ASHBURTON.

THE publick are here prefented not with a fine pifture, but a faithful portrait, with the character of a memorable and illuftrious man, not in the fyle of panegyrick on a monument, but in the language of fober truth, which friendfhip itfelf could not induce the writer to violate.
John Dunning (a name to which no title could add luftre) poffeffed profeffional talents which may truly be called inimitable; for, befides their fuperlative excellence, they were peculiarly his own; and as it would fcarcely be poffible to copy them, fo it is hardly probable that nature or education will give them to another. His language was always pure, always elegant; and the beft words dropped eafily from his lips into the beft places with a fluency at all times aftonifhing, and, when he had perfect health, really melodious: his ftyle of fpeaking confifted of all the turns, oppofitions, and figures, which
the old Rhetoricians taught, and which Cicero frequently practifed, but which the auftere and folemn fpirit of Demofthenes refufed to adopt from his firf, mafter, and feldom admitted into his orations, political or forenfick.

Many at the bar and on the bench thought this a vitiated ftyle; but, though diffatisfied as criticks, yet, to the confufion of all criticifm, they were tranfported as hearers. That faculty, however, in which no mortal ever furpaffed him, and which all found irrefiftible, was his wit. This relieved the weary, calmed the refentful, and animated the drowfy: this drew fmiles even from fuch as were the objects of it; fcattered flowers over a defert; and, like fun-beams fparkling on a lake, gave fpirit and vivacity to the dulleft and leaft interefting caufe. Not that his accompiifhments, as an advocate, confifted principally in volubility of fpeech or livelinefs of raillery. He was endued with an intellect, fedate, yet penetrating; clear, yet profound; fubtle, yet frong. His knowledge too was equal to his imagination, and his memory to his knowledge. He was no lefs deeply learned in the fublime principles of jurifprudence and the particular laws of his country, than accurately fkilled in the minute, but ufeful, practice of all our different courts. In the nice conduct of a complicated
caufe, no particle of evidence could efcape his vigilant attention, no thade of argument could elude his comprehenfive reafon. Perhaps the vivacity of his imagination fometimes prompted him to fport where it would have been wifer to argue; and, perhaps, the exactnefs of his memory fometimes induced him to anfwer fuçh remarks as hardly deferved notice, and to enlarge on fmall circumftances which added little to the weight of his argument: but thofe oply who have experienced can, in any degree, conceive the difficulty of exerting all the mental faculties in one inftant, when the leaft deliberation might lofe the tide of action irrecoverably. The people feldom err in appreciating the character of fpeakers; and thofe clients who were too late to engage Dunning on their fide, never thought themfelves fecure of fuccefa, while thofe againft whom he was engaged were always apprehenfive of a defeat.

As a lawyer, he knew that Britain could only be happily governed on the principles of her conftitution, or publick law; that the regal power was limited, and popular rights afcertained by it ; but that the ariftocracy had no other power. than that which too naturally refults from property, and which laws ought rather to weaken than fortify: he was therefore, an equal fupporter of
juft prerogative, and of national freedom, weighing both in the noble balance of our recorded conftitution. An able and afpiring fatefman, who profeffed the fame principles, had the wift dom to folicit, and the merit to obtain, the friendthip of this great man; and a connection, planted originally on the firm ground of fimilarity in political fentiments, ripened into perfonal affection which nothing but death could have diffolved or impaired. Whether in his minifterial ftation he might not fuffer a few prejudices infenfibly to creep on his mind, as the beft men have fuffered becaufe 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 fenfe of honour was lofty and heroick; his integrity ftern and inflexible; and though he had a ftrong inclination to fplendour of life, with a tafte for all the elegancies of fociety, yet no love of dignity, of wealth, or of pleafure, could have tempted him to deviate, in a fingle inftance, from the ftraight line of truth and honefty. He carried his democratical principles even into focial life, where he claimed no more of the convetfation than his juft fhare, and was always candidly attentive, when it was his turn to be a hearer. .His enmitide were ftrong, yet placable;
but his friendihips were eternal; and if his affections ever fubdued his judgment, it muft have been in cafes; where the fame or intereft of a friend were nearly concerned. The veneration with which he conftantly treated his father, whom his fortunes and reputation had made the happieft of mortals, could be equalled only by the amiable tendernefs which he fhewed as a parent. He ufed to fpeak with wonder and abhorrince of Swift, who was not afhamed to leave a written declaration, " that he could never be fond of children;" and with applaufe of the caliph, who, on the eve of a decifive battle, which was won by his valour and wifdom, amufed himfelf in his tent with feeing his children ride on his fcymitar, and play with his turban, and difmiffed a general, as unlikely to treat the army with lenity, who durft reprove him for fo natural and innocent a recreation.

For fome months before his death, the nurfery had been his chief delight, and gave him more pleafure than the cabinet could have afforded: but this parental affection, which had been a fource of fo much felicity, was probably a caufe of his fatal illnefs. He had loft one fon, and expected to lofe the other, when the author of this painful tribute to his memory parted from him with tears in his eyes, little hoping to fee him again in a perifhable ftate.-As he perceives,
without affectation, that his tears now fteal from him, and begin to moiften the paper on which he writes, he reluctantly leaves a fubject, which he could not foon have exhaufted; and when he alfo fhall refign his life to the great Giver of it, he defires no other decoration of this humble grave-ftone than this honourable truth:

With none to flatter, none to recommend, DUNNING approv'd and mark'd him as a friend.

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END OF THE SIXTH VOLUME.
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[^0]:    VOL. VI.

[^1]:    - Faradh'ei, a man skilled in the faráyidh', or sacred ordinances contained in the Alcoran.

[^2]:    * Pronounced in India, feri and tisba. See the last words of the report by the Mahomedan ductors in the Patna cause.

[^3]:    - A saying, I believe, of Mahomed: he meaned a rememberer of his oral preceples. Hence the mame of Hafilk, or Hafis, wat assamed by many illustrious persons, and, amoag them, by the celobrated poet.
    $\dagger$ See the answer of Muhammed Kásin to the thirteenth question proposed to him in the Patna cause.

[^4]:    - The margin has minho for wahin. From this verse it appears, that the degrees of consanguinity are computed by the Mahomedicns in the same manner as by our common lawyers.

[^5]:    - See A Narratice of the Proceedings in the Patna Cause, p. 11. Note b. The Arabick verb âs's'aba primarily signifies to collect and bind together the tranches of a tree: bence the secondary sense, to constitute the heir and head - a family.

[^6]:    - The Arabian lexicographers give this name to the husband or crif, the mother, the grandfather, and the whole sister ; possibly, because the rules of succession are a little disturbed in favour of them.
    $\dagger$ By ail, or root, he must mean the denominator of a fraction.
    : He, probably; considers the whole estate as twelve, which has faur divisors, beides unit.
    $\oint$ In our notation (which the Ariaticks, if they are wise, will adopt).: $t+t=\frac{3}{3}$.
    \& This paceare I do not underitand, not knowing the lable to whith

[^7]:    VOL. VI,

[^8]:    * The grammarians, translated by Golius, thus explain the word teo nsookh or monisakhah: "Mors et successio continua haredum, qux fit "integrâ manente et indivisâ hæreditate ;" but the last words convey oo adequate idea of the thing.

[^9]:    vol. vi.

[^10]:    * Page 213.

[^11]:    * Page 215.

[^12]:    * Page 2

[^13]:    * Page 217.

[^14]:    * Page 219.

[^15]:    * Page 222.
    + Page 225,

[^16]:    *Page 225.

[^17]:    * Page 226.
    + Page 227.

[^18]:    * Page $228 . \quad$ + Page 230.

[^19]:    * Page 230.

[^20]:    * Page 235-237.

[^21]:    * Page 237-240.
    $\dagger$ Page 240—242.

[^22]:    * Page 242, 243.

[^23]:    * Page 244, 245.

[^24]:    * Page 247, 248. $\quad+$ Page 249. . $\ddagger$ Page 250.

[^25]:    * Page 255.

[^26]:    * Page $256 . \quad+$ Page 258. $\ddagger$ Page 259, 260.

[^27]:    * Page $260 . \quad$ Page 227, 228.

[^28]:    * Page 262.

[^29]:    * Page 264.

[^30]:    *2. Comm. 452, 453, 454 .

[^31]:    * De Laud. Leg. Angl. c. 33. 34. † Seld. in Fort. C. 33.

[^32]:    * Contractûs quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpan. Dolum tantùm depositum et precarium; dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum; item dotisdatio, tutelf, negotia gesta: (in his edidam et diligentiam). Societas et rerum communio et doldas ET CULPAM recipit. D. 50. 17.23.

[^33]:    * Bocerus, Campanus, D'avezan, Del Rio, Le Conte, Rittershusius, Giphanius, J. Godefroi, and others.
    $\dagger$ The fcholium on Harmenopulus, 1. 6. tit. de Reg. Jur. n. 15. may be confidered as a commentary on this law.

[^34]:    * Epif. x. 4. Mifcell. cap. 41. See Gravina, lib. i. § 14 r.
    $t$ Taurelli, Prxf. ad Pand. Florent.

[^35]:    * Or 1. 5. §2. ff. Commod. and 1. 23. ff. de reg. jur. Inftead of $f$, which is a barbarous corruption of the initial letter of $\pi$ avdisxlau, many write D , for Digef, with more clearnefs and propriety.

[^36]:    * Spondet diligentiam, fay the Roman lawyers, gerendo negotio parem.

[^37]:    *Orig. Jur. Civ. lib. i. § 183.

[^38]:    * "Ego certè hac in re cenfentibus accedo, vix quidquam " generaliùs definiri poffe; remque hanc ad arbitrium judicis, " prout res eft, referendam." p. 141 .
    $\dagger$ Zas. Singul. Refp. lib. i. cap. 2.
    $\ddagger$ " Quorum definitiones exdem funt, ea inter fe funt " eadem; levis autem culpre levifima una et eadem defi" nitio eft; utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. \%

[^39]:    * Efai fur la Prefation des Fautes, à Paris, chez Saugrain, 2764.

[^40]:    * Oeuvres de M. Pothier, à Paris, chez Debure: 28 volumes in duodecimo, or 6 in quarto. The illuftrious author died in 1772.

[^41]:    * It is printed apart, in fourteen pages, at the end of his treatife on the Marriage-contrait.

[^42]:    *Soe p. 91. note ; and p. 120.

[^43]:    * See pages 32.73. 74. 149.
    $\dagger$ Baflica, 2, 3, 23. See Demofth. 3 Phil. Reifk's edit. I. 112. 3. For levifima culpa, which occurs but once in the whole body of Roman law, jaq9upia feems the proper word in Greek; and it is actually fo ufed in the Bafilica, 60. 3.5. where mention is made of the Aquilian law, in quâ, fays Ulpian, et kvifima culpa venit. D. 9. 2. $44^{\circ}$

[^44]:    * Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. 1 Leon. 224. I Cro. 219. Mulgrave and Ogden.
    † Lord Raym. 912.

[^45]:    * Mayn. Edward II. 275. Fitz. Abr. tit. Detinue, 59.
    + Lord Raym. 914.

[^46]:    * ${ }_{4}$ Rep. 84. $\quad$ D. 16. 3. 1. 4 1.

[^47]:    * 29. Aff. 28. Bro. Abr. tit. Bailment, pl. 7.
    $\dagger$ Exod. xxii. 7, 8.
    $\ddagger$ Lib. 10 . De Deprofito. This book is printed in the fame volume with the T.'neodofian Code, Paris, 1586.

[^48]:    * Gen. xxxi. 39. † Exod. xxii. 12.
    $\ddagger$ Gen, xxxi. 39 .

[^49]:    * 4 Rep. 83. b. I Inft. 89. a. b.

[^50]:    * 1 Cro. 815.
    + "Alia eft furti ratio; id enim non cafui, fed levi culpa, fermè afcribitur." Gotbofr. Comm. in L. Contraflus, p. 145. See D. :7. 2. 52. 3. where fays the annotator, "Adverfus latrones parùm prodeft cuftodia; adverfùs furem prodeffe poteft, fi quis advigilet." See alfo Poth. Contrat de Louage, n. 429. and Contrat de Pret à ufage, n. 53. So, by juftice Cot-

[^51]:    * Ld. Raym. 912.
    † 2 Sho. pl. 166.

[^52]:    * Ld. Raym. 911.

[^53]:    * Potr. Contrat de Dépót, n. 2g. Stiẹnh. de fure Sueon, 1. 2. c. 5.
    + Bract. 99. b. Juftin. Inft. 1. 3. tit. 15.
    $\ddagger$ L. Contractus, 23. D. de reg. jur.

[^54]:    * Doct. and Stud. dial. 2. chap. $3^{8 .}$
    + D. 16. 3! 1. 35.
    $\ddagger$ De la Prefation des Fautes, p. 77.

[^55]:    * Yelv. 4. 50. 128.
    +2 Cro. 667 . Wheatly and Low.

[^56]:    * D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4 . t Herod. VI. 86. Juv. Sat. XIII. 199.

[^57]:    * Lord Raym. 910.

[^58]:    * Yearb. 19. Hen. VI. 49.
    t D.13.6.17.3.

[^59]:    * Bro. Abr. tit. Action fur le Cafe, 72. FOL. VI.

    C $\mathbf{C}$

[^60]:    * Ld. Raym. 909-920. I Salk. 26. Coin. 133. Fart. 13. 131. 528.
    + P. $3^{61}$.

[^61]:    * Hargr. Co. Litt. 89. b. n. 3. The profeffion muft lament the neceffary fufpenfion of this valuable work.
    $\dagger$ Reg. Orig. iro. a. fee alfo 110 . b. De equo infirmo fanando, and De columbari reparando.

[^62]:    * Raft. Entr. 13. b.

[^63]:    - Yearb. 2 Hen. VII. 1 r.
    + Stath. Abr. tit. Accions fur le cas, pl. I 1. By juftice Pafon, ${ }^{6}$ fi un ferrour face covenant ove moy de ferrer mon chival, " jeo die qe fil neferra mon chival, uncore jeo averai accion " fur mon cas, qar en fon default paraventure mon chival eft " perie."

[^64]:    * 1 Ro. Abr. $1 p$.

[^65]:    * "In privatis rebus, fi quis rem mandatam non modo ma" litigfius geffiffet, fui quæftûs aut commodi caufà, verùmetiam " neeligentiùs, eum majores fummum admififfe dedecus exifti" mabant: itaque mandati conftitutum eft judicium, non minùs "tùrpe quàm furti." Pro S. Rofc. p. 116. Glafg.

[^66]:    * Dumoulin, tract. De co quod intereft, n. 185.
    t See p. 370. and notet.

[^67]:    * D. 44. 7. 1. 4. Ld. Raym. 916.
    + Poth. Prêt à UJage, n. 55. Puf. with Barbeyrac', notes, B. 5. C. 4. §6.

[^68]:    * Dos. and Stur. where before cited.

[^69]:    * Ld. Raym. 91.5.
    +P. 377 .

[^70]:    * Exod. xxii. 14, 15.

[^71]:     tion, 855. 3. Here the verb wivppiaza, may imply fight, or ardinary, neglect; or even fiaud, as Pctit has rendered it.

[^72]:    * 1 Iuft. 89. a. 4 Rep. 83. b. $\quad$ Bract. 99. b.
    f Id. Raym. 915, 916.919.

[^73]:    * P. 370. note $\dagger$.

[^74]:    * Before, p. 370.
    +29 Aff. pl. 28.

[^75]:    ${ }^{*}$ Doct. and Stud. dial 2. ch. $3^{8 .}$
    $\dagger$ Before, p. 370. notet.

[^76]:    * Abr. tit. Bailment, pl. $7 . \quad+2$ Salk. 522.
    $\ddagger 29$ Afr. pl. 28. Yelv. 179. Ratcliff and Davis.
    § Law of Niji Irius, 72.

[^77]:    * Ld. Raym. 917. † Yearb. 21 Hen. VII. 14. b. 15. 2.

[^78]:    * Law of Nifi Prias, 72.

[^79]:    * Ld. Raym. 9:7.
    $\dagger$ Ow. 124.
    $\ddagger$ Poth. Dépst, n. 47. Nantifement, n. 35.

[^80]:    * Duck de Auth. Jur. Civ. Rom. I. 2. 6.

[^81]:    * Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. Hywel Dda. lib. 2. cap. 2. § 29. note x. It may poffibly be the ufage in Turkey to fipulate "ut amifio pignoris liberet de" bitorem," as in C. 4. 24. 6.

[^82]:    * Law of Nifi Prius, $3^{\text {d }}$ edition corrected, $\boldsymbol{7 2}$.

[^83]:    * Ld. Raym. gi6.

[^84]:    * Bract. 62. b. Juftin. Inft. 3. 25. 5. where Theophilus has
    

    | + D 19. 2. 25. 7. | $\ddagger$ Le Brun, p. 93. § Burr. 426. |
    | :---: | :---: |
    | vol. vi. | E E |

[^85]:    s. Inf. vol. V. p. 138 . $\quad+$ Exod. xxii. 15.

[^86]:    * Salk. 282. Ld. Raym. 619.
    + D. 19. 2. 11.

[^87]:    * Poth. Louage, n. 193.
    + It may beufeful to mention a nicety of the Latin language in the application of the verbs locare and conducere: the em-

[^88]:    ${ }^{*} 8$ Rep. 32. Cayle'f cafe. $\ddagger$ Mo. 543. 1 Ro, Abr. 4
    $\ddagger$ Reg. Orig. 105. a. Noy, Max. ch. 43.

[^89]:    * 1 Bl . Comm. 430.
    † D. 4.9. 1. and 3.

[^90]:    * Doct. and Stud. where before cited.

[^91]:    * Sce before, p. 3īo.

[^92]:    * Burr. 1498. \&c. $\quad$ 3. Bl. Comm. 8. $\ddagger$ P. 392.

[^93]:    * D. 19. 2. 31. Bynk. Obf. Fur. Rom. lib. VIII.

[^94]:    * Doct. and Studs where often before cited.
    $\dagger 1$ Int. 89. a. Mo. 462. 1 Ro. Abr. 2. Woodiefe and Curties:
    $\ddagger$ Ld. Raym. 917. 12 Mod. 487.

[^95]:    FF2

[^96]:    - I Wils. part 1. 281. Dale and Hall.
    + D. 19. 2.13.6. $\ddagger$ Before, p. 362, 364, 366.
    § I Stra. 145. Titcbburn and White.

[^97]:    * Burr. 2298. Cabon and Paynton. See i Vent. 238. All. 93. Carth. 485.
    + Hob. ca. 30. 2 Cro. 330. Rich and Kneeland. "The "firf cafe of the kind, faid lord Holt, to be found in our " books." 12 Mod. 480.

[^98]:    * I Stra. 128. Amies and Stevens.
    $\dagger$ Palm. 548. W. Jo. 159 . See the doctrine of inevitable accident moft learnedly difcuffed in Defd. Heraldi Animadv. in Salmafii Obferv. in Jus Att-et Rom. cap. xp.
    $\ddagger$ All. 93.

[^99]:    * 2 Bulftr. 280. 2. Ro. Abr. 567.

[^100]:    * Doct. and Stud. dial. 2. chap. 38. laft fentence. + P. 335.

[^101]:    * Lindenbrog, LL. $W_{i}$ figoth. lib. 5. tit. 5. § 1, 2, 3. and LL. Baiuvar. tit. 14. § $1,2,3,4$. Capitul. lib. 5. § 204. † Capitul. lib. 6. § 22. Exod. xxii. 14, 15.
    $\ddagger$ LL. Hywel Dda, lib. 3. cap. 4. § 22. and lib. 3. cap. 3. $\$ 40$. See alfo Stiernb. De Jur. Sveon. p. 256, 257.

[^102]:    * "Hxc omaia, lays Grotius, Romanis quidem con " gruunt legibus, fed non ex illis primitùs, fed ex aquitate na"turali, veniunt: quare eadem apud alias quoque gentes "reperire eft." De Jure Belli ac Pacis, lib. 2. cap. 12. $\mathbf{j} 13$.

[^103]:    *Gentoo Laws, chap. IV. See before, p. 373.
    † Same chapter. See before, p. 397.

[^104]:    * Chap. I. Sect. I. Before, p. 415. 416.
    + Chap. I. Sect. II. Before, p. 409.
    $\ddagger$ Chap. IV. and Cbap. X. Before, P. 418, 42 I;

[^105]:    - Before, p- 328 and 337.

[^106]:    * 2 Stra. 1099. Myyton and Cock.

[^107]:    VOL. VI.
    H H

[^108]:    Watts, part I. chap. vi. $\quad \dagger$ Crompt. 124.

[^109]:    * 12. Hen. VII. 17.

[^110]:    * Lamb. Eiren. 316.
    $\ddagger$ I Comm. 344. 4 Comm. 122.

    $$
    \begin{aligned}
    & \text { + Dalt. c. } 95 \text {. } \\
    & \text { || C. s. }
    \end{aligned}
    $$

[^111]:    * 14 Hen. VII. 10. Crompt. 46. b. $\quad$ Crompt. 46. a.

[^112]:    - Dalt. c. $95 \cdot$

[^113]:    * 4 Com. $122 . \quad \dagger$ I Inft. Pref.

[^114]:    * Bro. Abr. tit. Office et Offcer. 23.

[^115]:    * Modo guerrino arraiati fo univerunt et afociaverunt, et iter fium arripuerunt, 3 Hen. VII. 1. 10 .'

[^116]:    - Ceo neft incontre la ley: So Brook reports his words, tit. Riots, 2.

[^117]:    - The ftatute of Marlbridge, c. 21. feems here to be meant; the words pof querimoniam faftann not being ufed in flat. Weftm. 2.

[^118]:    * Crompt. 46. b. 124. b. $\quad 1$ H. P. C. 495.

[^119]:    * Poph. 121, 122.

[^120]:    * 2 And. 67. $\dagger$ I II. P. C. 53. $\ddagger$ Kel. 76. \$ 224 .

[^121]:    * Lamb. Eiren. 317. Dalt. c. 95. † I Hawk. P. C. c. 65.

[^122]:    * Lamb. Eiren. 318. 1 Hale, H. P. C. 495.

[^123]:    * 1 H.P.C. $131 . \quad+3$ Inft. $9 . \quad \ddagger$ L. 3 c. 14 § 13.

[^124]:    * 1 H. P. C. 495.

[^125]:    * 4 Comm. 434 . $\dagger$ I Bh Comm. 337.

[^126]:    * 4 Comm. 143 .
    $\dagger 4$ Bl. Comm. 147.

[^127]:    * I Hawk. P. C. c. 65.

[^128]:    * \& Hale, II. P. C. Gor. $\quad+$ De Pace, 25. b.

[^129]:    T. Davisor, Printer, Whitefriars.

