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THE
WORKS
OF
SIR WILLIAM JONES.

WITH
THE LIFE OF THE AUTHOR,
BY
LORD TEIGNMOUTH.

IN THIRTEEN VOLUMES.

VOLUME VIII.

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THE
LAWS OF MENU,
SON OF BRAHMA,

(CONTINUED.)

CHAPTER THE NINTH.

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

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

2. ' Day and night muft women be held by
' their protectors in a ftate of dependence; but
' in *lawful and innocent* recreations, though
' rather addicted to them, they may be left at
' their own dilpofal

3. ' Their fathers protect them in childhood;
' their hufbands protect them in youth; their
' ions protect them in age: a woman is never
' fit for independence.

4. ' Reprehensible is the father, who gives
 ' not his daughter in marriage at the proper
 ' time; and the husband, who approaches not
 ' his wife in due season; reprehensible also is
 ' the son, who protects not his mother after the
 ' death of her lord.

5. ' Women must, above all, be restrained
 ' from the smallest illicit gratification; for, not
 ' being thus restrained, they bring sorrow on
 ' both families :

6. ' Let husbands consider this as the supreme
 ' law, ordained for all classes; and let them,
 ' how weak soever, diligently keep their wives
 ' under lawful restrictions;

7. ' For he, who preserves his wife *from*
 ' vice, preserves his offspring *from suspicion of*
 ' bastardy, his ancient usages *from neglect*, his
 ' family *from disgrace*, himself *from anguish* and
 ' his duty *from violation*.

8. ' The husband, after conception by his
 ' wife, becomes himself an embryo, and is born
 ' a second time here below; for which reason
 ' the wife is called *jaya*, since by her (*Jayate*)
 ' he is born again:

9. ' Now the wife brings forth a son endued
 ' with similar qualities to those of the father;
 ' so that, with a view to an excellent offspring,
 ' he must vigilantly guard his wife.

10. ' No man, indeed, can wholly refrain

' women by violent meafures; but, by thefe
' expedients, they may be refrained:

11. ' Let the hufband 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 houfchold utenfils.

12. ' 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 *fpirituos 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 hufbands be diligently
' careful in guarding them; though they well

ON THE SAME; AND ON THE

know the disposition, with which the lord of creation formed them:

17. ' MENU allotted to such women a love of their bed, of their feat, and of ornament, impure appetites, wrath, weak flexibility, desire of mischief, and bad conduct.

18. ' Women have no business with the texts of the *Véda*; thus is the law fully settled: having, therefore, no evidence of law, and no knowledge of expiatory texts, sinful women must be as foul as falsehood itself; and this is a fixed rule.

19. ' To this effect many texts, which may show their true disposition, are chanted in the *Védas*: hear now their expiation for sin.

20. " That pure blood, which my mother defiled by adulterous desire, frequenting the houses of other men, and violating her duty to her lord, that blood may my father purify!" Such is the tenour of the holy text, which her son, who knows her guilty must pronounce for her;

21. ' And this expiation has been declared for every unbecoming thought, which enters her mind, concerning infidelity to her husband; since that is the beginning of adultery.

22. ' Whatever be the qualities of the man with whom a woman is united by lawful

' marriage, such qualities even (he assumes;
' like a river *united* with the sea.

23. ' ACSHAMA'LA', a woman of the lowest
' birth, being thus united to VASISHT'HA, and
' SA'RANGI', being united to MANDAPA'LA,
' were entitled to very high honour:

24. ' These, and other females of low birth,
' have attained eminence in this world by the
' respective good qualities of their lords.

25. ' Thus has the law, ever pure, been pro-
' pounded for the civil conduct of men and
' women: hear, next, the laws concerning
' children, by obedience to which may happi-
' nesses be attained in this and the future life.

26. ' WHEN good women, united with hus-
' bands in expectation of progeny, eminently
' fortunate and worthy of reverence, irradiate
' the houses of their lords, between them and
' goddesses of abundance there is no diversity
' whatever.

27. ' The production of children, the nur-
' ture of them, when produced, and the daily
' superintendence of domestick affairs, are pe-
' culiar to the wife:

28. ' From the wife alone proceed offspring,
' good household management, solicitous atten-
' tion, most exquisite cares, and that heavenly
' beatitude, which she obtains for the names of
' ancestors, and for *the husband* himself.

29. ' She' who deferts not her lord, but
 ' keeps in fubjection to him her heart, her
 ' fpeech, and her body, fhall attain his manfion
 ' in heaven, and, by the virtuous in this world,
 ' be called *Sadhwi or good and faithful* ;

30. ' But a wife, by difloyalty to her huf-
 ' band, fhall incur difgrace in this life, and be
 ' born *in the next* from the womb of a fhakal,
 ' or be tormented with horrible difeafes, which
 ' punifli vice.

31. ' LEARN now that excellent law, univer-
 ' fally falutary, which was declared, concerning
 ' iffue, by great and good fages formerly born,

32. ' 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
 ' the woman.

33. ' 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.

34. ' In fome cafes the prolifick power of
 ' the male is "chiefly diftinguifhed ; in others,
 ' the receptacle of the female; but, when both
 ' are equal in dignity, the offspring is moft
 ' highly efteemed:

35. ' In general, as between the male and
' female powers of procreation, the male is held
' superiour; since the offspring of all procreant
' beings is distinguished by marks of the male
' power.

36. ' Whatever be the quality of feed, scat-
' tered in a field prepared in due season, a plant
' of the same quality springs in that field, with
' peculiar visible properties.

37. ' Certainly this earth is called the pri-
' meval womb of many beings; but the feed
' exhibits not in its vegetation any properties
' of the womb,

38. ' On earth here below, even in the same
' ploughed field, feeds of many different forms,
' having been sown by husbandmen in the
' proper season, vegetate according to their
' nature ;

39. ' Riceplants, mature in sixty days, and
' those, which require transplantation, *mudga*,
' *tila*, *mafha*, barley, leeks, and sugarcane all
' spring up according to the feeds.

40. ' That one plant should be sown, and
' another produced, cannot happen : whatever
' feed may be sown, even that produces its
' proper item.

41. ' Never must it be sown in another
' man's field by him, who has natural good
' sense, who has been well instructed, who

ON THE SAME ; AND ON THE

knows the *Veda* and its *Angas*, who defires long life:

42. ' They, who are acquainted with paff times, have preferved, on this fubjeft, 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, who fhoots it into the wound, which another had made juft before in the antelope, thus instantly perifhes the feed, which a man throws into the foil of another :

44. ' Sages, who know former times, confider this earth (*Prith'vivi*) us the wife of king PRITHU ; and thus they pronounce cultivated land to be the property of him, who cut away the wood, *or who cleared and tilled it*; and the antelope, of the firft hunter, who mortally wounded it.

45. ' Then only is a man perfect, when he confifts of *three perfons united*, his wife, himfelf, and his fon; and thus have learned *Brabmens* announced this *maxim*: " The hufband " is even one perfon with his wife," *for all domejtick and religious, not for all civil, purpofes.*

'6. ' Neither by fale nor defertion can a wife be releafed from her hufband : thus we fully acknowledge the law enacted of old by the lord of creatures.

47. ' Once is the partition of an inheritance
' made; once is a damfel given in, marriage;
' and once does a man lay " I give:" thefe
' three are, by good men, done once for all *and*
' *irrevocably*.

' 8. ' As with cows, mares, female camels,
' flave girls, miich buffalos, fhagoats, 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,

' 9. ' 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 hufbands;
' but the procreator can have no advantage
' from it.

52. ' Unlefs there be a fppecial 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 compad 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 offspring of cows, and mares, of female camels, goats, and fheep, of (lave girls, hens, and milch buffalos, *unlefs there be a fpecial agreement.*

56. ' THUS has the comparative importance of the foil and the feed been declared to you: I will next propound the law concerning women, who have no iffue by *their hufbands.*

57. ' The wife of an elder brother is confidered as mother-in-law to the younger; and the wife of the younger as daughter-in-law to the elder:

58. ' The elder brother, amoroufly approaching the wife of the younger, and the younger, careffing the wife of the elder, are both degraded, even though anthorized *by the*

hufband or fpiritual guide, except when fuch wife has no iffue.

59. ' On failure of iffue by the hufband, *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*:

61. ' Some fages, learned in the laws concerning women, thinking it poffible, that the great object of that appointment may not be obtained *by the birth of a Jingle fon*, are of opinion, 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 purpofe, who deviates from the ftrict rule, and acts from carnal defire, (hall be degraded, as having defiled the bed of his daughter-in-law or of his father.

6'. ' By men of twiceborn claffes no widow, or *childlefs wife*, muft be authorized to conceive by any other than her lord; for they,

' who authorize her to conceive by any other,
' violate the primeval law,

65. ' Such a com millïon *to a brother or other*
' *near kin/man* is nowhere mentioned in the
' nuptiàl texts of the *Véda*; nor is the marriage
of a widow even named in the laws con-
' cerning marriage.

66. ' This practice, fit only for cattle, is re-
' preherided by learned *Brahmens*; 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 lufh

68, ' Since his time the virtuous difapprove
' of that man, who, through delufion of mind,
' directs a widow *to receive the careffes of another*
' for the fake of progeny.

69. ' The damfel, *indeed*, whofe hufband
' fhall die after troth verbally plighted, *but*
' *before confummation*, his brother (hall take in
' marriage according to this rule :

70. ' Having efpoutèd her in due form of
' law, fhe 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. ' L E T NO man of fenfe, who has once

' given his daughter to a futor, give her again
' to another; for he, who gives away his
' daughter, whom he had before given, incurs
' the guilt and fine of fpeaking falſely in a
' caufe concerning mankind.

72. ' EVEN though a man have married a
' young woman in legal form, yet he may aban-
' don her, if he find her blemifhed, afflicted
' with difeafe, or previouſly deflowered, and
' given to him with fraud:

73. ' If any man give a faulty damſel in
' marriage, without difcloſing her blemifh, the
' huſband may annul that aft of her illminded
' giver.

74. ' SHOULD a man have bufineſs abroad,
' let him affure a fit maintenance to his wife,
' and then *retide for a time* in a foreign country;
' ſince a wife, even though virtuous, may be
' tempted to aft amifs, if ſhe be diſtreſſed by
' want of ſubſiſtence :

75. ' While her huſband, having fettled her
' maintenance, refides abroad, let her continue
' firm in religious aſterities; but, if he leave
' her no ſupport, let her ſubſiſt by *fpinning and*
' *other* blameleſs arts.

76. ' If he live abroad on account of ſome
' ſacred duty, let her wait for him eight
' years; if on account of knowledge or fame,

' fix; if on account of pleafure, three : *after*
 ' *thofe terms have expired, fhe muft follow him.*

77. ' FOR a whole year let a hufband bear
 ' with his wife, who treats him with averfion;
 ' but, after a year, let him deprive her of her fepa-
 ' rate property, and ceafe to cohabit with her,

78. ' She, who neglects her lord, though ad-
 ' dicted to gaming, fond of fpirituous liquors,
 ' or difeafed, muft be deferted for three months,
 ' and deprived of her ornaments and houfehold
 ' furniture :

79. ' But (he, 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 (tripped of her property.

80. ' 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 fuperseded by another
 ' wife.

81. ' A barren wife may be fuperseded by
 ' another in the eighth year : fhe, whofe chil-
 ' dren are all dead, in the tenth; fhe, who
 ' brings forth *only* daughters, in the eleventh;
 ' fhe, who fpeaks unkindly, without delay ;

82. ' But fhe, who, though afflicted with'

illness, is beloved and virtuous, must never be disgraced, though (he may be superseded by another wife with her own consent

83. ' If a wife, legally superseded, (shall depart in wrath from the house, (he must either instantly be confined, or abandoned in the presence of the whole family:

84. ' But she, who, having been forbidden, addicts herself to intoxicating liquor even at jubilees, or mixes in crowds at theatres, must be fined six *ratticas* of gold.

85. ' WHEN twiceborn men take wives, both of their own class and others, the precedence, honour, and habitation of those wives, must be settled according to the order of their classes:

86. ' To all such married men, the wives of the same class only (not wives of a different class by any means) must perform the duty of personal attendance, and the daily business relating to acts of religion;

87. ' For he, who foolishly causes those duties to be performed by any other than his wife of the same class, when (he is near at hand, has been immemorially considered as a mere *Chandala* begotten on a *Brahmeni*.

88. ' To an excellent and handsome youth of the same class, let every man give his daughter in marriage, according to law ; even

though she have not attained her age of *eight years* :

89. *But* it is better, that the damfel, though marriageable, should stay at home till her death, than that she should ever give her in marriage to a bridegroom void of excellent qualities.

90. Three years let a damfel wait, though she be marriageable; but, after that term, let her chuse for herself a bridegroom of equal rank:

91. If, not being given in marriage, she chuse her bridegroom, neither she, nor the youth chosen, commits any offence ;

92. But a damfel, thus electing her husband, shall not carry with her the ornaments, which she received from her father, nor those given by her mother or brethren: if she carry them away, she commits theft.

93. He, who takes to wife a damfel of full age, shall not give a nuptial present to her father; since the father lost his dominion over her, by detaining her at a time, when she might have been a parent.

94. A man, aged thirty years, may marry a girl of twelve, *if he find one* dear to his heart; or a man of twenty-four years, a damfel of eight: but, if he *finish his studentship* earlier, and the duties of his next order would

otherwise be impeded, let him marry immediately.

95. ' A 'wife, given by the gods, *who are named in the bridal texts*, let the husband receive and support constantly, if she be virtuous, though he married her not from inclination: such conduct will please the gods.

96. ' To be mothers, were women created ; and to be fathers, men; religious rites, therefore, are ordained in the *Veda* to be performed by the husband together with the wife.

97. ' IF a nuptial gratuity has actually been given to a damsel, and he, who gave it, should die *before marriage*, the damsel shall be married to his brother, if she consent;

98. ' But even a man of the fervile class ought not to receive a gratuity, when he gives his daughter in marriage; since a father, who takes a fee *on that occasion*, tacitly sells his daughter.

99. ' Neither ancients nor moderns, who were good men, have ever given a damsel in marriage, after she had been promised to another man;

100. ' Nor, even in former creations, have we heard *the virtuous approve* the tacit sale of a daughter for a price, under the name of a nuptial gratuity.

101. " Let mutual fidelity continue till death: "

this; in few words, may be considered as the
supreme law between husband and wife.

102. Let a man and woman, united by
marriage, constantly beware, lest, at any
time disunited, they violate their mutual
fidelity.

103. Thus has been declared to you the
law, abounding in the purest affection, for
the conduct of man and wife ; together with
the practice of raising up offspring *to a husband
of the fervile class on failure of issue by him be-
gotten*: learn now the law of inheritance.

104. After the death of the father and the
mother, the brothers, being assembled, may
divide among themselves the paternal *and
maternal* estate ; but they have no power over
it, while their parents live, *unless the father
choose to distribute it*.

105. The eldest brother may take entire
possession of the patrimony; and the others
may live under him, as *they lived* under their
father, *unless they choose to be separated*.

106. By the eldest, at the moment of his
birth, the father, having begotten a son, dis-
charges his debt to his own progenitors; the
eldest son, therefore, ought *before partition* to
manage the whole patrimony :

107. That son alone, by whose birth he
discharges his debt, and through whom he

COMMERCIAL AND SERVILE CLASSES. 19.

attains immortality, was begotten from a sense of duty: all the rest are considered by the wife as begotten from love of pleasure.

108. ' Let the father alone support his sons; and the first born, his younger brothers; and let them behave to the eldest, according to law, as children *should behave* to their father'

109. ' The first born' *if virtuous*' exalts the family, or, if *vitious*, destroys it: the first born is in this world the most respectable; and the good never treat him with disdain.

no. ' 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 behaviour of a good elder brother, he should be respected as a *maternal uncle, or other* kinsman.

111. ' Either let them thus live together, or, if they desire *separately to perform* religious rites, let them live apart; since religious duties are multiplied in separate houses, their separation is, therefore, legal *and even laudable*.

112. ' The portion deduced for the eldest is a twentieth part *of the heritage*, with the best of all the chattels ; for the middlemost, half of that, *or a fortieth*; for the youngest, a quarter of it, *or an eightieth*.

113. ' The eldest and youngest respectively

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

114. ' Of all the goods collected, let the firft
' born, *if be be tranfcendantly learned and vir-*
' *tuous*, take the beft article, whatever is moft
' excellent in its kind, and the beft of ten cows
' *or the like:*

115. ' But, among brothers equally {killed 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.

116. ' If a deduction be thus made, let equal
' fhares of the refidue be afcertained *and re-*
' *ceived*; but, if there be no deduction, the
' fhares muft be diftributed in this manner:

117. ' Let the eldeft have a double fhare,
' and the next born, a fhare and a half, *if they*
' *clearly furpafs the reft in virtue and learning* ;
' the younger fons muft have each a fhare: *if*
' *all be equal in good qualities, they muft all take*
' *fhare and fhare alike.*

118 ' To the *unmarried* daughters by the
' *fame mother*, let their brothers give portions
' out of their own allotments refpectively, *ac-*
' *cording to the claffes, of their feveral mothers:*

' let each give a fourth part of his own distinct share; and they, who refuse to give it, shall be degraded,

119. ' Let them never divide *the value of a single goat or sheep, or a single beast with uncloven hoofs: a single goat or sheep remaining after an equal distribution* belongs to the first born.

120. ' Should a younger brother *in the manner before mentioned* have begotten a son on the wife of his *deceased* elder brother, the division must then be made *equally between that son, who represents the deceased, and his natural father: thus is the law settled.*

121. ' The representative is not *so far* wholly substituted by law in the place of the *deceased* principal, *as to have the portion of an elder son; and the principal became a father in consequence of the procreation by his younger brother; the son, therefore, is entitled by law to an equal (share, but not to a double portion.*

122. ' A younger son being born of a first married wife, after an elder son had been born of a wife last married, *but of a lower class*, it may be a doubt in that case, how the division shall be made:

123. ' Let the son, born of the elder wife, take one most 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 were *married*
' *laft*.

124. ' A fon, indeed, who was firft 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 other* 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 *fwabrahmanya*, 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 fhall be
' born from her in wedlock, (hall be mine for
' " the purpofe of performing my obfequies."

128. ' In this manner DACSHA himfelf, lord
' of created beings, anciently appointed all his
' *fifty* daughters to raife up fons to him, for the
' fake of multiplying his race:

129. ' He gave ten to DHERMA, thirteen to

CASYAPA, twenty-seven to SOMA, king of *Brahmens and medical plants*, after doing honour to them with an affectionate heart.

130. 'THE son of a man is even as himself; and as the son, such is the daughter *thus appointed*: how then, *if he have no son*, can any inherit his property, but a daughter, who is closely united with his own soul?

131. 'Property, given to the mother on her marriage, is inherited by her *unmarried* daughter; and the son of a daughter, *appointed in the manner just mentioned*, shall inherit the whole estate of her father, who leaves no son *by himself begotten*:

132. 'The son, however, of *such* a daughter, who succeeds to all the wealth of her father dying without a son, must offer two funeral cakes, one to his own father, and one to the father of his mother.

133. 'Between a son's son and the son of *such* a daughter, there is no difference in law; since their father and mother both sprang from the body of the same man :

134. 'But, a daughter having been appointed to produce a son for her father, and a son, *begotten by himself* being afterwards born, the division of the heritage must in that case be equal; since there is no right of primogeniture 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, without 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, (hall produce from an
' hufband of an equal clafs, the maternal grand'
' father becomes in law the father of a fon :
' let that fon give the funeral cake and poffefs
' the inheritance,

137. ' By a fon, a man obtains victory over
' 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
' father from the hell named *put*, he was,
' therefore, called *puttra* by BRAHMA' himfelf:

. 139. ' Now between the fons of his fon and
' of his daughter *thus appointed*, there fubfifts in
' this world no difference; for even the fon of
' *fuch* 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. ' OF the man, to whom a fon has been

' given, *according to a subsequent law*, adorned
' with every virtue, that son shall take a *fifth*
' or *sixth part* of the heritage, though brought
' from a different family.

142. ' A given son must never claim the
' family and estate of his natural father: the
' funeral cake follows the family and estate;
' but of him, who has given away his son, the
' funeral oblation is extinct.

143. ' THE son of a wife, not authorized to
' have issue by another, and the son begotten.
' by the brother of the husband, on a wife, who
' has a son then living, are both unworthy of
' the heritage; one being the child of an adul-
' terer, and the other produced through mere
Muft.

144. ' Even the son of a wife duly authorized,
' not begotten according to the *law already pro-*
' *pounded*, is unworthy of the paternal estate;
' for he was procreated by an outcast:

145. ' But the son *legally* begotten on a wife,
' authorized for the purpose *before mentioned*
' may inherit *in all respects, if he be virtuous and*
' *learned*, as a son begotten by the husband;
' since *in that case* the seed and the produce be-
' long of right to the owner of the field.

146. ' He, who keeps a *fixed and moveable*
' estate of his *deceased* brother, maintains the
' widow, and raises up a son to that brother,

' 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 *fapinda*, of her huiband, that fon, if begotten with *amorous embraces, and tokens of impure defire*, the fages proclaim bafebom and incapable of inheriting.

148. ' THIS law, *which has preceded*, muft be underftood of a diftribution among fons begotten on women of the fame clafs: hear now the law concerning *Jons* by feveral women of different claffes.

149. ' If there be four wives of a *Brahmen* in the direct order of the claffes, and fons are produced by them all, this is the rule of partition *among them*:

150. ' The chief fervant in hufbandry, the bull kept for impregnating cows, the riding horfe or carriage, the *ring and other* ornaments, and the principal meffuage, fhall be deducted from the inheritance and given to the *Brahmen* fon, together with a larger (hare by way of preeminence.

151. ' Let the *Brahmen* take three (hares of the refidue; the fon of the *Cfhatriya* wife, two (hares; the fon of the *Vaifyd* wife, a (hare and 3 half; and the fon of the *Súdra* wife, may take one fhare.

بَحِيَّةُ الْبَاحِثِ عَنْ جَمَلِ الْمَوَارِثِ
نُظْمُ الشَّيْخِ الْإِمَامِ الْعَالِمِ مُؤَيَّدِ الدِّينِ
لِأَمِيرِ الْإِسْلَامِ مُحَمَّدٍ عَلِيِّ بْنِ الْحُسَيْنِ الرَّحْمَنِ الْعَوَفِ
بَابِ الْمُتَقَنَّةِ رَحِمَهُ اللَّهُ تَعَالَى

*This & Plates 12, 34, 50, 7, 8, 9, 10, 11, to follow each
other in Vol. 6, page 26*

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ وَبِهِ نَسْتَعِينُ
أَوَّلُ مَا تَشْفَعُ فِي الْمَقَالَةِ بِذِكْرِ حَمْدِ رَبِّنَا تَعَالَى
فَالْحَمْدُ لِلَّهِ عَلَى مَا أَلْفَعَا خَدَّاهُ يَجْلُو عَنْ الْعَبِيدِ الْغَمَّ
يُمْ الصَّلَاةُ بَعْدَ وَالسَّلَامِ عَلَى نَبِيِّ دِينِهِ الْإِسْلَامِ
يُحْمِلُ خَاتَمَ رُسُلِ رَبِّهِ وَالْهَمِّ مِنْ بَعْدِهِ وَصَحْبِهِ
وَنَسْئَلُ اللَّهَ لَنَا الْإِمَامَةَ مِنْهُ تَوْحِيدًا مِنَ الْإِبَانَةِ
عَنْ مَذْهَبِ الْإِمَامِ زَيْدِ الْقُرْبِيِّ إِذْ كَانَ ذَلِكَ مِنْ أَهْلِ الْغُرَّةِ
عَلَيْكَ يَا أَرْبَابَ الْعِلْمِ أَوْفَاءً مَا سَفَى فِيهِ وَأَوَّلًا مَالَهُ الْجِيدُ ذِي
وَأَنَّ هَذَا الْعِلْمُ مُخَصَّصٌ بِمَا قَدْ شَاعَ فِيهِ عِنْدَ كُلِّ الْعُلَمَاءِ
وَأَنَّ زَيْدًا أَحْصَى الْأَمْحَالَ بِمَا جَاءَهُ صَاحِبُ الرِّسَالَةِ
مِنْ قَوْلِهِ فِي فَضْلِهِ مُتَّبِعًا أَفْرَضَكُمْ زَيْدًا وَنَاصِيكًا
فَكَانَ أَوَّلِي بَأْتِ شَاعِ التَّابِعِ لَا يَسْتَيْقِظُ وَقَدْ جَاءَهُ الشَّافِعِيُّ
فَمَا كَانَ فِيهِ الْقَوْلُ بِالْإِسْمِ زَيْدٍ مِنْ رِصْمَةِ الْأَلْفَاظِ
أَسْتَبَابُ مِيرَاثِ الْوَرَاثَةِ كُلُّ يَحْدُثُ لَهُ الْوَرَاثَةُ
وَهُوَ نِكَاحٌ وَوَلَاؤٌ وَنَسَبٌ مَا بَعْدَهُنَّ لِلْمَوَارِيثِ مُتَّبِعٌ

وَمَنْعَ الشَّخْصِ مِنَ الْمِيرَاثِ وَاحِدَةً مِنْ عِلَلِ تِلْكَ
وَقَوْلُهُ وَأَخْلَافُ دِينِ نَاهِي عَنْ تَلْيِيسِ الشَّيْءِ كَالْبَقِيرِ
وَالْوَارِثُونَ فِي الدِّجَالِ عَشْرَةُ أَسْمَاءُ وَهُمْ مَعْرُوفَةٌ مِنْهُمْ
الْأَبْنُ وَالْأَبْنُ وَالْأَبْنُ مَتَمَّا تَزَلُّ وَالْأَبْنُ وَالْحَدْلَةُ وَالْأَبْنُ
وَالْأَخُ مِنْ أَيْ الْجِهَاتِ كَمَا قَدْ أَتَى اللَّهُ بِهِ الْقُرْآنَ
وَالْأَبْنُ الْأَخُ الْمُذَلِّي إِلَيْهِ بِالْأَبْنِ فَاسْتَعْمَلَهُ لِئَلَّا يَكُونَ الْمَكْرِبُ
وَالْعَمُّ وَالْأَبْنُ مِنَ الْبَنِيهِ فَاسْتَعْمَلَهُ الْإِعَارُ وَالنَّبِيَّةُ
وَالرَّوْحُ وَالْمُعْتَرِضُ وَالْوَلَاةُ فَجَمَلَهُ الدَّكْوَةُ هُوَ لَا
وَالْوَارِثَاتُ كُلُّهُنَّ سَعَى لَمْ يَقْطَعْ النَّبِيُّ عَنْهُ الشَّرْعُ
بَنَتْ وَبَنَتْ ابْنُ مَرْمُوفَةٍ وَجَدَتْ وَرَوْحَهُ وَمُعْتَرِضَةً
وَالْأَخْتُ مِنْ أَيْ الْجِهَاتِ كَانَتْ هَذِهِ عَدَّةً قَدْ بَانَ
وَأَعْلَمَ أَنَّ الْأَرْضَ نَوْعَانِ هُمَا قَرْضٌ وَتَعْصِيبٌ عَلَى قَسَمٍ
فَالْقَرْضُ فِي نَصْرِ الْكِتَابِ سِتَّةٌ لَا يَرْضَى إِلَّا ذَاتُ سِتِّ أَسْمَاءٍ
نِصْفٌ وَبَعْضٌ نِصْفٌ الْبَرْقُ وَالثَّلَاثُ وَالْإِسْدَنْسُ نِصْفُ الشَّرْعِ
وَالثَّلَاثُ هُمَا التَّمَامُ فَحَقِظْ وَكُلَّ حَافِظٍ إِذَا مَرَّ

فَالْبَيْتُ فَرَضٌ خَمْسَةُ أَفْرَادٍ الْوَجْهُ وَالْأُنْثَى مِنَ الْأَوَّلِ
وَبَيْتُ الْأَبِ عِنْدَ قَدِّ الْبَيْتِ وَالْأَخْتُ فِي مَدَّ هَبٍ كُلُّ مُقْتَرٍ
وَبَعْدَهَا الْأَخْتُ الَّتِي مِنَ الْأَبِ عِنْدَ أَفْرَادِ هُنَّ مِنْ مَقْصِدٍ
وَالْوَجْهُ فَرَضُ الْوَجْهِ أَرْكَانٌ مَعَهُ مِنْ وَلَدِ الزَّوْجَةِ مَنْ قَدْ مَنَعَهُ
وَهُوَ كُلُّ زَوْجَةٍ أَوْ أَكْثَرٍ مَعَ عَدَمِهَا وَلَا فِيهَا قَدْرًا
وَالْمَنْعُ لِلزَّوْجَةِ وَالزَّوْجَاتِ مَعَ الْبَنِينَ وَمَعَ الْبَنَاتِ
أَوْ مَعَ أَوْلَادِ الْبَنِينَ فَأَعْلَى وَابْنُ لِتَقَابِ الدُّرُوسِ وَالْمَنْعُ
وَالْتَنَاهُ لِلْبَنَاتِ جَمْعًا مَا زَادَ عَنْ وَاحِدَةٍ فَتَمَعُ
وَهُوَ كَذَلِكَ لِلْبَنَاتِ الْإِبْنِ نَاهِيَةً مُقَالِي هُمُ صَانِعِي الدَّهْرِ
وَهُوَ لَا خَيْرَ فِيهَا يَزِيدُ قَضَى بِهِ الْأَحْرَارُ وَالْعَبِيدُ
لَعْدًا إِذَا لَمْ يَكُنْ الْأُمُّ وَابْنٌ أَوْ ابْنٌ فَأَعْمَلُ لَعْدًا تَصِيبُ
وَالْبَيْتُ فَرَضٌ لَا مَرَحِيَّتَ لَوْلَا مِنْ الْأَجْزَاءِ جَمْعٌ وَعَدَمٌ
كَاتِبِينَ وَتَنْبِيْهِ أَوْلَادِهِ حُكْمُ الدَّكْرِ فِيهِ كَالْإِنْفَارِ
وَإِنْ تَكَرَّرَ زَوْجٌ وَأُمٌّ وَابْنٌ فَتَلَّتْ الْبَنَاتُ لَهَا مَرْتَبَةٌ
وَهِيَ كَذَلِكَ مَعَ زَوْجَةٍ نَصَاعِدًا فَلَا تَلْزَمُ مِنَ الْعُلُومِ قَاعِدًا

وَالثَّلَاثُ لِلْأَثَرِ أَوْ لِلنَّسَبِ مِنْ وَلَدِ الْأُمِّ بَعْدَ بَرِّئِ
وَهَكَذَا إِنْ كُنْتُمْ أَفْرَادًا وَأَمَّا لَكُمْ فِيمَا سِوَاهُ زَاوٍ
وَتَسْوِي لِنَاثٍ وَالذَّكَوُ فِيهِ كَأَنَّهُ أَوْضَحُ الْمُسْطَه
وَالسُّدُسُ فَرْضُ سَبْعَةٍ مِنَ الْعَدْلِ أَنْ دَامَتْ بِنْتُ الرَّجُلِ
الْأُخْتُ بِنْتُ الْإِبْنِ ثُمَّ الْجَدَّةُ وَوَلَدُ الْأُمِّ ثُمَّ الْمَدَّةُ
بِالْأَبِ بِنْتُ خُجَّةٍ مَعَ الْوَلَدِ وَهَكَذَا الْأُمُّ بِنْتُ الرَّجُلِ الصَّمَدِ
وَهِيَ لَهَا الْإِصْنَامُ الْإِثْنَيْنِ مِنْ أَخَوَاتِ الْمَيِّتِ فَتَسْتَفِيدُ
وَالْجَدَّةُ بِنْتُ الْإِبْنِ عِنْدَ فَقْدِهِ فِي جَزَاءٍ مَا يَصِيبُهُ وَمِثْلُهُ
إِلَّا إِذَا كَانَ هُنَاكَ أَخُو لِكُونِهِمْ فِي الْقَرْبِ وَلَقَدْ سَمِعْتُ
وَحُكْمَهُمْ وَحُكْمُهُ سَيِّئَاتِي مِثْلُ الْبَيَارِ فِي الْحَالَاتِ
وَبِنْتُ الْإِبْنِ تَأْخُذُ السُّدُسَ إِذَا كَانَتْ مَعَ الْبِنْتِ مِثْلًا لِحَدِّ
وَهَكَذَا الْأُخْتُ مَعَ الْأَخِي الَّتِي بِالْأَبَوَيْنِ يَأْخُذُ أَذَلَّتْ
بِأَنْ تَسَادَرَ لِسْتُ الْجَدَّاتِ وَكُنَّ كُلُّهُنَّ وَأَرْبَابُ
فَالسُّدُسُ لِكُلِّهِنَّ بِالسُّدُسِ فِي الْقِسْمَةِ الْعَادِلَةِ الشَّرْعِيَّةِ
كُلُّ مَنْ أَذَلَّتْ بَعِيرٌ وَادَّتْ فَمَا لَهَا حِظٌّ مِنَ الْمَوَارِثِ

وَتَسْفُطُ الْبُعْدُ نِزَانُ الْقُرْبِ الْمَذْهَبُ الْأَوَّلِيُّ فَقُلْ حَتَّى
وَقَدْ تَنَالَتْ قِسْمَةُ الْفُرُوضِ بِغَيْرِ شَكَالٍ وَلَا عَمَلٍ ضَرٍ
وَيُحَرِّجُ أَنْ تَشْرَعَ فِي التَّعْصِيلِ بِكُلِّ قَوْلٍ مَوْجُودٍ مُصِيبٍ
وَكُلِّ مَنْ أَجْزَلَ كُلِّ مَالٍ مِنَ الْقَرَابَاتِ أَوِ الْمَوَارِثِ
أَوْ كَانِ مَا يُفَضَّلُ بَعْدَ الْفَرْصِ لَهُ هُوَ أَخُو الصُّوْبَةِ الْمُفَضَّلَةِ
كَالْأَبِ وَالْجَدِّ وَجَدِّ الْجَدِّ وَالْأَبْنِ عِنْدَ قُرْبِهِ وَالْبَقْدِ
وَالْأَخِ وَالْأَبْنِ الْأَخِ وَالْأَعْمَامِ وَالسَّيِّدِ الْمُعْتَوِي ذِي الْأَنْعَامِ
وَهَكَذَا يُنَوِّمُ جَمِيعًا وَكَثُرَ لِمَا أَذْكَرَ سَمِعَ
وَمَا لِي فِي الْبُعْدِ مَعَ الْقُرْبِ الْأَنْثِ مِنْ حِظٍّ وَلَا نَصِيبٍ
وَالْأَخِ وَالْأَعْمَامِ وَأَبِ الْأَخِ مِنَ الْمَدَى لِي لِيَسْطِرَ النَّسَبُ
وَالْأَبْنِ وَالْأَخِ مَعَ الْأَنَاتِ يُفَضِّلُ فِي الْمِيرَاثِ
وَلَيْسَ فِي النِّسَاءِ طَعْنٌ أَعْصِيهِ إِلَّا الَّتِي مَاتَتْ بِعَثْرِ الرَّقَبَةِ
وَالْأَخَوَاتِ أَنْ يَكُنَّ نِسَاءً هُنَّ بَعْدَ هُنَّ بِعَصَبَاتٍ
وَالْجَدِّ مُحَرَّبٌ عَنِ الْمِيرَاثِ بِالْأَبِ فِي إِخْوَالِهِ الْقَلَابِثِ
وَهَكَذَا يُبَيِّنُ الْأَبْنِ بِالْأَبْنِ فَلَا يُبَيِّنُ عَنِ الْحَمِّ الصَّحِيحِ مَقْدَرًا لَا

وَتُسْقَطُ الْجَدَّاتُ مِنْ كُلِّ مَهْتَبٍ لَامٍ فَاحْفَظْهُ وَقَسْرُ الشَّيْبَةِ
وَتُسْقَطُ الْأَخَوُ بِالْبَيْنَاءِ وَالْأَبِ الْأَدْنَى كَمَا رُوِيَ
أَوْ بَنَى التَّبِينِ حَيْثُ كَانُوا يَتَبَارَفُونَ فِيهِ الْجَمْعُ وَالْوَحْدَانُ
وَنَفْعِلُ الْإِسْقَاطِ بِالْإِسْقَاطِ بِالْحَدِّ فَاحْفَظْهُ عَلَى احْتِطَاطٍ
وَبِالْبَنَاتِ وَبَنَاتِ الْأَبْنِ فَلَنْ يَحْفَظَ الْعِلْمُ حَتَّى يَمُوتَ
ثُمَّ بَنَاتُ الْإِسْقَاطِ مَتَى حَارَ الْبَنَاتِ التَّلْبِيسُ بِالنِّسْبِ
إِلَّا إِذَا عَصَبَهُنَّ الذَّكَرُ مِنْ وَلَدِ الْأَبْنِ عَلَى مَا ذَكَرُوا
وَبَعْدَ هَذِهِ الْأَخَوَاتُ الَّتِي يَذَلِّسُ بِالْقُرْبِ مِنَ الْجِهَاتِ
إِذَا اخْتَرْنَ قُرْبَاهُنَّ وَأَفِيئَا اسْقَطُوا لَدَا الْأَبِ الْبَوَالِيَا
وَأَنْ يَكُنْ أَخَاهُنَّ حَاضِرًا أَعَصَبَهُنَّ بِأُطْبَاطٍ وَظَاهِرًا
وَلَيْسَ بِنِزَاجٍ بِالْمَعْصَبِ مِنْ مِثْلِهِ أَوْ قَوْفَهُ فِي النَّسَبِ
وَأَنْ يَحْذَرُوا جَاءُوا وَأَمَّا وَإِنْ نَاوَا أَخَوَهُ لَلَامٍ حَارُوا وَالتَّلْبِ
وَأَخَوَهُ أَيْضًا لِأَبٍ وَاسْتَعْرِقَ الْمَالُ بِفَرْضِ النَّصَبِ
فَأَجْعَلُهُمْ كُلَّهُمْ لَامٍ رَاجِعِيئًا أَبَاهُمْ حَتَّى فِي الْيَوْمِ
وَأَفِيئَهُمْ عَلَى الْأَخَوَةِ تَلْتِ الشَّرِكَةِ وَهَذِهِ الْمُسْأَلَةُ الْمُسْتَرْكَه

والآن نبدأ بالذي أردنا في الجدة والآخره اذ وعدنا
قائلين غوما اقول المشيعا واجمع جواشي الكلمات اجمعها
واعلم بان الجدة و احوال انبيك عنهن على التوالي
تقسم الاخرة فيهن اذ لم يعد القسم عليه بالادي
فتارة ياخذ ثلثا كاملا ارجا بالقسمه عنه نازلا
ان لم تكن فيهم ذر ووسهم ناقصه بايصاح عن شقيها
وتارة ياخذ ثلث الباقي بعد ذر القصر والازراف
هذا القامما اصحت المقاسمه بنقصه عن ذاك بالمزاجه
وتارة ياخذ سدس المال وليس عنه نازلا بحساب
وقوم مع الاناث عند القسم مثل اخ و سهمه والحكم
واحببت بنى الاب لدى العدا وارض بنى الام مع الاحباء
واحكم على الاخرة بعد العدا حكمكم بهم عند فقد الجدة
والاخي لا فرض مع الجدة لها فيها علامه كملها
روح وام وهما مما فيها فاعلمه خير امة علامها
تعرف يا صاح بالاكدرية دهر بان حفظها حديته

يُقَضُّ النِّصْفُ لَهَا وَالسُّدُسُ لَهَا حَتَّى تَقُولَ بِالْفُرْصِ الْمُحْتَمَلَةِ
تَمَّ يَقُولُ الْمَقَاسِمَةُ كَمَا مَضَى نَا حِفْظُهُ وَاشْتَرَا نَا طَمَنَهُ
وَأَنْ تَرُدَّ مَعْرَنَةُ الْحِسَابِ لِنَتْنِهِ فِيهِ إِلَى الصَّوَابِ
وَتَعْرِتُ النِّسْمَةَ وَالتَّفْصِيلَ وَتَعْلَمُ الصَّحِيحَ وَالْأَصُولَ
نَا سَخَّرَ الْأَصُولَ الْمَسْبُوكَ وَلَا تَكُنْ عَنْ حِفْظِهَا بِذَاهِلٍ
وَهِيَ إِذَا فَضِّلَ فِيهَا الْقَوْلُ ثَلَاثَةٌ يَدْخُلُ فِيهَا الْعَوْلُ
وَيَعْدُهَا أَرْبَعَةٌ تَمَامٌ لِأَعْوَانٍ يَعْرِوْهَا وَلَا انْتِلَافٍ
فَالسُّدُسُ مِثْلُ ثَلَاثَةِ أَشْهُمٍ ثَوَا وَالثَّلَاثُ وَالذَّيْعُ سِتُّ أَشْهُمٍ عَشْرًا
وَالثَّمَنُ أَرْبَعَةُ أَشْهُمٍ السُّدُسُ فَاصِلُهُ الصَّيَادُ وَفِيهِ الْخَدُّ
أَرْبَعَةٌ يَتَّبِعُهَا عَشْرُونَ يَعْدُهَا الْحِسَابُ أَجْمَعُونَ
هَذِهِ الثَّلَاثَةُ الْأَصُولُ أَرْبَعُونَ نَهَضَتْ فِيهَا عِشْرُونَ
فَتَبْلُغُ السَّنَةَ عَقْدَ الْعِدَّةِ فِي صَوْلَةٍ مَعْرُوفَةٍ مُنْتَطِقَةٍ
وَتَلْحَقُ الَّتِي تَلِيهَا فِي الْأَثَرِ الْعَوْلُ فَرَادَا بِنِجْعَةٍ
وَالْعِدَّةُ الثَّلَاثُ قَدْ يَعْرِضُ بِتَمَنِهِ فَأَعْمَلُ بِمَا أَقُولُ
وَالنِّصْفُ وَالْبَاقِي وَالنِّصْفَانِ أَصْلُهُمَا فِي حُكْمِهِمَا اثْنَانِ

وَالثَّلَاثُ مِنْ ثَلَاثَةٍ يَكُونُ وَالرُّبْعُ مِرَارُ بَعْدَ مُسْتَوٍ
وَالشُّمْرُ إِنْ كَانَ قِسْمَ ثَمَانِيَةٍ هَذِهِ هِيَ الْأَصُولُ الثَّانِيَةُ
لَا يَدْخُلُ الْعَدْلُ عَلَيْهَا فَأَعْلَمْنَا أَنَّ اسْتِدْلَالَ النَّصِيحِ فِيهَا وَقِسْمِ
فَإِنْ تَكُنْ مِنْ أَصْلِهَا نَصِيحًا فَتَرَكْنَا تَطْوِيلَ الْحِسَابِ رِخْ
فَأَعْطَيْنَا كُلَّ شَهْمٍ مِنْ أَصْلِهِ مُكْتَبَةً وَأَعْلَلْنَا مِنْ عَوَلِهِ
وَأَنَّ تَوَكُّلَ الشُّهُمِ لَيْسَ تَنْقَسِمَ عَلَى دَوْرِ الْمِيرَاثِ فَاتَّبَعْنَا قِسْمَ
وَأَطْلَقَ طَرِيقَ الْاِخْتِصَارِ فِي الْعَمَلِ بِالضَّرْبِ وَالْوَقْفِ بِجَانِبِكَ
وَأَرَدْنَا إِلَى الْوَقْفِ الَّذِي يُؤَافِقُ وَأَضْرِبُهُ فِي الْأَصْلِ وَالتَّحْقِيقِ
إِنْ كَانَ جُلُوسًا وَاحِدًا أَوْ كَثْرًا فَاحْفَظْ وَدَعْ عِنْدَ الْحَدِّ
وَأَنَّ تَوَكُّلَ الْكُثْرِ عَلَى أَجْنَأٍ بِشَرِّهَا فِي الْحُكْمِ عِنْدَ النَّاسِ
تُخَصَّرُ فِي أَرْبَعَةِ أَقْسَامٍ يُعْرِفُهَا الْمَاهِرُ فِي الْأَحْكَامِ
مِمَّا تَلَّ مِنْ قَدَمِ مُنَاسِبَةٍ وَنَعْدَةٍ مُوَابِقَةٍ مُصَاحِبَةٍ
وَالرُّبْعُ الْمُنَاسِبُ الْخَالِفُ يُبَيِّنُكَ عَنْ تَفْصِيلِ الْعَيَافِ
فَخُذْ مِنَ الْمُنَاسِبِينَ وَاحِدًا وَخُذْ مِنَ الْمُنَاسِبِينَ الزَّائِدَ
وَخُذْ جَمِيعَ الْعَدُوِّ الْمُنَاسِبِينَ وَأَعْرِضْهُ فِي الثَّانِي وَلَا تَبْدَأْهُ

وَأَصْرَبْتُ جَمِيعَ الْوَفْقِ الْمُوَافِقِ وَأَسْلَكْتُ بِذَلِكَ أَيْهِمُ الطُّرُقِ
وَأَصْرَبْتُ فِي الْأَصْلِ التَّنْصِيلَ وَأَخَصَرْتُ مَا انْتَضَمَ وَسَيَّجَحْتُ
وَأَنْتَمْتُ فَالْقَسْمُ إِذَا صَحِيحٌ يَقْدَرُهُ الْأَعْمُ وَالنَّصِيحُ
هَذِهِ مِنَ الْحِسَابِ حُمْلُ يَأْتِي عَلَى مَنَاجِلِهِ الْعَمَلُ
بِزَيْرٍ تَطْوِيلٌ وَلَا اعْتِسَابٌ فَاقْنَعْ بِمَا فِيهِمْ فَهُوَ كَلَامٌ
وَأَنْ يَمُتَ آخِرُ قَبْلِ الْقِسْمَةِ حَقُّ السَّهَامِ وَاعْرِفْ قِسْمَهُ
وَأَجْعَلْهُ مَسْأَلَةً أُخْرَى لِمَا قَدْ يَنْشُرُ التَّفْصِيلُ فِيمَا قَدْ مَا
وَأَنْظُرْ فَإِنْ وَافَقَتْ السَّهَامُ حُدُودَ هَدِيَّتٍ وَفَقَاهُ مَا
وَأَصْرَبْتُ أَوْ جَمِيعَهَا فِي السَّابِقَةِ إِنْ لَمْ يَكُنْ بَيْنَهُمَا مُوَافَقَةٌ
فَالْأَسْهُمُ الْأُخْرَى فِي السَّهَامِ تَصْرُبُ أَوْ لَا وَفَقَاهُ تَمَامٌ
وَكُلُّ سَهْمٍ فِي جَمِيعِ الثَّانِيَةِ يُصْرَبُ أَوْ لَا وَفَقَاهُ عِلَالِيَّةٌ
هَذِهِ طَرِيقَةُ الْمَنَاسَخَةِ فَأَرَوْنِهَا رُبْنَةً فَضْلُ سَائِحَةٍ
وَأَنْ يَكُنْ فِي مَنَاجِلِ الْمَالِ حَتَّى صَحِيحٌ يَسَّرُ الْأَشْيَاءَ
فَأَقْسَمْتُ عَلَى الْأَقْلَى وَالْيَقِينِ بِحَقِّ الْقِسْمَةِ الْمُبِينِ
وَمَكَدَنِي حُكْمُ زِدَاتِ الْجَمَلِ يَنْشُرُ عَلَى الْيَقِينِ وَالْأَمَلِ

وَأَنْ يَمُتَ قَوْمٌ يَهْدِمُ أَوْ غَرَضٌ أَوْ حَادِثٌ عَمَّ الْجَمِيعَ كَالْجَرَدِ
وَلَمْ يَكُنْ يُعْلَمُ خَالُ السَّابِقِ فَلَا يُورِثُ نَافِعٌ مِنْ نَافِعٍ
تُعَدُّهُمْ كَأَنَّهُمْ أَجَانِبٌ وَهَكَذَا الرَّأْيُ الشَّدِيدُ الصَّابِتُ
وَقَدَانِي الْقَوْلُ عَلَى مَا بَيْنَنَا مِنْ قِسْمَةِ الْمِيرَاثِ كَيْ يَنْتَهِ
عَلَى طَرِيقِ التَّوَسُّعِ وَالْإِسْكَانِ مُلْخَصًا يَا وَحْدُ الْعَبَّاسِ
فَالْحَمْدُ لِلَّهِ عَلَى التَّمَامِ حَمْدًا كَثِيرًا ثُمَّ ۲ دَوَامُ
وَلَسْتُ الْعَفْوُ عَنِ التَّقْصِيرِ وَخَيْرٌ مَا نَاطِلُ ۲ الْمُصْبِرِ
وَعَفْرَتَاكَ مِنَ الذَّنْبِ وَشَرُّ مَا كَانَ مِنَ الْعُيُوبِ
وَأَفْضَلُ الصَّلَاةِ وَلِلنَّبِيِّ الْمُصْطَفَى الْكَدِيمِ
مُحَمَّدٍ خَيْرُ الْأَنْامِ الْعَاقِبِ وَآلِهِ الْغُرَّةُ وَوَلِيُّ الْمَنَاقِبِ
وَضَحِيَّةُ الْأَنْصِلِ الْأَبْرَارِ الصَّفْوَةِ الْأَمَّا بَلِ الْأَحْيَارِ
وَحَسْبُنَا اللَّهُ وَنِعْمَ الْكَافِي ذُو الْعِزِّ وَالْقُدْرَةِ وَالْأَطْوَارِ

ثُمَّ وَالْحَمْدُ لِلَّهِ الرَّعَائِي وَصَلَوَاتُهُ وَسَلَامُهُ
عَلَى سَيِّدِنَا مُحَمَّدٍ وَآلِهِ وَصَحْبِهِ الطَّيِّبِ الطَّاهِرِ
لِيَلْجَأَ الْجَمْعُ الْأَرْبَعُ لِيَاخُتُونَ مِنْ شَوَالِ سَنَةِ ١٠٥٠ وَسِعَامِ
ثُمَّ يَا تَعَالَى خَالِ السَّائِقَاتِ عَفَاةً

152. ' Or, *if no deduction be made*, let some person learned in the law divide the whole collected estate into ten parts, and make a legal distribution by this *following* rule:

153. ' Let the son of the *Brahmani* take four parts; the son of the *Cfhatriya*, three; let the son of the *Vaiya* have two parts; let the son of the *Sudra* take a single part, *if he be virtuous*.

154. ' But whether the *Brahmen* have sons, or have no sons, *by wives of the three first classes* no more than a tenth part must be given to the *son* of a *Sudra*.

155. ' The son of a *Brahmen*, a *Cfhatriya*, or a *Vaiya* by a woman of the servile class, shall inherit no part of the estate, *unless he be virtuous; nor jointly with other sons, unless his mother was lawfully married*: whatever his father may give him, let that be his own.

156. ' All the sons of twiceborn men, produced by wives of the same class, must divide the heritage equally, after the younger brothers have given the first born his deduced allotment.

157. ' For a *Sudra* is ordained a wife of his own class, *and no other*: all, produced by her, shall have equal shares, though he have a hundred sons.

158. ' OF the twelve sons of men, whom

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 his adopter*, and with *the fin of*
' *amitting them*.

170. ' In whose manfions foever a male
' child (hall be brought forth *by a married wo-*
' *man, whose husband has long been abfent*, if the
' real father cannot be difcovered, *but if it be*
' *probable that he 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 fon, after he has been deferted *with-*
' *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 fhe *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 receive' with
' his bride'

174 ' 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 mother; whether the boy be equal or unequal *to himfelf in good qualities, for in clafs all adopted fons 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 WOMAN twice married:

176. If, *on her fecond marriage*, (he be ftill a virgin, or if fhe left her hufband under the age of puberty and return to him at his full age, (he muft again perform the nuptial ceremony, *either with her fecond, or her young and deferted*, hufband.

177. He, who has loft his parents, or been abandoned *by them* without juft caufe, and offers himfelf to a man *as his fon*, is called a fon felfgiven.

178. A fon, begotten through luft on a *Súdra* 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 Have, or on the female flave of his male flave, may take a fhare of the heritage, if permitted *by the other fous*: thus is the law eftablifhed.

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180. ' Thefe eleven fons (the fon of the wife,
' and the reft as enumerated) are allowed by
' wife legiflators to be fubftitutes *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 fa-
' ther, from whose 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; *fa that, if fuch nephew*
' *would be the heir, 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 thofe twelve fons*, let the inferiour
' in order take the heritage; but, 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 iffe*, are heirs to the de-
' ceafed, but of him, who leaves no fon, nor a

wife, nor a daughter, the father shall take the inheritance; and, if he leave neither father, nor mother, the brothers.

186. To three *anceftors* must water be given at their obsequies; for three (*the father, his father, and the paternal grandfather*) is the funeral cake ordained : the fourth in descent is the giver of oblations to them, and their heir, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake.

187. To the *nearest sapinda, male or female*, after him in the third degree, the inheritance next belongs ; then, on failure of *sapindas* and of their issue, the *famanodaca*, or distant kinsman, shall be the heir; Or the spiritual preceptor, or the pupil, or the fellowstudent, of the deceased:

188. On failure of all those, the lawful heirs are such *Brahmens*, as have read the three *Vedas*, as are pure in body and mind, as have subdued their passions; and they must consequently offer the cake: thus the rites of obsequies cannot fail.

189. The property of a *Brahmen* shall never be taken as an *escheat* by the king: this is a fixed law: but the wealth of the other classes, on failure of all heirs, the king may take.

190. If the widow of a man, who died

' 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 colle6ied eftate of the deceafed,
 ' whatever it be.

191. ' If two fons, begotten by *two fucceffive*
 ' *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 all
 ' the uterine brothers, and the uterine fifters, *if*
 ' *unmarried*, equally divide the maternal eftate:
 ' *each married fifter fhall have a fourth 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 *feparate*
 ' property of a *married woman* :

195. ' What fhe received after marriage
 ' from the family of her hufband, and what
 ' her affectionate lord may have given her, (hall
 ' 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 *Brahma, Daiva, Arfha, Gandbarva, or Prajapatya*, fhall go to her hufbahd, if fhe 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 become the property of her father and mother.

198. ' If a widow, *whofe hufband had other wives of different claffes*, fhall have received wealth at any time as a gift from her father, and fhall die without iffue, it fhall go to the daughter of the *Brahmani* wife, or to the iffue of that daughter.

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

200. ' Such ornamental apparel as women wear during the lives of their, hufbands, the heirs of thofe hufbands fhall not divide among themfelves: they, who divide it among themfelves, 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 is juft, that the heir who

' 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 punifh-
' ment.

203. ' If the eunuch and the reft fhould at
' any time defire to marry, and if the wife of the
' eunuch fhould raife up a fon to him by a man te-
' gaily appointed, that fon and the iffue of fuch,
' as have children, fhall be capable of inheriting.

20'. ' After the death of the father, if the
' eldeft brother acquire *wealth by his own efforts*
' before partition, a fhare of that acquifition fhall
' go to the younger brothers, if they have made
' a due progrefs in learning;

205. ' And if all of them, being unlearned,
' acquire property *before partition* by their own
' labour, there fhall 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.

206. ' Wealth, however, acquired by learn'
' ing, belongs exclufively to any one of them,
' who 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

207. ' If any one of the brethren has a com-
' petence from his own occupation, and wants
' not the property of *Ms father*, he may debar

' himself from his own share, some trifle being
' given him as a consideration, *to prevent future*
' *trifle.*

208. ' What a brother has acquired by la-
' bour or skill, without using the patrimony, he
' shall not give up without his assent ; for it was
' gained by his own exertion;

209. ' And if a son, by his own efforts, re-
' cover *a debt or property unjustly detained*, which
' could not be recovered before *by his father*, he
' shall not, unless by his free will, put it into
' parcenary with his brethren, since in fact it
' was acquired by himself.

210. ' IF brethren, once divided and living
' again together as parceners, make a second
' partition, the shares must in that case be
' equal ; and the first born shall have no right of
' deduction.

211. ' Should the eldest or youngest of feve-
' ral brothers be deprived of his share *by a civil*
' *death on his entrance into the fourth order*,
' or should any one of them die, his *vested inter-*
' *est in a share* shall not wholly be lost;

212. ' But, *if he leave neither son, nor wife,*
' *nor daughter, nor father; nor mother*, his uter-
' ine brothers and sisters, and such brothers as
' were reunited after a separation, shall assemble
' and divide his share equally,

213. ' Any eldest brother, who from avarice
' shall defraud his younger brother, shall forfeit

' *the bonours of his primogeniture, be deprived*
 ' *of his own 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 (hall give fhares to the youngeft, *if*
 ' *they be not vitious.*

215. ' If, among undivided brethren *thing*
 ' with their father, there be a common exertion
 ' for common gain, the father fhall never make
 ' an unequal divifion among them' *when they*
 ' *divide their families.*

216. ' A fon, born after a divifion *in the*
 ' *lifetime of his father*, fhall alone inherit the
 ' patrimony, or fhall 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*
 ' *no widow*, the *father and* mother fhall take the
 ' eftate ; and, the mother alfo being dead, the
 ' paternal *grandfather and* grandmother fhall
 ' take the heritage *on failure of brothers and ne-*
 ' *phews.*

218. ' When all the debts and wealth have
 ' been jutly 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 heirs had used, by confent before parting,*

' dreffed rice, water *in a well or cistern*, female
' flaves, family priests, or fpiritual counfellors,
' and pasture ground for cattle, the wife have
' declared indivifible, *and ftill 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 muft ever be vigilant
' in fuppreffing both *modes of play*:

223. ' Gaming with lifelefs things is known
' among men by the name of *dyuta*; but *fa-*
' *mahwaya* fignifies a match between living
' creatures.

22'. ' Let the king punifh corporally at dif-
' 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 *ftring and other*
' marks of the twiceborn.

225. ' Gamefters, publick dancers and fing-

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ers, revilers of scripture, open hereticks, men who perform not the duties of their several classes, and sellers of spirituous liquor, let him instantly banish from the town:

226, Those wretches, lurking like unseen thieves in the dominion of a prince, continually harass his good subjects with their vicious conduct,

327. Even in a former creation was this vice of gaming found a great provoker of enmity; let no sensible man, therefore, addict himself to play even for his amusement:

228. On the man addicted to it, either privately or openly, let punishment be inflicted at the discretion of the king,

229, A MAN of the military, commercial, or fervile class, who cannot pay a fine, shall discharge the debt by his labour: a priest shall discharge it by little and little.

230, For women, children, persons of crazy intellect, the old, the poor, and the infirm, the king shall order punishment with a small whip, a twig, or a rope.

231, THOSE ministers, who are employed in publick affairs, and inflamed by the blaze of wealth, mar the business of any person concerned, Let the king strip of all their property.

232. Such, as forge royal edicts, lif-

' 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
' 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 fpiritual* father, are all to be con-
' fidered refpectively as offenders in the higheft
' degree, *except thofe, whofe crimes are not fit to*
' *be named*:

236. ' On 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* female part be impreffed *on the fore*
' *head with hot iron*; for drinking fpirits, a vint-
' ner's flag; for ftealing facred gold, a dog's
' foot; for murdering a prieft, *the figure of a*
' headlefs **corpfe**;

238. 'With none to eat with them, with none to sacrifice with them, with none to read with them, with none to be allied by marriage to them, abject and excluded from all social duties, let them wander over this earth:

239. 'Branded with *indelible* marks, they shall be deserted by their paternal and maternal relations, treated by none with affection, received by none with respect: such is the ordinance of MENU.

240. 'Criminals of all the classes, having performed an expiation, as ordained by law, shall not be marked on the forehead, but condemned to pay the highest fine:

241. 'For crimes by a priest, who had a good character before his offence, the middle fine shall be set on him; or, if his crime was premeditated, he shall be banished from the realm, taking with him his effects and his family;

242. 'But men of the other classes, who have committed those crimes, though without premeditation shall be deprived of all their possessions; and, if their offence was premeditated, shall be corporally, or even capitally, punished, according to circumstances.

243. 'LET no virtuous prince appropriate the wealth of a criminal in the highest degree;

' for he, who appropriates it through covetousness, is contaminated with the same guilt:

244. ' Having thrown such a fine into the waters, let him offer it to VARUNA; or let him bellow it on some priest of eminent learning in the scriptures :

2'5. ' VARUNA is the lord of punishment; he holds a rod even over kings; and a priest, who has gone through the whole *Veda*, is equal to a sovereign of all the world.

2'6. ' Where the king abstains from receiving to his own use the wealth of such offenders, there children are born in due season and enjoy long lives;

2'7. ' There the grain of husbandmen rises abundantly, as it was speedily sown; there no younglings die, nor is one deformed animal born.

248., ' SHOULD a man of the basest class, with preconceived malice, give pain to *Brâhmins*, let the prince corporally punish him by various modes, that may raise terror,

2'9. ' A king is pronounced equally unjust in releasing the man, who deserves punishment, and in punishing the man, who deserves it not: he is just, who always inflicts the punishment ordained by law.

250. ' These established rules for administering justice, between two litigant parties, have

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'been propounded at length under eighteen
' heads.

251. 'THUS fully performing all duties re-
' quired by law, let a king feek *with juſtice* to
' poſſeſs regions yet unpoſſeſſed, and, when
' they are in his poſſeſſion, let him govern them
' well.

252. ' His realm being completely arranged
' and his fortrefſes amply provided, let him ever
' apply the moſt diligent care to eradicate *bad*
' *men reſembling* thorny weeds, as the law di-
' rects.

253. ' By protecting ſuch as live virtuouſly,
' and by rooting up ſuch as live wickedly, thoſe
' kings' whoſe hearts are intent on the ſecurity
' of their people, ſhall riſe to heaven.

254. ' Of that prince, who takes a revenue,
' without reſtraining rogues, the dominions are
' thrown into diſorder, and himſelf ſhall be pre-
' cluded from a celeſtial abode;

255. ' But of him, whoſe realm, by the
' ſtrength of his arm, is defended and free from
' terrour, the dominions continually flouriſh,
' like trees duly watered.

256. ' L E T the king, whoſe emiſſaries are
' his eyes, diſcern well the two forts of rogues,
' the open and the concealed, who deprive
' other men of their wealth:

257. ' Open rogues are they, who ſubſiſt by

' cheating in various marketable commodities;
' and concealed rogues are they, who steal and
' rob in forests and the like secret places,

258. ' Receivers of bribes, extorters of money by threats, debasers of metals, gamesters, fortunetellers, importers, and professors of palmistry;

259. ' Elephant breakers and quacks, not performing what they engage to perform, pretended artists, and subtil harlots;

260. ' These and the like thorny weeds, overspreading the world, let the king discover with a quick sight, and others, who act ill in secret; worthless men, yet bearing the outward signs of the worthy'

261. ' Having detected them, by the means of trusty persons disguised, who *pretend to* have the same occupation with them, and of spies placed in several stations, let him bring them by artifice into his power:

262. ' Then, having fully proclaimed their respective criminal acts, let the king inflict punishment legally, according to the crimes proved;

263. ' Since, without certain punishment, it is impossible to restrain the delinquency of scoundrels with depraved souls, who secretly prowl over this earth'

264. ' Muchfrequented places, cisterns 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, thickets, 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 patrolling, 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 their fuccefs*, or on pretence of
 ' *mock battles and the like* feats of ftrength, let
 ' the fpies procure an affembly of thofe men.

269. ' Such as refufe to go forth on thofe oc-
 ' cafions, deterred by *former punifhments*, which
 ' the king *had inflicted*, let him feize by force,
 ' and 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-
 ' victed of fimple theft, unlefe taken with the

' mainer or with implements of robbery; but
' any thief, taken with the mainer, or with
' such implements, let him destroy without he-
' sitation;

271. ' And let him slay all those, who give
' robbers food in towns, or supply them with
' implements, or afford them shelter.

272. ' Should those men, who are appointed
' to guard any districts, or those of the vicinity,
' who were employed for that purpose, be neu-
' tral in attacks by robbers *and inactive in seiz-*
' *ing them*, let him instantly punish them as
' thieves'

273. ' Him, who lives *apparently* by the
' rules of his class, but *really* departs from those
' rules, let the king severely punish by fine, as a
' wretch, who violates his duty.

274. ' They, who give no assistance on the
' plundering of a town, on the forcible breaking
' of a dike, or on seeing a robbery on the high-
' way, shall be banished with their cattle and
' utensils,

275. ' Men, who rob the king's treasure, or
' obstinately oppose his commands, let him de-
' stroy by various modes of just punishment;
1 and those, who encourage his enemies. ,

276. ' Of robbers, who break a wall or
' partition, and commit theft in the night, let

' the prince order the hands to be lopped off,
' **and** themselves to be fixed on a 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
' ftolen, let the king punifh as *he would punifh* a
' thief.

279. ' The breaker of a *dam to fecure a pool*,
' let him punifh by long immerfion under
' water or by keen corporal fuffering; or the of-
' fender fhall repair it, but muft pay the higheft
' mulft.

280. ' Thofe, who break open the treafury,
' or the arfenal, or the temple of a deity, and
' thofe, who carry off royal elephants, horfes,
' or cars, let him without hefitation deftroy.

281' ' 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. ' H E, who fhall drop his ordure on *the*
' king's highway, except in cafe of neceffity,
' fhall pay two *panas* and immediately remove
' the filth;

283. ' But a perfon in urgent neceffity, a
' very old man, a pregnant woman, and a child,
' only deferve reproof, and fhall clean the place
' themfelves: that is a fettled rule.

284. ' A L L phyficians and furgeons acting
' unfkilfully in their feveral profeffions,' muft
' pay for *injury to* brute animals the loweft, but
' for *injury to* human creatures the middle,
' amercement.

285. ' T H E breaker of a footbridge, of a pub'
' lick flag, of a palifade, and of idols *made of*
' *clay*, fhall repair what he has broken, and pay
' a mulct of five hundred *panas*.

286. ' F O R mixing impure with pure com-
' modities, for piercing fine gems, *as diamonds*
' *or rubiest* and for boring *pearls or inferiour*
' *gems* improperly, the fine is the loweft of the
' three; *but damages muft always be paid*.

287. ' T H E man, who fhall 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. ' L E T the king place all prifons near a
' publick road, where offenders may be feen
' wretched or diffigured.

289. ' H I M, who breaks down a *publick*
' wall, him, who fills up a *publick* ditch, him,

' who throws down a *publick* gate, the king fhall
' fpeedily banifh.

290. ' FOR all facrifices to deftroy innocent
' men, the punifhment is a fine of two hundred
' *panas*; and for machinations with *poifonous*
' roots, and for the various *charms and* witch-
' eries *intended* to kill, by perfons not effecting
' their purpofe.

291. ' T H E 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 known
' landmarks, muft fuffer fuch corporal punifh-
' ment as will diffigure them;

292. ' But the moft pernicious of all de-
' ceivers is a goldfmith, who commits frauds:
' the king fhall 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. ' T H E king, and his council, his me-
' tfopolis, his realm, his treafure, and his army,
' together with his ally, are the feven members
' of his kingdom; *whence* it is called *Septanga*:

295. ' Among thofe feven members of a
' kingdom, let him confider the ruin of the
' firft, and fo forth in order, as the greateft ca-
' lamity';

296. ' Yet, in a fevenparted kingdom here below, there is no fupremacy among the feveral parts' from any preeminence in useful qualities: but all the parts muft reciprocally fupport each other, like the three ftaves 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 tranfacted, has the preeminence in that particular affair.

298. ' WHEN the king employs emiffaries, when he exerts power, when he regulates publick bufinefs, let him invariably know both his own ftrength and that of his enemy,

299. ' With all *their feveral* diftreffes and vices: let him then begin his operations, having maturely confidered the greater and left importance *of particular acts*:

300. ' Let him, *though frequently difappointed*, renew his operations, how fatigued foever, again and again: fince fortune always attends the man, who, *having begun well*, ftrenuoufly renews his efforts.

301. ' A L L the ages, called *Satya, Treta, Dwapara*, and *Cali*, depend on the conduct of the king; who is declared *in turn* to reprezent each of thofe ages :

302' ' Sleeping, he is the *Call* age; waking

'the *Dwapara*; exerting himself in action, the
' *Treta*; living virtuously, the *Satya*.

303. ' Of INDRA, of SU'RYA, of PAVANA,
' of YAMA, of VARUNA, of CHANDRA, of
' AGNI, and of PRIT'HIVI, let the king emulate
' the power and attributes.

30'. ' As INDRA sheds plentiful flowers
' during the four rainy months, thus let him,
' acting like the regent of clouds, rain just gra-
' tifications over his kingdom :

305. ' As SU'RYA with strong rays draws up
' the water during eight months, thus let him,
' performing the function of the sun, 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 emissaries:

307. ' As YAMA, at the appointed time,
' punishes friends and foes, *or those who revere,*
' *and those who contemn, him*, thus let the king,
' resembling the judge of departed spirits,
' punish offending subjects:

308. ' As VARUNA most assuredly binds the
' guilty in fatal cords, thus let him, represent-
' ing the genius of water, keep offenders in
' close confinement:

309. ' When the people are no less delighted
' on seeing the king, than on seeing the full

' moon, he appears in the character of CHAN-
' DRA:

310. ' Againſt criminals let him ever be ar-
' dent in wrath, let him be ſplendid in glory,
Met him confume wicked miniſters, thus
' emulating the functions of AGNI, regent of
' fire.

311. ' As PRĪT'HIVĪ ſupports all creatures
' equally, thus a king, ſuſtaining all ſubjects,
' reſembles in his office the gods of earth.

312. ' Engaged in theſe duties and in others;
' with continual activity, let the king *above all*
' *things* refrain robbers, both in his own terri-
' tories and in thoſe of other princes, *from which*
' *they come, or in which they ſeek refuge.*

313. ' L E T him not, although in the great-
' eſt diſtreſs *for money*, provoke *Brahmens* to
' anger *by taking their property*, for they, once
' enraged, could immediately *by ſacrifices and*
' *imprecations* deſtroy him with his troops, ele-
' phants, horſes and cars,

314. ' Who, without perſiſhing, could pro-
' voke thoſe holy men, by whom, *that is, by*
' *whoſe anceſtors, under BRAHMA*, the alldē-
' vouring fire was created, the ſea with waters
' not drinkable, and the moon with its wane
' and increaſe ?

315. ' What prince could gain wealth by
' oppreſſing thoſe, who, if angry, could Tramp

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

316. ' What man, desirous of life, would
'injure those, by the aid of whom, *that is, by*
' *who/e oblations*, worlds and gods perpetually
'subsist; those who are rich in the learning of
'the *veda*?

317. ' A *Brahmen*, whether learned or igno-
'rant, is a powerful divinity; even as fire is a
'powerful divinity, whether consecrated or
'popular.

318. ' Even in places for burning the dead,
'the bright fire is undefiled; and, when pre-
sented with clarified butter *at subsequent* sacri-
'fices, blazes again with extreme splendour:

319? ' Thus, although *Brahmens* employ
'themselves in all sorts of mean occupation,
'they must invariably be honoured; for they
'are something transcendently divine.

320. ' Of a military man, who raises his
'arm violently on all occasions against the
'priestly class, the priest himself (shall be the
'chastiser; since the soldier originally proceed-
'ed from the *Bráhmen*.

321. ' From the waters arose fire; from the
'priest, the soldier; from stone, iron: their all-
'penetrating force is ineffectual in the places,
'whence they respectively sprang.

322. ' The military class cannot prosper

CHAPTER THE TENTH.

On the mixed Claffes ; and on Times of Distrefs.

1. ' LET the three twiceborn claffes, remain-
' ing firm in their feveral duties, carefully read
' the *Veda*; but a *Brahmen* muft explain it to
' them, not a *man of* the other two *claffes*; this
' is an eftablifhed rule.

2. ' The *Brahmen* muft know the means of
' fubfiftence ordained by law for all the claffes,
' and muft declare them to the reft: let him-
' felf likewife aft 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 *Brahmen* is the lord of all
' claffes.

' The three twiceborn claffes are the fa-
' cerdotal, the military, and the commercial;
' but the fourth, or fervile, is onceborn, *that is*,
' *has nofecond birth from the gayatri, 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 to be confidered as the fame in clafs *with their 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, Murdhabbhifhicta, Mahifhya, and Carana, or Cayaft'ha; and their feveral employments are teaching military exercifes; mufick, aftronomy, and keeping herds, and attendance on princes.*

7. Such is the primeval rule for the fons of women one degree lower *than their hufbands*: for the fons of women two or three degrees lower, let this rule of law be known,

8. From a *Brahmen*, on a wife of the *Vaifya* clafs, is born a fon called *Ambajhfba*, or *Vaidya*, on a *Sudra* wife a *Nifhada*, named alfo *Pdrafava*:

9. From a *Cfhatriya*, on a wife of the *Sudra* clafs, fprings a creature, called *Ugra*, with a nature partly warlike and partly fervile, ferocious in his manners, cruel in his acts.

10. The fons of a *Brahmen* by women of three lower claffes, of a *Cfhatriya* by women of two, and of a *Vaifya* by one lower clafs, are

without the facerdotal, nor can the facerdotal be raised without the military: both classes, by cordial union, are exalted in this world and in the next'

323. ' SHOULD the king be *near his end through some incurable disease*, he must bestow on the priests all his riches accumulated from legal fines; and, having duly committed his kingdom to his son, let him seek death in battle, or, *if there be no war, by abstaining from food*.

32'. ' Thus conducting himself, and ever firm in discharging his royal duties, let the king employ all his ministers in acts beneficial to his people.

325. ' These rules for the conduct of a military man having been propounded, let mankind next hear the rules for the commercial and fervile classes in due order,

326. ' LET the *Vaijya*, having been girt with his proper sacrificial thread, and having married an equal wife, be always attentive to his business *of agriculture and trade*, and to that of keeping cattle;

327. ' Since the lord of created beings, having formed herd, and flocks, intrusted them to the care of the *Vaishya*, while he intrusted the whole human species to the *Brahmen* and the *Cshatriya*:

328. ' Never must a *Vaishya* be disposed to say,

" ON THE SAME AND ON THE

" I keep no cattle;¹ nor, he being willing to
' keep them, muſt they by any means be kept
' by men of another claſs!

329. ' Of gems, pearls, and coral, of iron,
' of woven cloth, of perfumes and of liquids, let
' him well know the prices both high and low:

330... ' Let him be killed likewiſe *in the time*
' *and manner of fowing* feeds, and in the bad OF
' good qualities of land; let him alſo perfectly
' know the correct modes of meaſuring and
' weighing,

331. ' The excellence or defects of commo-
' dities, the advantages and diſadvantages of
' different regions, the probable gain or loſs on
' vendible goods, and the means of breeding
' cattle with large augmentation:

332. ' Let him know the juſt wages offer-
' vants, the various dialects of men, the beſt
' way of keeping goods, and *whatever elſe be-*
' *longs to* purchaſe and ſale.

333. ' Let him apply the moſt vigilant care
' to augment his wealth by *performing* his duty ;
' and, with great ſolicitude, let him give nou-
' riſhment to all ſentient creatures.

334. ' SERVICE attendance on *Brahmens*
' learned in the *Veda*, chiefly on ſuch as keep
' houſe and are famed for virtue, is of itſelf the
' higheſt duty of a *Sudra*, and leads him to
' future beatitude;

335. ' Pure *in body and mind*, humbly ferving
' the three higher classes, mild in speech, never
' arrogant, ever seeking refuge in *Brahmens*
' principally, he may attain the most eminent
' class *in another transmigration*,

336. ' THIS clear system of duties has been
' promulgated for the four classes, when they
' are not in distress for subsistence; now learn
' in order their several duties in times of necessity.'

called *apafadab*, or degraded *below their fathers*.

11. ' From a *Cfbatriya*, by a *Bradhmeni* wife, springs a Suta by birth; from a *Vaifya*, by a military or facerdotal wife, spring a *Magadha* and a *Vaidēha*,

12. ' From a *Súdra*, on women of the commercial, military, and priestly classes, are born sons of a mixed breed' called *A'yogava*, *Cfhatttri*, and *Chandala*) the lowest of mortals.

13. ' As the *Ambafht'ha* and *Ugra*, born in a direct order with one class between *those of their parents*, are considered in law, so are the *Cfhatttri* and the *Vaideha*, born in an inverse order with one *intermediate class*; and all four may be touched without impurity.

14. ' Those sons of the twiceborn, who are begotten on women without an interval (*Antara*) between the classes mentioned in order, the wife called *Anantaras*, giving them a *distinct* name from the lower degree of their mothers.

15. ' From a *Brahmen*, by a girl of the *Ugra* tribe, is born an *A'vrita*; by one of the *Ambafht'ha* tribe, an *Abhira*; by one of the *A'yogava* tribe, a *Dhigvana*.

16. ' The *Ayogava*, the *Cfhatttri*, and the *Chandala*, the lowest of men, spring from a *sudra* in an inverse order of the classes, and

' are, *therefore*, all three excluded *front the performance of obsequies to their anceftors*:

17. ' From a *Vaifya* the *Magadha* and *Vatdeba*, from a *Cfhatriya* the *Suta* only, are born in an *inverfe* order; and they are three others excluded *from funeral rites to their fathers*.

18. ' The fon of a *Nifhada*, by a woman of the *Súdra* clafs, is by tribe a *Puccafa*; but the fon of a *Sudra* by a *Nifhadi*) woman, is named *Cuccutaca*.

19. ' One, born of a *Cfhatttri* by an *Ugra*, is called *Swapaca*; and one, begotten by a *Vaideha* on an *Ambafhthi* wife, is called *Vena*.

20. ' Thofe, whom the twiceborn beget, on women of equal claffes, but who perform not the proper ceremonies of *affuming the thread, and the like*, people denominate *vratyas*, or excluded from the *gayatri*

21. ' From fuch an outcaft *Bráhmén* fprings a fon of a finful nature, *who in different countries* is named a *Bhurjacantaca*, an *A'vantya*, a *Vatadhana*, a *Pufhpadha*, and a *Saic'ha*:

22. ' From fuch an outcaft *Cfhatriya* comes a fon called a *f'halla*, a *Malta*, a *Nich'hivi*, a *Nata*, a *Carana*, a *Chafa*, and a *Dravira*:

23. ' From fuch an outcaft *Vaifya* is born a fon called *Sudhanwan*, *Charya*, *Carufha*, *Vi-janman*, *Maitra*, and *Satwata*.

24. ' By intermixtures of the claffes, by their

marriages With Women who ought not to be married, and by their omission of prescribed duties, impure classes have been formed.

25 THOSE men of mingled births, who were born in the inverse order of classes, and who intermarry among themselves, I will now compendiously describe.

26. The *Suta*, the *Vaidiha*, and the *Chan'data*, that lowest of mortals, the *Magadha*, the *Cshattri* by tribe, and the *Ayogava*,

27. These fix beget similar sons on women of their own classes, or on women of the same class with their mothers; and they produce the like from women of the two highest classes, *and of the lowest*;

28. As a twiceborn son may spring from at *Brahmen*, by women of two classes out of three, a *similar son*, when there is no interval', and an *equal son* from a woman of his own class, it is thus in the case of the low tribes in order'

29. Those fix beget, on women of their own tribes' reciprocally, very many despicable and abject races even more foul than their begetters'

30. Even as a *Siidra* begets, on a *Brahmeril* woman, a son more vile than himself, thus any other low man begets, on *woman of the four classes*, a son yet lower,

31. 'The fix low clafles, marrying inverfely' beget fifteen yet lower tribes, the bafe producing ft ill bafe; *and in a direct order they produce fifteen more*'

32. 'A *Dajyù*, or outcaft of any pure clafs, begets on an *Ayógavi* woman a *Sairindhra*, who fhould know how to attend and to drefs his mafter; though not a flave, he muft live by flaviih work, and may alfo gain fubfiftence by catching wild beafts in toils:

33. 'A *Vaidéha* begets on her a fweetvoiced *Maitreyáca*, who, ringing a bell at the appearance of dawn, continually praifes great men:

34. 'A *Nifhada* begets on her a *Margava*, or *Dafa*, who fubfifts by his labour in boats, and is named *Caiverta* by thofe, who dwell in *A'rydverta*, or the land of the venerable.

35. 'Thofe three of a bafe tribe are feverally begotten on *Ayógavi* women, who wear the clothes of the deceafed and eat reprehenfible food.

36. 'From a *Nifodda* fprings by a woman of the *Vaideha* tribe, a *Caravara*, who cuts leather, and from a *Vaideha* ifpring by women of the *Cáravara* and *Niih'da cajls*, an *Andhra* and a *Mida*, who muft live without the town.

37. 'From a *Chandda*, by a *Vaidih* woman, comes a *Pandufopaca*, who works with cane

' and reeds; arid" from a *Nishada*, an *Ahinaica*)
 ' who acts as a jailor'

38. ' From a *Chandala*, by a *Puecasi* woman,
 ' is born a *Sopaca*, Who lives by punifhing crimi-
 ' nals condemned by the king, a finful wretch
 ' ever defpised by the virtuous

39. ' A *Nishadi* woman, by a *Chandala*, pro-
 ' duces a Ton called *Antyavafayin*, employed in
 ' places for burning the dead, ctontefinned even
 ' by the contemptible.

40. ' Thefe, among various mixed clafles,
 ' have been defcrib'd by their feveral fathers
 ' and mothers; and, whether concealed or open,
 ' they may be known by their occupations.

41. ' Six fons, *three* begotten on women of
 ' the fame clafs, and *three* 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 *Sudras*.

42. ' 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.

43. ' T H E following races of *Cshatriyas*, by
 ' their omiffion of holy rites and by feeing no
 ' *Brahmens*, have gradually funk among men to
 ' the loweft of the four claffes:

44. ' *Pāund' racas, Odras, and Draviras; Cambojas, Yavanas, and Sacas; Baradas, Pahlavas, Chinas, Ciratas, Deradas, and C'hafas.* -

45. ' All those tribes of men, who sprang from the mouth, the arm, the thigh, and the foot of BRAHMA', but who became outcasts by having neglected their duties, are called *Dasyus*, or *plunderers*, whether they speak the language of *Mlehc'* has, or that of *Aryas*.

46. ' THOSE sons of the twiceborn, who are said to be degraded, and who are considered as lowborn, shall subsist Only by such employments, as the twiceborn despise.

47. ' *Sutas* must live by managing horses and by driving cars; *Ambajhshas*, by curing disorders; *Vaidehas*, by waiting on women; *Mdgadhas*, by travelling with merchandise;

48. ' *Nishadas*, by catching fish; an *A'yogava*, by the work of a carpenter; a *Meda*, an *Andhra*, and (the sons of a *Brahmen* by wives of the *Vaideha* and *Ugra* classes, respectively called) a *Chunchu* and a *Madgu*, by flaying beasts of the forest;

49. ' A *CJhatti*, an *Ugra*, and a *Puccasa*, by killing or confining such animals as live in holes: *Dhigvanas*, by felling leather; *Venas*, by striking musical instruments:

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. ' T H E abode of a *Chandala* and a *Swapaca* muft be out of the town; they muft not have the ufe of entire veffels; their fole wealth 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 plate:

53. ' Let no man, who regards his duty religious 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 pottsherds, but not by the hands of the giver; and let them not walk by night in cities or towns:

55. ' By day they may walk about for the purpofe of work, diftinguifhed by the king's badges; and they fhall carry out the corpfes of every one, who dies without kindred: fuch is the fixed rule'

56. ' 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 ornaments.

57. ' H I M , who was born of a finful mother, *and confequently* in a low elafs, but is not openly known, who, though worthlefs in truth, bears the femblance of a worthy man, let people difcover by his acts:

58. ' Want of virtuous dignity, harfhnefs of fpeech, cruelty, and habitual neglect of prefcribed duties, betray in this world the fon of a criminal mother.

59. ' Whether a man of debafed birth affume the character of his father or of his mother, he can at no time conceal his origin:

60. ' He, whofe family had been exalted, but whofe parents were criminal in marrying, has a bafe nature, according as the offence *of his mother* was great or fmall.

61. ' In whatever country fuch men are born, as deftroy the purity of the four claffes, that country foon perifhes together with the natives of it.

62. ' Defertion of life, without reward, for the fake of preierving a prieft or a cow, a woman or a child, may caufe the beatitude of thofe bafeborn tribes.

63. 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.

6'. ' SHOULD the tribe fprung from a *Brah-*
' *men*, by a *Sudra* woman, produce *afuccejjion of*
' *children* by the marriages of its women with
' other *Brahmens*, the low tribe fhall be raifed
' to the higheft in the feventh generation.

65. ' As the fon of a *Súdra* may *thus* attain
' the rank of a *Brahmen*, and as the fon of a
' *Brahmen* may fink to a level with *Sudras*, even
' fo muft it be with him, who fprings from a
' *CJhatriya*; even fo with him, who was bom
' of a *Vaifya*'

66. ' IF there be a doubt, as to the preference
' between him, who was begotten by a *Bráhmén*
' for his pleafure, *but not in wedlock*, on a *Súdra*
' woman, and him, who was begotten by a
' *Sudra* on a *Brdhmeni*,

67. ' Thus is it removed: he, who was be-
' gotten by an exalted man on a bafe woman,
' may by his good ads become refpedable; but
' he, who was begotten on an exalted woman
' by a bafe man, muft 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.

69. ' As good grain, fpringing from good foil, is in all respects excellent, thus a man, fpringing from a respectable father by a respectable mother, has a claim to the whole institution 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 perifhes, and a good field with no grain fown in it, is a mere heap of clods;

72. ' But fince, by the virtue of eminent fathers, even the fons of wild animals, as Rífhyafringa, and others, have been transformed into holy men revered and extolled, the paternal 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 *Sudra*, faid: " Thofe two are neither equal nor unequal," *that is, they are neither equal in rank, nor unequal in bad conduct.*

74. ' L E T fuch *Brahmens* 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 others to read them, facrificing, and affifting others to

' sacrifice, giving to the poor, if themselves have
' enough, and accepting gifts from the virtuous' if
' themselves are poor, are the fix prescribed acts
' of the firstborn class;

76, ' But, among those fix acts of a *Brahmen*,
' three are his *means of subsistence*; assisting to
' sacrifice, teaching the *Vedas*, and receiving
' gifts from a purehanded giver.

77, ' Three acts of duty cease with the *Brah-*
' *men*, and belong not to the *Cshatriya*; teaching
' the *Vedas*, officiating at a sacrifice, and, thirdly,
' receiving presents;

78, ' Those three are also (by the fixed rule'
' of law) forbidden to the *Vaishya*; since MENU,
' the lord of all men, prescribed not those acts to
' the two *classes, military and commercial*.

79, ' The means of subsistence, peculiar to
' the *Cshatriya*, are bearing arms, either held for
' striking or missile; to the *Vaishya*, merchandize,
' attending on cattle, and agriculture; but *with*
' a view to the next life the duties of both are
' almsgiving, reading, sacrificing.

80, ' Among the several occupations. *gain*'
' *ing a livelihood* the most commendable respect-
' ively for the sacerdotal, military, and mercan-
' tile classes, are teaching the *Veda*, defending
' the people, and commerce of keeping herds
' and flocks.

81. ' Yet a *Brahmen*, unable to subsist by hi'

' 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 per/on* to tillage and attendance or' cattle:

83. ' But a *Brahmen* and a *Cshatriya*, obliged
' to fubfift by the acts of a *Vaifya*, muft: avoid
' with care, *if they can live by keeping herds*, the
' bufinefs of tillage, which gives great pain to
' *fentient creatures*, and is dependant on *the la-*
' *hour* pothers, *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
' wealth by felling commodities, ufually fold
by merchants, avoiding what ought to be
' avoided:

86. ' They muft avoid felling liquids of all
forts, dreffed grain, feeds of *tila*, ftones, fait,
cattle and human creatures;

87. ' All woven cloth dyed red, cloth made
of *fana*, of *cshuma* bark, and of wool, even

72 ON THE MIXED CLASSES; AND

though not red; fruit' roots, and medicinal
'plants;;

88. ' Water, iron, poifon, flefhmeat, the
' moonplant, and perfumes of any fort; milk,
' honey, buttermilk, clarified butter, oil of *tila*,
' waxi fugar, and blades of cus'a-grafs;

89. ' All beafts of the foreft, *as deer and the,*
' *like;* ravenous beafts, birds, *and fish'* fpi-
' ritqous liquors, nili, or indigo, and *lacjha*,
' or lac; and all beafts with uncloven hoofs.

90. ' But the *Brahmen* hufbandman may at
' pleafure fell pure *tila* feeds for the purpofe of
' holy rites; if he keep them not long *with a hope*
' *of more gain*, and fhall have produced then
' by his own culture;

91. ' If he apply feeds of *tila* to any purpofe
' but food, anointing, and facred oblations, he
' fhall be plunged, in the fhape of a worm, to«
' gether with his parents, into the ordure of dogs.

92. ' By felling flefhmeat, *lacsha*, or falt, a
' *Brahmen* immediately finks low; by felling
' milk three days, he falls to a level with a
' *Sudra*;

93. ' And by felling the other forbidden
' commodities with his own free will, he affumes
' in this world, after feven nights, the nature of
' a mere *Vaifya*.

9'. ' Fluid things may, however, be bartered
' ! for other fluids, but not fait 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 diftreff, may
 ' fubfift by all thefe means, but at no time muft
 ' he have recourfe to the higheft, or *facer dotal*,
 ' function.

96. ' A man of the loweft clafs, who,
 ' through covetoufnefs, lives by the ads of the
 ' higheft, let the king ftrip of all his wealth and
 ' instantly banifh:

97. ' His own office, though defectively per-
 ' formed, is preferable to that of another,
 ' though performed completely; for he, who
 ' *without neceffity* difcharges the duties of an-
 ' other clafs, immediately forfeits his own.

98. ' A MERCANTILE man, unable to fubfift
 ' by his own duties, may defcend even to the
 ' fervile acts of a *Sudra*, 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

' those various practical arts, *as painting and writing*, by following which, lie may ferve the
' twiceborn,

101. ' SHOULD a *Brahmen*, 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 act in
' this manner;

102. ' The *Brahmen*, having fallen into dif-
' treis, may receive gifts from any perfon what-
' ever; for by no facred rule can it be fhown,
' that abfolute purity can be fullied.

103. ' From interpreting the *Veda*, from offi-
' ciating at facrifices, or *from* taking prefents,
' though in modes generally difappropyed, no fin
' is committed by priests *in diftreff*; for they are
' pure as fire or water.

104. ' He, who receives food, when his life
' could not otherwife he fustained, from any
' man whatever, is no more tainted by fin, than
' the fubtil ether by mud;

105. ' AJIGARTA, dying with hunger, was
' going to deftroy his own fon (*named S'UNAH-
' S'E'P'HA*) by *felling him for fome cattle*; yet he
' was guilty of no crime, fince he only fought a
' remedy againft famifhing:

106. ' VA'MADE'VA, who well knew right
' and wrong, was by no means rendered impure'
' though defirous, when oppreffed *with hunger*,

of eating the flesh of dogs for the preformation of his life:

107. ' BHARADWA'JA, eminent in devotion, when he and his son were almost starved in a dreary forest, accepted several cows from the carpenter VRIDHU:

108. ' VISWA'MITRA too, than whom none better knew: the distinctions between virtue and vice, resolved, when he was perishing with hunger, to eat the haunch of a dog, which he had received from a *Chandala*'

109. ' Among the acts generally disapproved), namely', accepting presents from low men, affixing them to sacrifice, and explaining the scripture to them, the receipt of presents is the meanest in this world, and the most blamed in a Brahmen after his present life;

110, ' Because affixing to sacrifice and explaining the scripture are two acts always performed for those, whose minds have been improved by the sacred initiation; but gifts are also received from a fervile man of the lowest class.

111. ' The guilt, incurred by affixing low men to sacrifice and by teaching them the scripture, is removed by repetitions of the *gayatri* and oblations to fire; but that, incurred by accepting gifts from them, is expiated only

' by abandoning the gifts and by rigorous devotion.

112. ' It were better for a *Brahmen*, who could not maintain himself, to glean ears and grains after jbarveft from *the field of any perfon* whatever: gleaning whole ears would be better than accepting a prefent, and picking up fingle grains would be fill more laudable.

113. ' *Brdhmens*, 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 clafs; but a king, *known to be avaricious and unwilling to* give, muft not be folicted.

114. ' 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, drefled grain.

115. ' THERE are feven virtuous means of acquiring property; fucceffion, occupancy or donation, and purchafe or exchange, *which are allowed to allclafes*; conquelt, *which is peculiar to the military clafs* lending at intereft, husbandry or commerce, *which belong to the mercantile clafs*; and acceptance of prefents, *by the facer dotal clafs*, from respectable men.

116 ' Learning, *except that contained in the*

fcripturees, art, as mixing perfumes and the like, work for wages, menial fervice, attendance on cattle, traffick, agriculture, content with little, alms, and receiving high intereft on money, are ten modes of fubfiftence in times of diftreffs.

117. Neither a prieft nor a military man, though *dijlreffed*, muft 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 demands it.*

118. A MILITARY king, who takes even a fourth part of the crops of his realm at a time of urgent neceffity, 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 muft not recede from battle; fo that, while he defends by his arms the merchant and husbandman, he may levy the legal tax as the price of protection.

120. The tax on the mercantile clafs, which in times of profferity muft be only a twelfth part of their crops, and a fiftieth of their perfonal profits, may be an eighth of their crops in a time of *dijlreffs*, 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 *Siidra* want a fubfiftence and cannot attend a *prieft*, he may ferve a *CJha~triya* or, if he cannot wait on a foldier by birth, he may gain his livelihood by ferving an opulent *Vaifya*.

122. To him, who ferves *Brdhmens* with a view to a heavenly reward, or even with a view to both *this life and the next*, the union of the word *Brahmen* with his name of *fervant* will affuredly bring fuccefs.

123. Attendance on *Brdhmens* is pronounced the beft work of a *Siidra*: whatever elfe he may perform will comparatively avail him nothing.

124. They muft allot him a fit maintenance 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 inveft-

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

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

128. ' As a *Súdra*, without injuring another
 ' man, performs the *lawful acts* of the twice-
 ' born, even thus, without being censured, he
 ' gains exaltation in this world and in the
 ' next,

129. ' No *superfluous* collection of wealth
 ' must be made by a *Sudra*, even though he
 ' has power to *make it*, since a fervile man,
 ' who has *amassed riches, becomes proud, and,*
 ' *by his insolence or neglect, gives pain even to*
 ' *Brahmens.*

130- ' Such, as have been fully declared,
 ' are the several duties of the four classes in dis-
 ' tress for subsistence; and, if they perform
 ' them exactly, they shall attain the highest
 ' beatitude.

13'. ' Thus has been propounded the ty-
' ftem of duties, religious and civil, ordained
' for all clafles: I next will declare the pure fow
' of expiation for fin/

CHAPTER THE ELEVENTH.

On Penance and Expiation'

1. ' H l M , who intends to marry for the
' lake of havitig iflue; him, who wifhes to
' make a facrifice; 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 fir ft reads the
' *Vedas*, and him, who is afflicted with illnefs;

2. ' Thefe nine *Brdbmens* let mankind con-
' fider as virtuous mendicants, called *fn dtacas*;
' 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 *Brahmen'* muft
' rice alfo be given with holy prefents *at obla-*
' *tions to fire and within the con/aerated circle*;
' but the dreffed rice, which others are to re-
' ceive, mult be delivered on the outfide of the
' facred hearth: *gold and the like may be given*
' *any where.*

4. ' On fuch *Brabntens*, as well know the

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

5. ' H E , who has a wife, and, having begged money to *defray his nuptial expences*, marries another woman, fhall have no advantage but fenfual enjoyment: the offspring belongs to the beftower of the gift.

6. ' L E T every man, according to his ability, give wealth to *Brdhmens* detached from the world and learned in fcripture: fuch a giver fhall attain heaven after this life.

7. ' H E 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 nourifh, 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 juice of the moonplant, fhall gather no fruit from that facrament, even though he tafte it at the firft, or *folemn*, much lefs at any *occasional*, ceremony.

9. ' H E , who beftows gifts on ftrangers *with a view to worldly fame*, while he fuffers his family to live in diftreffes, though he has power to *fupport them*, touches his lips with honey, but fwallows poifon; fuch virtue is counterfeit:

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.

11. ' SHOULD a facrifice, performed by any
' twiceborn facrificer, and by a *Brahmen* 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
1 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 *Sudra*; fince a
' *Sudra* has no bufinefs with folemn rites.

1'. ' Even from the houfe of a *Brahmen* or
' a *Cfhatriya*, who poffeffes a hundred cows,
' but has no confecrated fire, or a thoufand
' cows, but performs no facrifice *with the moon-*
' *plant* 1 let a pried without fcruple take *the*
' *articles* wanted.

15. ' From another *Brahmen*, who continu-
' ally receives prefents but never gives, let him
' take fuch ingredients of the facrifice, if not

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

16. ' Thus, likewife, may a *Bráhmén*, who
' has not eaten at the time of fix meals, *or has*
' *fajled three whole days*, take at the time of the
¹ feventh meal, *or on the fourth morning*, from
' the man, who behaves bafely *by not offering*
' *him 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 hulk, or from
' the field, or from the houfe, or from any
' place whatever; but, if the owner afk *why he*
' *takes it*, the caufe of the taking muft be de-
' clared.

18. ' The wealth of a virtuous *Bráhmén*
' muft at no time be feized by a *Cjhatriya*'
' but, having no other means *to complete afacri-*
' *fee*, 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,
' and carries both *the good and the bad* over *afea*
' *of calamities*.

20. ' Wealth, poffeffed by men for the per-
' 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. ⁱ Let no pious king fine the man, *who*
' *takes by Jiealth 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
' *Bráhmén*:

22. ' Having reckoned up the perfons, whom
' the *Brahmén* is obliged to fupport, having af-
' certained his divine knowledge and moral
' conduit, let the king allow him a fuitable
' maintenance from his own houfehold;

23. ' And, having appointed him a mainte-
' nance, let the king proteft him on all fides;
' for he gains from the *Bráhmén*, whom he pro-
' tects, a fixth part of *the reward for his virtue*.

24. ⁱ L E T no *Brahmén* ever beg a gift from
' a *Súdra*; for, if he perform a facrifice after
' fuch begging, he (hall, in the next life, be
' born a *Chandála*.

25. ' The *Brahmén*, who begs any articles
' for a facrifice, and difpofes not of them all for
' that purpofè, (hall become a kite or a crow
' for a hundred years.

26. ' Any evilhearted wretch, who, through
' covetoufnefs, (hall feize the property of the
' gods or of *Brahmens*, (hall feed in another
' world on the orts of vultures'

27. ' T H E sacrifice *Vaifuydnari* must be constantly performed on the first day of the new year, or on the new moon of *Cbaitra*, as an expiation for having omitted *through mere forgetfulness* the appointed sacrifices of cattle and the rites of the moonplant:

28. ' But a twiceborn man, who, without necessity, does an act allowed only in a case of necessity, reaps no fruit from it hereafter: thus has it been decided.

29. ' By the *Vifwedevas*, by the *Sddbyas*, and by eminent *Rishis* of the sacerdotal class, the substitute was adopted for the principal act, when they were apprehensive of dying in times of eminent peril;

30. ' But no reward is prepared in a future state for that illminded man' who, when able to perform the principal sacrifice, has recourse to the substitute,

31. ' A PRIEST, who well knows the law, needs not complain to the king of any grievous injury' since, even by his own power, he may chastise those, who injure him:

32. ' His own power, *'which depends on himself alone*, is mightier than the royal power, *'which depends on other men*: by his own might, therefore, may a *Brahmen* coerce his foes'

33. ' He may use, without hesitation, the powerful charms revealed to AT'HARVAN, and

' by him to ANGIRAS; for speech is the weapon
' of a *Brahmen*: with that he may destroy his
' oppressors.

34. ' A foldier may avert danger from him-
' self by the strength of his arm; a merchant
' and a mechanick, by their property; but the
' chief of the twiceborn, by holy texts and ob-
' lations to fire.

35. ' A priest, who performs his duties, who
' justly corrects *his children and pupils*, who ad-
' vifes expiations for (in, and who loves all ani-
' mated creatures, is truly called a *Bráhmén*: to
' him let no man say any thing unpropitious,
' nor use any offensive language.

36. ' Let not a girl, nor a young woman
' married or unmarried, nor a man with little
' learning, nor a dunce, perform an oblation to
' fire; nor a man diseased, nor one uninvested
' with the *sacred string*;

37. ' Since any of those persons, who make
' such an oblation, shall fall into a region of
' torture, together with him, who suffers his
' hearth to be used: he alone, who perfectly
' knows the sacred ordinances, and has read all
' the *Vedas*, must officiate at an oblation to holy
' fire.

38. ' A *Brdhmen* with abundant wealth, who
' presents not the priest, that hallows his fire,
' with a horse consecrated to PRAJA'PATI,

' becomes equal to one who has no fire hal-
' lowed,

39. ' Let him, who believes the scripture,
and keeps his organs in subjection, perform
' all other pious acts; but never in this world
' let him offer a sacrifice with trifling gifts to
' the officiating priest::

40. ' The organs of sense and action, repu-
' tation *in this life*, a heavenly mansion *in the*
' *next*, life *itself* a great name *after death's* chil-
' dren, and cattle, are all destroyed by a sacri-
' fice offered with trifling presents; let no man,
' therefore, sacrifice without liberal gifts.

' 1. ' T H E priest, who keeps a sacred hearth,
' but voluntarily neglects *the morning and even-*
' *ing oblations* to his fires, must perform, *in the*
' *iqanner to be described*, the penance *chândrdyana*
' for one month ; since that *neglect* is equally
' sinful with the slaughter of a son.

, 42. ' They, who receive property from a
' *Sûdra* for the performance of rites to conse-
' crated fire, are condemned as ministers of the
' base, by all such as pronounce texts of the
' *Vêda:*

43' Of those ignorant priests, who serve
' the holy fire for the wealth of a *Sûdra*, the
' giver shall always tread on the foreheads, and
' thus pass over miseries *in th' gloom of death*.

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

' fcribed, or does an aft 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 *Veda*, 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'

'7. ' 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 penance remains unperformed'

48. ' Some evilminded perfbus, 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 *Brd/imen* has
' whitlows on his nails' a drinker of fpiritfl,
' black teeth; the flayer of a *Bráhmén*, a ma'
' rafmus ; the violator of his *gurus* 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;
 ' 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 mifcliievous extinguifher of it, blindnefs
 ' in one eye; a delighter in hurting fentient
 ' creatures, perpetual illnefs; an adulterer,
 ' windy fwelling in his limbs:

5.3." Thus, according to the diverfity of ac-
 ' tions, are born mendefpifed 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 *Brahmen*, drinking for-
 ' bidden liquor, ftealing gold from a prieft,
 ' 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 boafing of a high tribe, malig-
 ' nant information, before the king, of a crimU

' nal who muſt ſuffer death, and ſelfely accuſinga.
' ſpiritual preceptor, are crimes in the ſecond de-
' gree, and nearly equal to killing a *Bráhmén*'

57. ' Forgetting the texts of ſcripture, (how-
' ing contempt of the *Féda*, giving falſe evi-
' dence without a bad motive, killing a friend
' without malice, eating things prohibited, or,
' from their manifeſt impurity, unfit to be taſted,
' are fix crimes nearly equal to drinking (pínts;
' but perjury and homicide require in atrocious cafes
' the *harjhejt* expiation.

58. ' To appropriate a thing depofited or
' lent for a time, a human creature, a horſe,
' precious metals, a field, a diamond, or any
' other gem, is nearly equal to Healing the gold
' of a *Bráhmén*.

59. ' Carnal commerce with fiſters by the
' ſame mother, with little girls, with women
' of the loweſt mixed claſs, or with the wives
' of a friend or of a ſon, the wife muſt confider
' as nearly equal to a violation of the paternal
' bed,

60. ' SLAYING a bull or cow, ſacrificing
' what ought not to be ſacrificed; adultery, fell-
' ing oneſelf, deſerting a preceptor, a mother,
' a father, or a ſon, omitting to read the ſcrip-
' ture, and negled of the fires *preſcribed by the*
' *Dhermaſáſtra* only,

61. ' The marriage of a younger brother be-

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

62. ' Defiling a damsel, unfury, want of perfect chastity in a student, felling a holy pool or garden, a wife, or a child,

63., ' Omitting the sacred investiture, abandoning a kinsman, teaching the *Vêda* for hire, learning it from a hired teacher, felling commodities, that ought not to be sold,

64. ' Working in mines of any sort, engaging in *dykes, bridges, or other* great mechanical works, spoiling medicinal plants *repeatedly* substituting by *the harlotry of* a wife, offering sacrifices and preparing charms to destroy *the innocent*,

65. ' Cutting down green trees for firewood, performing holy rites with a selfish view merely, and eating prohibited food *once with'* *out a previous design*,

66. ' Neglecting to keep up the consecrated fire, stealing *any valuable thing besides gold*, nonpayment of *the three* debts, application to the books of a false religion, and excessive attention to music or dancing,

67. ' Stealing grain, base metals, or cattle, familiarity by *the twiceborn* with women, who have drunk inebriating liquor, killing *without*

' *malice*, a woman, a *Siidra*, a *Faifya*, or a *CJba-*
' *triya*, and denying a future state of rewards
' and punishments, are all crimes in the third
' degree, *but higher or lower according to circum-*
' *stances*.

68. ' GIVING pain to a *Brdhmen*, smelling at
' any spirituous liquor or any thing *extremely*
' *fetid and* unfit to be smelt, cheating, and un-
' natural practices with a male, are considered
' as causing a loss of casts.

69. ' To kill an ass, a horse, a camel, a deer,
' an elephant, a goat, a sheep, a fish, a snake, or
' a buffalo, is declared an offence, which de-
' grades the killer to a mixed tribe,

70. ' ACCEPTING presents from despicable
' men, illegal traffick, attendance on a *Sudra*
' matter, and speaking falsehood, must be con-
' sidered as causes of exclusion from social re-
' pasts,

71. ' KILLING an insect, small or large, a
' worm, or a bird, eating what has been brought
' *in the same basket* with spirituous liquor, steal-
' ing fruit, wood, or flowers, and great pertur-
' bation of mind on trifling occasions, are of-
' fences which cause defilement'

72. ' You (shall now be completely instruct-
' ed in those penances, by which all the sins
' just mentioned are expiable.

73. ' IF a *Brdhmen* have killed a man of the

facerdotal claſs, without malice prepenſe, the flayer being far ſuperior to theſlain in good qualities muſt himſelf make a hut in a foreſt and dwell in it twelve whole years, ſubſiſting on alms for the purification of his foul, placing near him, as a token of his crime, the Jkull of theſlain, if he can procure it, or, if not, any human Jkull The time of penance for the three lower claſſes muſt be twenty four, thirty fix, and forty eight, years.

74 ' Or, if the flayer be of the military claſs, he may voluntarily expoſe himſelf as a mark to archers, who know his intention; or, according to circumſtances, may caſt himſelf headlong thrice, or even till he die, into blazing fire.

75. ' Or, if he be a king, and ſew a prieſt without malice or knowledge of his claſs, he may perform, with preſents of great wealth, one of the following ſacrifices; an Afwatnedha, or a Swerjit, or a Gofava, or an Abhijit, or a Vjfwajit, or a Trivr̥it, or an Agnijhtut.

76, ' Or, to expiate the guilt of killing a prieſt without knowing him and without deſign, the killer may walk on a pilgrimage a hundred yojanas, repeating any onq; of the Ve'das, eating barely enough to ſuſtain life, and keeping his organs in perfect ſubjection;

77. ' Or, if in that caſe the flayer be unlearned

'but rich, he may give all his property to some
' *Brahmen* learned in the *Veda*, or a sufficiency
' of wealth for his life, or a house and furniture
' to hold while he lives:

78. ' Or, eating only such wild grains as are
' offered to the gods, he may walk to the head
' of the river *Saraswat*) against the course of
' the stream; or, subsisting on very little food,
' he may thrice repeat the whole collection of
' *Vedas*, or the *Rich*, *Yajush*, and *Saman*.

79. ' Or, his hair being shorn, he may dwell
' near a town, or on pastureground for cows,
' or in some holy place, or at the root of a fa-
' cred tree, taking pleasure in doing good to
' cows and to *bráhwins*'

80. ' There, for the preservation of a cow
' or a *Brahmen*, let him instantly abandon life;
' since the preserver of a cow or a *Bráhmén*
' atones for the crime of killing a priest:

81. ' Or, by attempting at least three times
' forcibly to recover from robbers the property
' of a *Brahmen*, or by recovering it in one of
' his attacks, or even by losing his life in the
' attempt, he atones for his crime.

82. ' Thus, continually firm in religious
' austerity, chaste as a student in the first order,
' with his mind intent on virtue, he may ex-
' piate the guilt of undefigedly killing a *Bráhm'*
' *men*, after the twelfth year has expired.

83. ' Or, if a virtuous Brahmen *umntihtidn'*
 ' ally kill another' who had no goo At qualify, he
 ' may atone for his guilt by proclaiming it in
 ' an aflembly of priefts and military men, at
 ' the facrifice of a horfe, and by bathing with
 ' other *Brohmem* at the clofe of the facrifice:

84. ' *Brahmem* are declared to be the bads,
 ' and *Cfhatriyas* 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 *Brahmen*
 ' is an object of veneration even to deities: his
 ' declarations to mankind are decifive evidence;
 ' and the *Veda* itfelf confers on him that cha-
 ' rafter,

86. ' Three at leaft, who are learned in the
 ' *Véda*, (hould be aflembled to declare the proper
 ' expiation for the fin of a priejl, but, for the
 ' three other claffes, 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 *Brahmen*, who has performed
 ' one of the preceding expiations, according to
 ' the circumftances of the homicide and the cha-
 ' racters of the perfons killed and killings with his
 ' whole mind fixed on GOD, purifies his foul,
 ' and removes the guilt of flaying a man of his
 ' own clafs:

88' ' He muſt perform the ſame penance
' for killing an embryo' *the ſex of which was*
' unknown, but whoſe parents were *ſacerdotal,*
' or a military or a commercial man employed
' in a ſacrifice, or a *Bráhmarii* woman, who has
' bathed after temporary uncleaneſs;

89. ' And *the ſame* for giving falſe evidence
' in a *cauſe concerning land or gold or precious*
' commodities, and for accuſing his preceptor un-
' juſtly, and for appropriating a depoſit, and
' for killing the wife of a prieſt, *who keeps a*
' *conſecrated* ſre, or for flaying a friend'

90. ' Such is the atonement ordained for
' killing a prieſt *without malice*; but for killing
' a *Brahmen* with malice prepenſe, this is no
' expiation ; *the term of twelve years muſt be*
' *doubled, or, if the caſe was atrocious, the tñur'*
' *derer muji actually die in flames or in battle.*

91. ' A N Y twiceborn man, who has *inten'*
' *tionally* drunk ſpirit of rice, through perverſe
' deluſion of mind, may drink more ſpirit in
' flame, and atone for his offence by feverely
' burning his body;

92. ' Or he may drink boiling hot, until he
' die, the urine of a cow, or pure water, or
' milk, or clarified butter, or juice expreſſed'
' from cowdung ;

93- ' Or, *if he taſted it unknowingly,* he may
¹ expiate the (in of drinking ſpirituous liquor,

by eating only some broken rice or grains of *tila*, from which oil has been extracted, once every night for a whole year, wrapped in coarse vesture of hairs from a cow's tail, or *fitting unclothed in his house*, wearing his locks and beard uncut, and putting out the flag of a tavern-keeper,

94. Since the spirit of rice is *distilled from the Mala*, or filthy refuse, of the grain, and since *Mala* is also a name for sin, let no *Bráhmén*, *Cshatriya*, or *Vaishya* drink that spirit.

95. Inebriating liquor may be considered as of three *principal* sorts; that extracted from dregs of sugar, that extracted from bruised rice, and that extracted from the flowers of the *Madhuca*: as one, so are all; they shall not be tasted by the chief of the twiceborn.

96. Those liquors, and *eight* other sorts, with the flesh of animals, and *Aśava*, the most pernicious beverage, *prepared with narcotick drugs*, are swallowed at the juncations of *Yajñas*, *Racshasas*, and *Pitachas*: they shall not, therefore, be tasted by a *Brahmén*, who feeds on clarified butter offered to gods.

97. A *Bráhmén*, stupefied by drunkenness, might fall on something very impure, or might even, when intoxicated, pronounce a secret phrase of the *Veda*, or might do some other act, which ought not to be done.

98. ' When the divine fpirit, *or the fight of*
 ' *holy knowledge*, which has been infufed into
 ' his body, has once been fprinkled with any
 ' intoxicating liquor, even his prieftly charac-
 ' ter leaves him, and he finks to the low degree
 ' of a *Sudra*.

99. ' 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 fit-*
 1 *verna*.

100. ' H E, who has purloined the gold of a
 ' *Brdhmen*) muft haften to the king, and pro-
 ' claim his offence; adding, " Inflift on me
 " the punifhment due to my crime."

101. ' Then (hall the king himfelf, taking
 ' from him an iron mace, *which the criminal muft*
 ' *beaY on his Jhoulder*, ftrike him with it once ;
 ' and by that ftroke, *whether he die or be only*
 ' *left as dead*, the thief is releafed from fin : a
 ' *Brahmen* by rigid penance alone *can expiate*
 ' *that offence; another twiceborn man may alfo*
 ' *perform fuch a penance* at his election.

102. ' The twiceborn man, who defires to
 ' remove by auftere devotion the taint caufed
 ' by dealing gold, ipuft 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 *Bráhmen*.

103' ' By thefe expiations may the fwicebom
 ' atone for the guilt of ftealing gold from a
 ' prieftj but the fin of adultery with the wife;
 ' of a father, *natural orfpiritual*, they muft ex-
 ' piate by the following penances.

10'. ' HE, who *knowingly and aBually* has
 ' defiled the wife of his father, *the being of the*
 ' *fame clafs*, muft extend himfelf on a heated
 ' iron bed, loudly proclaiming his guilt; and,
 ' there embracing the red-hot iron image of a
 ' woman, he (hall 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 dired path toward
 ' the fouthweft, or the region of NIRRĪTI, un-
 ' til he fall dead on the ground:

106. ' Or, *if he had miftaken her for another*
 ' *woman*, he may perform for a whole year,
 ' with intenfe application of mind, the penance
 ' *prajapatya*, with part of a bed, *or a human*
 ' *bone*, in his hand, wrapped in vefturc of coaric
 ' 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 woman*, he may expiate the fin of vio-
 ' lating the bed of his father, by continuing the
 ' penance *chdndrdyana* for three months, al-
 ' ways mortifying his body by eating only 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 auftefities.

109. ' H E, who has committed the fmaller
 ' offence of killing a cow *without malice*, muft
 ' drink for the firft month barleycorns boiled
 ' foft in water; his head muft be fhaved en-
 ' tirely; and, covered with the hide of *the jlain*
 ' cow, he muft fix his abode on her late paf-
 ' ture ground:

110. ' He may eat a moderate quantity of
 ' *wild grains*, but without any factitious fait,
 ' 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:

i n . ' All day he muft wait on the herd,
 ' and ftand quaffing the duft raifed by *their*
 ' *hoofs*; at night, having fervilely attended aird
 ' 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 ftand; follow them, when
 ' they move together; and lie down by them,
 ' when they lie down;

113, ' Should a cow be fick or terrified by

' tigers or thieves, or fall, or ftick in mud, he muft relieve her by all poffible means:

114. ' In heat, in rain, or in cold, or while the blaft furiously rages, let him not feek his own fhelter, without firft (heltering 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 flock not being fo large, muft deliver all he poffeffes, to fuch as beft know the *Veda*.

118. ' T H E preceding penances, or that called *chándrayanci*) muft be performed for the abfolution of all twiceborn men, who have committed fins of the lower *or third* degree; except thofe, who have incurred the guilt of an *avacirna*;

119. ' But he, who has become *Avacirnú* muft facrifice *a black or a oneeyed afs*, by way of a meatoffering to NIRRITI, *patronejs of the fouth-weft*, 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 *ib* forth, to PAVANA, to INDRA,
 ' to VRĪHASPATI, and to AGNI, regents of
 ' wind) clouds, a planet, and fire.

121. 'A voluntary effusion, naturally or
 ' other wife, of that which may produce a man
 ' by a twiceborn youth during the time of his
 ' ftudentfhip or before marriage, has been pro-
 ' nounced *avacirna*, Or a violation of the rule
 ' prefcribed for the *fitjl* order, by fages, who
 ' knew the whole fyftem of duty, and uttered
 ' the words of the *Vēda*.

122. 'To the four deities of purification,
 ' MA'RUTA, INDRA, VRĪHASPATI, AGNI,
 ' goes all the divine light, which the *Vēda* had
 ' imparted, from the ftudent, who commits the
 ' foul fin *avacima*;

123. ' But, this crime having actually been
 ' committed, he muft go begging to feven
 ' houfes, clothed only with the hide of the *Jā-*
 ' *crificed* afs, and openly proclaiming his act:

12'. ' Eating a fingle meal begged from
 ' them, at the regular time of the day, that is,
 ' in the morning or evening, and bathing each
 ' day at the three *fāvanas*, he fhall be abfolved
 ' from his guilt at the end of one year.

125. ' H E , who has voluntarily committed
 ' any fin, which caufes a los of clafs, muft per-
 ' form the *tormenting* penance, *thence* called
 ' *fanfapana*; or the *prajapatya*, if he offended
 ' involuntarily.

126. ' FOR fins, which degrade to a mixed
 ' clafs, or exclude from fociety, the finner muft
 ' have recourfg to the *lunar* expiation *chdndrdy-*
 ' *ana* for one month: to atone for acts, which
 ' occafion defilement, he muft fwallow nothing
 ' for three days but hot barleygruel.

127. ' FOR killing *intentionally* a *virtuous*
 ' man of the military clafs, the penance muft be
 ' a fourth part of that ordained for killing a
 ' prieft; for killing a *Vaifya*, only an eighth;
 ' for killing a *Sudra*, who had been conftant in
 ' *dtfcharging* his duties, a fixteenth part:

128. ' But, if a *Brāhmen* kill a *CJhatriya*
 ' without malice, he muft, after a full perform-
 ' ance of his religious rites, give the priefts one
 ' bull together with a thoufand cows;

129. ' Or he may perform for three year's
 ' the penance for flaying a *Brāhmen*, mortify-
 ' ing his prgans of fenfation and action, letting
 ' his hair grow long, and living remote from
 ' the town, with the root of a tree for his man-
 ' fion,

130, ' If he kill *without malice* a *Vaifya*, who

' had a good moral character, he may perform the same penance for one year, or give the priests a hundred cows and a bull:

131. ' For six months must he perform this whole penance, if *without intention* he kill a *Súdra*; or he may give ten white cows and a bull to the priests.

132. ' If he kill *by design* a cat, or an ichneumon, the bird *Chajha*, or a frog, a dog, a lizard, an owl, or a crow, he must perform the *ordinary* penance required for the death of a *Súdra*, that is, the *ch añ dráy ana*:

133. ' Or, if he kill one of them undefectively, he may drink nothing but milk for three days and nights, or each flight walk a *yógan*, or thrice bathe in a river, or silently repeat the text on the divinity of water; that ;V, if he be disabled by real infirmity from performing the *firji* mentioned penances, he may have recourse to the next in order.

134. ' A *Brahmen*, if he kill a snake, must give to some priest a hoe, or ironbeaded stick; if an eunuch, a load of ricestraw, and a *má/ha* of lead;

135. ' If a boar, a pot of clarified butter; if the bird *tittiri* a *drona* of *tila* feeds: if a parrot, a fter two years old; if the waterbird *crauncba*, a fter aged three years:

136. ' If he kill a *goof*, or a *phenicopteros*, a

' *beron*, or cormorant, a bittern, a peacock, a
' ape, a hawk, or a kite, he muſt give a cow to
' ſome *Brahmen*:

137. ' If he kill a horſe, he muſt give a
' mantle; if an elephant, five black bulls; if a
' goat or a ſheep, one bull; if an afs, a calf one
' year old;

138. ' If he kill a carnivorous wild beaſt, he
' muſt give a cow with abundance of milk; if a
' wild bead not carnivorous, a fine heifer; and
' a *raſiicd* of gold, if he ſlay a camel r

139. ' If he kill a woman *of any claſs* caught
' in adultery, he muſt give as an expiation, in
' the direſt order of the four claſſes, a leathern
' pouch, a bow, a goat, and a ſheep.

140. ' Should a *Brahmen* be unable to expi-
' ate by gifts the fin of killing a ſnake and the
' reſt, he muſt atone for his guilt by perform-
' ing, on each occaſion, the penance *prajdpatya*.

141. ' For the Daughter of a thouſand ſmall
' animals which have bones, or for that of
' boneleſs animals enow to fill a cart, he muſt
' perform the *chandrayana*, or common penance
' for killing a *Siidra*;

142. ' But, for killing boned animals, he
' muſt alſo give ſome trifle, *as a pana of copper*,
' to a *Brahmen*: for killing thoſe without bones,
' he may be abſolved by holding his breath, *at*
' *the cloſe of his penance*, while he thrice repeats

' the *gâyatrî* with its *head*, the *pranava*, and the
' *vyahritis*.

143. ' For cutting *,, without malice* trees
' yielding fruit, shrubs with many crowded
' stems, creeping or climbing plants, or such as
' grow again when cut, if they were in blossom
' when he hurt them, he must repeat a hundred
' texts of the *Vêda*.

144. ' For killing insects of any sort bred in
' rice or other grains, or those bred in honey or
' other fluids, or those bred in fruit or flowers,
' eating clarified butter is a full expiation.

145. ' If a man cut, *wantonly and* for no
' good purpose, such grasses as are cultivated,
' or such as rise in the forest spontaneously, he
' must wait on a cow for one day, nourished by
' milk alone.

146. ' By these penances may mankind atone
' for the sin of injuring sentient creatures, whether
' committed by design or through inadvertence:
' hear now what penances are ordained
' for eating or drinking what ought not to be
' tasted.

147. ' HE, who drinks undefigedly any spirit
' but that of rice, may be absolved by a new
' investiture with the sacrificial fire: even for
' drinking intentionally the weaker sorts of spirits,
' a penance extending to death must not (as the
' law is now fixed) be prescribed.

148.. ' For drinking water which has ftood
 ' in a veffel, where fpirit of rice or any other
 ' fpirituos liquor had been kept, he muft fwal'
 ' low nothing, for five *days and* nights, but the
 ' *plant fatic'hapujhpi* boiled in milk:

149. ' If he touch any fpirituos liquor, -et
 ' 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 ,/tf-grafs boiled in water.

150. ' Should a *Brahmen*, who has once taft-
 ' ed the holy juice of the moonplant, even fmeH
 ' the breath of a man who has been drinking
 ' fpirits, he muft remove the taint by thrice re-
 ' peating the *gdyatri*, 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, ox any thing that has touched fpirituos
 ' liquor, they muft, *after a penance*, be girt
 ' anew with the facrificial thread;

152. ⁱ But, in fuch new inveftiture of the
 ' t, riceborn, the partial tonfure, the zone, the
 ' ftaff, the petition of alms, and the ftrict rules
 ' of abftinence, need not be renewed.

153. ' SHOULD one of them eat the food of
 ' thofe perfons, with whom, he ought never to
 ' e, t, or food left by a woman or a *Sudra*, or

' any prohibited flefli, he muft drink barleygruel
' only for (*even days and nights*).

15'. ' If a *Brahmen* 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 tailed the dung or urine of a tame boar,
' an afs, a camel, a fhakal, an ape or a crow,
' muft perform the penance *chāndrāyana*:

156. ' If he tafte dried flefhmeat, or mu(h~
' 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 fleih of car-
' nivorious beafts, of town-boars, of camels, of
' gallinaceous birds, of human creatures, of
' crows, or of afles, the penance *taptacricb'bra*,
' or *burning andfevere*, is the only atonement.

158. ' A *Brahmen*, who, before he has com-
' pleted his theological ftudies, eats food at
' monthly obfequies *to one ancejlor*, muft faft
' three days *and nights*, and fit in water a day:

159. ' But a ftudent in theology, who at any
' time *unknowingly* tafte honey or flefli, muft
' perform the loweft penance, or the *prajapatya*,
' and proceed to finifh his ftudenthip.

160. ' Having eaten what has been left by a

' cat, a crow, a moufe, a dog, or an ichneumon,
' or what has even been touched by a loufe, he
' muft drink, *boiled in water*' the plant *brah~*
' *mufuvercbald*.

161 ' By the man, who feeks purity of foul,
' no forbidden food muft be tailed: what he has
' undefignedly fwallowed he muft instantly
' vomit up, or muft purify himfelf with fpeed
' by legal expiations.

162. ' Such, as have been declared, are the
' various penances for eating prohibited food:
' hear now the law of penance for an expiation
' of theft.

163. ' T H E chief of the twiceborn, having
' voluntarily ftole fuch property, as grain, raw
' or dreffed, from the houfe of another *Brdb-*
' *men*, (hall be abfolved on performing the pe-
' Hance *prajapatya* for a whole year;

164. ' But the penance *cbdndrdyana* muft be
1 performed for ftealing a man, woman, or
' child, for feizing a field, or a houfe, or for
' taking the waters of an enclosed 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
' *Jantapana*; having firft reftored, *as the peni-*
' *tent thief* 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 hulk, molafles, cloth or leather, fifh, or
' other animal food, a ftrict faft muft be kept
' three *days and three nights.*

168. ' For ftealing gems, pearls, coral, cop-
' per, filver, iron, brafs, or ftone, nothing but
' broken rice muft be fwallowed for twelve
' days;

169. ' And nothing but milk for three days,
' if cotton, or filk, or wool had been ftolen, or
' a beaft either with cloven or uncloven hoofs,
' or a bird, or perfumes, or medicinal herbs, or
' cordage,

170. ' 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.

171. ' H E , who has wafted his manly
' 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

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daughter of his paternal aunt, *who is almost equal to a fister*, or the daughter of his maternal aunt, or the daughter of his maternal uncle, *who is a near kinfman*, must perform the *chandrayana*, or *lunar penance* '

173. ' No man of fense would take one of those three as his wife: they shall not be taken in marriage by reason of their confanginity; and he, who marries any one of them, falls deep into *Jin*.

17'. ' He, who has waisted, what might have produced a man, with female brute animals, with a woman during her courses, or in any but the natural part, or in water, must perform the penance *Jñtapana*: for a bejial act with a cow the penance must be far more severe.

175. ' A twiceborn man, dallying lasciviously with a male in any place or at any time, or with a female in a carriage drawn by bullocks, or in water, or by day, *shall be degraded*, and must bathe himself publicly, with his apparel

176. ' Should a *Brahmen* carnally know a woman of the *Chandala* or *Mlech'ha* tribes, or taste their food, or accept a gift from them, he loses his own class, *if he acted unknowingly*, or, *if knowingly*, sinks to a level with them'

177. ' A wife, excessively corrupt, let her husband confine to one apartment, and compel

her to perform the penance ordained for a man, who has committed adultery:

178. ' If, having been solicited by a man of her own class, she again be defiled, her expiation must be the penance *prajapatya* added to the *chandrayana*.

179. ' The guilt of a *Brahmen*, who has dallied a whole night with a *Chandali* woman, he may remove in three years by subsisting on alms, and incessantly repeating the *gayatri* with other mysterious texts.

180. ' These penances have been declared for sinners of four sorts, *those who hurt sentient creatures* *those who eat prohibited food*, *those who commit theft*, and *those who are guilty of lasciviousness*: hear now the prescribed expiation for such, as hold any intercourse with degraded offenders.

181. ' HE, who associates himself for one year with a fallen sinner, falls like him; not by sacrificing, reading the *Vêda*, or contracting affinity with him, *since by those acts he loses his class immediately*, but even by using the same carriage or seat, or by taking his food at the same board:

182. ' That man, who holds an intercourse, with any one of those degraded offenders, must perform, as an atonement for such later-

course, **the** penance ordained for that finner himself.

183. ' *The fapindas and famanodacas* of a man degraded, *for a crime in the first 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 ninth of the moon*, his paternal kinfmen, his officiate ing prieft, and his fpiritual guide being prefent.

184. ' A female flave muft kick down with her foot an old pot filled with water, *which had for that purpose been placed towards the south*, as if it were an oblation for the dead; and ail the kinfmen, in the nearer and remoter degrees, muft remain impure for a day and a night:

185. ' 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 attention, *as inviting him on the first day of the year, and the like*.

186. ' His right of primogeniture, *if he was an elder brother*, muft be withholden from him, and whatever perquifites arife from priority of birth: a younger brother excelling him in virtue, muft appropriate the **thare** of the firftborn.

187. ' But, when he has performed his due
' penance, his kinfmen and he muft 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 beperform-
' ed by the kindred even of women degraded,
' for whom clothes, dreffed rice, and water muft
' be provided; and they muft dwell *in huts* near
' the family houfe'

190. ' With tinnors, whofe expiations are
' unperformed, let not a man tranfact butinefs
' 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 *gayatri* has not been repeated and
' explained, according to law, the affembly muft
' caufe to perform three *prajapatya* penances,
' and *afterwards* to be girt with the facrificial
' ftring;

193. ' And the fame penance they muft pre-
 ' fcribe to fuch twiceborn men, as are anxious
 ' to atone for fome illegal act, or a neglect of
 ' the *Veda*.

194. ' If priests have accepted any property
 ' from bafe hands, they may be abfolved by re-
 ' linquifhing the prefents, by repeating myfteri-
 ' ous texts, and by ads of devotion :

195. ' By three thoufand repetitions of the
 ' *gayatri* with intenfe application of mind, and
 ' by fubfifting on milk only for a whole month
 ' in the pafture of cows, a *Bráhmén*, who has
 ' received any gift from a bad man, or a bad
 ' gift from any man, be cleared from fin.

196. ' When he has been mortified by abfti-
 ' nence, and has returned from the pafturnage,
 ' let him bend low to the other *Brahmens*, 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. ' H E , who has officiated at a facrifice
 ' for outcasts, or burned the corpe of a ftranger,
 ' or performed rites to deftroy the innocent, or
 ' made the impure facrifice, called *Abina*, may

' expiate his guilt by three *prajapatya* penances.

199. ' A TWICEBORN man, who has rejected a suppliant for his protection, or taught the *Veda* on a forbidden day, may atone for his offence by subsisting 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 horse, a camel, or a boar, may be purified by stopping his breath during one repetition of the *gayatri*.

201. ' To eat only at the time of the sixth meal, or on the evening of every third day, for a month, to repeat a *Sanbita* of the *Vedas*, and to make *eight* oblations to fire, accompanied with *eight* holy texts, are always an expiation for those, who are excluded from society at repairs.

202. ' SHOULD a *Bráhmén* voluntarily ascend a carriage borne by camels or drawn by asses, or defignedly bathe quite naked, he may be absolved by one suppression of breath, while he repeats in his mind the most holy text,

203. ' HE, who has made any excretion, being greatly pressed, either without water near him, or in water, may be purified by

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

204. **FOR** an omission of the acts, which the *Veda* commands to be constantly performed, and for a violation of the duties prescribed to a housekeeper, the atonement is falling *one day*.

205. **HE**, who says *hufh* or *pifh* to a *Brahmen*, or thou to a *superior*, must *immediately* bathe, eat nothing for the rest of the day, and appease him by clasping his feet with respectful salutation.

206. **For** striking a *Brahmen* even with a blade of grass, or tying him by the neck with a cloth, or overpowering him in argument, and adding contemptuous words, the offender must soothe him by falling prostrate.

207. **An** assaulter of a *Brahmen*, with intent to kill, shall remain in hell a hundred years; for actually striking him *with the like intent*, a thousand:

208. **As** many small pellets of dust as the blood of a *Brahmen* collects on the ground, for so many thousand years must the shedder of that blood be tormented in hell.

209. **For** a simple assault, the first or common penance must be performed; for a battery, the *third* or very severe penance; but

' for fhedding blood, *without killing*, both of
' thofe penances.

210. ' 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 defcribe
' to you; penances, which have been perform-
' ed by deities, by holy fages, and by forefathers
' *of the human 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 unalked *but prefented to him*;
' and for three more days, nothing.

213. " *Eating for a whole day* the dung and
' urine of cows mixed with curds, milk, cla-
' rified butter, and water boiled with cusa-grafs,
' and then fafting entirely for a *day and a night*,
' is the penance called *Santapana*, 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, ' fingle mouthful, *or*

' a ball of rice its large as a hen's egg, for three times three days; and for the last three days, must wholly abstain from food.

215. ' A Brahman, performing the ardent penance, must swallow nothing but hot water, hot milk, hot clarified butter, and hot (tea), each of them for three days successively, performing an ablution, and mortifying all his members.

216. ' A total fast for twelve days *and nights*, by a penitent with his organs controlled and his mind attentive, is the penance named *paraca*, which expiates all *degrees of guilt*.

217. ' If he diminish his food by one mouthful each day during the dark fortnight, *eating fifteen mouthfuls on the day of the opposition*, and increase it in the same proportion, during the bright fortnight, *fasting entirely on the day of the conjunction*, and perform an ablution regularly at sunrise, noon, and sunset, this is the *chandrayana*, or the lunar penance:

218. ' Such is the penance called an *hour-glass-shaped* or *narrow in the middle*; but, if he perform the *barley-shaped* or *broad in the middle*, he must observe the same rule, beginning with the bright halfmonth, and keeping under command his organs of action and sense.

219. ' To perform 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 *Brahmen* 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 he happens* by any means *to meet*
' with them, keeping his organs in fubjection,
' fhall attain the fame abode with the regent of
' the moon:

222. ' The eleven *Rudras*, the twelve *A'di-*
' *tyas*, the eight *Vafus*, the *Maruts*, or genii of
' the winds, and the feven great *Rifhis*, 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, fky, heaven*; he muft perfectly abftain
' from injury to fentient creatures, from falfe-
' hood, from wrath, and from all crooked
' ways.

22'. ' 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 *Sudra*, or
' an outcaft.

225. ' L E T him be always in motion, fitting
' and rifing alternately, or, if unable *to be thus*
' *reftlefs*, let him deep low *on the bare ground*;
' chafte as a ftudent of the *Veda*, bearing the
' facred zone and ftaff, (bowing reverence to
' his preceptor, to the gods, and to priefts;

226. ' Perpetually muft he repeat the *gayatrt*,
' and other pure texts to the heft 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 mifchievous by their example*;
' but for fins not publick, the affembly of priefts
' muft award them penances, with holy texts
' and oblations to fire.

228. ' B Y open confeffion, by repentance,
' by devotion, and by reading the feripture, a
' finner may be releafed from his guilt; or by
' almfgiving, in cafe of his inability *to perform*
' *the other 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 fnake from his flough;

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

'cerely loathes his evil deed, fo far fhall his
'vital fpirit be freed from the taint of it.

231. ' If he commit tin, and actually repent'
' that fin (hall 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 ftate, let him
, be conftantly good in thoughts, words, and
' 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 confeience,
' let him repeat the fame devout act, until his
' confeience be perfectly fatisfied.

235. ' All the blifs of deities and of men is
' declared by fages, who difcern the fenfe of
' the *veda*, 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 Brah-*
' *men; it is defence of the people in a Cfhatriya;*
† *deyotion is the bufineis of trade and agriculture*

in a Vaifya; devotion is dutiful service in a
Sudra.

237. Holy fages, with subdued passions,
 feeding only on fruit, roots, and air, by devo-
 tion alone are enabled to survey the three
 worlds, terrestrial, *ethereal*, and *celestial*, peopled
 with animal creatures, locomotive and fixed.

238. Perfect health, or unfailing medicines,
 divine learning, and the various mansions of
 deities; are acquired by devotion alone : their
 efficient cause is devotion.

239. Whatever is hard to be traversed, what-
 ever is hard to be acquired, whatever is hard
 to be visited, whatever is hard to be perform-
 ed, all this may be accomplished by true de-
 votion; for the difficulty of devotion is the
 greatest of all.

240. Even sinners in the highest degree,
 and of course the other offenders, are absolved
 from guilt by austere devotion well-practised,

241; *Souls, that animate* worms, and insects,
 serpents, moths, beads, birds, and vegetables,
 attain heaven by the power of devotion.

242, Whatever sin has been conceived in
 the hearts of men, uttered in their speech, or
 committed in their bodily acts, they speedily
 burn it all away by devotion, if they preserve
 devotion as their best wealth.

243, Of a priest, whom devotion has puri-

fied, the divine fpirits'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 *Veda*, by performing *the Jive* great
' facraments, and by forgiving all injuries, even
' fins of the higheft degree fhall be foon ef-
' faced:

247. ' As fire confumes in an infant with his
' bright flame the wood, that has been placed
' on it, thus, with the flame of knowledge, a
' *Brahmen*, who underftands the *Veda*, 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.

2'9. ' SIXTEEN fuppreffions of the breath,
' *while the holieft of texts is repeated* with the
' three mighty words, and the trilateral fyllable,
' continued each day for a month, abfolve even

' the flatyer of a *Brahmen* 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 *mahitra*, or that, of which the firft word is *fuddhavatyab*.

251. ' By repeating *each day for a month* the text *a'fyavamiya*, or the hymn *Sivafancalpa*, the dealer of gold from a prieft becomes instantly pure'

252, ' He, who has violated the bed of his preceptor, is cleared *from fecret faults* by repeating *fixteen times a day* the text *bavifhyantiya*, or that beginning with *na tamanhab*, or by revolving in his mind the *fixteen* holy verfes, called *Paurufha*.

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*'

25'. ' He, who has accepted an illegal preft, or eaten prohibited food, may be cleaned in three days by repeating the text *taratfamandiya*.

255, ' Though he have committed many fecret fins, he fhall be purified by repeating

for a month the text *fomaraudra* or the three texts *aryamna*, while he bathes in a sacred stream.

256. A grievous offender must repeat the seven verses, beginning with *INDRA*, for half a year; and he, who has defiled water with any impurity, must fit a whole year subsisting by alms.

257. A twiceborn man, who shall offer clarified butter for a year, with *eight* texts appropriated to *eight* several oblations, or with the text *na mé*, shall efface a sin even of an extremely high degree.

258. He, who had committed a crime of the first degree, shall be absolved, if he attend a herd of kine for a year, mortify his organs, and continually repeat the texts beginning with *pavamani*, living solely on food given in charity:

259. Or, if he thrice repeat a *Sanhita* of the *Vedas*, or a large portion of them with all the mantras and brahmanas, dwelling in a forest with subdued organs, and purified by three *pardcas*, he shall be set free from all sins how heinous soever.

260. Or he shall be released from all deadly sins, if he fast three days, with his members mortified, and twice a day plunge into water, thrice repeating the text *aghamarjhana*:

261. ' As the sacrifice of a horse, the king of sacrifices, removes all sins, thus the text *aghamarhana* destroys all offences.

262. ' A priest who should retain in his memory the whole *Rigveda*, would be absolved from guilt, even if he had slain the inhabitants of the three worlds, and had eaten food from the foulest hands.

263. ' By thrice repeating the *mantras* and *brahmanas* of the *Rich*, or those of the *Yajush*, or those of the *Saman*, with the *upanishads*, he shall perfectly be cleansed from every possible taint :

264. ' As a clod of earth, cast into a great lake, sinks in it, thus is every sinful act submerged in the triple *Véda*.

265. ' The divisions of the *Rich*, the several branches of the *yajush*, and the manifold strains of the *Saman* must be considered as forming the triple *Véda*: he knows the *Véda*, who knows them collectively.

266. ' The primary triliteral syllable, in which the three *Védas* themselves are comprised, must be kept secret, as another triple *Veda*: he knows the *Veda*, who distinctly knows the mystic sense of that word.'

CHAPTER THE TWELFTH,

On Transmigration and final Beatitude.

1. ' OTHOU, who art free from sin, *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. BHRIGU, whose heart was the pure effence
of virtue, who proceeded from MENU himself,
thus addrest the great fages: ' Hear the in-
' fallible rules for *the fruit of deeds* in this
' universe.

3. ' ACTION, either mental, verbal, or cor-
' poreal, bears good or evil fruit, *as itself is good*
' *or evil*; and from the actions of men proceed
' their various transmigrations in the highest,
' the mean, and the lowest degree:

4. ' Of that threefold action, connected with
' bodily functions, disposed in three claffes, and
' confifting of ten orders, be it known in this
' world, that the heart is the instigator.

5. ' Devifing means to appropriate the wealth of other men, refolving on any forbidden deed, and conceiving notions of atheifm or materialifm' are the three bad acts of the mind:

6. ' Scurrilous language, falfehood, indifcriminate backbiting, and ufelefs tattletale, 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 have their oppojites, which are good in an equal degree.*

8. ' A rational creature has a reward or a punifhment for mental adts, in his mind; for verbal acb, in his organs of fpeech; for corporeal acts, in his bodily frame.

9. ' For finful ads moftly corporeal, a man fhall aflume *after death* a vegetable or mineral form; for fuch acts moftly verbal, the form of a bird or a beaft; for ads moftly mental, the loweft of human conditions:

10. ' He, whose firm understanding obtains a command over his words, a command over his thoughts, and a command over his whole body, may juftly be called a *tridand*), or *triple commander*; *not a mere anchorite, who bears three vifibleftaves.*

11. ' The man, who exerts this triple self-command with respect to all animated creatures, wholly, subduing both lust and wrath, shall by those means attain beatitude.

12. ' THAT substance, which gives a power^c of motion to the body, the wife call *cjhétra-jnya*, or *jivdtman*, the vital spirit; and that body, which thence derives all live functions, they name *bhúdtman*, or *composed of elements*:

13. ' Another internal spirit, called *mahat*, or *the great soul*, attends the birth of all creatures embodied, and thence in all mortal forms is conveyed a perception either pleasing or painful.

1'. ^c Those two, the vital spirit and reasonable soul, are closely united with *five elements*, but connected with the supreme spirit,⁶ or divine essence, which pervades all beings high and low:

15. ' From the substance of that *supreme spirit* are diffused, like sparks from fire, innumerable vital spirits, which perpetually give⁵ motion to creatures exalted and base.

16. ' By the vital souls of those men, who have committed sins *in the body reduced to ashes*, another body, composed of *nerves with five sensations*, in order to be susceptible of torment, (shall certainly be assumed after **death**;

17. ' And, being intimately united with
' those minute nervous particles, according to
' their distribution, they (hall feel, in that new
' body, the pangs inflicted in each case by the
' sentence of YAMA.

18. ' When the vital soul has gathered the
' fruit of sins, which arise from a love of
' sensual pleasure, but must produce misery,
' and, when its taint has thus been removed, it
' approaches again those two most effulgent
' essences *the intellectual soul and the divine spirit*:

19. ' They two, closely conjoined, examine
' without remission the virtues and vices of that
' sensitive soul, according to its union with
' which it acquires pleasure or pain in the pre-
' sent and future worlds.

20. ' If the vital spirit had practised virtue
' for the most part and vice in a small degree,
' it enjoys delight in celestial abodes, clothed
' with a body formed of pure elementary par-
' ticles;

21. ' But, if it had generally been addicted
' to vice, and seldom attended to virtue, then
' (shall it be deserted by those pure elements,
' and, *having a coarser body offensive nerves*, it
' feels the pains to which YAMA (shall doom it:

22. ' Having endured those torments ac-
cording to the sentence of YAMA, and its
' taint being almost removed, it again reaches'

those five pure elements in the order of their natural distribution.

23. Let each man, considering with his intellectual powers these migrations of the soul according to its virtue or vice, *into a region of bliss or pain*, continually fix his heart on virtue.

24. BE it known, that the three qualities of the rational soul are a tendency to goodness, to passion, and to darkness; and, endued with one or more of them, it remains incessantly attached to all these created substances:

25. When any one of the *three* qualities predominates in a mortal frame, it renders the embodied spirit eminently distinguished for that quality.

26. Goodness is declared to be true knowledge; darkness, gross ignorance; passion, an emotion of desire or aversion: such is the compendious description of those qualities, which attend all souls,

27. When a man perceives in the reassembling soul a disposition tending to virtuous love, unclouded with any malignant passion, clear as the purest light, let him recognize it as the quality of goodness;

28. A temper of mind, which gives uneasiness and produces disaffection, let him consider as the adverse quality of passion, ever agitating embodied spirits:

29. ' That indiftinct:, inconceivable, unaccountable difpofition of a mind naturally fenfual, and clouded with infatuation, let him know to be the quality of darknefs.

30. ' Now will I declare at large the various acts, in the higheft, middle, and loweft degrees, which proceed from thofe three difpofitions of mind.

31. ' Study of fcripture, auftere devotion, facred knowledge, corporeal purity, command over the organs, performance of duties, and meditation on the divine fpirit, accompany the good quality of the foul:

32. ' Interefted motives for afts *of religion or morality*, perturbation of mind on flight occafions, commiffion of afts forbidden by law, and habitual indulgence in felfiih gratifications, are attendant on the quality of paffion:

23. ' Covetoufnefs, indolence, avarice, detraction, atheifm, omiffion of prefcribed afts, a habit of folliciting favours, and inattention to neceffary bufinefs, belong to the dark quality.

3'. ' 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 Ihort *but certain* criterion.

35' ' Let the wife confider, as belonging to the quality of darknefs, every aft which a

man is affamed of having done, of doing, or of going to do:

36. ' Let them confider, as proceeding from the quality of paffion, every ad, by which a man feels exaltation and celebrity in this world, though he may not be much afflicted, if he fail of attaining his object:

37. ' To the quality of goodnefs belongs every ad, by which he hopes to acquire divine knowledge, which he is never affliamed 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 *objects* are fuperiour in dignity.

39. ' SUCH tranfmigrations, as the foul procures in this univerfe by each of thofe qualities, I now will declare in order fuccindtly.

40. ' Souls, endued with goodnefs, attain always 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 tranfmigration.

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 rinany di-
' ftinctions of afts and of knowledge.

42. ' Vegetable and mineral fubftances,
tworms, infefts, and reptiles, fdme very mi-
' nute, fome rather larger, fifh, fnakes, tor-
' toifes, cattle, ihakals, are the loweft forms, to
' which the dark quality leads:

43. ' Elephants, horfes, men of the fervile
' clafs, and contemptible *Mlechas*, or *barbaric*
' *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. ' *yhallas*, 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 ikilled in the
' war of controverfy, are the middle ftates
' caufed by the quality of paffion:

47. ' *Gandharvas*, or aerial muficians, *Guhy*
' *acas* and *Yacfbas*, or fervants and companions
' of CUVE'RA, genii attending fuperiour gods,
' ct the *Vidydbarás* and others, together with

various companies of *Apfarafes*.or nymphs, are the higheft of thofe forms, which the quality of paffion attains.

48. a Hermits, religious mendicants, other *Brahmens*, fuch orders of demigods as arc wafted in airy cars, genii of the figs and lunar manfions, and *Daityas*, or the offspring of DITI, are the loweft of ftates procured by the quality of goodnefs:

'9. ^c Sacrificers, holy fages, deities of the lower.heaven, genii of the *Vēdas*, regents of ftars *not in the paths of the fun and moon*, divinities of years, *Pitrīś* or progenitors of mankind, and the demigods, named *Sddhyas*, are the middle forms, to which the good quality conveys *all fpirits moderately endued with it*:

50. ⁱ BRAHMA' with four faces, creators of worlds *under him*, as MARI'CHI and others, the genius of virtue, the divinities prefiding over (two principles of nature in the philofophy of CAPILA) *mahat*, or the mighty, and *avyacla* 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, according to actions of three kinds, and which comprifes all animated beings, has been revealed in its full extent:

52. ' Thus, by indulging the fenfual appetites, and by neglecting the performance of duties, the bafeft of men, ignorant of facred expiations, affume the bafeft forms.

53; ' WHAT particular bodies the vital fpirit enters in this world, and in confequence of what fins here committed, now hear at large and in order.

5'. ' Sinners in the firft degree, having paired 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 *Brahmen* mull: enter *according to the circumjlances of his crime* the body of a dog, a boar, an afs, a camel, a bull, a goat, a flieep, a flag, a bird, a *Clianddla*, or a *Puccafa*.

56. ' A prieft, who has drunk fpirituous liquor, fhall migrate into the form of a fmaller or larger worm or infeft, of a moth, of a fly feeding on ordure, or of fome ravenous animal.

57. ' He, who fteals the gold of a prieft, fhall pafs a thoufand times into the bodies of fpiders, of fnakes and cameleons, of *crocodiles and other* aquatick monfters, or of mifchicvous blood fucking dempns.

58. ' He, who violates the bed of his *natural*

c or *fpiritual* father, migrates a hundred times
 ' into the forms of graffes, of fhrubs with
 ' crowded ftems, or of creeping and twining
 ' plants, of *vultures and other* carnivorous ani-
 ' mals, of *lions and other* beads with fharp teeth,
 ' or of *tigers and other* cruel brutes.

59. ' They who hurt any feñtient beings,
 ' are born *cats and other* eaters of raw flefh;
 ' they, who tafte what ought not to be tafled,
 ' maggots or fmall flies; they, who fteal *crdi-*
 ' *nary things*, devourers of each other: they
 ' who embrace very low women, become reft-
 ' lefs ghofls.

60. ' He, who has held intercourfe with
 ' degraded men, or been criminally connected
 c with the wife of another, or ftofen *common*
 ' *things* from a prieft, fhall be changed into a
 ' fpirit, called *Brahmardcfiafa*.

61. ' The wretch, who through covetouf-
 ' nefls has ftofen *rubies or other* gems, pearls, or
 ' coral, or precious things of which there are
 ' many forts, fhall be born *in the tribe of gold-*
 ' *fmiths, or among birds called* hemacaras, or
 ' *goldmakers*.

62. ' If a man fteal grain in the hufk, he
 ' fhall be born a rat; if a yellow mixed metal,
 ' a gander; if water, a *plava*, or diver; if
 ' honey, a great flinging gnat; if milk, a crow;
 ' if expreffed juice, a dog; if clarified butter, an
 ' ichneumon weäfel;

63. ' If he fteal flefhmeat, a vultufe; if any
' ibrt of fat, the water-bird *madgu'''i* oil, a
' blatta, or oil drinking beetle; if fait, a cicada
' or cricket; if curds, the bird *valdca*;

64. ' If filken clothes, the bird *tittiri*; if
' woven flax, a frog; if cotton cloth, the
' waterbird *crauncba*; if a cow, the lizard
' *godhd*; if molaffes, the bird *vagguda*;

65. ' If exquisite perfumes, a mufkrat; if pot-
' herbs, a peacock; 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 *chac'ora*;

67. ' If a deer or an elephant, he (hall
' 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 *chataca*' 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 necessity, the performance of their several duties, they shall migrate into sinful bodies, and become slaves to their foes.

71. Should a *Brahmen* omit his peculiar duty, he shall be changed into a demon called *Ulcamuc ha* or *ivith a mouth like a firebrand*, who devours what has been vomited; a *Cjha-triya*, into a demon called *Cataptitana*, who feeds on ordure and carrion;

72. A *Vaifya*, into an evil being called *Maitrdehjayótica*, who eats purulent carcases; and a *Súdra*, who neglects his occupations, becomes a foul embodied spirit called *Chaild-Jāca*, who feeds on lice.

73. As far as vital souls, addicted to sensuality, indulge themselves in forbidden pleasures, even to the same degree shall the acuteness of their senses be raised in their future bodies, that they may endure analogous pains;

74. And, in consequence of their folly, they shall be doomed as often as they repeat their criminal acts, to pains more and more intense in deprecable forms on this earth.

75. They shall first have a sensation of agony in *Tamifra* or *utter darkness*, and in other feats of horror; in *Afipatravana*, or *the swordleaved forest*, and in different places of binding fast and of rending :

76. Multifarious tortures await them: they

' fhall be mangled by ravens and owls, fhall
 ' c fwallow cakes boiling hot; (hall walk over
 ' inflated lands; and fhall feel the pangs of
 ' being baked like the veffels of a potter:

77. ' They (hall afTume the forms of beads
 ' 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-
 ' ent wombs; and, after agonizing births, be
 ' condemned to feverc captivity, and to fervile
 ' attendance on creatures like themfelves:

79. ' Then fhall follow feparations from kin-
 ' dred and friend?, forced refidence with the
 ' wicked, painful gains and ruinous loffes of
 ' wealth ; friendihips 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 a6l *religious*
 ' or *moral*, in a future body endued with the
 ' i fame quality, fhall he receive his retribution.

82. ' THUS has been revealed to you the
 ' 1 fyftem of punifhments for evil deeds: next
 ' 1 learn thofe acis of a *Bráhmén*, which lead to
 ' eternal blifs.

83. ' Studying and comprehending the *Vida*,

' praclifing pious aufterities, acquiring divine
' knowledge of law and philofophy, command
' over the organs of (enfe and acHon, avoiding
' all injury to fentient creatures, and (howing
' reverence to a natural andfpiritual father, are
' the chief branches of duty which enfure final
' happinefs.'

8'. ' Among all thofe good acts performed
' in this world, *fald the fages*, is no fingle act
' held more powerful than the reft in leading
' men to beatitude ?'

85. ' OF all thofe duties, *anfwered* BHRĪGU,
' the principal is to acquire from the *Upanifhads*
' a true knowledge of one fupreme GOD ; that
' is the mod exalted of all feiences, becaufe it
' enfures immortality:

86. ' In this life, indeed, as well as the next,
' the ftudy of the *Véda*, to acquire a knowledge
' of GOD, is held the moil efficacious of thofe
' fix duties in procuring felicity to man;

87. ' For in the knowledge and adoration of
' one GOD, which the *Véda* teaches, all the
' rules of good conduit, *before mentioned* in order,
' are fully comprifed.

88. ' T H E ceremonial duty, prefcribed by the
' *Veda*, is of two kinds; *one* connected with this
' world, and caufing profperity on earth; *the*
' *other* abftracted from it} and procuring blifs
' in heaven.

89; ' A religious act proceeding from selfish views in this world, as a sacrifice for rain, or in the next, as a pious oblation in hope of a future reward, is declared to be concrete and interested ; but an act performed with a knowledge of GOD, and without self love, is called abstract and disinterested.

90. ' He, who frequently performs interested rites, attains an equal station with the regents of the lower heaven ; but he, who frequently performs disinterested acts of religion, becomes for ever exempt from a body composed of the five elements:

91. ' Equally perceiving the supreme soul in all beings and all beings in the supreme soul, he sacrifices his own spirit by fixing it on the spirit of GOD, and approaches the nature of that sole divinity, who shines by his own effulgence.

92. ' Thus must the chief of the twiceborn, though he neglect the ceremonial rites mentioned in the *Sastras*, be diligent alike in attaining a knowledge of GOD and in repeating the *Veda*;

93. ' Such is the advantageous privilege of those, who have a double birth from their natural mothers and from the *gayatrî* their spiritual mother', especially of a Brahmen ' since the twiceborn man by performing this duty but

' not otherwife, may foon acquire endlefs felicity.

94. ' To patriarchs, to deities, and to mankind, the fcripture is an eye giving conftant light; nor could the *Veda Safta* have been made by human faculties; nor can it be meafured by human reafon *unaffifted by revealed gloffes and comments*: this is a fure propofition.

95. ' Such codes of law as are not grounded on the *Véda*, and the various heterodox theories of men, produce no good fruit after death; for they all are declared to have their bafis on darknefs.

96. ' All fyftems, which are repugnant to the *Véda* muft have been compofed by mortals, 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 *Veda* 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 primeval *Veda Safta*, which the wife therefore

' hold fupreme, becaufe it is the fupreme fource
' of profperity to this creature, man.

100. ' Command of armies, royal authority,
' power of inflicting punifhment, and fovereign
' dominion over all nations, he only well de-
' ferves, who perfectly underftands the *Veda*
' *Sāftra*.

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 Safta*, 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 ftu-
' 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 *Brabmen* 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-

' ftration, logical inference, and the authority
' of thofe various books, which are deduced
' from the *Vēda*, muft be well underftood by
' that man, who feels a diftinct 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 *Veda*, 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 *Manava Safta* fhall 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 inftrued
' *Brahmens* propound, fhall be held incontestible
' law."

109. ' Well inftructed *Brahmens* 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
vedangas, *Mimanfa*, *Nyaya*, *Dhermafaftra*,
Puranas:

110. ' A point of law, *before not exprefsly re-*
vealed, which (hall be decided by an affembly
of ten fuch virtuous *Brahmens* under one chief,

or, if ten be not procurable, of three such under one president, let no man controvert.

111. The assembly of ten under a chief either the king himself or a judge appointed by him, must consist of three, each of them peculiarly conversant with one of the three *Vēdas*, of a fourth skilled in the *Nyaya*, and a fifth in the *Mīmāṃsā* philosophy; of a sixth, who has particularly studied the *Nirukta*; a seventh, who has applied himself most assiduously to the *Dharmasāstra*; and of three universal scholars, who are in the three first orders.

112. One, who has chiefly studied the *Rig-veda*, a second, who principally knows the *Yajur*, and a third best acquainted with the *Saman*, are the assembly of three under a head, who may remove all doubts both in law and casuistry.

113. Even the decision of one priest, if more cannot be assembled, who perfectly knows the principles of the *Vedas*, must be considered as law of the highest authority; not the opinion of myriads, who have no sacred knowledge.

114. Many thousands of *Brahmins* cannot form a legal assembly for the decision of contests, if they have not performed the duties of a regular studenthip, are unacquainted with scriptural texts, and subsist only by the name of their sacerdotal class.

115. ' The fin of that man, to whom dunces, pervaded by the quality of darknefs, propound the law, of which they are themfelves ignorant, fhall pafs, increafed a hundredfold, to the wretches who propound it.

116. ' This comprehensive fyftem of duties, the chief caufe of ultimate felicity, has been declared to you; and the *Bráhmén*, who never departs from it, fhall attain a fuperiour ftate above.

117. ' THUS did the allwife MENU, who poffeffes extenfive dominion, and 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 receive it*.

118. ' L E T every *Bráhmén* with fixed attention confider all nature, both vifible and invifible, 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:

119. ' 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 ~~the~~ confident with free will*, the connefted feries of acts performed by imbodyed foulds.

120. ' He may contemplate the fubtil ether

in the cavities of his body; the air in his muscular motion and sensitive nerves; the supreme solar and igneous light, in his digestive heat and his visual organs; in his corporeal fluids, water; in the terrene parts of his fabric, earth;

121. In his heart, the moon; in his auditory nerves, the guardians of eight regions; in his progressive motion, VISHNU, in his muscular force, HARA; in his organs of speech, AGNI; in excretion, MITRA; in procreation, BRAHMA:

122. But he must consider the supreme omnipresent intelligence as the sovereign lord of them all, *by whose energy alone they exist; a spirit, by no means the object of any sense, which can only be conceived by a mind wholly abstracted from matter, and as it were flumbering; but which for the purpose of assisting his meditation, he may imagine more subtil than the finest conceivable essence, and more bright than the purest gold.*

123. Him some adore as transcendently present in elementary fire; others, in MENU, lord of creatures, *or an immediate agent in the creation; some, as more distinctly present in INDRA, regent of the clouds and the atmosphere, others, in pure air; others, as the most High Eternal Spirit*

124. ' It is He, who, pervading all beings in
' five elemental forms, causes them by the
' gradations of birth, growth, and dissolution,
' to revolve in this world, *until they deserve beati-*
' *tude*, like the wheels of a car.

125. ' Thus the man, who perceives in his
' own soul the supreme soul present in all crea-
' tures, acquires equanimity toward them all,
' and shall be absorbed at last in the highest ef-
' fence, even that of the Almighty himself'.

126. HERE ended the sacred instructor; and
every twiceborn man, who, attentively reading
this *Manava Sastra* promulgated by BHRIGU,
shall become habitually virtuous, will attain the
beatitude which he seeks'

GENERAL NOTE.

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

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

II. VRIHASPATI: I. Appointments of *kinsmen to beget children on widows, or married women, when the husbands are deceased or impotent*, are mentioned by the sage MENU, but forbidden by himself with a view to the order of the

four ages: no such ad can be legally done in this age by any others *than the husband*.

2. In the first and second ages men were endowed with true piety and sound knowledge; for they were in the third age; but in the fourth a diminution of their *moral and intellectual* powers was ordained by their Creator :

3. Thus were sons of many different sorts made by ancient fages, but such cannot now be adopted by men destitute of those eminent powers.

III. PARA'SARA: 1. A man, who has held intercourse with a deadly finner, must abandon his country in the first age; he must leave his town, in the second; his family, in the third age; but in the fourth he needs only desert the offender.

2. In the first age, he is degraded by mere conversation with a degraded man; in the second, by touching him; in the third, by receiving food from him ; but in the fourth, the finner alone bears his guilt.

IV. NA'RADA : The procreation of a son by a brother of the deceased, the slaughter of cattle in the entertainment of a guest, the repast on fleshmeat at funeral obsequies, and the order of a hermit are forbidden or obsolete in the fourth age.

V, A'ditya puraṇa: 1. What was a duty in the

first age muft not *in all cafes* be done in the fourth; fince, in the *Call yuga*, both men and women are addicted to fin :

2. Such are a ftudentfhip 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 'e avoided by twiceborn men; fo muft a fecond gift of a married young woman, *whofe bit/band has died before confummation*, and the larger portion of an eldeft brother, and procreation on a brother's widow or wife.

VI. *Smṛiti*: 1. The appointment of a man to beget a fon on the widow of his brother; the gift of a young married woman to another bridegroom, *if her hufband fhould die* while fhe remains a virgin;

2. The marriage of twiceborn men with damfels not of the fame clafs; the flaughter, in a religious war, of *Brahmens*, 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 necejty of carrying a waterpot*;

4. Walking on a pilgrimage till the pilgrim die; and the slaughter of a bull at a sacrifice; the acceptance of spirituous liquor, even at the ceremony called *Sautrdmani*;

5. Receiving what has been licked off, at an oblation to fire, from the pot of clarified butter; entrance into the third order, or that of a hermit, though ordained *for the first ages*;

6. The diminution of crimes in proportion to the religious acts and sacred knowledge of the offenders; the rule of expiation for a *Brahmen* extending to death;

7. The sin of holding any intercourse with finners; the secret expiation of any great crimes except theft; the slaughter of cattle in honour of eminent guests or of ancestors;

8. The filiation of any but a son legally begotten or given in adoption *by his parents*; the desertion of a lawful wife for any offence less than actual adultery:

9. These *parts of ancient law* were abrogated by wise legislators, as the cases arose at the beginning of the *Call* age, with an intent of securing mankind from evil.

On the preceding texts it must be remarked, that none of them, except that of *VRĪHASPATI*, are cited by *CULLUCA*, who never seems to have considered any other laws of *MENU* as restrained to the three first ages; that the *Smṛiti*,

or sacred code, is quoted without the name of the legislator; and that the prohibition, in any age, of *self-defence*, even against *Brahmens*, is repugnant to a text of SUMANTU, to the precept and example of CRISHNA himself, according to the *Mahabharat*, and even to a sentence in the *Véda*, by which every man is commanded *to defend his own life from all violent aggressors*

Calcutta, March 1, 1794-

SIR,

THE Institutes 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 for 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 Digest of Indian Laws, confifting of nine large volumes, two of which remain to be collated and ftudied with the learned Brahmen, who affifts 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 gracioufly 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 Digest 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, Efq.

THE
MAHOMEDAN LAW
OF
SUCCESSION
TO
THE PROPERTY OF INTESTATES,
IN
ARABICK,
ENGRAVED ON COPPER PLATES
FROM
AN ANCIENT MANUSCRIPT:
WITH
A VERBAL TRANSLATION, AND EXPLANATORY NOTES.

THE
PREFACE.

NOTHING more seems necessary, in order to explain the object of the following work, than barely to cite the late statute concerning *the administration of justice in BENGAL* ; by the seventeenth section of which it is enacted, " That " the Supreme Court of Judicature at *Fort William* shall have full power to *hear and determine* all manner of actions and suits against the inhabitants of *Calcutta*, provided that their *inheritance and succession to lands, rents and goods*, and all matters of contract and dealing between party and party, shall be determined, *in the case of Mahomedans*, by the laws and usages of MAHOMEDANS, and, where only one of the parties shall be a Mahomedan, by the laws and usages of the defendant:" by the twenty first section, the provincial courts of *Adalet*, or *Justice*, are expressly recognised, and the powers of the governor and council, as the *Sedr Adalet*, in determining civil

caufes on appeals from thofe courts, are fully eftablifhed in conformity to the old *Mogul* conftitution.

But it may naturally be afked, 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 *Mahomedan* 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 *hear 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 *Hindu* learning,) and confequently of the *languages* ufed by *Mahomedan* writers, are effential to a complete adminiftration of juftice in our *Afiatick* territories; a knowledge I mean, though not equal to that of the MUFTI at *Conftantinople*, 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 opposed or supported by their books of allowed authority, to which they should constantly refer.

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

The author, a native of *Alrahaba*, in *Mesopotamia*, was himself an *IMAM*; and his decisions are, on that account, considered as binding by the sect of *Ali*, which the *Indian*, as well as the *Persian*, Mahomedans profess; but *IBNO'LMOTAKANNA* informs us, that he drew his knowledge from the fountain head, and has epitomised the system of *Zaid*, who was recommended by *MAHOMED* himself as the surest interpreter of his laws, and who had been implicitly followed by *SHAFIEI*, the first writer on *Mahomedan* jurisprudence, 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 bahitb* may be cited, as a book of authority, in all the *Mujleman* courts; and the *European* reader muft 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, whose province is pure *reafon*, wholly excludes; but *verfe*, as numberlefs instances prove, *is not always poetry*-, and a regular meafure is fo confiderable an aid to the *memory*, that, if the *metrical abridgement of COKE'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 *Agathyrfi* and the *Turdetani*, who, as we are told by *Ariftotle* 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 tranflations 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 subject so delicate as law, must be sacrificed without mercy to exactness; and for this reason I have rendered the *Arabian* treatise, line for line, and word for word, with a fidelity almost religiously scrupulous.

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

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

The present publication will answer, I conceive, another purpose by no means unimportant; as it will habituate the student of eastern languages to the reading of old *Arabian* manuscripts; but, lest the hand-writing of the very learned *Saad Al Sivafi*, 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 fpecifick fymbol*; an advantage, which hardly any alphabet has, but which all ought to have.

**Bigyah'o 'lbahhithi an jumali 'lmowarithi
nadh'mo 'lfhaikhi alimami alaalimi
mowaffiki 'ldeini abei abdillahi
mohhammedi 'bni âlei ibni 'Ihhofaîni
alrahhabiyyi almarufi bi 'bni 'I
motakannah'i rahhamaho allaho taaalai.**

**Bifmi 'llahi alrahmani alrahheimi wabihi
neftaêino.**

[I]

awwalo ma neftaftihho 'lmekala
bidhicri hhamdi rabbiná taâálá
falhhamdo lillahi alai ma anama
hhamdan' bihi nejlua ani 'laini 'lama
thomma als'alwah o bado walfalamo
alai nebiyyin' deinoho aliflamo
mohammedin' khatimi rufli rabbihi
waálihi min bâdihi was'ahhbihi
wanefalo 'llaha lind 'lîânah'a
feima tawakhkhaina min alibanah'a
an medh-hebi 'limami zaidi 'Ifaradh'ei
idh cana dhaca min ahammi 'lgaradh'i
ilman' bianna 'lilmo dufa ma foei"
feihi wactúlá má leho 'Mbdo doêi
waánna hadha' 'lilma makhs'ús'on' bimá
kad fhaaa feihi inda culli 'lulema
waánna zaidán' khus'sa lá mahhálah
bima hhabaho s'ahhibo 'lrifalah
min kaulihi fei fadh lihi monabbaha

afradh' acom zaidon wanaheica beha
 facána áulai be-íttibdi 'ltdbii
 lá fiyyamá wakat nahhctho 'lfhdfiëi
 fahctca feihí dlkaúla bi'leijdzi
 mobarraán' min kas'mah'i 'lálgázi
 dlbábo meíráthi 'lwaral thelctthah
 cullon yofeido rabbaho 'Iwiráthah
 wahai nicáhhon' waweláon' wanafab
 mct badahonna lilmawareithi fabab.

[2]

wayamnao 'lfhakhs'a min almeirathi
 wáhhidah'on' min ilalin' theláthi
 rikkon' wakatlon' waakhtilafo deini
 faafham falaifa Ifhacco calyakeini
 wálwáarithúno fei 'lrijáli âfharah
 dfmáwahom mârúfahón' mulhtaharah
 alibno wa'bno 'libni mahma nazala
 wa'latbo wa'ljeddo leho wa'i'n ala
 walakho min ayyi 'ljehatti cana
 kad anzela 'llaho bihi 'lkorana
 wabno 'lakhi 'lmodlei ilaihi bi'labi
 fafma mekalan' laifa bi'lmucadhdhābi
 wa' latmmo watbno 'lammi min abeihi
 fahcor ledhei 'leijatzi waltanbeihī
 walzaujo walmotiko dhu 'Iwelai
 fajumlah'o 'ldhucuri hawolai
 walwarithato cullohinna febo
 lam yath'i onthei gairahonna 'lfhero

binton' wabinto 'bnin' waómmmon' muflhfikah
 wajaddah'on' wazaújah'on' wamôtikah
 wálákhto min áyyi 'ljeháti cánat
 fahadhihi iddatohá kad bánat
 wadlam bianna 'lirtha nauaani homa
 fardh'on' watas eibon' alai ma kofima
 falfardho fei nas'si 'lcitibi fittah
 lá fardh'o fei 'lirthi fiwáhá bittah
 nisfon' warubôn' thomma nis'fo 'lrubi
 walthultho walfudfo binas'si 'lfheri
 wálthuitháni wahomá 'altemámo
 flhhfadh" facullo hhatfidh' in' imatmo

[3]

fálnis'fo fardh'o khamfáhin' áfrádi
 alzaujo walonthai min alauladi
 wabinto 'libni inda fakdi 'lbinti
 wálákhto fei medh-hebi culli muftai
 wabádaht 'lákhto 'llati min álábi
 inda dnfirádihinna min moássíbi
 wálrubô fardh'a 'lzaúji ín cána maâh
 min waladi 'lzaújah'i men kad monaâh
 wahu leculli zaujah in' au acthera
 ma adami 'lauladi feima kaddera
 walthomno lilzaujahi walzaujatti
 ma albeneina au ma albenatti
 au maa auladi 'lbeneini faalemei
 wabek le-itkari 'ldunifi waflemei
 waalthulthatni lilbenati jemaa

ina zada an wahhidah'i fafemaa
 wahúa cadháca lebenáti 'libni
 fáfham mekálei Fahma sáfe! 'Idhihni
 wahua liakhtaini fema yezeido
 kadh'ai bihi lahhraro walabeido
 hadhá idhá cunna liómmi wáábi
 au liabi faamel bihadha tos'ibi
 wálthultho fardhó 'lómmi hhaítho lá weled
 wela mina 'lákhwah'i jemô waâded
 cáthnaíni áú thintaini áú theláthi
 hocmo 'ldhucúri feihi cálináthi
 wain yecun zaujon' waomon' waabo
 fathultho 'Ibakiyo lehd morattabo
 wahacadhai má zaújah'in' fas'didd
 felá tecun mina 'lûlúmi káidá

[']

wálthultho liláthiiaími ctú thintaíni
 min weledi 'lómmi bigairi maíni
 wahacadhai in catharua faradua
 fema lehom feimá fiwáho zado
 wataftawai 'linátho wáldhucúro
 feihi camá kad dúdh'ahho 'lmeftthúro
 walfudfo fardh'o febah'in' mina 'laded
 ábon' waómmmon' thomma binto'bni Wajedd
 wctfokhto binto 'lábi thomma 'ljeddah
 waweledo 'lómmi temámo 'liddah
 fálábo yeftahikkoho maa 'lweled
 wahacadhai 'lómmo betenzexli 'Is'emed

wahu lehd aydh'an' mcta 'ldthnaint
 min ikhwahl 'lmaiṭi fakis hadhafnj
 wáljeddo mithlo 'ldbi inda fakdihi
 fei jeza md yes'eiboho wameddihi
 illd lḏhá cána hondca lḵwah
 licaúnahom fei 'lkurbi wahú áfwah
 wahhucmohim wahhucmoho feyátei
 mocammela 'lbayána fei 'lhháláti
 wabinto Tibni tákhodh álfudfa idhd
 cdnat máḏ 'lbinti mitháid yahhtadhaf
 wahacadhai 'l6khto mcta loḵhti 'Uatai
 bidlábawaini yá ókhayyo ddlata
 fáṭn tefáwai nefebo 'ljedddti
 wacunna cullahonna' wáaritháti
 fálfudfo bainahonna biálfawiyyah
 fei 'lkifmah'i 'laddilah'i 'lfheriyyah
 wacullo men ádlat bigairi wáarithi
 femá lehá hhadh"dh"on' mina 'lmawáarithi.

[5]

watalkotho 'lbôdai bidhdti 'lkurbi
 feí Imedh-hebi 'láúlai fakol leí hhaḥbei
 wakad tenáhat kifmah'o 'lforúdh'i
 bigairi ifhcáli weld gomiidh'i
 wabhokka án neḥliraâ fei 'Itâs'eibi
 biculli kaúlin' mújizin' mus'eibi
 facullo men áhhraza culla 'lmdli
 mina 'lkarabati au dlmawdlei
 áú cána má yafdh'olo báda 'lfardh'i leh
 fahu akhu 'las'ubahi 'lmofadh'dh'aleh

calabi walljeddi wajeddi 'ljeddi
 walibni inda kurbihi walbodi
 wálákhi wábni 'iákhi wáldâmámi
 wálfayyidi 'lmôtiki dheí 'linâámi
 wahacadhai benúohom jemeíâán'
 fajcun lemá ádhcoroho femeíâán'
 wamá ledhei 'Ibôdi maa 'lkareíbi
 fei 'lírthi min hhadh'dh'in' wela nes'eíbi
 wálákho wálámmo liómmín' wadbi
 áúlaí mina 'lmodlei biihath'ri 'Inafabi
 wa'libno wctlakho maa Tináthi
 yoás's'ibánahinna fei 'lmeiráthi
 walaifa feí 'lnifai th'urrán á's'abah
 ilia 'llatai mennat bi itki 'lrakabah
 walakhawatto in yecun benato
 fahonna badahonna as abatto
 wa'ljeddo mahhjubon' áni 'lmeíráthi
 bi'labi fei ahhwalihi 'lthelathi
 wahacadhai 'bno Tibni bi'líbní felá
 tabig áni 'Ihhacmi 'lfáhheihhi mādílá'

[6] .

watafkoth'o 'ljeddáto min culli jiheh
 bi 'lommi fahhfadh"-ho wakis ma afhbeheh
 watafkothó 'likhwah'o bi'lbeneiná
 wabi'labi 'ladnai cama ruweina
 au bibenei 'lbeneina hhaitho canua
 fiyyáni feihi 'ljemi wa'lwahhdáno
 wayaf dh'olo'bno 'lómmi bi'lilkáthi
 biljeddi fáhfhadh"-ho álai ihhtiydthi

wabi 'lbenati wabenati 'libni
 facun bihhifdh'l 'lilmi jiddán' mônei
 thomma bendto 'libni yelkothna metai
 hháza 'Ibenáto álthulthaina yd fetaí
 illd idhd âs's'abahonna áldhacaro
 min welidi 'libni^alai má dhacarúa
 wabâdahonna 'lakhawaáto 'llátai
 yodleina bi'lkurbi min áljiháti
 idhá 'akhádna fardh'áhonna wáfiyá
 áfkath'na diiláda 'lábi 'lbawáciyd
 wai n yecun akho lehonna hhadh'iran'
 aas'abahonna bathinan' wadh'ahiran'
 walaifa ibno'lakhi bi'lmoassabi
 men mithlaho áú faiikaho fei 'lnafabi
 wáin tajid zaúján' waómmán' wdrithá
 waikhwahán' lilómmi hházúá 'Ithulothá
 wadkhwah'an' áydh'dn' liómmi wadbi
 waáftugrika 'Imálo bifardh'i 'Inos'obi
 fájâlahomo cullohomo liómmi
 wadhhfib ábáhom hhajarán' fei 'lyammi
 wákfmi âlai 'likhwahi thultha 'ltaricah
 wahadhihi 'Imcielah'o 'lmuihtaracah

[7]

wálána nebda bi'lladhai áradná
 fei 'ljeddi wa'likhwahi idh waádná
 faalik nahhau ma akulo 'lmifmaaa
 wajma hhawalhei 'lcelamati ajmaaa
 waalem bianna 'ljeddo dhu dhhwali

,nbeíca |nhonna álal 'ltawáleí
 fakáfuno TikHwahi feíhonna ídhá
 lam yaôdi 'lkafmo Aláíhi bi'lddhai
 fatárahán' yákhodho thulthdn' cámilán'
 in cana bi'lkifmah'i anho natzilan'
 in lam yecun feihim dhawú fihámi
 faknct bidydh'ahhef ctni iftifhami
 watárah'an' yakhodho thultha 'lbákeí
 bada dhawei 'lforudh i wa' larzaki
 hadhá' ídhá m' ádh'-hhati 'lmokáfamah
 tenkos ho âni dháci bi'lmez'ahhamah
 watárah'an' yákhodho fudfa 'lmáli
 walaifa ânho názilán' bihháli
 wahau' maa 'h'náthi inda 'Ikafmi
 mithlo ákhin' feí fahmihi wa'lhhocmi
 wáhhlēb benei' 'liibi ledaí 'lidádi
 wárfodh' benei' 'lómmi maa 'lájdádi
 wáhhcom álai 'likhwah'i bâda 'lâddi
 hhocmaca feihim inda fakdi Mjeddi
 walokhto la fardh'o maa 'Ijeddi leha
 feíma álá mefelah'an' cammalehá
 zaújon' waómmon' waliomá temámohd
 fáâlem fakhairo ómmahín âlhimohá
 terafo ya sahhi bi'lacdariyyah
 wahei bian tahhfadh o-ha hhariyyah

[8]

fayofradh'o 'lnis'fo lehá wa'lfudfo Ich
 hhataí táúli bi'lforúdhi 'lmojmeleh
 thomma yaúúdáni /lai Mmokáfameh

cama madh'ai fahhfadh"-ho waincor naon men
 waf n torid marifah'a 'lhhifabi
 letentahá feihi ílaí 'Is'awábi
 Watârifo 'Ikifmahá wa'ltafseilá
 watâlim 'als'ahheihha wa'lósúld
 faftakhriji 'Ios lila fei 'Imefayili
 Wala tecun an hhifdh'iha bidhahili
 wahai idhá fos's'ila feihá 'lkaúlo
 thelethah'ori' yedkholo feihá 'lâulo
 wabctdahd árbaâh'on' temámo
 lá âula yâruhð welá inthilámo
 fâlfudfo min fittah'i ás-homin' terá
 Walthultho wa'lrubô min áthnai âihará
 wálthumno in dh'omma ilaihi 'lfudfo
 factsloho 'ls'ádiko feihi 'lhadfo
 árbacth'on' yatbaôhá ifhrúná
 yârifohá 'lhhufábo ájmaúúná
 fahadhihi 'Ithelethah'o 'lós'úlo
 in caththorat forúdh'ohd taúúlo
 fatablogo 'lfittah'o ctkda 'lafhareh
 fei s'úrah'in' mârúfah'in' muftath'areh
 watalhhako Mlatai teleihá fei 'láthar
 fei Mauli afradan' befebah'i aihar
 wa'lâdado 'lthálitho kad yaúúlo
 bithumnihi fáâmel bimá ákúlo
 wa'lnis'fo wa'lbakei awi'lnis'fani
 aslohomd fei hucmihom athnani

[9]

wa'lthultho mill thelethahln' yecúntf
 wa'lrubo min arbacth'iri mefnuno
 waMthumno in cana famin themaniyah
 fahadhihi hai 'los'ulo 'lthaniyah
 la yedkholo 'laulo alaiha faalemi
 thomma áflocá 'ltás'-hheihí feihd wákfimi
 faí'n tecun mia ds'lihá tas'ihhhhho
 fatarco tath'weili 'Ihhifábi ribhho
 fdáthi cullán' fahmaho min ás'lhi
 mocammilán' aii ááyilán' min áúlihi
 waín terai 'Ifiháma laifa tankafim
 alai dhawei 'lmeirathi fatba ma rufim
 wáthlob th'areika 'likhtisári fei 'lfimal
 bi'ldh'arbi wa'lwafki yojánibca 'lzelel
 wárdod ilai 'Iwafki 'lladhai yowáfiko
 wádhtribho fei 'lás'li waánta 'lhhádika
 in cána jinfán' wáhhidán' ál 'áctherá
 fahhfadh" wadá áncia Ijidála wa'lmirá
 waín terai 'Icathra álai ájnáfi
 faí'nnahá fei 'lhucmi inda 'lnáfi
 tohhs'aro fei arbaah'in' akfami
 yarifofoha 'Imahiro fei 'lahhcatmi
 momathilon' min bctdiho monatfibo
 wabddaho mowáfikon' mos'ahhibo
 wa'lrctbio 'lmobayino 'lmokhalifo
 yonbeica an tafs eilihinna 'laarifo
 fakhodh mina 'lmomathilaini wahhida

**Wakhodh mina 'lmonáfibaini 'lzáyidi
wakhodh jemeii 'lâdadi 'lmobáyini
wadh'ribho fei 'lthánel welá todáhini**

[10]

wddh'rib jemeia 'lwaf ki fei 'lmowatfiki
wafloc bidhaca anhaja 'lth'arayiki
wadh'ribho fei 'lasli 'lladhai taas'sila
waahhsi *ma* andh'amma wama tahhassala
waakfimho fa'lkafma idha s'ahheihho
yârifoho Idâjemo wa'lfas'eihho
fahadhihi mina 'lhhifabi jumalo
yátei âlai mithálihinna 'lâmalo
min gairi tath'weilin' welá 'âtifáfi
fákna bimd feihinna fahii cáfi
waí'n yemut ákharo kabla 'lkifmah
fahhakkiki 'lfihami waarif kifmah
wctjâl leho mefalah'an' ókhrai lemi
kad bayyana 'ltafs'eila feimd koddimá
wctndh'or faXn wafakati 'lfihamo
fakhodh hodeíta waf kohá temámo
wddhribho ctu jemeiahd fei 'lfabikah
in lam yecun bainahortia mowafakah
fdlds-homo 'lokhrái fafei 'lfihami
todh'rebo au fei wafkiha temami
wacullo fahmin' fei jemeii 'lthaniyah
yodh'rebo du fei waf kihd alaniyah
fahadhihi th'areikah'o 'lmonofakhah
farka biha rutbah'a fadhli fhamikhah

Wa'in yecun fei muftahhakki 'lmali
 khonthain s'ahhefhon bayyana 'lifhcali
 fakfirti ala'lakalli wa'lyekeini
 tahhdh' a bihakki 'lkifmah'i 'Imobeini
 tvahacadhai hucmo dhatoáti 'lhhamli
 yobnai' âlai 'lyekeini walákalli

[11]

tva'i'n yemut kaúmon' bihadmin' dú garak
 áú hhádithin' ámma 'ljemeiâ ca'lhharak
 walam yecun yôlemo hbálo 'lfábiki
 fala yowarrath nafikon' min nafiki
 taôddohom ca'i'nnahom ájanibo
 Ivahacadhai 'lráyyo 'lfadeido 'ls'dyibo
 tvakad atai 'lkaulo alai ma fheina
 min kifmah'i 'Imeirdthi ca yebeiná
 âlai th'areiki 'lramzi wa'lífhárah
 molakhkhas'an' biaujezi 'libarah
 fa'lhhamdo lillahi alai 'ltemami
 hhamdan catheiran' tomma fei 'ldawami
 wanafalo 'lâfwa âni 'ltaks'eiri
 wakhaira ma namolo fei 'lmes'eiri
 wagafra ma cana mina 'ldhonubi
 wafatra ma cana mina 'loyubi
 ivadfdh'alo 'ls'alwab'i wa'ltafleimi
 alai 'Inebiyi 'Imus'th'afai 'lcereímt
 mohammedin' khairi lanami 'Iaakibi
 waalihi 'lgurri dhawei 'lmenakibi
 was ahhbihi 'lafadb 'ili 'labrari

alsifwahl 'ldmithili 'lakhyari
 wahhalbond 'llaho wanima 'Icáfei
 dhú 'lizzi wa'lkodrah'i wa'lctlt'h'áfi

tummat wa'lhamdo lillahi
 rabbi 'lctálemeini was'alwdtoho
 wafelámoho álai' fayyidind
 mohammedin' alnebiyyi 'lómmiyi
 waâlai' álihi was'ahhbihi
 dlth'ayyibeini dlth'ahereini
 jailah'o 'ljemaah liarbadi liyali
 khalaiina min fhewali finnah
 athnei afhari wafebd mayih'i
 yetheki bi'llahi taâálai
 fakhro 'lfábikánei
 afa 'llaho anho.

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

Composed by the learned *Shaikh*, the *Imám*

Mowaffiko' ddein, father of *Abdalla*,

Mohammed, son of *Ali*, son of *Hosaw*,

Al Rahabi, commonly called *Ibuo'l*

Matakamta. May GOD be merciful to him !

In the name of God, the Clement, the Merciful; and
from Him we seek assistance,

[1]

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

• Faradh'ei, a man skilled in the *farayidh'* or *saqed* ordinances contained in the Alcoran.

Free from a particle of ambiguity.

The causes of inheritance among men are three;

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

And they are wedlock, collateral relation, and descent:

There is not besides them a single cause of inheritance.

[2]

And any one of three incapacities

Excludes a person from the succession;

Servitude, and homicide, and a difference of faith :

Understand then j 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 pl(early)

And the husband, and the emancipater nearly connected

And all the niales, *who inherit*, are these.

And all the inheriting females are seven,

(To no woman, but them, does the law give that title)

The daughter, and the son's daughter, and the tender

mother.

And the grandmother, and the wife, and the emancipatress.

And the sister, on whichever side' she stands:

And this their number *thus* appears.

And know, that inheritance is of two sorts, which *are*

The SHARE, and the HEIRSHIP' of what is distributable.

Now the shares, by the declaration of the book, are six:

(Besides them is no share in the inheritance)

' Pronounced in India, *fen* and *Ma*. See the last words of the report by the *Mahometan* doctors in the *Patna* cause.

A moiety, and a fourth; next, half a fourth,
 And a third, and a sixth, as the law declares,
 And two thirds; and these *are* the whole.
 Remember then; for " Every one, who remembers, is
 an IMAM."

[3]

A moiety then is the share of five persons,
 -The husband, and the female child,
 And the daughter of a son, on failure of daughters,
 And the *whole* sister, by the opinion of every MUFTI
 And, after her, the sister, who has the same father;
 This when they stand alone without any HEIR.
 And a fourth is the share of the husband, if there be with
 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 †,
 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 by the father *only*. (Act by this *rule*; thou wilt be right)
 And the third *is* the mother's share, when *there is* no child,

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

† See the answer of Mohammed Kasim to the *thirteenth* question proposed to him in the *Patna* cause,

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

[5]

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

• See ' A Narrathe of the Proceedings in the Patna Cause, p, 11. Note b '
 the Arabkh verb *as'saba* primarily signifies to collect and bind together the
 branches of a tree: hence the tecondary sense, to constitute the heir and head
 of a family .

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

[6]

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

And the whole estate is comprised in the allotment of shares;
Place them all to *the side of* the mother,
And consider their father as a rock in the sea,
And divide among the brethren a third of the estate left,
And this is the case of *mushtaraca*, or parcenary.

[7]

And now we will enter upon what we desire
Concerning the grandfather and the brothers, as we promised.

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

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

And the sister has no share with the grandfather
In what exceeds the case already concluded;
The consort and the mother, and these two *are* all of
them,

(Know then, for the best of the sect is he who knows best;
Are called, O friend, the *dedariyyah* ' ;
And they deserve to be remembered by thefcj

[8]

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

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

† By as'l, or roof, he mu't mean the *denominator* of a fraction.

‡ He, probably, considers the whole estate as *twelve*, which has four
divisors, besides unit.

§ In our notation (which **the** *Asiatics*, if they are wise, will adopt),-

1 + 1 = 2.

¶ This **passage** I do not **understand**, not knowing the *fable* to which

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

[9]

And the third comes *obviously* from three;
 And the fourth is formed from four ;
 And the eighth, if it be *required*, is from eight;
 And these are the second roots,
 To which no remainder belongs : know this ;
 Then pursue the method of verifying it, and distribute :
 And, if thou hast verified the root,
 The end of lengthened computation is clear gain.
 Give then to each person his share, from his root,
 Complete, or broken from its remainder.
 And, if thou see that the shares cannot be distributed
 To the partakers of the inheritance, follow what is pre-
 scribed,
 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,
 Remember well, and dismiss from thee doubt and difficulty;
 And, if thou see multiplicity in the kinds,
 Then they, by the rule among men,
 Are numerically ranged in four terms,
 The skilful *accountant* will know them by the rules;
 The similar *term*, after it the proportional,

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

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

[10]

And, mix the whole quantity with the concordant'
 And pursue by it the plainest of ways;
 And multiply it into the root, which thou hast investigated.
 And compute what is the sum, and what it amounts to;
 And divide it; and, if the division be just,
 The illiterate and the eloquent man will equally know it':
 And this is the whole of the computation.,
 (The work thus proceeds in similar cases)
 Without prolixity or digression ;
 Be satisfied then with what it contains; for it is sufficient*},
 And if one person die before the distribution,
 Make the shares just, and know his proper division j
 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 5 the quantity is complete-;
 And mix it, or all of them, into the preceding,
 if there be not an agreement between them,,

' The preceding- verse' contain an awkward **rule of practice** ; but it
 hence appears, that *Chardin* was **mistaken**, when he asserted, that nei-
 ther the *Indians* nor *Persians* of his time were at all acquainted with the
 common practical rules: see his chapter on the *Persian Arithmetick*.

† 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 de-
 spair of explaining them, if I had leisure to scud a few arithmetical
 books of the *Arabs* of *Persians*.

And the new shares Into the *former* shares
 Are blended, or into the entire quantity;
 And every share into the aggregate of the second
 Is mixed, or into the whole quantity, manifestly:
 And this is the method of *monasakhah*¹ ;
 Mount then by it the lofty degrees of excellence.
 And, if there be among the claimants of the estate
 A real hermaphrodite, removing *all* doubts,
 Distribute to the less *evident* and to the certain '
 Thou wilt allot with justice the clear portion ;
 And this is the rule of pregnant women,
 Which is founded on the certain, and the less *evident*.

[11]

And, if many kinsmen die by ruin or drownings
 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

¹ The grammarians, translated by Golizts, thus explain the word to *wisakh* or *rnonasakhah* : " Mors et successio continua hæredum, quæ fit
 ' Integrâ manente et indivisâ hæreditate ;" but the last words convey
 no adequate idea of the thing.

On the prophet' the pure, the illustrious,
MOHAMMED, the best of created beings, the last of *prophets*,
And on his family, **bright** with glorious qualities,
 And his **companions**, the excellent, the noble,
 The spotless, **the** exalted, **the** beneficent!
 And our sufficient help is GOD! O all-sufficient!
Endued with greatness, and with power, and with clemency!

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

The Transcriber, surnamed
 FAKHKO'L SA'BIKA'N!
 (or, Excelling his Predecessors)
 confides in GOD Most High::
 May GOD forgive his sins!

AL SIRĀJĪYAH:

OR,

THE MOHAMMEDAN LAW OF
INHERITANCE;

WITH

A COMMENTARY

BY

SIR WILLIAM JONES

P R E F A C E .

THE two *Mufelman* authors, whom I now introduce to my countrymen in *India*, are *Shaikh SIRA'JU'DDI'N*, a native of *Sejavend*, and *Sayyad SHARI'F*, who was born at *Jurjan* in *Khwarezm* near the mouth of the *Oxus*, and is said to have died, at the age of seventy-fix years, in the city of *Shirdz*: their compositions have equal authority in all the *Mohammedan* courts, which follow the system of *ABU' HANI'FAH*, with those of *LITTLETON* and *COKE* in the courts at *Westminster*; and there is, indeed, a wonderful analogy between the works of the old *Ara-Man* and *Englilh* lawyers, and between those of their several commentators, with this difference in favour of our own country, that *LITTLETON* is always too clear to need a gloss, and with this difference in favour of the *Arabs*, that the sole object of *SHARIF*, was to explain and illustrate his text, Without an ostentitious dif-

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

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

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

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

but the number fought, or, to itte the *Arabian* expreffion, *the integrant of the cafe*, I have ufually named the *divifor* of the eftate.

It will be feen in the *Sirajiiyyah*, that the fyftem of ZAID, though in part exploded by ABU HANI'FAH, 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 dictionary explains, except in their popular fenfes ; but, though my literal verfion of the trad by ALMU-TAJCANNA feems for pages together like a firing of enigmas, yet the following work makes every fentence in it perfectly clear; and the original, which was engraved from a very old manu, fcript, appears to be a lively and elegant epitome of the law of inheritance according to ZAID, but manifeftly 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 preceptors. This may be no improper place to inform the reader, that, although A B U HANI'PAH be the acknowledged head of the prevailing fect, and has given his name to it, **yet** fo great veneration is fhown to A B U Y U'-SUF **and the lawyer MUHAMMED' that**, when

they *froth* different from their matter, the *Mufelman* judge is at liberty to adopt either of the two decisions, which may seem to him the more consonant to reason, and founded on the better authority.

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

daft would exhibit this formula $D^3/6 + DF^2/6 + DS^1/6$; or, if AMRU had left his wife, two daughters, and both his parents, the formula in the fourth table would be $2 D^{1/2}/7 + F^4/27 + M^4/27 + W^3/27$; 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: thus might we construct a fet of tables, mathematically accurate, in which the legal diftribution, in every poffible cafe' might be feen in a moment without thought and even without learning; and fuch a blind facility, though not very confident with the dignity of fcience, would certainly be convenient in practice. We might alfo arrange the whole in a fynthetical method (of all the moft luminous and fatisfactory) by beginning with the *ftutences* of the *Korah*, as with indubitable axioms, followed by the genuine oral *maxims* of MUHAMMED; 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 fhould be conftant references by numbers in the manner of geometricians: this method I propofe to adopt in the Digeft, from which I have feperated the *Sirajiyyah*, becaufe it feemed worthy of being exhibited entire, and may be confidered as *Inftitutes of Arabian Law* on the important title' mentioned by the *Britifh*.

legiflature, of *inheritance and fucceffion to lands, rents, and goods.*

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 fovereign be not the/oft proprietor of all the land in his empire, which he or his predeceffors have not granted to a fubject, and his heirs;* 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 expreffly mentions *fields and houfes* as inheritable and alienable property: he fays, that a *houfe*, on which there is a lien, fhall not be fold to defray even funeral expenfes; that, if a man dig a well in his own field, and another man perifh by falling into it, he incurs no guilt; but, if he had trefpaffed on the field of another 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 aft of parties, as the cafe of contract, or, by the aft of

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

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

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

I am happy in an opportunity of advancing these arguments against a doctrine, which I think unjust, unfounded, and big with ruin; for, in the course of nine years, I have seen enough of these provinces and of their inhabitants, to be convinced, that, if we hope to make our government a blessing to them and a durable benefit to ourselves, we must realize our hope, not by wringing for the present the largest possible revenue from our *Asiatick* subjects, but by taking no more of their wealth than the publick exigencies, and their own security, may actually require; not by diminishing the *interest*, which landlords must naturally take in *their own soil*, but by augmenting it to the utmost, and giving them assurance, that it will descend to their heirs; when their laws of property, which they literally hold *sacred*, shall in practice be secured to them; when the land-tax shall be moderate, that they cannot have a colourable pretence to rack their

when they (hall have a well grounded confidence, that the proportion of it will never be raised, except for a time on some great emergency, which may endanger all they possess; when either the performance of every legal contract shall be enforced, or a certain and adequate compensation be given for the breach of it; when no wrong shall remain unredressed, and when redress shall be obtained at little expense, and with all the speed, that may be consistent with necessary deliberation ; then will the population and resources of *Bengal* and *Bahar* continually increase, and our nation will have the glory of conferring happiness on considerably more than *twenty-four* millions (which is at least the present number) of their native inhabitants, whose cheerful industry will enrich their benefactors, and whose firm attachment will secure the permanence of our dominion.

AL SIRÁJIYYAH.

THE INTRODUCTION.

IN THE NAME OF THE MOST MERCI- FUL GOD!

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

" discharge of his just debts from the whole of
" his remaining effects; then the payment of
' his legacies out of a third of what remains
" after his debts *are* paid; and, lastly, the distri-
" bution of the residue among his successors, ac-
" cording to the Divine Book, to the Traditions,
" and to the Assent of the Learned." They
begin with the persons entitled to shares, who
are such as have each a specific share allotted
to them in the book of Almighty GOD; then
they proceed to the residuary heirs by relation,
and they are all such as take what remains of
the inheritance, after those who are entitled to
shares; and, if there be only residuaries, they
take the whole property: next to residuaries for
special cause, as the master of an enfranchised
slave and his *male* residuary heirs; then they
return to those entitled to shares according to
their respective rights of consanguinity; then to
the more distant kindred; then to the successor
by contract; then to him who was acknow-
ledged as a kinsman through another, so as not
to prove his consanguinity, provided the de-
ceased persisted in that acknowledgement even
till he died; then to the person, to whom the
whole property was left by will; and lastly to
the publick treasury.

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 Shares, and the Perfons entitled to them.*

T H E *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 defendant 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 ablolute fharc, which is a fixth, and that with the fon, or Ton's fon, how low foever; 2, a legal fhare, 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 he 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 fhare 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 husband takes in two shares; half, on failure of children, and son's children, and a fourth, with children or son's children, how low foever they descend.



On Women,

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

them 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* himself.

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 *tafhbib*.

FIRST SET.

Son,
|
Son, Daughter,
|
Son, Daughter,
|
Son, Daughter,

SECOND SET.

Son,
|
Son,
|
Son, Daughter,
|
Son, Daughter,
|
Son, Daughter,

THIRD SET.

Son,
|
Son,
|
Son,
|
Son, Daughter,
|
Son, Daughter,
|
Son, Daughter.

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

of **the** 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 haft 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 entitled to a fhare: 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 reliduaries 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 filters, with daughters, refiduaries."

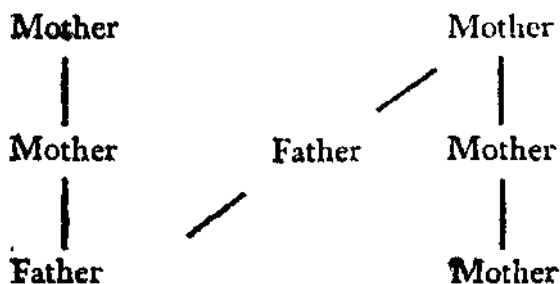
Sifters by the lame father only are like filters by the fame father and mother, and may be in feven cafes: half goes to one, and two thirds to two or more on failure of filters by the fame father and mother; and with one fifter by

the same father and mother, they have a share as the complement of two thirds; but they have no inheritance with two sisters by the same father and mother, unless there be with **them** a brother by the same father, who makes them residuaries; and then the residue is distributed among them *by the sacred rule* " to the male " what is equal to the share of two female.' The sixth case is, where they are residuaries with daughters or with son's daughters, as we have before stated *it*.

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

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

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



theft 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 the 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 own right is every male, in whole 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 offspring 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 (hall 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 (he 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 (hares 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 (hare 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 fiftier with a daughter, as we have mentioned before. The laft refiduary is the matter 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 mailer 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 flave; or " their freedman has manumitted one, or they " have fold a manumiffion to a flave, 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 *ABU YUSUF*; but, according to both *ABU HANIFA* 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, as all the learned agree. When a man poffeffes as his Have a

kinfman in a prohibited degree, he manumits 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 leaving 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* exclusion from one fhare, 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 lifter by the fame father; and an explanation of it has preceded. 2. *Perfect* exclusion: there are two fetts of perfons having a claim to the inheritance: one of which fetts is not excluded entirely in any cafe; and they are fix perfons, the fon, the father, the hufband, **the** daughter, the mother, and the wife; but **the** other fet inherit in one cafe and in another cafe

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



On the Divisors of Shares.

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

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



On the Increase.

A U L, or *increase*, is, when some fraction remains above the *regular* divisor, or when the divisor is too small to admit one share. Know, that the whole number of divisors is seven, four

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 *dúl* 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 *Mimberiyya* (or a cafe answered 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 MAS'UD (may GOD be gracious to him!) for, in his opinion, the *divifor* twenty-four 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.*

T H E *temathul* of two numbers is the equality of one to the other; the *tedákhul* is, when the fmaller of two numbers exactly meafures the larger, or exhausts it ; or we call it *tedakhul*, 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 *tawafuk*, 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 fraction ion common to both. The *tabayun* 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*) *mutawafik* 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 caſes there is need of ſeven principles; three, between the ſhares and the perſons, and four between perſons and perſons. Of the three *principles* the firſt is, that, if the portions of all the claſſes be divided among them without a fraction, there is no need of multiplication, as *if a man leave* both parents and two daughters. The ſecond is, that, if the portions of one claſs be fractional, yet there be an agreement between their portions and their perſons, then the meaſure of the number of perſons, whoſe ſhares are broken, muſt be multiplied by the root of the caſe, and its increaſe, if it be an increaſed caſe, as *if a man leave* both parents and ten daughters, or *a woman leave* a huſband, both parents, and fix daughters. The third *principle* is, that, if their portions leave a fraction, and there be no agreement between thoſe portions and the perſons, then the whole number of the perſons, whoſe ſhares are broken, muſt be multiplied into the root of the caſe, as *if a woman leave* her huſband and five ſiſters by the ſame father and mother. Of the four *other principles* the firſt is, that, when there is a fractional diviſion between two claſſes or more, but an equality between the numbers

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

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man leave two wives, fix female anceftors, ten daughters, and *feven* paternal uncles'

Section.

WHEN thou defireft to know the (hare of each clafs by arrangement, multiply what each clafs has from the root of the cafe by what thou haft already multiplied into the root of the cafe, and the product is the fhare of that clafs; and, if thou defireft to know the (hare 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 (hare 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 (hare 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 cleared; and it is, that a proportion be afcertained for the (hare of each clafs from the root of the cafe to the number of per-

fons one by one, and that, according to such proportion from the multiplied *number*, a share be given to each individual of that class.



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

IF there be a disagreement between the property left and the *number arising from the arrangement*, then multiply the portion of each heir, according to that arrangement, into the aggregate of the property, and divide the product by the number of the arrangement, but, when there is an agreement between the arrangement and the property left, then multiply the portion of each heir, according to the arrangement into the measure of the property, and divide the product by the measure of the *number arising from the arrangement*: the quotient is the portion of that heir in both methods. This *rule* is in order to know the portion of each individual among the heirs; but, in order to know the portion of each class of them, multiply what each class has, according to the root of the case, into the measure of the property left, then divide the product by the measure of the case, 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 arifng 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 (hare from *the number arifng* 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 hufband 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 fhares; and thus there will be two parts for the mother, and one for the uncle.

On the Return.

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

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

whom there is no return: then fettle the cafe according to their fhares; 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 , well; as *if there be* a husband 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 husband, 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 muſt be made, and, if the remainder quadrate, *it is well*; and this *is* in one form' that is, when a fourth *goes* to the wives, and the refidue is *diftributed* in thirds among thofe entitled to a return; as *if there be* a wife, and a grandmother, and two lifters by the mother's fide: but, if it do not quadrate, then multiply the whole caſe 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 (hares of both claſſes; as *if there be* four wives, and nine daughters, and fix female anceſtoirs: then multiply the fhares of thofe, to whom no return muſt be made, into the caſe of thofe, who are entitled to a return, and the (hares of thofe, to whom a return is to be made, into what remains of the denominator of the (hare of thofe, who are not entitled to a return. If there be a fraction in fome, adjuſt the caſe by the before-mentioned principles.



On the Diviſion of the Paternal Grandfather.

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

" *thren* of the whole blood and the brethren by
 " the father's fide inherit *not* with the grand-
 "father" this is also the decifion of ABU
 HANIFA (on whom be GOD's mercy!) and
 judgments are given conformably to it. ZAID
 the fon of THABIT, indeed, aflerts, that they
da inherit with the grandfather, and of this opi-
 nion are both ABU YUSUF and MUHAM-
 MED, as well as MALIC and ALSHAFI. According to ZAID, the fon of THABIT (on
 whom be GOD's mercy!) the grandfather,
 with brothers or fillers of the whole blood and
 by the father's fide, takes the beft in two cafes,
 from the *mukdfamah*, or *divifion*, and from a
 third of the whole eftate. The meaning of
mukdjamah is, that the grandfather is placed in
 the divifion as one of the brethren, and the
 brethren of the half blood enter into the divi-
 fion with thofe of the whole blood, to the pre-
 judice of the grandfather; but, when the grand-
 father has received his allotment, then the half
 blood are removed from the reft, *as if* difinhe-
 rited, and receive nothing; and the refidue
 goes to the brethren of the whole blood: ex-
 cept when among thofe of the whole Blood
 there is a fingle fifter, who receives her legal
 flictre, I mean the whole after the grandfather's
 allotment; then, if any thing remains, *it goes*
 to the half blood; if not, they have nothing'

and this is *the case*, when a man leaves a grandfather, a fifter by the fame father and mother, and two fitters by the fame father only: *in this case* there remains to thofe fifters a tenth of the eftate, and the correct denominator is twenty; but, if there be, in the preceding case, one 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 fhare, 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 refidue is better from the grandfather, and the refidue has not a complete third, multiply the denominator of the third into the root of the case. 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 case* is raifed to thirteen, and the fifter has nothing. Know, that ZAID, the fon of THABIT (on whom be GOD's grace !) has

not placed the fifter by the fame father and mother, or by the fame father, as entitled to a fhare 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 which cafe* the hufband *ought to have* 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 correft diftribution is made by twenty-feven' The cafe is called *acdariyyah*, becaufe it occurred on *the death* of a woman belonging to the tribe of ACDAR. If, inftead of the fifter, there be a brother or two ifters, there is no increafe, nor *is that cafe* an *acdariyyah*.

On Succelfion to Vefted Interefts.

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

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



On Distant Kindred.

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

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

On the Firft Clafs.

T H E 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 perfbhs 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 roots agree, *in which 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 oppofition 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 M U H A M M E D , 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 M U H A M M E D (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 fhare of his mother. Thus, according to M U H A M M E D (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 higheft difference that occurs among their children, and, in the fame manner, what goes to the females ; and thus the operation is continued to the end according to this fcheme;

S	S	S	D	D	D	D	D	D	D	D	D	D
D	D	D	D	D	D	D	D	D	D	D	D	D
S	D	D	S	S	S	D	D	D	D	D	D	D
D	D	D	S	D	D	S	S	S	D	D	D	D
D	S	D	D	D	D	S	D	D	S	D	D	D
D	D	D	D	D	S	D	D	S	D	S	D	D

Thus M U H A M M E D (to whom G O D 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 Deceased,

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

In this cafe according to A B U Y U S U F (on whom be G O D's mercy!) the property is divided among the branches in feven parts, by confidering their perfons; but, according to M U C A M M E D (to whom G O P be merciful!) the property is diftributed according to the high* eft difference of fex, I mean in the fecond rank, in fevenths, by the number of branches in the roots ; and, according to M m, 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, *which* 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 correct 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 firft 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:

The Deceased.

Daughter	Daughter	Daughter
I	I	I
Daughter	Son	Daughter
Son	Two Daughters.	

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

*On the Second Class.*

HE among them, who is preferred in the succession, is the nearest of them to the deceased, on which side soever he stands; and, in the case of equality in the degrees of proximity, then he, who is related to the deceased through an heir, is preferred by the opinion of ABU SUHAIL, furnished ALFERAIDI, of ABU FUDAIL ALKHASSAF, and of ALI, the son of ISAI ALBASRI; but, no preference is given to him

according to ABU SULA1MAN ALJURJANI, and ABU ALI AL BAIHATHI ALBUSTI. If their degrees be equal, and there be none among them, who is related through an heir, or, if all of them be related through an heir, then, if the fex of 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 then relation differ, then two thirds go to thofe on the fathers fide, that *being* the fhare of the father, and one third goes to thofe on the mother's fide, that *being* the fhare 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.

T H E 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 fitter'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 this case* the whole estate goes to the daughter of the brother's son, because she is the child of a residuary; and, if it be by *the fame* mother *only*, *distribution is made* between them *by the rule*, " A male has " the share of two females," *and*, by the opinion of A B U YUSUF (to whom GOD be merciful!) in thirds' according to the persons, but, by that of M U H A M M E D (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 residuary among them, or if all of them be children of residuaries, or if some of them be children of residuaries, and some of them children of those entitled to' shares, and their relation differ, then A B U YUSUF (to whom GOD be merciful!) considers the strongest *in consanguinity*' but M U H A M M E D (may GOD be merciful to him !) divides the property among the brothers and sisters in moieties, considering, as well the number of the branches, as the sides in the roots; and what has been allotted to each set is distributed among their branches, as in the first class; thus, *if a man leave* the daughter of the daughter of a sister by *the fame* father and mother, she is preferred to the son of the daughter of a brother by the same father *only*, accord-

ing to *ABU YUSUF* (to whom *GOD* be merciful!) by reason of the strength of relation; but, according to *MUHAMMED* (may *GOD* be merciful to him!) the property is divided between them both in moieties by confederation of the roots. So, when *a man* leaves three daughters of different brothers, and three sons and three daughters of different fathers, as in *this* figure;

"THE Deceased.

Sister_Sister_Sister_Brother_Brother_Brother

by the fame

Mother—Father—Father—Mother—Father—Father
and Mother and Mother

Son Son Son Daughter Daughter Daughter
Daughter Daughter Daughter.

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

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

The 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 fhe is the child of a refiduary, and hath alfo the ftrength of confanguinity.

On the Fourth Cafs.

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 *with 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 frown* 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 Children, and the Rules concerning them'

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

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

the roots, as in the first class; 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 residuaries.

On Hermaphrodites.

To the hermaphrodite, *whose sex is quite doubtful, is allotted* the fmaller of two (hares, I mean the worfe of two conditions, according to ABU HANI'FAH (may GOD be merciful to him !) and his friends, and this is the doctrine of the generality of the *Prophet's* companions? (may GOD be gracious to them!) and conformable to it are decifions *given*; as, when *a man* leavea a fon, and a daughter, and an hermaphrodite, then the hermaphrodite has the fhare of a daughter, fince that is afcertained: and, according to ĀMIR ALSHĀBĪ (and this is the opinion of IBNU ĀBBAS, may GOD be gracious to them both !) the hermaphrodite has a moiety of the two fhares in the controverfy; but *the two great lawyers* differ in putting in practice the doctrine of ALSHĀBĪ: for ABU YŪSUF fays, *that* the fon has one fhare, and the daughter half a

fhare, 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 *his* 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 fhare for he (ABU YÚSUF) pays attention to the legal fhare and to the increafe, and he verifies *the cafe* by nine: or, we may fay, the fon has two fhares, and the daughter one fhare, 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 him* 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 produd: 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' *has it* multiplied into

five; Co that thirteen fhares go to the hermaphrodite, and eighteen to the fon, and nine to the daughter.



On Pregnancy,

T H E longest 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 ALFAHMI (may GOD be merciful to him !) three years; and, according to ALSHAFII (may GOD be merciful to him !) four years : but according to ALZUHRI (may GOD be merciful to him !) seven years: and the shortest time for it is six months. There is reserved for the child in the womb, according to ABU HANÍFAH (may GOD be merciful to him !) the portion of four fons, or the portion of four daughters, whichever of the two is most; and there is given to the rest of the heirs the smallest of the portions; but, according to MUHAMMED (may GOD be merciful to him !) there is reserved the portion of three fons or of three daughters, whichever of the two is most : LAITH, fon of SÂD, (may GOD be gracious to him !) reports this opinion from him ; but, by another report, *there is reserved the* portion of two fons; and one of

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

Now the way of knowing the life of the child at the time of its birth, is, that there be found in him that, by which life is proved; as a voice, or sneezing, or weeping, or smiling, or moving a limb; and, if the smallest *part* of the child come out, and he then die, he (shall 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 bread come out, he fhall inherit; but if he come out inverted (*or with 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 produft will be the arranger of the cafe: then multiply the allotment of him, who would have fbomething 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 fhall be giveo to fuch an heir; and the difference between them muft be referved from the allotment of that

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

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



On a Lost Person.

A LOST person is *considered as* living in regard to his estate ; so that no one can inherit from him ; and his estate is reserved, until his death can be ascertained ; or the term for a *preemption of it* has passed over: now the traditional 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 WASANT, the son of ZIYÁD, reports from ABUHANÍFAH (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 says, an hundred and ten years; and ABUYÚSUF says, an hundred and five years; and some of them, *the learned*, say, ninety years ; and according to that *opinion* are decisions *made*. Some of *the learned in the law* say, that the estate of a lost person must be reserved for the final regulation of the *Imám*, and the judgement suspended as to the right of another person, so that his share from the estate of his ancestors must be kept, as in the *case* of pregnancy; and, when the term is elapsed, and judgement given of his death, then his estate goes to his heirs, *'who are* to be found, according to the judgement on his decease; and, what was reserved on his account from the estate of his ancestor, is restored to the heir of his ancestor, from whose estate that (share was reserved ; it need the lost person is dead as to the estate of another.

The principle in arranging cases concerning a lost person is, that the case be arranged on a supposition of his life, and then arranged on a supposition of his death ; and the rest of the operation is what we have¹ mentioned in the chapter of pregnancy.

On an Apostate.

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

On a Captive.

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

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

WHEN a company *ofperjbnsdẋc*, and it is not known which of them died first, they are considered, as if they had died at the same moment; and the estate of each of them goes to his heirs, who are living; and some of the deceased (shall not inherit from others: this is the approved opinion. But [^]ALi and [^]IBNU MAS[^]U[^]UD say, according to one of the traditions from them, that some of them shall inherit from others, except in what each of them has inherited from the companion of his fate.

A
 CO MM EN'TARY
 ON
 THE 'SIRAJITTAH.

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

law of *fucceffion* manifeftly relating to the *dead*, it is properly oppofed to all other laws, which prefcribe the duties and afcertain the rights of the *living*; but we merely take notice of the fentence, that no part of the *Sirdjiyyab* may be unexplained, and proceed to the *four* acts, which, on the deceafe of a *Mohammedan*, are to be fucceffively performed 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 perions be removed out of fight, with all due fpeed and ioiemnity, 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 previoufly attached : but the *Mufelman* lawyers, who admit, that the funeral charges mud in the firft place be defrayed, aflign a very whimfical reafon for fuch a priority ; *becaufe*, they lay, the *winding-Jheet* and other clothes of the dead are analogous to *juitahle* apparel worn by the living, and confequently fhould not be liable to the claims of a creditor. The legal expenfes of burying a *Mohammedan* are very moderate, both in the *nutfiber* 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, w pieces for a woman, would be held a prodigal superfluity, and less than those, a niggardly deficiency, of expence, so, if the funeral clothes of AMRU or HINDA were dearer than the vesture usually worn by them, when alive, it would be a culpable excess; and if cheaper, a blameable defeat; but, if in fact they had been used to wear one sort of apparel on solemn festivals, another in visiting their friends, and a third, in their own houses, the value of their visiting dresses must regulate that of their burial, and either extreme would be too prodigal or too parsimonious. Should their debts, indeed, cover the whole of their property, the *legal* expence of the funeral must be reduced to the *sufficient* expence, as it is called -, that is, to two pieces of cloth for AMRU and to *three* for HINDA : the names, dimensions, and uses of all the cloths used in funerals, both for men and for women, are enumerated in *Persian* by *Maulavi KASIM*; but it would be useless to mention them; and it seems only necessary to add on this article, that if deceased persons leave no property whatever, or none without a special lien on it, the funeral expenses must be paid by such of their relations, as would have been compellable by law to maintain them, when living; and, if there be no such relations, by the publick trea-

fury, in which there is always an ample fund arising 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 health*, to ufe the *Arabian* phrafe, muft be difcharged before a *debt of Sickness*; that is, a debt *contrasted* or *acknowledged*, while the party was of found understanding and body, is preferred, when legally proved, to one *acknowledged* in ficknefs, 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 muft 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, muft not exceed *a third part* of the property left by him, and remaining after the difcharge 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 SHARĪF; though a distinction, which the text by no means implies, has been taken between a *determinate* and an *indeterminate* legacy.

IV. We come now to the *distribution* of his estate, remaining after the payment of debts and legacies, among his *heirs* (for so we may call them, although *real* and *personal* property are undistinguished in the laws of the *Arabs*) according to certain rules derived from three sources, the *Koran*, the genuine system of oral traditions from the legislator, and those opinions in which the learned and orthodox have generally concurred: the order, and proportions, in which the property of AMRU or HIND A must be distributed, constitute the principal subject of the work, which we have undertaken to explain.

1. The first class of *heirs* are they, who may be called *pharers*, because a certain *share* of the estate is expressly allotted to each of them in the *Korān*, and particularly in the *fourth* chapter of it.

2. Next come they, who may be distinguished by the name of *residuaries*, because they take the *residue* after the *shares* have been duly distributed; and they are of two sorts, residu-

aries by *confanguinity* and residuaries for *special cause*, the former of whom are preferred in the order of iucceffion; the latter are the niafters or miftrefles, of enfranchifed flaves, or their *male* residuary heirs. If no *Jbarers* be living, the *residuaries* take the whole; but, if there be fharers by *confanguinity* and no residuaries, a farther portion of the inheritance *reverts* to them, though never to the widower or to the widow, while any heirs by blood are alive.

3. On failure of the two preceding claiTes, the diftribution is made among thofe *next of kiriy* who are neither *fharers* nor *residuaries*: they may be called the *diftant kindred*.

1. Should none of the diftant kindred be living and capable of inheriting, the eftate goes (unlets there be a widow or a widower, who is firft entitled to *a pare*) to him, who may be called the *fucce for by contrast*; 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 fucceffbr after my death, *paying for me my* " fine and ranfom, to which I may become " liable," and ZATD accept the condition, it is a valid contract by the *Arabian* law; and, if ZAID alfo be a man whose defcent is unknowh, and make the fame propofal to AMRU, who likewife accepts it, the contract is mutual and

fimilar, and they are *fucceffors by contrast* 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 *brother* or his *uncle*, that is, to be related to him by his *father* or by his *grandfather*, 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 ancestor*, 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 Ibures 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 ftridly conformable to law (for the *Koran* Teems to allow *pious bequefts* only), than fuffer his eftate to efcheat; which muft be the confequence of his dying without a representative. 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 eftablifhed*, 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 claffes; but this doctrine feems quite exploded.

BEFORE we proceed to the law of *fhares*, 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 *Mufelmans*.

i. Slavery, by the *Mohammedan* law, is either *perfect* and *absolute*, as when the Have and all, that he can polfeffs, are wholly at the difpofal of his mafter, or *imperfekt* and *privileged*, as when the mafter has promifed the flave his freedom on his paying a certain fum of money by eafy infalments, or, without any payment, after the death of the mafter: a female Have, who has borne a child to her mafter, is alfo *privileged*; but in both forts of flavery, as long as it continues, the Have 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 manu-

miffion by prudente and induftry, and by degrees pay the price of his freedom, may fuggeft an excellent mode of enfranchifing the black Haves 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 *Mufelman* Have, or by failing two entire months, and by paying the price of blood; or, thirdly, it is *accidental*, for which an expiation is neceffary. *Malicious homicide* 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 (harp illick or a large ftone, or with fire, which has *the effeél*, fays KA'SIM, *of the moft dangerous inftrument*, and, by parity of reafon, *withpoifon* or by *drowning*; but thofe two modes of killing are not fpecified by him; and there is a ftrange diverfity of opinion concerning them : killing *without proof of malice* is, when death enfues from a beating or blow with a flight wand, a thin whip, or a fmali pebble, or with any thing not ordinarily dangerous: *accidental death* is, when it was neither defigned nor could have been pfevented

by ordinary care, as if AMRU were to fhoot 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 flayer would not be permitted to inherit *from thejlain*. 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 ftone, the doer of the illegal aft, which was the primary *occafion* (but not the *caafe*) of the death, muft pay the price of blood, but would not, it feems, be difabled from fucceeding to the property of the decaffed, whom he could not in ftrictnefs be faid to have killed.

3. An unbeliever fliall never be heir to a believer, nor converfely ; but infidel fubjects may inherit from infidels.

'. The difference between two ftates or countries confifts in the difference of fovereigns, by whom protection is given to their refpective fubjetts, and to whom allegiance is refpectively due from them: this difference is particularly marked between a country governed by a *Mohammedan* power and a country ruled by a prince of *any other religion*; for they are always, virtually at leaft, in a ftate of warfare, the firft being called by lawyers *the feat of peace* ,

and the fecond, *the feat of hofility*. A difference of country, therefore, which excludes from the right of inheriting, is either *afual* and *unqualified*, as when an *alien enemy* reiiides in the *feat of hofility*', 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, becaufe each of them owed a feparate allegiance; or the difference is *qualified*', as when a *fugitive* enemy feeks quarter, and obtains a temporary refidence in the *feat of peace*, or when two alien enemies are fugitives from two different hoftile countries: now, although the *tributary* and the *fugitive* actually live in the fame kingdom, yet, iince the fugitive continues a fubjcft 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.

reduced to money of one denomination, the magiftrate, or his officer, muft proceed to the diftribution of the *jhares*; and, as they are a *moiety*, a *fourth*, an *eighth*, two *thirds*, one *third*, and a *fixth*, of the aggregate fum, it will be convenient at firft to confider that fum as confifting of *twenty-four* equal parts, fo that the fhares will be, in whole numbers, *twelve*, *fix*, *three*, *fixteen*, *eight*, and *four*.

THE *FbarerS* are *twelve* perfons, *four* males and *eight* females ; but, before we fpecify their refpective allotments, it is neceffary to premife that a *grandfather* and a *grandmother*, according to the *Arabian* idiom, fignify a *male*, and a *female*, *ancejlor* in any degree; that a *true* grandfather is he, between whom and the deceafed no female anceftor intervened; that a *false* 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 false grandfather* intervened between her and the deceafed : in fhort, the only *true line of ancejlry*, according to the *Arabs*, is an uninterrupted fucceffion of *paternal* forefathers. The *male* fhareers then are *the father*, the *true grandfather*, the *brother by the fame mother* only, and the *widower*: the females are the *widow*, the *daughter*, the *female iffue of the fon*, the *ifter of the whole blood*, the *ifter by the fame father* only,

the *fifter* by the *fame* mother only, the mother herfelf, and the *true grandmother*.

We begin with the *males* in the order of the fhares before enumerated; and, 1. The father of AMRU or HIND A takes' a *fixth* 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 *refiduary heir*; and, if there be only a *daughter* of the deceafed, or a *female* defcendant from the fon, he firft has his legal fharc, or *afitth*, and, when her fhare alfo has been allotted, he claims the refidue. 2. The true grandfather is excluded from any fhare 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 cxclufion of her children, yet the father has the additional ftrength of a double title, both as *zjharer* and a *rejiduary*: but, if the father alfo be dead, *his* father, or true paternal ancestor, has exactly the fame intereft, except in four cafes, which will be prefently mentioned. 3. A fingle half-brother, by the fame mother oilly, takes a *fixth*, and two or more fuch half-brothers, a *third*; provided that the deceafed

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* pharers; for, *in this injtance*, there is no diftinction of fex; both brothers *and fifiers* by the fame mother only having an equal right and an equal fhare in the diftribution. '. A *moiety* of HINDA'S eftate, if fhe die without children, or the iffue of a deceafed fon, goes to her widower AMRU, who, if (he leave fuch iffue, has no more than a *fourth*.

As examples of the father's right?, 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 foil's fon, OMAR : in this cafe the *four hundred* pieces are the (hare of ZAID, and OMAR takes the remaining two thoufand; but, if AMRU leave only his father ZAID and either a daughter, or fon's daughter, LAILA, the father is firft: entitled to the *four hundred* pieces, or *fixth* part; and, after LAILA has received *twelve* hundred, or a moiety of the eftate (which, as we fhall fee, is her *Jbare* 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 LEBÍD the brother, of the

deceased, LEBID is excluded; and the whole estate goes to ZAID. If, in the three preceding cases, the paternal grandfather SÁLIM had been left instead of ZAID, his rights would have been precisely the same; and the only difference between ZAID and SÁLIM will appear from the four following examples. i. The paternal grandmother would be excluded by ZAID her son, but not by his father, her husband, 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 HÁRETH has received the legal share; but, if SÁLIM be substituted for ZAID, she would have a right to a third of the *whole effects*, according to the prevailing opinion, although ABÙ YUSÚF thought her entitled, even in that case, to no more than a third of the *remainder*. 3. The brothers of the whole blood, and those by the same father only, are excluded from the inheritance by ZAID the father, but not by the grandfather SALIM, as the best lawyers agree, differing on this point from their master ABÙ HANÍFAH. 4. If AMRU had manumitted his slave YÁSMÍN, and died, leaving his father ZAID and a son OMAR, *Sixth* part

of the right of fucceflion to YA'SMİN would have vefted, according to AB'U YU'SUF, in ZAID, but, if the paternal grandfather SA'LIM had been left inftead of the father, the whole intereft would have vefted in the fon: in this cafe that illuftrious lawyer ultimately diflentend 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 fucceflion to the manumittee vefted in OMAR.

Let us proceed to the (hares of the *females*" and i. If AMRU die without children, and without any iffue of a deceafed fon, his widow HINDA muft receive a *fourth* of his aftets; but her (hare is an *eighth* only', if any fuch iflue be living: (ould he leave more widows than one, they take equal parts of fuch *fourth* or *eighth*; fo that the legal (hare of the widower is always in a double ratio to that of the widow or widows: as, if HINDA die worth *twenty-four* thoufand zccchins, her furviving hufband AMRU muft be entitled either to *twelve* or to *fix* thoufand; and if AMRU die with the fame eftate, his widow HINDA muft have either *fix* or *three* thoufand for her fole fhare; or, if ZAINEB and ABLA had alfo been legally married to AMRU, the three widows muft receive

cither *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, exprefled in the *Koràn*, is this; " to one male give the portion of two " females;" and the daughters in that cafe are not properly *pharers*, but *refiduary heirs* with the fon, their part of the inheritance being always in a fubduple ratio to his part. Thus, if AMKU die worth *twenty four* thoufand pieces of gold, his only child FATIMA takes twelve thoufand as her *Jhare*; but, if fhe have three iifters, AZZA, LATI'FA, and ZUBAIDA, two thirds of the aftets, or *fifteen* thoufand pieces, are equally divided between the four girls; and if there be a fon OMAR, he muft receive, in the firft cafe, *fifteen* thoufand, while FATIMA has *eight*; and, in the fecond, *eight* thoufand, while fhe and her lifters 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 FA'TI-MA been living, fhe would have taken *half the* eftate, or *twelve* thoufand pieces of gold, and a *fifth* only, or *four* thoufand, the complement of *two thirds* or *fifteen* 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 fhare to the exclufion of their brother's *female* iflue, unlefs the right of that iflue had been fuftained by a *male* in an *equal*, or a *lower* degree, who would have made them *refduaries*, " the *male* " taking, by the rule, the portion of females;" but a male in a *higher* degree would not have given them that advantage; and, if OMAR himfelf had furvived, his daughters would have been wholly excluded. The *fix* cafes, therefore, or different fituations, of the female iflue of OMAR may be thus recapitulated: i. 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 fhare of the female iflue. 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 correpond with thofe of daughters: but in the three laft. their rights are weaker, becaufe they are in a remoter degree from, the deceafed,

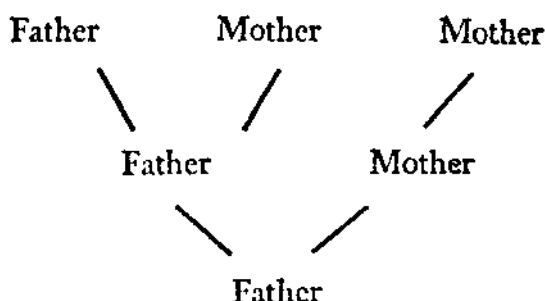
The pedigree exhibited in the text' is called by the *Arabs* the *tafhbib*, becaufe, in their opinion, it fharpens the underftanding, and captivates the fancy as much as the *compofition of an elegant love-poem*, which the word literally fignifies; but, without adopting fo wild a metaphor, we may truly fay, that it is very perfpicuous, and that no comment, after what has been premifed, could render it clearer. An example, however, will (how more diftin⁵My than an abftra6t rule, in what manner an eftate is dividible, when a *male* defcendant gives a *rejiduary* title to a *female* in the fame, or in a *higher*, 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 *afixth* together with the higheft 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 OMAR be the brother of ZARI'FA, whom we fuppofe the loweft of the middle fet, the remaining *third* of the eftate muft be diftributed in *fevenths*,

becaillfe there areyfw 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 lowed 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 *twelve* thoufand of them; the two daughters of his fons' fons receive each *two* thoufand; and, the refidue being *eight*, 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, ' . 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 clais is comprised in the *feventh* cafe of the fecond; and that (6,) the fifters by the fame mother have been mentioned in a former fection. There wilt be no ufe in repeating the ingenious arguments of IBNU ABBAS in fupport of his diflent on many points from other old lawyers, nor the

solid answers, which have been given to his objections; but a story, told by SHARÍF, may here be repeated, because it conveys an idea of the traditionary *Arabian* law, and shows from what sources our excellent author derived his doctrine: 'HUDHAIL used to relate, that ABU MUSA, being consulted on the distribution of an heritage among a daughter, a son's daughter, and a sister, answered, *the first must have a moiety; the second a sixth; and the third, what remains* " but " Consult IBNU MASUUD, " added he, and apprise me of his answer;" when IBNU MASUUD, was consulted, he said, that he was present, when MUHAMMED, himself gave the same decision; and, when that answer was reported to ABU MUSA, he said, " you must put no questions to me, as long as that illustrious lawyer remains with you."

7. Although the different rights of the mother in different cases be very clearly explained, yet her title to *a third of the residue* may be illustrated by two examples: first, if ADHRA leave only her husband WAMIK, her mother SOADA, and her father MAZIN, half of her estate goes to WAMIK, a third of the other half, or a sixth of the whole, to SOADA, and the remainder to

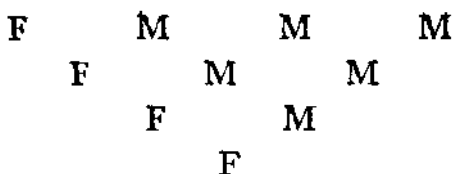
MAZIN ; but, fecondly, if WAMIK leave only his wife ADHRA, his mother ZAINEB and his father LEBID, the widow takes a quarter of his property, while ZAINEB has a third, and LEBID two thirds, of the remaining three quarters. 8. In giving an example of the divifion between two great grandmothers *, we may anticipate in fome degree, the arithmetical part of the work, which will be found extremely clear and ingenious. The pedigree exhibited by SHARÍF is in this form:



Now the paternal grandmother's mother, and the mother of the paternal grandfather, are together entitled to a fixth, and the paternal grandfather's fâther to the refidue, of the eftate, which ought, by the general rule, to be divided *into fix* parts, becaufe fix is the denominator of the fhare; but, to avoid a fraction, we muft

oblerve 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 fix*, 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*.

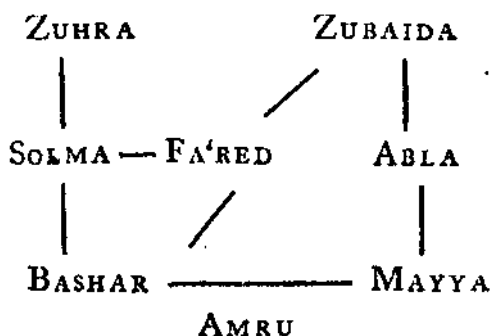
The great grandfathers are called anceftors in the *fecond*, and their fathers, anceftors in the *third*, degree, and fo forth; and it muft be remarked that in thefe tables the number of *female* anceftors, who inherit with the *males*, is equal to the number of fuch degrees; thus in the following,



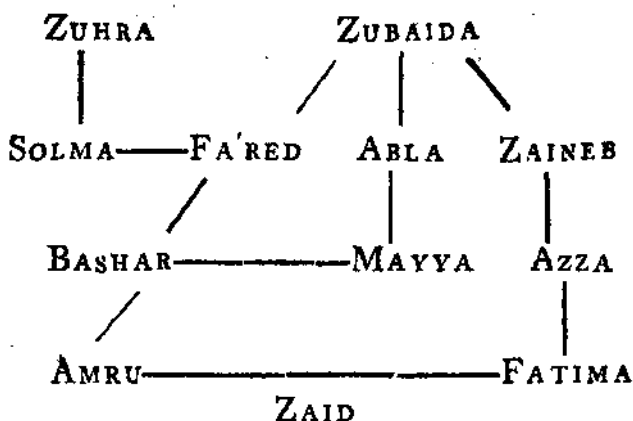
there are *three* great great grandmothers, and the eftate muft be divided into *eighteen* parts, becaufe one and three are prime to each other. We fuppofe in both pedigrees, that the higheft line only are left by the deceafed AMRU; for, by the text, *the near eft female anceftor excludes the more diftant*; and, if he leave his fathei ZUHAIR, and his paternal grandmother AZZA< with L A H - A his maternal grandmother's mother

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

Let us conclude the subject with a case put by SHARÍF in illustration of the pedigree in the text: ZUBAIDA gave her daughter's daughter MAYYA in marriage to her son's son BASHAR, and the young pair had a son AMRU, who acquired an estate, and died: now ZUBAIDA was both paternal and maternal great grandmother of AMRU, and had, therefore, a *double* relation to him; but another woman, named ZUHRA, had married her daughter SOLMA to FARED, who was the son of ZUBAIDA, brother of ABLA, and father of BASHAR; so that ZUHRA was AMRU'S paternal grandmother's mother, and had only a single relation; as it will appear by the following arrangement of the family:



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



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

In both these cases a *fixth* of the assets is divided *equally* between the two female ancestors, by the opinion of ABU YUSUF, and, according to one authority, by that of his great master also; but his fellow-student MUHAMMAD (whose arguments, and the answers to them, it is needless to add) contended, that

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

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

be free; but, by the persuasion of a *Cbristian* friend, (he renounces her faith, and seeks refuge in a hostile country: now *a believer cannot be the flave of an infdel*; and the *Mohamedanyidgt* pronounces accordingly, that NERGIS has gained his freedom; but LAILA, repenting of her apostasy, returns to her native country and her former belief; after which NERGIS dies without heirs: LAILA succeeds as residuary to her promisee, as (he would have succeeded to a flave of NERGIS purchased after the decision of the judge, if a similar promise of manumission at his death had been made by the matter; and if that second promisee had died without heirs after her repentance and return. Should CĀFŪR, a flave of LAILA, marry, with her consent, MERJĀNA, the freedwoman of AMRU, the son of that couple would be born free, because, in respect of freedom or slavery, *a child has the condition of its mother*, and he bears a relation to AMRU her manumitter; but should LAILA give CĀFŪR his freedom, he would draw that relation from AMRU, through himself, to LAILA, so that she would succeed to the son of CĀFŪR and MERJĀNA, if he died after his parents and without other heirs *pi* the first or second class: the case would be similar, if CĀFŪR being enfranchised, had

bought a flave Misc, and given him in marriage to the freed woman of ZAID; for, if the iflue of that marriage had been a fon, born free, but with a relation to ZAID, and if CÁFÚR had then given Misc his liberty, he would have *drawn* from ZAID the relation of his freedman's child, and transferred it, through himfelf, to LAILA his former miftrefs. This dodtrine of a *relation* (as the *Arabs* call it) firft *ve/ied* through the mother and then *devejied* through the father, is founded on a decifion of OTHMÁN in the cafe of ZUBAIR and RAFÍ.

We had occafion before, to mention the difference (according to ABU YUSUF) between the *father*, and the *grandfather*, 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 *rejiduaries*, which proves, that the relation of enfranchifement may arife by the *aft of law* as well as by the *act of the party*. Let it be premifed, that marriage is prohibited between kindred of two clafles; firft, between all thofe in afcending or defcending lines of confanguinity, who are called *near*; fecondly, between brothers and fitters, and their iflue, or between nephews or nieces and aunts or uncles, paternal

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

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

The chapter of *exclusion*'s very perspicuous; but the case of an *unbelieving* heir having really occurred in the time of A L I , we may infer it as a monument of early *Arabian* jurisprudence. SOLMA had embraced the new faith, and died, leaving her husband, and two brothers by the same mother, who were all three believers, with *zfin*, who continued an infidel: on a dispute concerning the inheritance, A L I and Z A I D

gave a moiety to the widower, confidering **the** fon asyctually *dead*, a third to the half-brothers, and the reft to fuch of the refiduaries as be-filved in *the Korah*; while IBNU'L MASUÚD Infiftecf, that the fon was *dead* as to the right of inheriting, but alive as to the power of exclud-ing, 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 Dif-fenfions 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 grand-father, who is both free and a believer, the father is confidered as *dead in law* to all pur-pofes, and the grandfather is heir to AMRU.

We come now to the *Arabian* method of as-certaining the fmalleft number of *parcels*, into which an eftate can be divided, fo as to avoid fradions in the legal diftribution of it: that *number* we call the *denominator*, or devifor, of **the ejlate**, though the *Arabick* word mean lite-rally *the place of coming out*; and the problem is eafily foived by the following rules: if the **two** numbers in queftipn be prime, multiply one of them into the other ; if they be *compojit* to each other, multiply the *meafure* of one into **the** fecond, and **the** produft 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 mull 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 f: LAILA died, leaving only AMRU her hufband, HINDA her mother, and ABLA her fifter of the whole blood. Now the hufband and filler 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 fix* parts only; but ABBAS, a companion of MUHAMMED, being confulted by the Caliph, propofed, that the regular divifor fhould be fo *increafed*, that of *eight* parts AMRU and ABLA might each take *three*, and HINDA *two*. The fon of ABBAS, whose opinions were always rather ingenious than folid, was prefent at the decifion; but, fearing the bad temper of the Caliph, fupprefled at that time his own fentiments: he thought, that the *Jifter*, having (as we have feen) a weaker right, fhould bear the lofs, becaufe, *where different rights concur, the weakeft invariably yields*; and he faid, that if an arithmetician

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, althotfgh the *fifter* may in fome cafes be removed into a diftindt clafs of heirs, yet, with a hufband and a mother of the decaffed, her fhare is fixed by pofitive law, and (he cannot by any means be deprived of it; fo that the (hares 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 *eight*, and each of the other heirs, *twelve*; now thofe claims cannot all be fatisfied, but eight is to twelve, as *fix* to *nine*, which will be the refpective fhares, according to the decifion of ABBAS.

Examples of the divifor fix 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 decifions, however, deferring particular notice, becaufe they were made in real caufes, and have been univerfally approved. ZUBAIDA left her hufband ADNÁN, with *two fifters of the whole blood*, two fifters by the fame mother only, and the mother herfelf; whofe legal fhares, in order as they are mentioned, were a *moiety*, *two thirds*, *a third*, and *a fixth*: it was impoffible, therefore, to diftribute them out of

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

'The arithmetical part of the *Sirdjiyya* ' is very fimple, and may be found in the firft pages of all our elementary books ; but the difference of the *Arqbian* 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 *Arabkk* language makes it impoffible to exprefs in a fingle word the fradions lefs than a *tenth*: thus *twenty-feven* and *twenty-four* agree, as they exprefs it, in a third *j* and a *third* of each number is called its *wafk*, or meafure, as *nine* of twenty-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

(ould be divided into fix parts, becaufe the fhare of each parent is a *fixth*, and that of all the daughters *two thirds*; but *four* parts cannot be diftributed, without a fraction, among *ten* perfons; for which reafon we muft multiply *jive*, which is the meafure of *ten*, into *fix*, which is the firft number of parcels, and the product *thirty* is the number of lots, into which the property of AMRU muft in fad be divided; each of his parents taking five lots, and each of his daughters *two*.

II. HINDA leaves her hufband, both her parents, and fix daughters ; whofe legal (hares 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 *fix* daughters, the *meafure* of *fix*, or *three*, is multiplied by fifteen; fo that of *forty-five* lots *nine* may go to the hufband, *twelve* to the parents, and *twenty four* to the daughters, in exaét proportion to their firft diftributive (hares.

It will be very eafy to apply the remaining-rules to all the other examples given by SIR Á' J'UDDIN' ; but fince, in the two laft cafes, which are not likely to occur, the inheritance

muft be divided into '320 and 50'0 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, *fix* female anceftors, capable of inheriting together, *ten* daughters, and *feven* paternal uncles, whose fhares of *twenty-four* (the *root*, as they call it, of this cafe) are *three, four, fifteen, 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 SA AD'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 daughters*' and the allotment of each fharer appears at once from the following proportions:

Persons.	First	Shares.	MULTIPICAND.	SHARES OF EACH.
2	3	3	210	531.
6	4	4	210	1'0.
10	16	16	210	336.

The laft aft of the *Mufelman* judge is to make an adual divifion of the ftate'; and we will fuppofe that LAILA, in the cafe answered by by AKBAS, had left ZAINEB and ABLA, two fillers of the whole blood, with AMRU, her hufband, and HINDA, her mother; and that her property amounted only to *twenty-five* gold *mohrs*: now the *root* of the cafe is increafed, as we have feen, from *Jix* to *eight*' which is prime to twenty-five; and the products of *two*, the fhare of each fifter, *oi three*, the fhare of the hufband, and of *one*, the fhare of the mother, multiplied by the number of gold *mohrs*, are 50, 75, and 25, which, divided by *eight*, give the following fhares: to each fifter, 6 *mohrs*, ' *rupees*; to AMRU, 9 m. 6 r.; to HINDA, 3 m. 2 r. Had LAILA'S eftate been *Jifty* gold *mohrs*, the diftribution would have been thus:

	M.	R.
ZAINEB, ...	12,	8 .
ARLA, • . . .	12,	8 .
AMRU, ...	18,	12.
HINDA, ...	6,	' ,

It feems neediefs to give examples of the fimple rules for afccrtaining the dividends of each *clafs*' but the paflage concerning creditors,

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, *Jive* pieces to SAAD, and *ten* to AHMED ; here the aggregate of the debts, *Jifteen*, is compofit to *nine*, and their *meafures are five, and three*; fo that, by the rule before-mentioned of diftribution among heirs, AHMED will receive *fix*,['] and SAAD, *three* pieces ; but, had the debtor left *thirteen*, which would have been prime to the amount of both debts, *ihcnjifteen*, ftanding in the place of the *verificatifik*, as they call it, muft be the devifor of the feveral products, arifing from the multiplication of *ten* and *Jive* into thirteen, and the quotients $82/3$ and $1/3$ will be the refpective dividends of AHMED and SAAD.

The practice *oifubtraSlion* ' arofe from the cafe of ABDUR'RAHMAN and his four wives, decided in the reign of OTHMAN ; and the folution 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 *third*, and the uncle, to the *refidue*; fo that, if LAILA'S eftate be divided into *fix* parcels, the diftribution may be made without a fraction : but if the widower agree to

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

cefs is a feme of the allotments to the other claimants.

There is no difficulty in the chapter on the *return*', except what arises from the *Arabick* idiom to which the reader is probably by this time habituated; but it is necessary to remark, that, although, by the letter of the *Korán* and the strict rules of law, no *return* can be made to the *widower* or *widow*, yet an equitable practice has prevailed, in modern times, of *returning* to them *on failure of sharers by blood and of distant kindred*. The last case in the chapter can rarely occur; and the result of the calculation (which, fills ten pages in the *Persian* work of *Maulavi KASIM*) is, that, of 100 parcels, the four widows take ($36 \times 5 =$) 180; the nine daughters ($36 \times 28 =$) 1008; and the six female ancestors ($36 \times 7 =$) 252; so that 5 parts go to each widow, 112 to each daughter, and 2 to each female ancestor.

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

divifion feems to have been inferted merely from reped: to ABU YUSUF and MUHAMMED, who diffented on this point from their mailer': it Is one of the cleareft chapters in the *Sirajiyyah*, and will be ufeful to us, if the queftion fhould arife in a family of *Shiahs*, who follow, no doubt, the opinions of ALI and ZAID. The cafe called *acdariyya*, which was decided by the fon of TH'ABIT, and has acquired fuch celebrity in *Irak*, that it is diftinguifhed among the lawyers of that country by the epithet of *algharra*, 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 *disturbed* 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 hereditary interejls* †: and, firft, we may fuppofe, that ZAID had two wives, named ZAINEB and LATÍFA, 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

' Page 237—210.

† Page 210—2'2.

fhareers are named, would be a *fourth*, a *fifth*, 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 fhares, that is as *one* to *three*; but, when ZAID has taken *his fourth*, the *three* fourths, which remain, cannot be diftributed in that proportion ; and, fince *three* 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 Iriifband's *foare*, and the fquare number anfwers the purpofe of integral diftribution; for *offixteen* parcels ZAID will be entitled to *four*, ZUHRA to *three*, and HINDA to *nine*.

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

Thirdly, fuppofe HINDA to die Before any aétual diftribution, leaving the before-named

ZUHRA, her grandmother, ZUBAIDA her daughter, and two sons, HA'TIF and BASHAR; now she had a *vejied interejl* in *nine* parts out of the *Sixteen*, and, her own estate being divisible *izctoijix* parts, we observe, that *nine* and *fo* are compofit to each other, or agree, as the *Arabian* phrase is, *in a third'* so that a third of fix, or two, must be multiplied into *Sixteen*, and the product *thirty-two* will be the denominator for both cases; for of *thirty-two* parts *nine* will vest in ZUHRA (*fix* as mother to ZAINEB, and *three* as grandmother to HINDA), *twelve* in the two sons, *three* in ZUBAIDA, and *eight* in ZAID'S representatives; since, to ascertain the share of each individual, the just-mentioned shares out of *fixteen* must be multiplied by *two*, and those out of *fix*, by *three*, which is here called the *rneajure* of HINDA'S vested interest.

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

and the products will be lots of the fveral claimants ; *eight* parcels going to LĀTIFA, *fix-teen* to ABID, *eight* 'o BASIRA, *forty-eight* in moieties to HĀTIF and BASHAR, *twelve* to ZUBAIDA, *eighteen* to CĀAB, and *eighteen* in moieties to CĀLIB and TĀRIF.

"We need only add, that, although the conclusion of the chapter before us be obfcured by its extreme concifenefs, yet it plainly means, that, " when any number of heirs die fuc-
" ceflively before the diftribution, if the *jhares*
" *vejied* 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 heir*, and himfelf as the *fcond*,
" and then work by the preceding rules j" 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 *foarers* nor *rejiduaries*, 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 *firft* clafs of diftant kindred the doctrine of ABU YŪSUF has far more fimplicity

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

The reader would be unnecessarily fatigued,

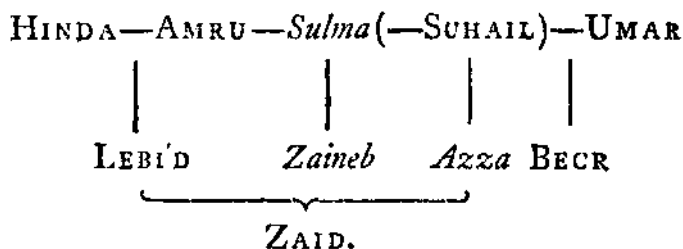
if we were to exhibit every step of the arithmetical process, by which the estate of AMRU must be Attributed, according to the opinion of MUHAMMED, between his *great grand/on* by females only, and his *two great granddaughters*, who have the advantage of a male in the line of descent'; nor does the fiction concerning the difference of *fides* require elucidation.

II. On the *second* class, or the *grandfathers* and *grandmothers*, who are excluded from *hares*, we need only sum up the doctrine of our author in the words of SHARÍF:—' The degrees " in this case are either equal or unequal ; if " *unequal*, the nearer is preferred ; if *equal*, the " preference is given to the person claiming " *through a sharer* ; if there be an *equality* in " that respect, the *fides* must be the same or different; if different, the distribution must be " made in *thirds*, the paternal fide having a " *double* allotment; if *the same*, the *fexes* of the " *roots*, or ancestors, must agree, or not; if " they agree, the estate must be distributed according to the persons of the *branches*, or " claimants; if not, according to the *first* rank " that differs, as in the preceding class f."

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

it muft be remarked, that although the brothers and fillers by the fame *mother only* take equally, according to the *Koran*, without any diftinction of fex, yet that exception to the general rule by no means extends to the *iffue* of fuch brothers and fillers.

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 *Maulavi K A' - SIM*, which the following pedigree will make more intelligible than his dry ftate of the cafe:

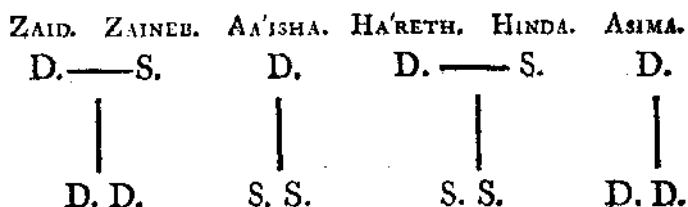


A MRU, having had by HIND A a fon, named LKBID, married SULMA, by whom he had a daughter, named ZAINEB: after AMRU'S death, SUL MA married SUHAIL, to whom {he produced AZZA, and after his death, fhe married UMAR, by whom fhe became the mother of KKCR : now ZAID was the fon of LEBID and A Z Z A; and he died, leaving no heirs but

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

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

of her daughter; HĀRETH, two daughter's fons, who were also the fons of the fon of H I N - D A ; and ASIMA, two daughter's daughters; as in this pedigree:



AMRU himself afterwards died, with no heirs but the *grandchildren* of his uncles and aunts: In this case ABU YUSUF would have divided the inheritance into *thirty* parts ; *twenty* for the *paternal* 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 estate into *thirty fix*, allotments, would have given *twenty four* to the paternal, and *twelve* to the maternal fide; that is, *fix* to each of ZAID'S granddaughters, as much, and *four* to each of them, as granddaughters of ZAINEB ; two to each of AAISHA'S grandfons; *three* to each grandfon of HĀRETH, as much; and *two* more to each of them, as grandfons of HINDA ;

while *one thirty-fixth* part would have gone to each of ASJ-MA'S female defcendants. The reafon of thefe different diftributions 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; fince monftrous births are, I truſt, extremely rare in all countries, and the fubjeft is too (hocking to be difcuſed without adtual neceffity; nor will it anfwer, I imagine, any ufeſul purpoſe to relate the old *Arabian* ſtories, and ft range opinions of ſome lawyers, concerning the longeſt poſſible time of geſtation†; which is now limited, on the authority of AAÍSHA, one of MOHAMMED'S wives, to *two years* ; and, though the *Mufelmans* have traditionary accounts of *threei foury*, or even *Jive* children produced at one birth, yet the pradice, we find, is to reſerve the fhare of *one* fon; or that of one *daughter*, if, on fuppofition of her birth, the funi reſerved would be larger ‡. The practice of *reſervation* for the unborn child is well explained by the caſe in the text, to which we may now proceed, fince the reſt of the chapter needs no illuſtration ; unleſs it be neceſſliry to inform

* Page 256. † Page 258. ‡ Page 259, 260.

the reader, that a widow ought by law to abstain for a certain time after her husband's death, from the carefls of any other man ; and, if ihe freely confefs that fhe has not abftained, it cannot be certain, that her husband 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, AMRU'S eftate ought regularly to be divided into *twenty-four* parts, but, on the birth of a female, into *twenty feven*; becaufe, in the firft cafe, the *flares* are an *eighth*, for the widow, and a *fixth* for each of the parents ; but, in the fecond, befides the fliares juft mentioned, the daughters would have *two-thirds* between them, and it would be the cafe of *Mimberiyya'*. Now *three* is the *common* meafure of *twenty four* and *twentyfeven*, and the feveral *meafures* of thofe numbers are *eight* and *nine*, either of which, multiplied into the other *whole* number, gives *two hundred and fixteen* for the product; and that, according to what has preceded, is the number of fhares into which the inheritance muft be actually divided ' In the firft cafe HINDA would have *twentyfeven* fhares; LEBID

and ASUMA, each *thirty-fix'* the pofthumous fon *feventy-eight*, and Z AINEB, his fitter, *thirty-nine'* but, in the fecond, the widow would have *twenty-four*; and each of the parentSj *thirty-two*; while the pofthumous daughter and her fitter would divide ths remainder between them, each taking *fixty-four* fhares. Should *Jour* 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, Z AINEB receiving *thirteen* parts, and each of her brothers *twenty-fix*; but, in the cafe of a mifcarriage, the daughter would be entitled to *a hundred and eight* 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 prefumed in law to be dead, has varied, we fee, in different ages'; but the modern practice I understand to be this: if Z AID has been fo long abfent, that no man can tell whether he be dead or alive, and *feventy* years have etafped from the day of his birth, he is prefumed to be dead, as to *his 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;

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 *Murfhedabad*, leaving AMRU her hufband, with two fifters of the whole blood, NA'DIRA and SACI'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 firft fuppofition, the affets of HINDA muft be divided, as we have fhown, *into feven* fhares, of which AMRU muft have *three*, and each of the fifters, *lieo'* but, on the fecond, into *eight* parts, *four* of which go to the hufband, and *two* to the brother, while NA'DIRA and SACI'NA 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 *eighty* which are *prime* to one another' is the ftumber of fhares, into which the eftate muft be divided ; *hventy-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 *eighteen* referved fhares muft be divided equally between SACINA and NA'DIRA, to complete their *two fevenths*, which the law gives, in that cafe, to each of them. The *Perfian* commentator has added three cafes, in one of which the two firft divifors of the affets are *compoft* 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 husband or wife cannot fucceed to an apoftate, becaufe a change of religion is an immediate diffolution of the marriage.

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 AMRU, 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 infant, 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 ALT, 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 whole 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 fhore, the pro-

perty of each muft be feverally diftributed, according to' the HANIFEANS ; the daughter' of each taking *half*, or *forty-five* pieces; the mother *fixth*, or *fifteen*, and the manumittor, as refi' duary, the *thirty* pieces which remain; but according to ALI, the younger brother HASAN be' ing firft confidered as the furvivar, that refidue vefts i|i him, and is then diftributed, in the juft mentioned ratio; *half* 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; fothat the daughter of each takes on the whole *fixty*; the mother, *twenty*; and the manumittor, *ten* pieces of gold,

قَدْ طُبِعَ هَذَا الْكِتَابُ الْهَسْبِيُّ بِالْفَرَائِضِ السِّرَاجِيَّةِ

بِدَارِ الْإِمَارَةِ بِلَدَةِ كَلْكَتَةِ الْمَحْمِيَّةِ وَذَلِكَ بِأَمْرِ

سِرِّ وَلِيمِ يُونُسَ الَّذِي هُوَ أَحَدُ حُكَّامِ الْمَحْكَمَةِ الْعَالِيَةِ

الْإِسْلَامِيَّةِ

فِي سَنَةِ الْفِ وَ مِائَتَيْنِ وَ وَاحِدٍ مِنَ الْهَجْرَةِ النَّبَوِيَّةِ

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قد صحح هذا الكتاب بعون الله تعالى الملك الوهاب

تَفْصِيحُ الْكِتَابِ

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مَا تَوَاصَعَا فَبَالَ كُلِّ وَاحِدٍ مِنْهُمْ لَوَرِثَتَهُ الْآحْيَاءُ وَلَا يَرِثُ

بَعْضُ الْآمَوَاتِ مِنْ بَعْضٍ هَذَا هُوَ الْمَخْتَارُ وَقَالَ عَلِيٌّ

وَإِبْنُ مَسْعُودٍ فِي أَحَدِي الرَّوَايَتَيْنِ عَنْهَا بَعْضُهُمْ

يَرِثُ مِنْ بَعْضٍ إِلَّا فِيمَا وَرِثَ كُلُّ وَاحِدٍ مِنْهُمْ مِنْ صَاحِبِهِ

تَهَيَّ الْقُرَآنُ الصِّرَاجِيَّةُ بِعَوْنِ

اللَّهِ تَعَالَى

فَهُوَ فِيهِ بِالْإِجْمَاعِ وَكَسَبَ الْهَرْتَدَةُ جَمِيعًا لَوْرَثَهَا الْهَسْلِيَّينَ

بِالْخِلَافِ بَيْنَ أَصْحَابِنَا رَحِمَهُمُ اللَّهُ وَأَمَّا الْهَرْتَدَةُ فَالْهَرْتَدَةُ

مِنْ أَحَدٍ لَا مِنْ مُسْلِمٍ وَلَا مِنْ مُرْتَدٍ مِثْلَهُ وَكَذَلِكَ الْهَرْتَدَةُ

لَا تَرِثُ مِنْ أَحَدٍ إِلَّا إِذَا ارْتَدَ أَهْلُ نَاحِيَةٍ يَاجِعُهُمْ فَجِيئَتْ

بِتَوَارِثُونَ

بَابُ الْأَسِيرِ

حُكْمُ الْأَسِيرِ كَحُكْمِ سَائِرِ الْهَسْلِيَّينَ فِي الْيَرَاثَةِ مَا لَمْ

يَفَارِقَ دِينَهُ فَإِنْ فَارَقَ دِينَهُ فَحُكْمُهُ حُكْمُ الْهَرْتَدَةِ فَإِنْ لَمْ يَعْلَمْ

رَدَّتْهُ وَلَا حَيَاتُهُ وَلَا مَوْتُهُ فَحُكْمُهُ حُكْمُ الْبَغْقُولِ

فَصَلِّ فِي الْغُرْتِي وَالْحَرْتِي وَالْهَدْمِي

إِذَا مَاتَ جَمَاعَةٌ وَلَا يُدْرِي أَيُّهُمْ مَاتَ أَوَّلًا جُعِلُوا كَأَنَّهُمْ

مَنْ مَالَهُ لَانَ الْهَقُودِ مِيتَ فِي مَالٍ غَيْرِهِ الْأَصْلَ فِي تَصْحِيحِ

مَسَائِلِ الْهَقُودِ أَنْ تَصَحَّحَ الْمَسْئَلَةَ عَلَيَّ تَقْدِيرِ حَيَاتِهِ ثُمَّ

تَصَحَّحَ الْمَسْئَلَةَ عَلَيَّ تَقْدِيرِ وَفَاتِهِ وَبَاقِي الْعَمَلِ

مَا ذَكَرْنَا فِي الْحَبْلِ

فَصْلٌ فِي الْهَرْتَدِ

إِذَا مَاتَ الْهَرْتَدُ أَوْ قُتِلَ أَوْ لَحِقَ بِدَارِ الْحَرْبِ وَحَكَمَ الْقَاضِي

بِلَحُوقِهِ فِيهَا أَكْتَسَبَهُ فِي حَالِ إِسْلَامِهِ فَهُوَ لَوْرَثَتِهِ الْمُسْلِمِينَ

وَمَا أَكْتَسَبَهُ فِي حَالِ الرِّدَّةِ يُوضَعُ فِي بَيْتِ الْهَالِ عِنْدَ

أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ وَعِنْدَهَا الْكُتُبَانِ جَمِيعًا لَوْرَثَتِهِ

الْمُسْلِمِينَ وَعِنْدَ الشَّافِعِيِّ رَحِمَهُ اللَّهُ الْكُتُبَانِ يُوضَعَانِ

فِي بَيْتِ الْهَالِ وَمَا أَكْتَسَبَهُ بَعْدَ اللَّحُوقِ بِدَارِ الْحَرْبِ

يُصَحِّحُ مَوْتَهُ أَوْ يَهْضِي عَلَيْهِ الْهَدَّةُ وَاخْتَلَفَتْ الرِّوَايَاتُ فِي تِلْكَ

الْهَدَّةِ فَفِي ظَاهِرِ الرِّوَايَةِ أَنَّهُ إِذَا لَمْ يَبْقَ أَحَدٌ مِنْ أَقْرَبِيهِ

حُكِمَ بِهِ تَهْوِيرُ الْحَسَنِ بْنِ زِيَادٍ عَنِ ابْنِ حَنِيفَةَ رَحِمَهُ اللَّهُ

أَنَّ تِلْكَ الْهَدَّةَ مِائَةٌ وَعِشْرُونَ سَنَةً مِنْ يَوْمٍ وَلَدَ فِيهِ وَقَالَ

مُحَمَّدٌ مِائَةٌ وَعِشْرِينَ سَنَةً وَقَالَ أَبُو يُونُسَ مِائَةٌ وَخَمْسَ سِنِينَ

وَقَالَ بَعْضُهُمْ تِسْعُونَ سَنَةً وَعَلَيْهِ الْقَتَوِيُّ وَقَالَ بَعْضُهُمْ

مَالُ الْهَقُودِ مَوْقُوفٌ إِلَى اجْتِهَادِ الْإِمَامِ وَمَوْقُوفٌ الْحَكَمُ

فِي خَفِّ غَيْرِهِ حَتَّى يُوقَفَ نَصِيبُهُ مِنْ مَالِ مَوْرَثِهِ كَمَا فِي

الْجَهْلِ فَإِذَا مَضَتْ الْهَدَّةُ وَحُكِمَ بِهِ تَهْوِيرُ فَهَالَهُ لَوْرَثَتِهِ

الْمَوْجُودِينَ عِنْدَ الْحَكَمِ بِهِ تَهْوِيرُهُ وَمَا كَانَ مَوْقُوفًا لِأَجَلِهِ مِنْ

مَالِ مَوْرَثِهِ يَرُدُّ إِلَى وَارِثِ مَوْرَثِهِ الَّذِي وَقَفَ ذَلِكَ الْهَقُودُ

مِنْهَا لِأَنَّ الْهَوَافَّ فِي حَقِّهَا نَصِيبُ أَرْبَعَةِ بَنِينَ عِنْدَ

الْبَحْنِيغَةِ رَحِمَهُ اللَّهُ وَإِذَا كَانَ الْبَنُونَ أَرْبَعَةً فَنَصِيبُهَا سَهْمٌ

وَأَرْبَعَةُ أَتْسَاعٍ سَهْمٌ مِنْ أَرْبَعَةِ عَشْرِينَ مَضْرُوبًا فِي تِسْعَةِ أَصْصَارٍ

ثَلَاثَةَ عَشْرَ سَهْمًا فِي لَهَا وَالْبَاقِي مَوْتَوَفٍ وَهُوَ مِائَةٌ وَخَمْسَةٌ

عَشْرَ سَهْمًا فَإِنْ وَلَدَتْ بِنْتًا وَاحِدَةً أَوْ أَكْثَرَ فَجَمِيعُ الْهَوَافَّ

لِلْبَنَاتِ وَإِنْ وَلَدَتْ ابْنًا وَاحِدًا أَوْ أَكْثَرَ فَيُعْطَى لِلْمَرْأَةِ وَالْأَبَوَيْنِ

مَا كَانَ مَوْتَوَفًا مِنْ نَصِيبِهِمْ وَمَا بَقِيَ يُقَسَّمُ بَيْنَ الْأَوْلَادِ

وَإِنْ وَلَدَتْ مِثْلًا فَيُعْطَى لِلْمَرْأَةِ وَالْأَبَوَيْنِ مَا كَانَ مَوْتَوَفًا مِنْ

نَصِيبِهِمْ وَلِلْبَنَاتِ إِلَى تَهَامِ النِّصْفِ فَهُوَ خَمْسَةٌ وَتِسْعُونَ سَهْمًا

وَالْبَاقِي لِلْأَبِ وَهُوَ تِسْعَةُ أَصْحَابٍ لِأَنَّهُ عَصَبَةٌ

بَابُ الْهَقُودِ

الْهَقُودُ حَقٌّ فِي مَالِ مَخْنِي لَا يَرِثُ مِنْهُ أَحَدٌ وَيُوقَفُ مَالُ مَخْنِي

وَاحِدٍ مِنَ الْوَرِثَةِ مَا كَانَ مَوْقُوفًا مِنْ نَصِيْبِهِ كَمَا إِذَا تَرَكَ بِنْتًا

وَأَبَوَيْنِ وَامْرَأَةً حَامِلَةً فَالْهَسْبَةُ مِنْ أَرْبَعَةٍ وَعِشْرِينَ عَلَيَّ

تَقْدِيرُ أَنْ الْحَمْلَ ذَكَرَ مِنْ سَبْعَةٍ وَعِشْرِينَ عَلَيَّ تَقْدِيرُ أَنَّهُ

أَنْثَى وَبَيْنَ عَدَدِي تَصْحِيحُ الْمَسْنَلَتَيْنِ تَوَافَقَ بِالثَّلَاثِ

فَإِذَا ضَرَبَ وَفَقَ أَحَدَهُمَا فِي جَمِيعِ الْاِخْتِصَارِ الْحَاصِلُ مَا تَبَيَّنَ

وَسِتَّةَ عَشْرَ سَهْمًا وَمَتَاهَا تَصَحُّحُ الْمَسْنَلَةِ وَعَلَيَّ تَقْدِيرُ ذَكَرَتِهِ

لِلْمَرَأَةِ سَبْعَةٌ وَعِشْرُونَ وَلِكُلِّ وَاحِدٍ مِنَ الْأَبَوَيْنِ سِتَّةٌ

وِثْلَاثُونَ وَعَلَيَّ تَقْدِيرُ الْأُنْثَى لِلْمَرَأَةِ أَرْبَعَةٌ وَعِشْرُونَ وَلِكُلِّ

وَاحِدٍ مِنَ الْأَبَوَيْنِ اثْنَانِ وَثْلَاثُونَ فَيُعْطَى لِلْمَرَأَةِ أَرْبَعَةٌ

وَعِشْرُونَ وَيُوقَفُ مِنْ نَصِيْبِهَا ثَلَاثَةُ أَسْمٍ وَيُوقَفُ مِنْ نَصِيْبِ

كُلِّ وَاحِدٍ مِنَ الْأَبَوَيْنِ أَرْبَعَةٌ أَسْمٍ وَيُعْطَى لِلْبِنْتِ ثَلَاثَتَا عَشَرَ

الحمل ذكر وعلي تقدير انه انثى ثم تنظر بين تصحيح

المسئلتين فان توافقا فاضرب وقت احديهما في جميع

الآخري وان تبأينا فاضرب كل احديهما في جميع الآخري

فالحاصل تصحيح المسئلة ثم اضرب نصيب من كان له شبي

من مسئلة ذكوره في مسئلة انوثته او في وقتها ثم من كان

له شبي من مسئلة انوثته في مسئلة ذكوره او في وقتها

كما ذكرنا في الخنثي ثم انظر في الحاصلين من الضرب

ايهما اقل يعطى لذلك الوارث والفضل بينهما موقوف من

نصيب ذلك الوارث فاذا ظهر الحمل فان كان مستحقا

لجميع الموقوف فيها وان كان مستحقا للبعض فيأخذ

ذلك البعض والباقي مقسوم بين الورثة فيعطى لكل

وَلَمْ تَكُنِ الْهَرَاءُ أَتَرْتِ بِانْقِضَاءِ الْعِدَّةِ بَرْتِ وَيُورِثُ عَنْهُ وَإِنْ

جَاءَتْ بِالْوَلَدِ لَأَكْثَرُ مِنْ أَكْثَرِ مَدَّةِ الْحَمْلِ لَا يَرِثُ وَلَا يُورِثُ

عَنْهُ وَإِنْ كَانَ الْحَمْلُ مِنْ غَيْرِهِ وَجَاءَتْ بِالْوَلَدِ لِسِتَّةِ أَشْهُرٍ أَوْ

أَقَلَّ بَرْتِ وَإِنْ جَاءَتْ بِالْوَلَدِ لَأَكْثَرُ مِنْ أَقَلِّ مَدَّةِ الْحَمْلِ

لَا يَرِثُ وَطَرِيقُ مَعْرِفَةِ حَيَاةِ الْحَمْلِ وَقْتُ الْوِلَادَةِ إِنْ يَوْجَدُ

مِنْهُ مَا يَعْلَمُ بِهِ الْحَيَاةُ كَصَوْتٍ أَوْ عَطَاسٍ أَوْ بَكَاءٍ أَوْ ضَحْكٍ أَوْ

تَحَرُّكِ عَضُوفٍ فَإِنْ خَرَجَ أَقَلُّ الْوَلَدِ ثُمَّ مَاتَ لَا يَرِثُ وَإِنْ خَرَجَ

أَكْثَرُهُ ثُمَّ مَاتَ يَرِثُ فَإِنْ خَرَجَ الْوَلَدُ مُسْتَقِيمًا فَالْمُعْتَبَرُ

صَدْرُهُ أَعْنِي إِذَا خَرَجَ صَدْرُهُ كُلُّهُ يَرِثُ وَإِنْ خَرَجَ مَشْكَوَسًا

فَالْمُعْتَبَرُ سَرْتُهُ الْأَصْلُ فِي تَصْحِيحِ مَسَائِلِ الْحَمْلِ إِنْ

تَصَحَّحَ الْهَسْنَةُ عَلَيَّ تَقْدِيرَيْنِ أَعْنِي عَلَيَّ تَقْدِيرَانِ

سَنِينَ وَعِنْدَ الشَّافِعِيِّ رَحِمَهُ اللَّهُ أَرْبَعُ سَنِينَ وَعِنْدَ الزَّهْرِيِّ

رَحِمَهُ اللَّهُ سَبْعَ سَنِينَ وَأَقْلَهَا سِتَّةُ أَشْهُرٍ وَيُوقِفُ لِلْحَمَلِ

عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ نَصِيبُ أَرْبَعَةِ بَنِينَ أَوْ نَصِيبُ أَرْبَعِ

بَنَاتٍ إِيَّاهُمَا أَكْثَرُ وَيُعْطَى لِبَقِيَّةِ الْوَرِثَةِ أَقْلُ الْأَنْصِبَاءِ وَعِنْدَ

مُحَمَّدٍ رَحِمَهُ اللَّهُ يُوقِفُ نَصِيبَ ثَلَاثَةِ بَنِينَ أَوْ ثَلَاثِ بَنَاتٍ

إِيَّاهُمَا أَكْثَرُ رَوَاهُ عَنْهُ لَيْثُ بْنُ سَعْدٍ رَضِيَ اللَّهُ عَنْهُ وَفِي رِوَايَةٍ

أُخْرَى نَصِيبُ ابْنَيْنِ وَاحِدِي الرَّوَّائِيْنِ عَنْ أَبِي يُوسُفَ

رَحِمَهُ اللَّهُ رَوَاهُ عَنْهُ هِشَامٌ وَرَوَى الْخَصَافُ عَنْ أَبِي يُوسُفَ

رَحِمَهُ اللَّهُ أَنَّهُ يُوقِفُ نَصِيبُ ابْنٍ وَاحِدٍ أَوْ بِنْتٍ وَاحِدَةٍ وَعَلَيْهِ

الْفَتْوَى وَيُؤْخَذُ الْكَفِيلُ عَلَى قَوْلِهِمْ إِنْ كَانَ الْحَمَلُ مِنْ

الْهِيتِ وَجَاءَ بِالْوَلَدِ لَتِهَامٍ أَكْثَرَ مَدَّةِ الْحَمَلِ أَوْ أَقْلَ مِنْهَا

مُحَمَّدٌ رَحِمَهُ اللَّهُ يَأْخُذُ الْخَنْثِيَّ خَمْسِي الْهَالِ إِنْ كَانَ ذَكَرًا
 وَرَبْعَ الْهَالِ إِنْ كَانَ أُنْثَى فَيَأْخُذُ نِصْفَ النَّصِيِّينَ وَذَلِكَ
 خَمْسٌ وَثَنِينَ بِاعْتِبَارِ الْحَالِينَ وَتَصَحُّحِ مَنْ أَرْبَعِينَ وَهُوَ
 الْمَجْتَمِعُ مِنْ ضَرْبِ أَحَدِ الْبَسْنَلَتَيْنِ وَاهِيِ الْارْبَعَةِ
 فِي الْآخِرِي وَهِيَ الْخَمْسَةُ ثُمَّ الْمَبْلُغُ فِي الْحَالَتَيْنِ فَمَنْ
 كَانَ لَهُ شَيْءٌ مِنَ الْخَمْسَةِ فَيَضْرُوبُ فِي الْارْبَعَةِ وَمَنْ كَانَ لَهُ
 شَيْءٌ مِنَ الْارْبَعَةِ فَيَضْرُوبُ فِي الْخَمْسَةِ فَصَارَ لِلْخَنْثِيِّ
 ثَلَاثَةٌ عَشْرٌ وَلِلْأَبْنِ ثِنَايَةَ عَشْرٍ وَلِلْبَنَاتِ تِسْعَةٌ أَسْمَ

بَابُ فِي الْحَمْلِ

أَكْثَرُ مَدَّةِ الْحَمْلِ سِتَانِ عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ
 وَاصْحَابِهِ وَعِنْدَ لَيْثِ بْنِ سَعْدٍ الْفَهْرِيِّ رَحِمَهُ اللَّهُ ثَلَاثُ

رَضِيَ اللَّهُ عَنْهُمْ وَعَلَيْهِ الْفَتْوَى كَمَا إِذَا تَرَكَ ابْنًا وَبِنْتًا وَخَنَثِي

فَلِلْخَنَثِي نَصِيبٌ بِنْتُ لَأَنَّهُ مُتَيْقِنٌ وَعِنْدَ عَامِرِ الشَّعْبِيِّ

وَهُوَ قَوْلُ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهَا لِلْخَنَثِي نِصْفٌ

النَّصِيبِينَ بِالْمَنَازِعِ وَخَفَوْا اخْتِلَافِي تَخْرِيجِ قَوْلِ الشَّعْبِيِّ قَالَ

أَبُو يُونُسَ لِلْإِبْنِ سَهْمٌ وَلِلْبِنْتِ نِصْفُ سَهْمٍ وَلِلْخَنَثِي ثَلَاثَةُ

أَرْبَاعِ سَهْمٍ لِأَنَّ الْخَنَثِي يَسْتَحِقُّ سَهْمًا إِنْ كَانَ ذَكَرًا وَ

نِصْفًا إِنْ كَانَ أُنْثَى وَهَذَا مُتَيْقِنٌ فِي اخْتِذَاكَ نِصْفِ مَجْمُوعِ

النَّصِيبِينَ أَوْ نَقُولُ يَأْخُذُ النِّصْفَ الْهَتِيقَنُ مَعَ نِصْفِ

النِّصْفِ الْهَتْنَارِ فِيهِ فَصَارَ لَهُ ثَلَاثَةُ أَرْبَاعِ سَهْمٍ لِأَنَّهُ يُعْتَبَرُ

لِلسَّهْمِ وَالْعَوْلِ وَتَصَحَّحَ مِنْ تِسْعَةِ أَوْ نَقُولُ لِلْإِبْنِ سَهْمَانِ وَلِلْبِنْتِ

سَهْمٌ وَلِلْخَنَثِي نِصْفُ النَّصِيبِينَ وَهُوَ سَهْمٌ وَنِصْفُ سَهْمٍ وَقَالَ

لَأَبِ لَكِنِ الثَّلَاثِينَ لِمَنْ يَدُلِّي بِقَرَابَةِ الْأَبِ فَيُعْتَبَرُ فِيهِمْ قُوَّةُ
 الْقَرَابَةِ ثُمَّ وَلَدَ الْعَصْبَتِ الثَّلَاثُ لِمَنْ يَدُلِّي بِقَرَابَةِ الْأُمِّ وَيُعْتَبَرُ
 فِيهِمْ قُوَّةُ الْقَرَابَةِ ثُمَّ عِنْدَ أَبِي يُوسُفَ رَحِمَهُ اللَّهُ مَا أَصَابَ
 كُلَّ فَرِيقٍ يُقَسَّمُ عَلَى أَبْدَانٍ فُرُوعِهِمْ مَعَ اعْتِبَارِ عَدَدِ
 الْجِهَاتِ فِي الْفُرُوعِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ يَقْسَمُ الْهَالِ
 عَلَى أَوَّلِ بَطْنٍ اخْتَلَفَ مَعَ اعْتِبَارِ عَدَدِ الْفُرُوعِ وَالْجِهَاتِ
 فِي الْأَصُولِ كَهَافِي الصِّنْفِ الْأَوَّلِ ثُمَّ يَنْتَقِلُ هَذَا الْحُكْمُ إِلَى
 جِهَةِ عُمَيَّةِ أَبِي يُوَيْحَى وَخَوَلَتِهَا ثُمَّ إِلَى أَوْلَادِهِمْ ثُمَّ إِلَى جِهَةِ عُمَيَّةِ
 أَبِي أَبِي يُوَيْحَى وَخَوَلَتِهَا ثُمَّ إِلَى أَوْلَادِهِمْ كَهَافِي الْعَصَبَاتِ

بَابُ الْخَنْثِيِّ

لِلْخَنْثِيِّ الْهَشَكِلُ أَقَلُّ النَّصِيبِينَ أَعْنِي أَسْوَأَ الْحَالَاتَيْنِ
 عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ وَأَصْحَابِهِ وَهُوَ قَوْلُ عَامَةِ الصَّحَابَةِ

الْعَمَّ وَابْنِ الْعَمَّةِ كَلَاهُهَا لِأَبٍ وَأُمٍّ أَوْلَابُ الْهَالِ كُلُّهُ لَبْنَتْ

الْعَمَّ وَإِنْ كَانَ أَحَدُهُمَا لِأَبٍ وَأُمٍّ وَالْآخَرُ لِأَبٍ كَانَ الْهَالُ كُلُّهُ

لِبْنٍ كَانَتْ لَهُ قُوَّةُ الْقَرَابَةِ فِي ظَاهِرِ الرِّوَايَةِ قِيَاسًا عَلَيَّ

خَالَةِ لِأَبٍ مَعَ كَوْنِهَا وَلَدُ ذِي الرَّحِمِ تَكُونُ هِيَ أُولَى

لِقُوَّةِ الْقَرَابَةِ مِنَ الْخَالَةِ لَمْ مَعَ كَوْنِهَا وَلَدُ الْوَارِثِ لِأَنَّ التَّرْجِيحَ

بِعَنِي فِيهِ وَهُوَ قُوَّةُ الْقَرَابَةِ أُولَى مِنَ التَّرْجِيحِ فِي غَيْرِهِ وَهُوَ

الْأَدْلَى بِالْوَارِثِ وَقَالَ بَعْضُهُمُ الْهَالُ كُلُّهُ لَبْنَتْ الْعَمَّ لِأَبٍ لِأَنَّهَا

وَلَدُ الْعَصْبَةِ وَإِنْ اسْتَوَوْا فِي الْقَرَبِ وَلَكِنْ اخْتَلَفَ حَيْثُ قَرَابَتُهُمْ

لَا عِتْبَارَ هُنَا لِقُوَّةِ الْقَرَابَةِ وَلَا لَوْلَا الْعَصْبَةُ فِي ظَاهِرِ الرِّوَايَةِ

قِيَاسًا عَلَيَّ عَمَّةٍ لِأَبٍ وَأُمٍّ مَعَ كَوْنِهَا ذَاتُ الْقَرَابَتَيْنِ وَلَوْلَا الْوَارِثُ

مِنَ الْجِهَتَيْنِ وَامْهَازَاتُ فَرْضٍ لَيْسَتْ هِيَ بِأُولَى مِنَ الْخَالَةِ

بَنْتُ ابْنَ أَخِي لَابِ وَأُمُّ بَنْتِ ابْنَ أَخِي لَابِ بَنْتُ ابْنَ أَخِي لَامِ
الْهَالُ كُلُّهُ لِبَنْتِ ابْنِ الْأَخِي لَابِ وَأُمُّ بِالِاتِّفَاقِ لِأَنَّهَا وَلَدَتِ الْعَصْبَةَ
وَلَهَا أَيْضًا قُوَّةُ الْقَرَابَةِ

فَصْلٌ فِي الصَّنْفِ الرَّابِعِ

الْحَكْمُ فِيهِمْ أَنَّهُ إِذَا انْفَرَدَ وَاحِدٌ مِنْهُمْ اسْتَحَقَّ الْهَالُ كُلُّهُ
لِعَدَمِ الْهَزَاجِ وَإِذَا اجْتَمَعُوا وَكَانَ حِيزٌ قَرَأَ بِهِمْ مُتَّحِدًا
كَالْعِبَاتِ وَالْأَعْمَامِ لَأَمِّ أَوِ الْأَخْوَالِ وَالْخَالَاتِ فَلَا قُوَّةَ مِنْهُمْ
أُولَى بِالْإِجْمَاعِ أَعْنِي مَنْ كَانَ لِأَبٍ وَأُمٍّ أُولَى مِنْهُنَّ كَانَ
لِأَبٍ وَمَنْ كَانَ لِأَبٍ أُولَى مِنْهُنَّ كَانَ لِأُمٍّ ذُكُورًا كَانُوا وَإِنَاثًا
وَإِنْ كَانُوا ذُكُورًا وَإِنَاثًا وَاسْتَوَتْ قَرَابَتُهُمْ فَلِلذَّكَرِ مِثْلُ
حَظِّ الْأُنثَيَيْنِ كَعَمٍّ وَعَمَّةٍ كَالْأَهْلِ أَوْ خَالٍ وَخَالَةٍ كَالْأَهْلِ

اخ لابوام اخ لاب اخ لام اخت لابوام اخت لاب اخت لام
 بنت بنت بنت ابن بنت ابن بنت ابن بنت

عند أبي يوسف يقسم كل الهال بين فروع بني الأعيان ثم

بين فروع بني العلات ثم بين فروع بني الأخياف للذكر

مثل حظ الانثيين ارباعا باعتبار الابدان وعند محمد رحمه

الله يقسم ثلث الهال بين فروع بني لأخياف علي النسوة

اثلاثا باعتبار استواء اصولهم في قسمة الاباء والناتي بين

فروع بني الأعيان أنصافا باعتبار عدد الفروع في الأصول

نصفه لبنت الأخ نصيب أبيها والنصف الآخر بين ولدي

الأخت للذكر مثل حظ الانثيين باعتبار الابدان وتصح

من تسعة ولو ترك ثلاث بنات بني أخوة مستفرقين

لهذه الصورة

باعتبار الأصول وإن استووا في القرب وليس فيهم ولد عصبة

أو كان كلهم أولاد العصباء أو كان بعضهم أولاد العصباء

وبعضهم أولاد أصحاب الغرائب واختلفت قرباتهم

فابن يوسف رحمه الله يعتبر الأقوي ومحمد رحمه الله يقسم

الهمال علي الإخوة والأخوات نصفين مع اعتبار عدد الفروع

والجبهات في الأصول فما أصاب كل فريق يقسم بين فروعهم

كما في الصنف الأول كُنت بنت الأخت لأب وأم أولي من

ابن بنت الأخ لأب عند أبي يوسف رحمه الله لقوة القرابة

وعند محمد رحمه الله يقسم الهمال بينها نصفين باعتبار

الأصول كما إذا ترك ثلاث بنات أخوة متفرقين وثلاث

بنين وثلاث بنات أخوات متفرقات بهذه الصورة

الْأَوَّلُ وَإِنْ اِخْتَلَفَتْ قَرَابَتُهُمْ فَالْثَلَاثَانِ لِقَرَابَةِ الْآبِ وَهُوَ نَصِيبُ

الْآبِ وَالثَّلَاثُ لِقَرَابَةِ الْأُمِّ وَهُوَ نَصِيبُ الْأُمِّ ثُمَّ مَا أَصَابَ كُلَّ

فَرِيقٍ يَقْسَمُ بَيْنَهُمْ كَمَا لَوْ اتَّحَدَتْ قَرَابَتُهُمْ

فَصْلٌ فِي الصَّنْفِ الثَّالِثِ

الْحَكْمُ فِيهِمْ كَالْحَكْمِ فِي الصَّنْفِ الْأَوَّلِ اعْنِي أَوْلَاهُمْ

بِالْمِيرَاثِ أَقْرَبُهُمْ إِلَيَّ الْهَيْتِ وَأَنْ اسْتَوَوْا فِي الْقُرْبِ فَوَلَدُ

الْعَصْبَةِ أَوْلَى مِنْ وَلَدَةِ وَي الْأَرْحَامِ كَبُنْتُ ابْنَ أَخٍ وَأَبْنُ

بُنْتُ اخْتِ كَلَا هُمَا لَابٍ وَأُمُّ أَوْلَابٍ أَوْ أَحَدُ هُمَا لَابٍ وَأُمُّ وَالْآخِرُ

لَابٍ الْهَالُ كُلُّهُ لِبُنْتِ ابْنِ الْأَخِ لِأَنَّهَا وَلَدُ الْعَصْبَةِ وَلَوْ كَانَ

لَا مَ بَيْنَهُمَا لِلدِّ كَرِ مِثْلُ خَطَا الْأَنْثِيِّينَ عِنْدَ أَبِي يُوسُفَ رَحِمَهُ

اللَّهُ أَثَلَا ثَا بِاعْتِبَارِ الْإِبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ أَنْصَافًا

فُصِّلَ فِي الصَّنْفِ الثَّانِي

أَوَّلَهُمْ بِالْبِيرَاتِ أَقْرَبَهُمْ إِلَى الْهَيْتِ مِنْ أَيِّ جِهَةٍ كَانَ

وَعِنْدَ الْأُسْتَوَاءِ فِي دَرَجَاتِ الْقُرْبِ فَهَنْ كَانَ يَدُ لِي إِلَى

الْهَيْتِ بَوَارِثٍ فَهُوَ أَوْلَى عِنْدَ أَبِي سَهَيْلٍ الْفَرَّافِضِيِّ وَ

أَبِي قُضَيْلٍ الْخَصَّافِ وَعَلِيِّ بْنِ عَيْسَى الْبَصْرِيِّ وَلَا تَفْضِيلَ

لِعِنْدَ أَبِي سَلِيحَانَ الْجَرَّجَانِيِّ وَأَبِي عَلِيٍّ الْبَيْهَقِيِّ الْبَسْتِيِّ

وَإِنْ اسْتَوَتْ مَنَازِلُهُمْ وَلَيْسَ فِيهِمْ مَنْ يَدُ لِي بَوَارِثٍ أَوْ كَانَ

كُلُّهُمْ يَدُ لِي بَوَارِثٍ فَإِنْ اتَّفَقَتْ صِفَةُ مَنْ يَدُ لِي وَاتَّحَدَتْ

قَرَابَتُهُمْ فَالْقِسْمَةُ عَلَيَّ أَبَدَانِهِمْ وَإِنْ اخْتَلَفَتْ صِفَةُ مَنْ يَدُ لِي

بِهِمْ يُقَسَّمُ الْهَالُ عَلَيَّ أَوَّلِ بَطْنٍ اخْتَلَفَ كَهَا فِي الصَّنْفِ

مُحَمَّدٌ رَحِمَهُ اللَّهُ يَعْتَبِرُ الْجِهَاتِ فِي الْأَصُولِ كَمَا إِذَا تَرَكَ

بُنْتَيَّ بِنْتُ بِنْتٍ وَهِيَ أَيْضًا بِنْتُ ابْنٍ بِنْتٍ وَابْنٍ بِنْتٍ بِنْتٍ

بِهَذِهِ الصُّورَةِ

بِنْتٌ	بِنْتٌ	بِنْتٌ

بِنْتٌ	ابْنٌ	بِنْتٌ

ابْنٌ	بُنْتَيْنِ

عِنْدَ أَبِي يُوسُفَ الْهَالُ بَيْنَهُمْ اثَلَاثُ أَوْحَ صَارَ الْهَيْتُ كَأَنَّهُ تَرَكَ

أَرْبَعَ بَنَاتٍ وَابْنًا فَيَكُونُ ثَلَاثًا لِلْبَنَتَيْنِ وَثَلَاثَةً لِلْأَبْنِ وَعِنْدَ

مُحَمَّدٍ رَحِمَهُ اللَّهُ الْهَالُ بَيْنَهُمْ عَلَيَّ ثَمَانِيَّةٍ وَعِشْرِينَ سَهْمًا

لِلْبَنَتَيْنِ اثْنَانِ وَعِشْرُونَ سَهْمًا سِتَّةَ عَشَرَ مِنْ قَبْلِ أَيْمِهِمَا

وَسِتَّةَ أَشْهُمٍ مِنْ قَبْلِ أُمِّهِمَا وَالْأَبْنُ سِتَّةَ أَشْهُمٍ مِنْ قَبْلِ أُمِّهِ

ابْنِ الْبِنْتِ إِذْ هِيَ نَصِيبُ جَدِّهَا وَثَلَاثَةُ سَبَاعِهِ وَهُوَ
 نَصِيبُ الْبِنْتَيْنِ يُقَسَّمُ عَلَيَّ وَلَدَيْهَا أَعْنِي فِي الْبَطْنِ
 الثَّلَاثِ انْصَافًا نِصْفُهُ لِبْنْتِ ابْنِ بِنْتِ الْبِنْتِ نَصِيبُ
 أَيْمِهَاوَالنَّصْفُ الْآخَرُ لِابْنِي بِنْتِ بِنْتِ الْبِنْتِ نَصِيبُ أُمِّهَا
 وَتَصَحَّحَ مِنْ ثَنَائِيَّةٍ وَعَشْرِينَ وَقَوْلُ مُحَمَّدٍ رَحِمَهُ اللَّهُ أَشْهَرُ
 الرَّاوَيْتَيْنِ عَنِ ابْنِ حَنِيفَةَ رَحِمَهُ اللَّهُ فِي جَمِيعِ أَحْكَامِ
 دَوِي الْأَرْحَامِ وَهُوَ قَوْلُ أَبِي يُوسُفَ الْأَوَّلِ ثُمَّ رَجَعَ فَقَالَ
 لَا عِبْرَةَ لِلْأَصُولِ الْبَنَّةِ

فَصْلٌ

عَلِمْنَا وَنَارِحُهُمُ اللَّهُ يَعْتَبِرُونَ الْجِهَاتِ فِي التَّوْرَةِ غَيْرَانِ
 أَبَا يُوسُفَ رَحِمَهُ اللَّهُ يَعْتَبِرُ الْجِهَاتِ فِي أَبْدَانِ الْفُرُوعِ وَ

وَكَذَلِكَ مُحَمَّدٌ رَحِمَهُ اللَّهُ يَأْخُذُ الصِّفَةَ مِنَ الْأَصْلِ حَالَةً
 الْقِسْمَةِ وَالْعَدَدِ مِنَ الْفُرُوعِ كَمَا إِذَا تَرَكَ ابْنِي بِنْتُ بِنْتِ
 بِنْتِ وَبِنْتِ ابْنِ بِنْتِ بِنْتِ وَبِنْتِي بِنْتِ ابْنِ بِنْتِ بِهَذِهِ الصُّورَةِ

بِنْتٌ	بِنْتٌ	بِنْتٌ
بِنْتٌ	بِنْتٌ	بِنْتٌ
بِنْتٌ	ابْنٌ	بِنْتٌ
بِنْتَيْنِ	بِنْتٌ	ابْنَيْنِ

عِنْدَ أَبِي يُوسُفَ رَحِمَهُ اللَّهُ يَقْسَمُ الْهَالَ بَيْنَ الْفُرُوعِ أَسْبَاعًا
 بِاعْتِبَارِ أَبْدَانِهِمْ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ يَقْسَمُ الْهَالَ عَلَي
 أَعْلَى الْخِلَافِ أَعْنِي فِي الْبَطْنِ الثَّانِي أَسْبَاعًا بِاعْتِبَارِ
 عَدَدِ الْفُرُوعِ فِي الْأَصُولِ فَعِنْدَهُ أَرْبَعَةُ أَسْبَاعٍ لِبَنَتِي بِنْتِ

وَكَذَلِكَ عِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ إِنْ كَانَ أَوْلَادُ الْبَنَاتِ

مختلفة يقسم الهال علي أول بطن اختلف في الاصول

ثم يجعل الذكور طليعةً والاناث طليعةً أخرى بعد القسمة

فَهَا صَابَ الذِّكْرُ بِجَمْعٍ وَيُقَسَّمُ عَلَيَّ أَعْلَى الْخِلَافِ الَّذِي

وَتَعْنِي أَوْلَادَهُمْ وَكَذَلِكَ مَا أَصَابَ الْأُنثَىٰ وَهَكَذَا يُعْمَلُ

إِلَى أَنْ يَنْتَهِيَ بِهَذِهِ الصُّورَةُ

[illegible]

يُعْتَبَرُ أَبْدَانُ الْغُرُوعِ إِنْ اتَّعَقَتْ صِفَةُ الْأَصُولِ مُوَافَقًا لَهَا

وَيُعْتَبَرُ أَبْدَانُ الْأَصُولِ إِنْ اخْتَلَفَتْ صِفَاتُهُمْ وَيُعْطَى الْغُرُوعُ

مِيرَاثُ الْأَصُولِ مُخَالَفًا لَهَا كَمَا إِذَا تَرَكَ ابْنُ بِنْتٍ وَبِنْتُ بِنْتٍ

عِنْدَ هَآءِ الْهَالِ بَيْنَهُمَا لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثَيَيْنِ بِاعْتِبَارِ

الْأَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ كَذَلِكَ لِأَنَّ صِفَةَ الْأَصُولِ

مُتَّفِقَةٌ وَلَوْ تَرَكَ ابْنُ بِنْتٍ وَابْنُ بِنْتٍ بِنْتُ عِنْدَهُمَا

الْهَالُ بَيْنَ الْغُرُوعِ اثْنَلَاثًا بِاعْتِبَارِ الْأَبْدَانِ ثَلَاثًا لِلذَّكَرِ

وِثْلَتَهُ لِلْأُنثَى وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ عَلَيْهِ الْهَالُ بَيْنَ

الْأَصُولِ أَعْنِي فِي الْبَطْنِ الثَّانِي اثْنَلَاثًا ثَلَاثًا لِبِنْتِ ابْنٍ

الْبِنْتُ نَصِيبُ أَبِيهَا وَثَلَاثَةٌ لِابْنِ بِنْتِ الْبِنْتِ نَصِيبُ أُمِّهِ

فُرْعُهُ وَفُرْعُهُ أُولَى مِنْ أَصْلِهِ

فَصْلٌ فِي الصَّنَفِ الْأَوَّلِ

أُولَهُمْ بِالْمِيرَاثِ أَقْرَبُهُمْ إِلَى الْهَيْتِ كَبُنْتُ الْبِنْتُ فَأَتَاهَا

أُولَى مِنْ بِنْتُ بِنْتِ الْإِبْنِ وَإِنْ اسْتَوَوْا فِي الدَّرَجَةِ فَوَلَدُ

الْوَارِثِ أُولَى مِنْ وَلَدِ دَوِي الْأَرْحَامِ كَبُنْتُ بِنْتُ الْإِبْنِ

أُولَى مِنْ ابْنِ بِنْتِ الْبِنْتِ وَإِنْ اسْتَوَتْ دَرَجَاتُهُمْ وَلَمْ يَكُنْ

فِيهِمْ وَلَدُ الْوَارِثِ أَوْ كَانَ كُتْلَهُمْ وَلَدَ الْوَارِثِ فَعِنْدَ

أَبِي يُوسُفَ رَحِمَهُ اللَّهُ وَالْحَسَنُ بْنُ زِيَادٍ يَعْتَبِرُ أَبْدَانُ

الْقُرُوعِ وَيُقَسَّمُ الْهَالُ عَلَيْهِمْ سَوَاءٌ تَعَقَّتْ صَعَةُ الْأَصُولِ

فِي الذَّكُورَةِ وَالْأُنْثَى أَوْ اخْتَلَفَتْ وَمُحَمَّدٌ رَحِمَهُ اللَّهُ

يُنْتَهِي إِلَى جَدِّي الْهَيْتِ أَوْجَدَتْهُ وَهِيَ الْعَهْتُ وَالْأَعْمَامُ

لَأَمِّ وَالْأَخْوَالِ وَالْخَالَاتُ فَهَؤُلَاءِ وَكُلُّ مَنْ يَدُلُّ إِلَى الْهَيْتِ

بِهِمْ مِنْ ذَوِي الْأَرْحَامِ رَوَى أَبُو سَلِيمَانَ عَنْ مُحَمَّدِ بْنِ

الْحَسَنِ عَنْ ابْنِ حَنِيفَةَ رَحِمَهُمُ اللَّهُ إِنْ أَقْرَبَ الْأَصْنَافِ

الصَّنْفُ الثَّانِي وَإِنْ عَلَوْا ثُمَّ الْأَوَّلُ وَإِنْ سَفَلُوا ثُمَّ الثَّلَاثُ

وَإِنْ نَزَلُوا ثُمَّ الرَّابِعُ وَإِنْ بَعْدَ وَارَوَى أَبُو يُوسُفَ وَالْحَسَنُ

بْنُ زَبَادٍ عَنْ ابْنِ حَنِيفَةَ رَحِمَهُمُ اللَّهُ إِنْ أَقْرَبَ الْأَصْنَافِ

الْأَوَّلُ ثُمَّ الثَّانِي ثُمَّ الثَّلَاثُ ثُمَّ الرَّابِعُ كَثُرَتْ بِنُ الْعَصَبَاتِ

وَهُوَ الْبَاقُونَ لِلْفَتَوَى وَعِنْدَ هَذَا الصَّنْفُ الثَّلَاثُ مُقَدَّمٌ

عَلَى الْجَدَابِ الْأَمِّ لِأَنَّ عِنْدَ هَذَا كُلِّ وَاحِدٍ مِنْهُمْ أُولَى مِنْ

بَابُ ذَوِي الْأَرْحَامِ

وَذَوِ الرَّحِمِ هُوَ كُلُّ قَرِيبٍ لَيْسَ بِذِي سَهْمٍ وَلَا عَصَبَةٍ كَانَتْ

عَامَّةُ الصَّحَابَةِ يَرُونَ تَوْرِيثَ ذَوِي الْأَرْحَامِ بِهِ قَالَ أَصْحَابُنَا

وَمَنْ تَابَعَهُمْ رَحِمَهُمُ اللَّهُ تَعَالَى وَقَالَ زَيْدُ بْنُ ثَابِتٍ رَضِيَ اللَّهُ

عَنْهُ لَا مِيرَاثَ لَذَوِي الْأَرْحَامِ وَيُوضَعُ الْهَالُ فِي بَيْتِ الْهَالِ

وَيُقَالُ مَالِكٌ وَالشَّافِعِيُّ رَحِمَهُمَا اللَّهُ تَعَالَى وَذَوِي الْأَرْحَامِ

أَصْنَافُ أَرْبَعَةٌ الصَّنِفُ الْأَوَّلُ يَنْتَهِي إِلَى الْبَيْتِ وَهُمْ أَوْلَادُ

الْبَنَاتِ وَأَوْدَانُ الْبَنَاتِ الْإِبْنُ وَالصَّنِفُ الثَّانِي يَنْتَهِي إِلَيْهِمْ

الْبَيْتُ وَهُمْ الْأَجْدَادُ السَّاقِطُونَ وَالْجَدَّاتُ السَّاقِطَاتُ

وَالصَّنِفُ الثَّلَاثُ يَنْتَهِي إِلَى أَبَوَيْ الْبَيْتِ وَهُمْ أَوْلَادُ

الْأَخَوَاتِ وَبَنَاتُ الْأَخَوَةِ وَبَنُو الْأَخَوَةِ لَأَمَّ وَالصَّنِفُ الرَّابِعُ

المهاثلة ما في يده من التصحيح الاول علي التصحيح

الثاني فلا حاجة الي الضرب وان لم يستقم فانظر ان كان

بينها موافقة فاضرب وفق التصحيح الثاني في جميع

التصحيح الاول وان كان بينها مباينة فاضرب كل

التصحيح الثاني في كل التصحيح الاول فالبلغ مخرج

السلتين فساهم ورثة الهيت الاول يضرب في المضروب

اعني في التصحيح الثاني اوفي وفقه وسهام ورثة الهيت

الثاني يضرب في كل ما في يده اوفي وفقه وان مات

ثالث اوراق فلجعل الببلغ الثاني مقام الاول والثالث

مقام الثاني في العمل ثم في اربع والخامس كذلك

الي غير النهاية

وَتَعُولُ إِلَى تِسْعَةٍ وَتَصَحَّحَ مِنْ سَبْعَةٍ وَعَشْرِينَ إِنَّهَا سَبِيتُ

أَكْدَرِيَّةٌ لِأَنَّهَا وَاقِعَةٌ فِي أَمْرَةٍ مِنْ بَنِي أَكْدَرٍ وَلَوْ كَانَ

مَكَانَ الْأَخْتِ أَخٍ أَوْ اخْتَانٍ فَلَا عَوْلَ وَلَا أَكْدَرِيَّةٌ

بَابُ الْهِنَاسَخَةِ

وَلَوْ صَارَ بَعْضُ الْأَنْصَبَاءِ مِيرَاثًا قَبْلَ الْقِسْمَةِ كَزَوْجٍ وَبْنَتٍ

وَأُمِّ نَهَاتِ الزَّوْجِ قَبْلَ الْقِسْمَةِ عَنْ أَمْرَةٍ وَأَبَوَيْنِ ثُمَّ مَاتَتِ

الْبْنَتُ عَنْ ابْنَيْنِ وَبْنَتٍ وَجَدَةٍ ثُمَّ مَاتَتِ الْجَدَةُ عَنْ زَوْجٍ

وَأَخَوَيْنِ الْأَصْلُ فِيهِانِ تَصَحَّحَ مَسْئَلَةُ الْهَيْتِ الْأُولَى وَتُعْطَى

سَهَامَ كُلِّ وَارِثٍ مِنْ هَذَا لِتَصْحِيحِ ثُمَّ تَصَحَّحَ مَسْئَلَةُ

الْهَيْتِ الثَّانِي وَتَنْظَرُ بَيْنَ مَا فِي يَدِهِ مِنَ التَّصْحِيحِ الْأُولَى

لِتَصْحِيحِ الثَّانِي أَلَا ثَلَاثَةُ أَحْمَالٍ فَأَلَا اسْتِقْلَالُ نَسَبٍ

لأب وأم وأما سدس جميع الهال كجد وجدة وبنت وأخوين

وإذا كان ثلث الباقي خيرا للجد وليس للباقي ثلث

صحيح فاضرب مخرج الثلث في أصل المسئلة فإن تركت

جدا وزوجا وبنتا وأما واختا لأب وأم أولاب فالسدس خير

للجد وتعمل المسئلة إلى ثلاثة عشر ولاشي للاخت

واعلم أن زيد بن ثابت رضي الله عنه لا يجعل الاخت

لأب وأم أولاب صاحبة فرض مع الجد الأفي المسئلة

الأكدر يقو هي زوج وأم وجد وأخت لأب وأم أولاب للزوج

النصف وللأم الثلث وللجد السدس وللخت النصف

ثم يضم الجد نصيبه إلى نصيب الاخت فيقسمان للذكر

مثل حظا لاثنيين لأن المقاسمة خير للجد أصلها من ستة

بَنُو الْعَلَاتِ يَدْخُلُونَ فِي الْقِسْمَةِ مَعَ بَنِي الْأَعْيَانِ

أَضْرَارًا لِلْجَدِّ فَإِذَا اخْتَلَفَ نَصِيبُهُ فَبَنُو الْعَلَاتِ يَخْرُجُونَ

مِنَ الْبَيْنِ خَائِبِينَ بِغَيْرِ شَيْءٍ وَالْبَاقِي لِبَنِي الْأَعْيَانِ

إِلَّا إِذَا كَانَتْ مِنْ بَنِي الْأَعْيَانِ أُخْتُ وَاحِدَةٌ أَخَذَتْ

فَرَضَهَا اعْنِي الْكُلَّ بَعْدَ نَصِيبِ الْجَدِّ فَإِنْ بَقِيَ شَيْءٌ

فَلِبَنِي الْعَلَاتِ وَالْأَفْلَاشِ لَهُمْ وَذَلِكَ كَجَدِّ وَاخْتِ

لِأَبٍ وَأُمٍّ وَأَخْتَيْنِ لِأَبٍ فَبَقِيَ لِلْأَخْتَيْنِ لِأَبٍ عَشْرُ أِهَالٍ وَ

تَصَحَّحَ مِنْ عِشْرِينَ وَلَوْ كَانَتْ فِي هَذِهِ الْهَسْبَةِ اخْتُ لِأَبٍ

لَمْ يَبْقَ لَهَا شَيْءٌ وَإِذَا اخْتَلَطَ بِهِمْ ذُو سَهْمٍ فَلِلْجَدِّ هَهُنَا أَفْضَلُ

الْأُمُورِ الثَّلَاثَةِ بَعْدَ فَرَضِ ذِي سَهْمٍ أَمَّا لِهَقَاسَةِ كَزَوْجٍ

وَجَدٍّ وَاخٍ وَأَمَّا ثَلَاثُ مَا يَبْقَى كَجَدٍّ وَجَدَّةٍ وَأَخَوَيْنِ وَاخْتِ

مَنْ لَا يَرُدُّ عَلَيْهِ فَإِنْ انْكَسَرَ عَلَيَّ الْبَعْضُ صَحَّحَ
الْهَسْبَةَ بِالْأَصُولِ الْمَذْكُورَةِ

بَابُ مَقَاسَةِ الْجَدِّ

ثَلَاثُ أَتُوبِكِرِ الصَّدِيقِ رَضِيَ اللَّهُ عَنْهُ وَمَنْ تَابَعَهُ مِنْ
الصَّحَابَةِ بَنُوا الْأَعْيَانِ وَبَنُوا الْعُلَاتِ لَا يَرْثُونَ مَعَ الْجَدِّ وَهَذَا
قَوْلُ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ وَبِهِ يَقْتَضِي وَقَالَ زَيْدُ بْنُ ثَابِتٍ
يَرْثُونَ مَعَ الْجَدِّ وَهُوَ قَوْلُهَا وَقَوْلُ مَالِكٍ وَالشَّانِعِيِّ
رَحِمَهُمُ اللَّهُ تَعَالَى وَعِنْدَ زَيْدِ بْنِ ثَابِتٍ رَحِمَهُ اللَّهُ تَعَالَى
عَلَيْهِ لِلْجَدِّ مَعَ بَنِي الْأَعْيَانِ وَالْعُلَاتِ أَفْضَلُ الْأَمْرَيْنِ
مِنَ الْهَقَاسَةِ وَمِنْ ثَلَاثِ جَمِيعِ الْهَالِ وَتَفْسِيرُ الْهَقَاسَةِ
أَنْ يُجْعَلَ الْجَدُّ فِي الْقِسْمَةِ كَأَحَدٍ مِنَ الْأَخْوَةِ وَ

عَدَدِ رُوسِهِمْ فِي مَخْرَجِ فَرَضٍ مِنْ لَا يَرُدُّ عَلَيْهِ فَالْمَبْلَغُ مِنْهَا

تَصَحُّحُ الْمَسْئَلَةِ وَالرَّابِعُ أَنْ يَكُونَ مَعَ الثَّانِي مِنْ لَا يَرُدُّ عَلَيْهِ

فَاقْسِمِ مَا بَقِيَ مِنْ مَخْرَجِ فَرَضٍ مِنْ لَا يَرُدُّ عَلَيْهِ عَلَيَّ

مَسْئَلَةٍ مَنْ يَرُدُّ عَلَيْهِ فَإِنْ اسْتَقَامَ الْبَاقِي فِيهَا وَهَذَا فِي

صُورَةٍ وَاحِدَةٍ وَهِيَ أَنْ يَكُونَ لِلزَّوْجَاتِ الرَّبْعُ وَيَكُونَ

الْبَاقِي بَيْنَ أَهْلِ الرَّدِّ ثَلَاثًا كَزَوْجَةٍ وَجَدَّةٍ وَأُخْتَيْنِ

لَمْ وَإِنْ لَمْ يَسْتَقِمْ فَاضْرِبْ جَمِيعَ مَسْئَلَةٍ مَنْ يَرُدُّ عَلَيْهِ فِي

مَخْرَجِ فَرَضٍ مِنْ لَا يَرُدُّ عَلَيْهِ فَالْمَبْلَغُ مَخْرَجِ فَرُوضِ

الْغَرِيقَيْنِ كَأَرْبَعِ زَوْجَاتٍ وَثَلَاثِ بَنَاتٍ وَسِتِّ جَدَّاتٍ

ثُمَّ اضْرِبْ سِهَامَ مَنْ لَا يَرُدُّ عَلَيْهِ فِي مَسْئَلَةٍ مَنْ يَرُدُّ عَلَيْهِ

وَسِهَامَ كُلِّ مَنْ يَرُدُّ عَلَيْهِ فِيهَا بَقِيَ مِنْ مَخْرَجِ فَرَضٍ

وَالثَّانِي إِذَا اجْتَمَعَ فِي الْمَسْبَلَةِ جِنْسَانِ أَوْ ثَلَاثَةُ أَجْنَاسٍ
مِنْ بَرْدٍ عَلَيْهِ عِنْدَ عَدَمِ مَنْ لَا يَرُدُّ عَلَيْهِ فَاجْعَلِ الْمَسْبَلَةَ
مِنْ سَهْمٍ أَعْنِي مِنْ اثْنَيْنِ إِنْ كَانَ فِي الْمَسْبَلَةِ سُدْسَانِ
أَوْ مِنْ ثَلَاثَةٍ إِذَا كَانَ فِيهَا ثُلُثٌ وَ سُدُسٌ أَوْ مِنْ أَرْبَعَةٍ
إِذَا كَانَ فِيهَا نِصْفٌ وَ سُدُسٌ أَوْ مِنْ خَمْسَةٍ إِذَا كَانَ فِيهَا
ثُلُثَانِ وَ سُدُسٌ أَوْ نِصْفٌ وَ سُدْسَانِ أَوْ نِصْفٌ وَ ثُلُثٌ وَ الثَّالِثُ
أَنْ يَكُونَ مَعَ الْأَوَّلِ مَنْ لَا يَرُدُّ عَلَيْهِ فَاعْطِ فَرَضَ مَنْ لَا يَرُدُّ
عَلَيْهِ مِنْ أَقْلٍ مَخْرَاجِهِ فَإِنْ اسْتَقَامَ الْبَاقِي عَلَى رُوسٍ
مِنْ يَرُدُّ عَلَيْهِ فَبِهَا كَزُوجٍ وَ ثَلَاثَ بَنَاتٍ وَإِنْ لَمْ يَسْتَقِمْ فَاضْرِبْ
وَقِفْ رُوسَهُمْ فِي مَخْرَجِ فَرَضٍ مِنْ لَا يَرُدُّ عَلَيْهِ إِنْ وَافَقَ
رُوسُهُمُ الْبَاقِي كَزُوجٍ وَ سِتِّ بَنَاتٍ وَ إِلَّا فَاضْرِبْ كُلَّ

بَابُ الرِّدِّ الْمَرْدُودِ الْعَوْلِ

وَهُوَ فِيهَا قَضِيلٌ عَنْ فَرَضِ ذَوِي الْفَرُوضِ وَلَا مَسْتَحِقَّ لَهُ

يُرَدُّ ذَلِكَ عَلَى ذَوِي الْفَرُوضِ بِقَدْرِ حُقُوقِهِمْ إِلَّا عَلَى

الزَّوْجَيْنِ وَهُوَ قَوْلُ عَامَّةِ الصَّحَابَةِ كَعَلِيٍّ وَمَنْ تَابَعَهُ

رَضِيَ اللَّهُ عَنْهُمْ وَبِهِ اخْتِذَا صَحَابُنَا رَحِمَهُمُ اللَّهُ وَقَالَ زَيْدٌ

بُنْ ثَابِتٌ لَا يُرَدُّ الْعَاقِلُ بَلْ هُوَ لِبَيْتِ الْهَالِ وَبِهِ اخْتَذَ

عُرْوَةُ وَالزَّهْرِيُّ وَمَالِكٌ وَالشَّانِعِيُّ رَحِمَهُمُ اللَّهُ تَعَالَى

ثُمَّ مَسَابِلُ الْبَابِ اِقْسَامُ اَرْبَعَةٍ اَحَدُهَا اَنْ يَكُونَ فِي

الْهَسْبَلَةِ جِنْسٌ وَاحِدٌ مِمَّنْ يُرَدُّ عَلَيْهِ عِنْدَ عَدَمِ مَنْ لَا يُرَدُّ

عَلَيْهِ فَاجْعَلِ الْهَسْبَلَةَ مِنْ رُؤُسِهِمْ كَمَا اِذَا تَرَكَ الْهَيْثُ

بِثْنَيْنِ اَوْ اَخْتَيْنِ اَوْ جَدَّتَيْنِ فَاجْعَلِ الْهَسْبَلَةَ مِنْ اِثْنَيْنِ

بينهما مباينة فاضرب في كل التركة ثم اقسم الحاصل
 علي جميع التصحيح المسئلة فالخارج نصيب ذلك
 الغريق في الوجهين وامناني قضاء الدين فدين
 كل غريم بمنزلة التصحيح

فصل في الخارج

من صالح علي شي من التركة فاطرح سها مه من
 التصحيح ثم اقسم باقي التركة علي سهام الباقيين
 كنزوجة وام وعم فصالح الزوج علي باقي ذمته للزوجة
 من المهر وخرج من البين فيقسم باقي التركة بين
 الام والعم اثلاثا بقدر سها مهها وح يكون سهاها للام و
 سهم واحد للعم

فَصَلِّ فِي تَسْمَةِ لِّشْرَكَاتِ بَيْنَ الْوَرِثَةِ وَالْغَرَمَاءِ

إِنْ كَانَ بَيْنَ التَّرَكَةِ وَاللِّتَّصُّحِيحِ مَبَايِنَةٌ فَاضْرِبْ سِهَامَ كُلِّ

وَارِثٍ مِنَ اللَّتَّصُّحِيحِ فِي جَمِيعِ التَّرَكَةِ ثُمَّ اقْسِمِ الْهَبْلُغَ عَلَيِ

اللِّتَّصُّحِيحِ وَإِذَا كَانَ بَيْنَ اللَّتَّصُّحِيحِ وَالتَّرَكَةِ مُوَافَقَةٌ

فَاضْرِبْ سِهَامَ كُلِّ وَارِثٍ مِنَ اللَّتَّصُّحِيحِ فِي وَفَقِ التَّرَكَةِ

ثُمَّ اقْسِمِ الْهَبْلُغَ عَلَيِ وَفَقِ اللَّتَّصُّحِيحِ فَالْخَارِجُ نَصِيبُ ذَلِكَ

الْوَارِثِ فِي الْوَجْهَيْنِ هَذَا أَنَّهُ هُوَ لِعَرَفَةِ نَصِيبِ كُلِّ

فَرْدٍ مِنَ الْوَرِثَةِ وَأَمَّا لِعَرَفَةِ نَصِيبِ كُلِّ فَرِيقٍ مِنْهُمْ

فَاضْرِبْ مَا كَانَ لِكُلِّ فَرِيقٍ مِنْ أَصْلِ الْهَسْبَةِ فِي

وَفَقِ التَّرَكَةِ ثُمَّ اقْسِمِ الْهَبْلُغَ الْحَاصِلَ عَلَيِ وَفَقِ

الْهَسْبَةِ إِنْ كَانَ بَيْنَ التَّرَكَةِ وَالْهَسْبَةِ مُوَافَقَةٌ وَإِنْ كَانَ

وَإِذَا أَرَدْتَ أَنْ تَعْرِفَ نَصِيبَ كُلِّ وَاحِدٍ مِنْ أَحَادِ ذَلِكَ

الْفَرِيقِ مِنَ التَّصْحِيحِ فَاقْسِمِ مَا كَانَ لِكُلِّ فَرِيقٍ مِنَ

أَصْلِ الْمُسَبَّلَةِ عَلَى عَدَدِ رُوسِهِمْ ثُمَّ اضْرِبِ الْخَارِجَ فِي

الْمَضْرُوبِ فَالْحَاصِلُ نَصِيبُ كُلِّ وَاحِدٍ مِنْ أَحَادِ ذَلِكَ

الْفَرِيقِ وَوَجْهٌ آخَرَانِ تَقْسِمِ الْمَضْرُوبَ عَلَى أَيِّ شَيْءٍ

ثُمَّ تَضْرِبِ الْخَارِجَ فِي نَصِيبِ الْفَرِيقِ الَّذِي تَسَهَتْ

عَلَيْهِمِ الْمَضْرُوبَ فَالْحَاصِلُ نَصِيبُ كُلِّ وَاحِدٍ مِنْ أَحَادِ

ذَلِكَ الْفَرِيقِ وَوَجْهٌ آخَرُهُوَ طَرِيقُ النِّسْبَةِ وَهُوَ الْأَوْسَرُ

فَهُوَ أَنْ يُنْسَبَ سَهَامُ كُلِّ فَرِيقٍ مِنْ أَصْلِ الْمُسَبَّلَةِ إِلَى

عَدَدِ رُوسِهِمْ مُفْرَدًا ثُمَّ يُعْطَى بِهَيْئِلِ تِلْكَ النِّسْبَةِ مِنْ

الْمَضْرُوبِ لِكُلِّ وَاحِدٍ مِنْ أَحَادِ ذَلِكَ الْفَرِيقِ

الْبَلَّغِ فِي أَصْلِ الْهَسْنَةِ كَارِبِ زَوْجَاتِ وَثَنَائِي عَشْرَةَ بَنَاتٍ

وَخَمْسَ عَشْرَةَ جَدَّةً وَسِتَّةَ أَعْمَامَ وَالرَّابِعَ أَنْ تَكُونَ الْأَعْدَادُ

مُتَبَايِنَةً لَا يُوَافِقُ بَعْضُهَا بَعْضًا فَالْحَكْمُ فِيهَا أَنْ يَضْرِبَ أَحَدُ

الْأَعْدَادِ فِي جَمِيعِ الثَّانِي ثُمَّ يَضْرِبُ مَا بَلَغَ فِي جَمِيعِ

الثَّالِثِ ثُمَّ مَا بَلَغَ فِي جَمِيعِ الرَّابِعِ ثُمَّ يَضْرِبُ مَا اجْتَمَعَ

فِي أَصْلِ الْهَسْنَةِ كَأَمْرَ اثْنَيْنِ وَسِتِّ جَدَّاتٍ وَعَشْرَةِ بَنَاتٍ

وَسَبْعَةِ أَعْمَامَ

فَصْلٌ

وَإِذَا ارْتَدَّتْ أَنْ تَعْرِفَ نَصِيبَ كُلِّ فَرِيقٍ مِنَ التَّصْحِيحِ

فَأَضْرِبْ مَا كَانَ لِكُلِّ فَرِيقٍ مِنْ أَصْلِ الْهَسْنَةِ فِيهَا فَاصْرِفْهُ

فِي أَصْلِ الْهَسْنَةِ فَهَا حَصَلَ كَانَ نَصِيبُ ذَلِكَ الْفَرِيقِ

أَصْلُ الْهَسْلَةِ زَوْجٌ وَخَمْسُ أَخَوَاتٍ لَّابٍ وَأُمٍّ وَأُمَّا الْأَرْبَعَةُ

فَاحِدَهَا أَنْ يَكُونَ الْكُسْرُ عَلَى طَانِغَتَيْنِ أَوْ أَكْثَرٍ وَلَكِنْ

يُبَيِّنُ أَعْدَادَ رُؤُسِهِمْ مِمَّا ثَلَاثَةٌ فَالْحُكْمُ فِيهَا أَنْ يُضْرَبَ أَحَدُ

الْأَعْدَادِ فِي أَصْلِ الْهَسْلَةِ مِثْلُ سِتِّ بَنَاتٍ وَثَلَاثِ جَدَّاتٍ

وِثْلَاثَةِ أَعْمَامٍ وَالثَّانِي أَنْ يَكُونَ بَعْضُ الْأَعْدَادِ فِي بَعْضِهِ

مَتَدًّا إِخْلًا فَالْحُكْمُ فِيهَا أَنْ يُضْرَبَ أَكْثَرُ الْأَعْدَادِ فِي

أَصْلِ الْهَسْلَةِ كَأَرْبَعِ زَوَاجَاتٍ وَثَلَاثِ جَدَّاتٍ وَاثْنِي

عَشْرَةً وَالثَّالِثُ أَنْ يُوَافِقَ بَعْضُ الْأَعْدَادِ بَعْضًا فَالْحُكْمُ

فِيهَا أَنْ يُضْرَبَ وَقْتُ أَحَدِ الْأَعْدَادِ فِي جَمِيعِ الثَّلَاثِ ثُمَّ

مَا بَلَغَ فِي وَقْتِ الثَّلَاثِ إِنْ وَافَقَ الْمُبْلَغُ الثَّلَاثَ وَالْأَ

فَالْمُبْلَغُ فِي جَمِيعِ الثَّلَاثِ ثُمَّ فِي الرَّابِعِ كَذَلِكَ ثُمَّ يُضْرَبُ

بَابُ التَّصْحِيحِ

يَحْتَاجُ فِي تَصْحِيحِ الْمَسَائِلِ إِلَى سَبْعَةِ أَصُولٍ ثَلَاثَةٌ مِنْهَا
بَيْنَ السَّهَامِ وَالرُّؤُسِ وَأَرْبَعَةٌ مِنْهَا بَيْنَ الرُّؤُسِ وَالرُّؤُسِ أَمَّا
الثَّلَاثَةُ فَأَحَدُهَا إِنْ كَانَ سَهَامٌ كُلِّ فَرِيقٍ مُنْقَسِبَةً عَلَيْهِمْ
بِلَا كَسْرِ فَلَا حَاجَةَ إِلَى الضَّرْبِ كَأَبَوَيْنِ وَبَنَتَيْنِ وَالثَّانِي
هُوَ أَنْ يَنْكَسَرَ عَلَى طَائِفَةٍ وَاحِدَةٍ نَصِيبُهُمْ وَلَكِنْ بَيْنَ سَهَامِهِمْ
وَرُؤُسِهِمْ مُوَافَقَةٌ فَيُضْرَبُ وَتَقُ عَدَدُ رُؤُسٍ مِنْ أَنْكَسَرَ
عَلَيْهِمُ السَّهَامُ فِي أَصْلِ الْهَسْلَةِ وَعَوْلَهَا إِنْ كَانَتْ عَابِلَةً
كَأَبَوَيْنِ وَعَشْرَ بَنَاتٍ أَوْ زَوْجًا وَأَبَوَيْنِ وَسِتِّ بَنَاتٍ وَالثَّلَاثُ
أَنْ يَنْكَسَرَ سَهَامُهُمْ وَلَا يَكُونُ بَيْنَ سَهَامِهِمْ وَرُؤُسِهِمْ مُوَافَقَةٌ
فَيُضْرَبُ كُلُّ عَدَدِ رُؤُسٍ مِنْ أَنْكَسَرَ عَلَيْهِمُ السَّهَامُ فِي

الْعَدَدُ الْعَادِلُهَا مَخْرَجُ لِحْزْرِ الْوَقْفِ وَتَبَايُنُ الْعَدَدَيْنِ
 أَنْ لَا يَعْدَ الْعَدَدَيْنِ الْمُخْتَلِفَيْنِ مَعَ عَدَدٍ ثَالِثٍ أَصْلًا
 كَالْتَسَعِ مَعَ الْعَشْرِ وَطَرِيقُ مَعْرِفَةِ الْهَوَاقِفِ وَالْمُبَايَنَةِ بَيْنَ
 الْهَقْدَارَيْنِ الْمُخْتَلِفَيْنِ أَنْ يَنْقُصَ مِنَ الْأَكْثَرِ بِهَقْدَارٍ
 الْأَقَلِّ مِنَ الْخَائِبِينَ مَرَّةً أَوْ مَرَارًا حَتَّى اتَّفَقَا فِي دَرَجَةٍ
 وَاحِدَةٍ فَإِنْ اتَّفَقَا فِي وَاحِدَةٍ فَلَا وَفَقَ بَيْنَهُمَا وَإِنْ اتَّفَقَا فِي
 عَدَدٍ فَهِيَ مُتَوَاتِفَتَانِ فِي ذَلِكَ الْعَدَدِ فَفِي الْإِثْنَيْنِ
 بِالنِّصْفِ وَفِي الثَّلَاثَةِ بِالثُّلُثِ وَفِي الْأَرْبَعَةِ بِالرُّبْعِ هَكَذَا
 إِلَى الْعَشْرِ وَفِيهَا وَمِثْلُ الْعَشْرِ يَتَوَاتَفَتَانِ بِحِزْزٍ أَعْنِي فِي
 أَحَدٍ عَشَرَ بِحِزْزٍ مِنْ أَحَدٍ عَشَرَ وَفِي خَمْسَةٍ عَشَرَ بِحِزْزٍ مِنْ
 خَمْسَةٍ عَشَرَ فَيُحْتَسَبُ هَذَا

كاسرة وام واختين لاب وام واختين لام وابن محرو

بَابُ مَعْرِفَةِ التَّهَاتُلِ وَالتَّدَاخُلِ

وَالْتَوَاقِفِ وَالتَّبَايُنِ بَيْنَ الْعَدَدَيْنِ

تَهَاتُلُ الْعَدَدَيْنِ كَوْنُ أَحَدِ هُمَا مُسَاوِيَا لِلآخِ

وَتَدَاخُلُ الْعَدَدَيْنِ أَنْ يُعَدَّ أَقْلُهَا أَلَّا كُتِرَ أَيُّ يُغْنِيهِ

أَوْ نَقُولُ تَدَاخُلُ الْعَدَدَيْنِ هُوَ أَنْ يَكُونَ أَكْثَرُ الْعَدَدَيْنِ

مَنْقَسِبًا عَلَيِ الْأَقْلِ قِسْمَةً صَحِيحَةً أَوْ نَقُولُ هُوَ أَنْ زَيْدٌ عَلَيِ

الْأَقْلِ مِثْلُهُ أَوْ أَمْثَالُهُ فَيُسَاوِي الْأَكْثَرَ أَوْ نَقُولُ أَنْ يَكُونَ

الْأَقْلُ جُزْءًا الْأَكْثَرِ مِثْلُ ثَلَاثَةٍ وَتِسْعَةٍ وَتَوَاقَفَ الْعَدَدَيْنِ أَنْ

لَا يُعَدَّ أَقْلُهَا الْأَكْثَرَ وَلَكِنْ يُعَدُّهَا عَدَدٌ ثَالِثٌ كَالثَّانِيَةِ

مَعَ الْعِشْرِينَ يُعَدُّهَا أَرْبَعَةٌ فَهِيَ مُتَوَاقِفَانِ بِالرَّبْعِ لِأَنَّ

الْبَرَكَةُ وَالثَّانِي الْأَقْرَبُ فَلَا قُرْبَ كَهَا ذَكَرْنَا فِي

العصبات والمحرم ولا يحجب عندنا وعند ابن مسعود

رضي الله عنه يحجب حجب النقصان كما في

والقاتل والمرتقب والمحجوب يحجب بالانقاف

كما لاثنين من الإخوة والأخوات فصاعداً من أي جهة

كما نفاها لبرئان مع الأب لكن يحجبان الأم من

الثلاث إلى السادس

بَابُ مَخَارِجِ الْفُرُوضِ

اعْلَمْ أَنَّ الْفُرُوضَ السِّتَّةَ الْهَذِ كُورَةٌ فِي كِتَابِ اللَّهِ

تَعَالَى نَوْعَانِ الْأَوَّلُ النِّصْفُ وَالرَّبْعُ وَالثُّلُثُ وَالثَّانِي

الثَّلَاثَانِ وَالثَّلَاثُ وَالسُّدُسُ عَلَى التَّنْصِيفِ وَالتَّضْعِيفِ

بَابُ الْحَجْبِ

الْحَجْبُ عَلَى نَوْعَيْنِ حَجْبُ نَقْصَانٍ وَهُوَ حَجْبٌ عَنْ سَهْمٍ

إِلَى سَهْمٍ وَذَلِكَ لِخُمُسَةِ نَعْرِ لِلزَّوْجَيْنِ وَالْأُمِّ وَبِنْتِ الْإِبْنِ

وَالْأَخْتِ لِأَبٍ وَقَدْ مَرَّ بِهَا نَهْ وَحَجْبُ حِرْمَانٍ وَالْوَرِثَةُ فِيهِ

فَرِيقَانِ فَرِيقٌ لَا يَحْجُبُونَ بِحَالِ الْبَنَّةِ وَهُمْ سِتَّةُ الْإِبْنِ

وَالْأَبُ وَالزَّوْجُ وَالْبِنْتُ وَالْأُمُّ وَالزَّوْجَةُ وَفَرِيقٌ يَرْتُونَ

بِحَالٍ وَيَحْجُبُونَ بِحَالٍ وَهَذَا مَبْنِيٌّ عَلَى أَصْلَيْنِ أَحَدُ

هُمَا هُوَ أَنَّ كُلَّ مَنْ يَدُلِّي إِلَى الْمَيِّتِ بِشَخْصٍ لَا يَرِثُ مَعَ

وُجُودِ ذَلِكَ الشَّخْصِ كَأَبْنِ الْإِبْنِ مَعَ الْإِبْنِ سِوَى

أَوْلَادِ الْأُمِّ فَإِنَّهُمْ يَرْتُونَ مَعَهَا لِانْعِدَامِ اسْتِحْقَاقِهَا جَمِيعَ

وَأَعْتَقَ مِنْ أَعْتَقَ أَوْكََا تَبْنَ أَوْكََا تَبْنَ مِنْ كَا تَبْنَ
 أَوْكََا تَبْنَ أَوْكََا تَبْنَ مِنْ دَبْنَ أَوْكََا تَبْنَ أَوْكََا تَبْنَ وَلَوْكََا تَبْنَ
 أَوْكََا تَبْنَ وَأَبْنَهُ سُدُسُ أَلُولَ لَلَّابِ وَالْبَا قِي لِلْبَنِ
 أَعْنَدَ هُمَا كُلُّهُ لِلْأَبْنِ وَلَوْكََا تَبْنَ أَوْكََا تَبْنَ وَجَدَهُ
 فَأَلُولَ لَلَّابِ لِلْأَبْنِ بِالْإِنْعَافِ وَمِنْ مَلِكِ ذَارِجٍ مُحَرَّمٍ
 مِنْهُ عَتَقَ عَلَيْهِ وَيَكُونُ وَلَائُهُ لَهُ كَثَلَتْ بَنَاتٍ لِلصَّغْرَى
 عَشْرُونَ دِينَارًا وَلِلْكُبْرَى ثَلَاثُونَ دِينَارًا فَاشْتَرَتْ أَبَا هُمَا
 بِالْخُمُسَيْنِ ثُمَّ مَاتَ الْأَبُ وَتَرَكَ شَيْئًا مِنَ الْمَالِ فَالْثَلَاثَانِ
 بَيْنَهُنَّ أَثْلَاثًا بِالْعَرَضِ وَالْبَاقِي بَيْنَ مُشْتَرَتِي الْأَبِ
 أَخْمَا سَا ثَلَاثَةُ أَخْمَاسٍ لِلْكُبْرَى وَخُمْسَاهُ لِلصَّغْرَى
 فَتَصَرَّحَ مِنْ خُمْسَةٍ وَأَرْبَعِينَ

الْحَكْمُ فِي أَعْمَامِ الْهَيْتِ ثُمَّ فِي أَعْمَامِ أَبِيهِ ثُمَّ فِي أَعْمَامِ
جَدِّهِ أَمَّا الْعَصَبَةُ بِغَيْرِهِ فَأَرْبَعٌ مِنَ النِّسْوَةِ وَهِنَّ اللَّاتِي
فَرَضَهُنَّ النِّصْفَ وَالثَّلَاثَانِ يَصِرْنَ عَصَبَةً بِأَخَوَاتِهِنَّ
كَمَا ذَكَرْنَا فِي حَالَتِهِنَّ وَمَنْ لَأَفْرَضَ لَهَا مِنَ الْإِنَاثِ
وَأَخَوَهَا عَصَبَةٌ لِأَتَصِيرَ عَصَبَةً بِأَخِيهَا كَالْعَمِّ وَالْعَمَّةِ
وَأَمَّا الْعَصَبَةُ مَعَ غَيْرِهِ فَكُلُّ أَنْثَى تَصِيرُ عَصَبَةً مَعَ أَنْثَى
أُخْرَى كَالْأَخْتِ مَعَ الْبِنْتِ كَمَا ذَكَرْنَا وَأَخِرُ الْعَصَبَاتِ
مَوْلَى الْعِتَاقَةِ ثُمَّ عَصَبَتُهُ عَلَى التَّرْتِيبِ الَّذِي ذَكَرْنَا
لِقَوْلِهِ عَلَيْهِ الصَّلَاةُ وَالسَّلَامُ الْوَلَاءُ لِلْحِمَةِ كُلِّ حِمَةٍ النَّسَبِ
وَلَا شَيْءَ لِلْإِنَاثِ مِنْ وَرَثَةِ الْهَيْتِ لِقَوْلِهِ عَلَيْهِ الصَّلَاةُ
وَالسَّلَامُ لَيْسَ لِلنِّسَاءِ مِنَ الْوَلَايَةِ شَيْءٌ إِلَّا مَا اعْتَقَنَ

وَأَصْلُهُ وَجَزْءُ أَبِيهِ وَجَزْءُ جَدِّهِ الْاَقْرَبُ فَالْاَقْرَبُ يَرْجُو

يُقَرِّبُ الدَّ رَجَّةً اَعْنِي بِهِ اَوْلَاهُمْ بِا لِهَيْرَاثِ جُزْءِ الْهَيْتِ

اَيُّ الْبَنُوْنَ تَمَّ بَنُوْهُمْ وَاِنْ سَعَلُوْا تَمَّ اَصْلُهُ اَيُّ الْاَبِ تَمَّ الْجَدُّ

اَبِ الْاَبِ وَاِنْ عَلَا تَمَّ جُزْءُ أَبِيهِ اَيُّ الْاَخَوَةِ تَمَّ بَنُوْهُمْ

وَاِنْ سَعَلُوْا تَمَّ جُزْءُ جَدِّهِ اَيُّ الْاَعْمَامِ تَمَّ بَنُوْهُمْ وَاِنْ سَعَلُوْا

تَمَّ يَرْجُوْنَ بِقُوَّةِ الْقَرَابَةِ اَعْنِي بِهِ ذَا الْقَرَابَةِ بَيْنِ اَوَّلِي

مِنْ ذِي قَرَابَةٍ وَاحِدَةٍ ذَكَرًا كَانَ اَوْ اُنْثَى لِقَوْلِهِ

عَلَيْهِ السَّلَامُ اِنَّ اَعْيَانَ بَنِي الْاَبِ وَالْاُمِّ يَتَوَارَثُوْنَ دُونَ

بَنِي الْعَلَاتِ كَالْاَخِ لِاَبٍ وَاُمِّ اَوَّلِيٍّ مِنْ الْاَخِ لِاَبٍ وَالْاَخْتِ

لِاَبٍ وَاُمِّ اِذَا صَارَتْ عَصَبَةً مَعَ الْبِنْتِ اَوْ لِيٍّ مِنْ الْاَخِ لِاَبٍ

وَابْنِ الْاَخِ لِاَبٍ وَاُمِّ اَوَّلِيٍّ مِنْ ابْنِ الْاَخِ لِاَبٍ وَكَذَلِكَ

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يُقَسَّمُ السُّدُسُ بَيْنَهُمَا عِنْدَ أَبِي يُوسُفَ رَحْمَةُ اللَّهِ عَلَيْهِ

أَنصَابًا بِأَعْتِبَارِ الْإِبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحْمَةُ اللَّهِ عَلَيْهِ

أَثَلَاثًا بِأَعْتِبَارِ الْجِهَاتِ

بَابُ الْعُصَبَاتِ

الْعُصَبَاتُ النَّسَبِيَّةُ ثَلَاثَةٌ عَصَبَةُ بِنَفْسِهِ وَ عَصَبَةُ بغيرِهِ

وَعَصَبَةُ مَعَ غَيْرِهِ أَمَّا الْعُصَبَةُ بِنَفْسِهِ فَكُلُّ ذَكَرٍ لَا يَدُ خُلِّ

فِي نَسَبِهِ إِلَى الْهَيْتِ أَنْثَى وَهِيَ أَرْبَعَةُ أَصْنَافٍ جُزْ الْهَيْتِ

وابوين اوزوجة وابوين ولو كان مكان الاب جد فلان
 ثلث جميع الهال الا عندابي يوسف رحمه الله فان لها
 ايضا ثلث الباقي وللجدة السدس لِم كانت اولاب
 واحدة كانت او اكثر اذا كن ثابتات متحاضيات
 في الدرَجَة وَيَسْقُطَنَّ كَلَّتْ بِالْأُمِّ وَالْأَبَوِيَّاتُ أَيْضًا
 بِالْأَبِ وَكَذَلِكَ بِالْجَدِّ الْأُمِّ الْأَبِ وَإِنْ عُلْتُ فَإِنَّهَا تَرِثُ
 مَعَ الْجَدِّ لَإِنَّهَا لَيْسَتْ مِنْ قَبْلِهِ وَالْجَدَّةُ الْقَرِيبِي مِنْ أَيِّ
 جِهَةٍ كَانَتْ تَحْجِبُ الْجَدَّةَ الْبَعْدِي مِنْ أَيِّ جِهَةٍ
 كَانَتْ وَارِثَةُ كَانَتْ الْقَرِيبِي أَوْ مَحْجُوبَةٍ وَإِذَا كَانَتْ
 الْجَدَّةُ ذَاتَ قَرَانَةٍ وَاحِدَةٍ كَأُمِّ الْأَبِ وَالْآخِرَى ذَاتَ
 قَرَابَتَيْنِ أَوْ أَكْثَرَ كَأُمِّ الْأُمِّ وَهِيَ أَيْضًا أُمُّ الْأَبِ
 بِهَذِهِ الصُّورَةِ

لِأَبٍ وَأُمٍّ وَلَهُنَّ الشُّدُسُ مَعَ الْأَخْتِ لِأَبٍ وَأُمٍّ تَكْمِلَةٌ
لِلثَلَاثِينَ وَلَا يَرْتُنْ مَعَ الْأَخْتَيْنِ لِأَبٍ وَأُمٍّ إِلَّا أَنْ يَكُونَ
مَعَهُنَّ أَخٌ لِأَبٍ فَيُعْصِبُهُنَّ وَيَكُونُ الْبَاقِي بَيْنَهُنَّ لِلذَّكَرِ
مِثْلُ حَظِّ الْأُنثَيَيْنِ وَالسَّادِسَةُ أَنْ يَصْرُنَ عَصَبَةً مَعَ الْبَنَاتِ
أَوْ مَعَ بَنَاتِ الْإِبْنِ لَهَا ذَكَرُ نَا وَبَنُو الْأَعْيَانِ وَبَنُو الْعَلَاتِ
كَأَنَّهُمْ يَسْتَقْطُونَ بِالْإِبْنِ وَأَبْنِ الْإِبْنِ وَإِنْ سَقَلَ وَبِالْأَبِ
بِالْإِنْفَاقِ وَبِالْجِدِّ عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى
وَيَسْقُطُ بَنُو الْعَلَاتِ أَيْضًا بِالْأَخِ لِأَبٍ وَأُمٍّ أَمَّا لِلنِّسَاءِ فَأَحْوَالُ
ثَلَاثُ الشُّدُسِ مَعَ الْوَلَدِ أَوْ وَلَدِ الْإِبْنِ وَإِنْ سَقَلَ أَوْ مَعَ الْإِ
ثْنَيْنِ مِنَ الْإِخْوَةِ وَالْأَخَوَاتِ فَصَاعِدًا مِنْ أَيِّ جِهَةٍ كُنَّا
وَتِلْكَ الْكُلِّ عِنْدَ عَدَمِ قَوْلِ الْهَذَكُورِينَ وَتِلْكَ مَا بَقِيَ
بَعْدَ نَفْسِ أَحَدِ الزَّوْجَيْنِ وَذَلِكَ فِي مَسْنَلَتَيْنِ زَوْجٍ

الْوَلِ النَّصْفُ وَلِلْوَسْطَى مِنَ الْعَرِيقِ الْأَوَّلِ مَعَ
 مَنْ يُوَازِيهَا السُّدُسُ تَكْمِلَةُ الثَّلَاثِينَ وَ لَا شَيْءٌ
 لِلْمُسْفِلِيَّاتِ أَصْلًا لِأَنَّهُ يَكُونُ مَعَهُنَّ غُلَامٌ فَيُعَصِّبُهُنَّ
 مَنْ كَانَتْ بِحَدَايِهِ وَمَنْ كَانَتْ قُوَّةُ لِهِنَّ لَمْ يَكُنْ
 دَا تَسْرِمٌ وَيَسْقُطُ مَنْ دُونَهُ وَأَمَّا الْأَخَوَاتُ لِأَبٍ وَلِأُمٍّ
 فَأَحْوَالُ خُمُسِ النَّصْفِ لِلْوَحِدَةِ وَالثَّلَاثَانِ لِلْإِثْنَيْنِ
 فَصَاعِدًا وَمَعَ الْأَخِ لِأَبٍ وَأُمٍّ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثِيَيْنِ
 فَيَصْرَنَ بِهِ عَصَبَةٌ لَأَسْتَوْيُهُمْ فِي الْقَرَابَةِ إِلَى الْهِبَةِ
 وَلَهُنَّ الْبَاقِي مَعَ الْبَنَاتِ أَوْ بَنَاتِ الْإِبْنِ لِقَوْلِهِ عَلَيْهِ الصَّلَاةُ
 وَالسَّلَامُ اجْعَلُوا الْأَخَوَاتِ مَعَ الْبَنَاتِ عَصَبَةً وَالْأَخَوَاتُ
 لِأَبٍ كَالْأَخَوَاتِ لِأُمٍّ وَلَهُنَّ أَحْوَالُ سَبْعِ النَّصْفِ
 لِلْوَحِدَةِ وَالثَّلَاثَانِ لِلْإِثْنَيْنِ فَصَاعِدًا عِنْدَ عَدَمِ الْأَخَوَاتِ

ابْنُ بِنْتٍ ابْنُ ابْنُ

ابْنُ بِنْتٍ ابْنُ بِنْتٍ ابْنُ

ابْنُ بِنْتٍ ابْنُ بِنْتٍ ابْنُ بِنْتٍ

ابْنُ بِنْتٍ ابْنُ بِنْتٍ

ابْنُ بِنْتٍ

الْعُلْيَا مِنَ الْغَرِيفِ الْأَوَّلِ لِأَيَّازِ يَهَا أَحَدٌ وَالْوُسْطَى

مِنَ الْغَرِيفِ الْأَوَّلِ تُوَازِيهَا الْعُلْيَا مِنَ الْغَرِيفِ الثَّانِي

وَالسُّفْلَى مِنَ الْغَرِيفِ الْأَوَّلِ تُوَازِيهَا الْوُسْطَى

مِنَ الْغَرِيفِ الثَّانِي وَالْعُلْيَا مِنَ الْغَرِيفِ الثَّالِثِ

وَالسُّفْلَى مِنَ الْغَرِيفِ الثَّانِي تُوَازِيهَا الْوُسْطَى

مِنَ الْغَرِيفِ الثَّالِثِ وَالسُّفْلَى مِنَ الْغَرِيفِ الثَّالِثِ

لَا يُوَازِيهَا أَحَدٌ إِذَا عَرَفْتَ هَذَا فَقُولْ لِلْعُلْيَا مِنَ الْغَرِيفِ

كَبَنَاتِ الصُّلْبِ وَلَهُنَّ أَحْوَالٌ سِتُّ النِّصْفِ لِلْوَا حِدَةٍ

وَالثَّلَاثَانِ لِلْاِثْنَيْنِ فَصَا عِدَا عِنْدَ عَدَمِ بَنَاتِ الصُّلْبِ

وَلَهُنَّ السَّدُسُ مَعَ الْوَاحِدَةِ الصُّلْبِيَّةِ تَكْمِلَةً لِلثَّلَاثَيْنِ

وَلَا يَرْتَنُّ مَعَ الصُّلْبِيَّتَيْنِ إِلَّا أَنْ يَكُونَ بِحِذَابِهِنَّ أَوْ اسْغُلَّ

مِنْهُنَّ غُلَامٌ فَيُعْصِبُهُنَّ وَابْنَا فِي بَيْنَهُنَّ لِلَّذِي كَرُمْتُ

حِطَالِثَيْنِ وَيَسْقُطَنَّ كُلُّهُنَّ بِالْإِبْنِ وَلَوْ تَرَكَ ثَلَاثَ

بَنَاتِ ابْنٍ بَعْضُهُنَّ اسْغُلَّ مِنْ بَعْضٍ وَثَلَاثَ بَنَاتِ ابْنٍ

ابْنٍ آخَرَ بَعْضُهُنَّ اسْغُلَّ مِنْ بَعْضٍ وَثَلَاثَ بَنَاتِ ابْنٍ

ابْنِ ابْنٍ آخَرَ بَعْضُهُنَّ اسْغُلَّ مِنْ بَعْضٍ بِهَذِهِ الصُّورَةِ

وَتُسَمَّى مَسْنَلَةُ الشَّيْبِيبِ

مِنْ
الْفَرِيقِ الْأَوَّلِ وَالْفَرِيقِ الثَّانِي وَالْفَرِيقِ الثَّلَاثِ

ابْنٌ ابْنٌ ابْنٌ

فَأَحْوَالُ ثَلَاثِ السُّدُسِ لِلْوَحْدَةِ الثَّلَاثِ لِلْاِثْنَيْنِ فَصَاعِدًا
فَكَوْرَهُمْو اِنَاثِهِمْ فِي الْقِسْمَةِ وَالْاِسْتِحْقَاقِ سَوَاءً
وَيَسْتَقْطُونَ بِالْوَلَدِ وَلَدِ الْاَبْنِ اِنْ سَعَلَ وَبِالْاَبِ
وَبِالْجَدِّ بِالْاِتِّفَاقِ وَاَمَّا لِلزَّوْجِ فَحَا لَتَانِ النِّصْفِ
عِنْدَ عَدَمِ الْوَلَدِ وَوَلَدِ الْاَبْنِ اِنْ سَعَلَ وَالرَّبْعُ
مَعَ الْوَلَدِ اَوْ وَلَدِ الْاَبْنِ اِنْ سَعَلَ
فَصُلِّ فِي النِّسَاءِ

لِلزَّوْجَاتِ حَالَتَانِ الرَّبْعُ لِلْوَحْدَةِ فَصَاعِدًا عِنْدَ عَدَمِ
الْوَلَدِ وَلَدِ الْاَبْنِ اِنْ سَعَلَ وَالثُّنَيْنِ مَعَ الْوَلَدِ
اَوْ وَلَدِ الْاَبْنِ اِنْ سَعَلَ وَاَمَّا لِبَنَاتِ الصُّلْبِ فَأَحْوَالُ ثَلَاثِ
النِّصْفِ لِلْوَحْدَةِ وَالثَّلَاثَانِ لِلْاِثْنَيْنِ فَصَاعِدًا اَوْ مَعَ الْاَبْنِ
نَلْذِكْرٍ مِثْلُ حِطِّ الْاِثْنَيْنِ وَهُوَ يَعْصِبُهُنَّ وَبَنَاتِ الْاَبْنِ

نَفَرَا اَرْبَعَةً مِنَ الرِّجَالِ وَهُمْ الْاَبَ وَالْجَدُّ الصَّحِيحُ
وَاِنْ عَلَا وَالْاَخُ لِامِّ الزَّوْجِ وَتَهَانَ مِنَ النِّسَاءِ وَهِنَّ الزَّوْجَةُ
وَالْبِنْتُ وَبِنْتُ الْاَبْنِ وَاِنْ سَفَلَتْ وَالْاَخْتُ لِاَبٍ وَاَمْ
وَالْاَخْتُ لِاَبٍ وَالْاَخْتُ لِامِّ وَاَمْ وَالْجَدَّةُ الصَّحِيحَةُ
وَهِيَ الَّتِي لَا يَدْخُلُ فِي نِسْبَتِهَا اِلَى الْهَيْتِ جَدُّ نَاسِدٌ
اِمَّا لِاَبٍ فَاحْوَالٌ ثَلَاثُ الْفَرْضِ الْمَطْلُوقِ وَهُوَ السُّدُسُ
وَذَلِكَ مَعَ الْاَبْنِ اَوْ ابْنِ الْاَبْنِ وَاِنْ سَفَلَتْ وَالْفَرْضُ
وَالْتَعْصِيبُ مَعَاوِذُكَ مَعَ الْاَبْنَةِ اَوْ ابْنَةِ الْاَبْنِ وَاِنْ سَفَلَتْ
وَالْتَعْصِيبُ الْمَحْضُ وَذَلِكَ عِنْدَ عَدَمِ الْوَلَدِ وُلْدِ الْاَبْنِ
وَاِنْ سَفَلَتْ وَالْجَدَّةُ الصَّحِيحَةُ كَالْاَبِ اِلَّا فِي اَرْبَعِ مَسَائِلٍ
وَسَنْدُ كَرِّهَا اِنْشَاءُ اللَّهِ تَعَالَى وَيَسْقُطُ الْجَدُّ بِاَبٍ
لَاَنَّ الْاَبَ اَصْلٌ فِي قَرَابَةِ الْجَدِّ اِلَى الْهَيْتِ وَاِمَّا الْوَلَدَ اِلَامَ

مُصَرَّاعًا عَلَيَّ أَقْرَارِهِ ثُمَّ الْهَوَاصِي لَهُ بِجَمِيعِ الْهَالِ ثُمَّ بَيْتُ الْهَالِ

فَصُلِّ فِي الْهَوَا نَعِ مِنَ الْأَرْتِ

الْهَانِعُ مِنَ الْأَرْتِ أَرْبَعَةُ الرِّقِّ وَأَفْرَاكَانَ أَوْ نَاقِصًا وَالْقَتْلُ

الَّذِي يَتَعَلَّقُ بِهِ وَجُوبُ الْقِصَاصِ أَوْ الْكُفَّارَةِ وَاخْتِلَافُ

الدِّينِينَ وَاخْتِلَافُ الدَّارِينَ إِمَّا حَقِيقَةً كَالْحَرْبِيِّ

وَالذِّمِّيِّ أَوْ حُكْمًا كَالْهِسْتَا مِنْ وَالِدِ مَيِّ أَوْ الْحَرْبِيِّ

مِنْ دَارَيْنِ مُخْتَلِفَيْنِ وَالِدٌ أَرَا نَهَا تَخْتَلِفُ

بِاخْتِلَافِ الْهِنَعَةِ وَالْهَلَكِ لِانْقِطَاعِ الْعِصْمَةِ فِيهَا بَيْنَهُمْ

بَابُ مَعْرِفَةِ الْفُرُوضِ وَمُسْتَحْتِهَا

الْفُرُوضُ الْمُقَدَّرَةُ فِي كِتَابِ اللَّهِ تَعَالَى سِتَّةُ النِّصْفِ

وَالرُّبْعِ وَالثُّلُثَيْنِ وَالثُّلُثِ وَالسُّدُسِ عَلَيَّ

التَّصْعِيفِ وَالتَّنْصِيفِ وَأَصْحَابُ هَذِهِ السَّهَامِ اثْنِي عَشَرَ

وَتَكْفِينِهِ بِالْإِتْبَانِ وَلَا تَقْتِيرُ ثُمَّ يَقْضِي دِيُونَهُ مِنْ
جَمِيعِ مَا بَقِيَ مِنْ مَالِهِ ثُمَّ تَنْفَعُ وَصَايَاهُ مِنْ ثُلُثِ
مَا بَقِيَ بَعْدَ الدِّينِ ثُمَّ يُقَسِّمُ الْبَاقِي بَيْنَ وَرَثَتِهِ
بِالْكِتَابِ وَالسُّنَّةِ وَاجْتِهَادِ الْأُمَّةِ فَيُيَدِّدُ بِأَصْحَابِ
الْفَرَايِضِ وَهُمْ الَّذِينَ لَهُمْ سَهَامٌ مُقَدَّرَةٌ فِي كِتَابِ
اللَّهِ تَعَالَى ثُمَّ بِالْعَصَبَاتِ مِنْ جِهَةِ النَّسَبِ وَالْعَصَبَةِ
كُلٌّ مَنْ يَأْخُذُ مِنَ التَّرَكَّةِ مَا أَبْقَتْهُ أَصْحَابُ الْفَرَايِضِ
وَعِنْدَ الْإِنْفِرَادِ يَحْزِرُ جَمِيعُ الْأَهْلِ ثُمَّ بِالْعَصَبَةِ مِنْ
جِهَةِ السَّبَبِ وَهُوَ مَوْلَى الْعِتَاقَةِ ثُمَّ عَصَبَتُهُ ثُمَّ الرَّدُّ
عَلَى ذَوِي الْفُرُوضِ النَّسَبِيَّةِ بِقَدْرِ حَقِّهِمْ ثُمَّ ذَوِي
الْأَرْحَامِ ثُمَّ مَوْلَى الْهَوَايَةِ ثُمَّ الْهَرَقُ لَهُ بِالنَّسَبِ عَلَى الْغَيْرِ
بِحَيْثُ لَمْ يَثْبُتْ نَسَبُهُ مِنْ ذَلِكَ الْغَيْرِ إِذَا مَاتَ الْهَرَقُ

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

الْحَمْدُ لِلَّهِ رَبِّ الْعَالَمِينَ حَمْدَ الشَّاكِرِينَ وَالصَّلَاةُ
 عَلَيَّ خَيْرِ الْبَرِيَّةِ مُحَمَّدٍ وَالْهَاطِطِينَ قَالَ رَسُولُ اللَّهِ
 صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ تَعْلَمُوا الْفَرَايِضَ وَعَلَيْهَا النَّاسُ
 فَإِنَّهَا نِصْفُ الْعِلْمِ قَالَ عَلَمَانَا رَحِمَهُمُ اللَّهُ يَتَعَلَّقُ

بِتَرْكَةِ الْبَيْتِ حَقُوقَ أَرْبَعَةٍ مَرْتَبَةِ الْأَوَّلِ يَدُ بِتَجْهِيزِهِ

ESSAY

ON

THE LAW OF BAILMENTS.



In tutelis, societatibus, fiduciis, *mandates*, rebus emptis-venditis, *conduclis'o' catis*, quibus vitae societas continetur, magni est iudicis statuere (praesertim àim in plerisque sint iudicia contraria), *quid quemque cuique 'prcestarè oportcat*

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

Art

ESSAY

ON

THE LAW OF BAILMENTS.

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

which our rules of fpecial pleading are founded; but there is hardly a man of any age or ftation, who does not every week and almoft every day contrad the obligations or acquire the rights of a *hirer* or a *letter to hire*, of a *borrower* or a *lender*, of a *depository* or a perfon *depoſiting*, 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 cbftfuifc their motion, the whole machine would inftantly be difordered or broken to pieces: preſerve them, and various accidents may flill de' jprive men of happinefs; but deftroy them, and the whole ſpe'tes muft infallibly be miferable. It feems therefore aſtoniſhing, that ſo important a branch of jurifprudence ſhould have been ſo long and ſo ftrangely unfettled in a great commercial country; and that, from the reign of ELIZABETH to the reign of ANNE, *the doctrine of bailments* ſhould have produced more contradictions and confuſion, more diverſity of opinion and inconfiſtency of argument, than any

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

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

' a. Comm. 452, 453, 454.

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

I propoſe to begin with treating the ſubjeſt *analytically* and, having traced every part of it up to the firſt principles of natural reaſon, ſhall proceed *hiſtorically*, to ſhow with what perfect harmony thoſe principles are recognised and eſtabliſhed by other nations, eſpecially the ROMANS, as well as by our ENGLISH courts, when their deciſions are properly underſtood and clearly diſtinguiſhed; after which I ſhall reſume ſyn-*thetically* the whole learning of *bailments*, and expound ſuch 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 rejlore the thing 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 mod cafes be tranfgreffed, if he were made answerable for the lofs of it *without his 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 particular contrad is the problem, which involves the principal difficulty.

There are infinite Iliades of *care* or *diligence* from the flighteft momentary thought, or tranfient glance of attention, to the moft vigilant anxiety and follicitude; 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 harfh 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 faking, muft lie fomewhere between thefe extremes;

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

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

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

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

they Have been introduced into our books even of high authority'

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

ing, as before, excluded, we muſt look within them for modes applicable to practice; and theſe we ſhall find to be the omiſſions of ſuch care as *a man of common ſenſe, however inattentive, and of ſuch as a very cautious) and vigilant man, reſpectively take of their own poſſeſſions.*

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

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

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

glect to a *foce irreftible* by any human power. Law, as a practical fcience, cannot take notice of melting lines, Alée difcriminations, and evanefcent quantities; but it does not follow, that *negledt, 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 contrading 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 contrad is *reciprocally beneficial to both forties*, 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 relponfible for no more than *ordinary neglect*; but it is very different, both in reafon and policy, when *one* only of the contrading parties derives advantage from the contrad.

If the *bailor only* receive benefit or convenience from the bailment, it would be hard and unjuft to requite any particular trouble from *the bailee*, who ought not to be motefted unneceffiarly for *his pbiiging comdisd*; if more therefore, than

good faith were exacted from such a person, that is, if he were to be made answerable for less than *gross* neglect, few men after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.

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

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

man fhall be *prefumed* to bind himfeif againft *irrefiftible force*, it is a juft rule, that *every* bailee is refporifible *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 negleft, having been traced by this fhort analyfis, I come to the fecond, or *hiftorical*, part of my effay; in which I fhall demonftrate, after a few introductory remarks, that a perfect harmony fubfifts on this interefting 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* intitutions we have fome curious rules on the very fubjeft 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 eclipsed, and her glory extinguifhed.

The decifidns 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 *Englifhmen*: 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 excefs.

The conftitution of ROME was originally excellent; but, when it was *fettled*, as hiftorians Write, by AUGUSTUS, or' in truer words, when that bafe diflembler 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, efpecially rights of the higheft nature, can have " no operation beyond the *perfon*s of thofe, who " renounce them." Yet, iniquitous and odious as the *Settlement* of the conftitution was, U L - PIAN only fpoke in conformity to it, when he faid that " the will of the prince had the force

" of law ;" that is, as he afterwards explains himself, *in the ROMAN empire*; for he neither meant, 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 exerted themfelves to introduce the civil laws *of Rome* into the government of ENGLAND"; and fo hateful was it to our fturdy anceftors, that, if JOHN of SALISBURY be credited, " they burned and tore all fuch books of civil and canon law as fell into their hands:" but this was intemperate zeal; and it would have been iufficient to improbate the *publick*, or *conftitutional*, maxims of the *Iloman* 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 *Romans* are demonftrated by FORTESCUE, with great force, to be far furpaffed in juftice and fenfe by our own immemorial cuftoms; and the refcripts of SEVERUS or CARACALLA, which were laws, it feems, at *Rome*,

' De Laud. Leg. Angl. c. 33. 3' - † Seld. in Fort. c. 33.

have certainly no kind of authority at *Wefminster*; but, in queftions of *rational* law, no caufe can be affigned, why we fhould not fhorten our own labour by reforting occafionally to the wifdom of ancient jurifts, many of whom were the moft 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 inftances, 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 fubjeft of *refponfibility for negledt*.

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 tradl 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 eluci-
date the queftion before us.

" Somecontracts, faysthegreat writeron *Sabinus*,

" make the party reſponſible for DECEIT ONLY;
 " ſome, for both DECEIT AND NEGLECT. NO-
 " thing more than *reſponſibility for DECEIT* is
 'C *demande*d in DEPOSITS and POSSESSION AT
 " WILL; both DECEIT AND NEGLECT are 1/1-
 " *hibited* in COMMISSIONS, LENDING FOR
 " USE, CUSTODY AFTER SALE, TAKING IN
 " PLEDGE, HIRING; alſo in PORTIONS, GUAR-
 " DIANSHIPS, VOLUNTARY WORK: (among
 " theſe SOME *require even more than ordinary*
 " DILIGENCE). PARTNERSHIP and UNDI-
 " VIDED PROPERTY make *the partner and joints*
"proprietor anſwerable for both DECEIT AND
 " NEGLIGENCE'."

" In contracts, ſays the ſame author in his
 " other work, we are ſometimes reſponſible for
 " DECEIT, ALONE ; ſometimes, for NEGLECT
 " ALSO; for DECEIT ONLY in DEPOSITS; be-
 " cauſe, ſince NO BENEFIT accrues to the de-
 " poſitary, he can juſtly be anſwerable for no
 " more than DECEIT; but, if a REWARD hap-
 " pen to be given, then *a reſponſibility for NE-*
 " GLECT ALSO is required; or, if it be agreed

' **Contractus quidam DOLUM malum DUNTAXAT recipiunt j**
quidam, et DOLUM ET CULPAM. DOLUM tantum DEPOSITUM
 et PRECARIUM; DOLUM ET CULPAM, MANDATUM, COMMO-
 DATUM, VENDITUM, PIGNORI ACCEPTUM, LOCATUM ' item
 DOTISDATIO, TUTELE, NEGOTIA GESTA: (in his QUIDAM et
 DILIGENTIAM). SOCIETAS et RERUM COMMUNIO et DOLUM
 ET CULPAM recipit. .D. 50. 17. 23.

" at the time of the contrad, that the depofitary
 " fhall anfwer both for NEGLECT and for ACCI-
 " DENT: but, where A BENEFIT accrues to
 " BOTH parties, as in KEEPING A THING
 " SOLD, as in HIRING, as in PORTIONS, as in
 " PLEDGES, as in PARTNERSHIP, both DE-
 " CEIT AND NEGLECT make the party liable.
 " LENDING FOR USE, indeed, is for the mod
 " 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 perfpicuous and precise, compofed by the fame
 writer, who was indubitably the beft expofitor

' In contractibus interdum DOLUM SOLUM, interdum ET
 CULPAM, praeftamus; DOLUM in DEPOSITO; nam, quia
 NULLA UTILITAS ejus verfatur, apud quem deponitur, me-
 rito DOLUS praeftatur SOLUS; nifi fortè et MERCES accellit,
 tunc enim, ut eft et conftitutum, ETIAM CULPA exhibetur;
 aut, fi hoc ab initio convenit, ut et CULPAM et PERICULUM
 praestet is, penes quem deponitur: fed, ubi UTRIUSQUE UTI-
 LITAS vertitur, ut in EMPTO, ut in LOCATO, ut in DOTE, ut
 in PIGNORE, ut in SOCIETATE, et DOLUS ET CULPA praeftatur.
 COMMODATUM autem plerumque SOLAM UTILITATEM con-
 tinet ejus, cui COMMODATUR; et ideo verior eft Q, Muci
 fententia exiftimantis et CULPAM praestandam et DILIGEN-
 TIAM. D. 13. 6. 5. 2.

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

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

'BOCERUS, CAMPANUS, D'AVEZAN, DEL RIO, LE CONTE, RITTERSHUSIUS, GEFHANIUS, J. GODEFROI, and others.

f 'The scholium on *Hermenopulus*, 1. 6. tit. de Reg. Jur., n. 15. may be considered as a commentary on this law.

eminent, have written on the fubjed; fecondly, the loofe and equivocal fenfe of the words DILIGENTIA and CULPA; laftly and principally, the darknefs of the parenthetical claufe Iff HIS QUIDAM ET DILIGENTIAM, which has produced more doubt, as to its true reading and fignification, than any fentence of equal length in any author *Greek* or *Latbu* 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 manucripts, 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 *moji* others, as giving a fenfe both perfpicuous in itfelf and confident with the fecondlaw; 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 funilar 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 than ordinary degree of diligence*, the common reading will imply, conformably with the fecond law before cited, that " SOME of the pre-

"ceding contracts demand that higher degree;" but the *Florentine* reading will denote, in contradiction to it, that "A L L of them require more" the ordinary exertions."

It is by no means my defign to depreciate the authority of the venerable manuscript preserved at *Florence*; for, although few civilians, I believe, agree with POLITE AN, in fupppping it to be one of the *originals*, which were fent by *Jujiinian* himfelf to the principal towns of *Italy*', yet it may *poffibly* be the very book,, which the Emperor LOTHARIUS II. is *faid* to have found at *Arnalji* about the year 1130, and gave to the citizens of PISA, from whom it was taken, near three hundred years after, by the *Florentines*, and has been kept by them with fupperftitious reverence: be that as it may, the copy deferves the higheft refpect; but, if any proof be requifite, that it is *nofaultlefs* tranfeript, we may observe, that, in the very law before us, *accedunt* is erroneoufly 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.

' Epift. x. '. Mifcell. cap. ' 1 ' See Gravina, Hb. i. § 141

† Taurelli, Praef. ad Pand' Floreat-

This, too, is indisputably clear; that the sentence *in his QUIDEM et diligentiam*, is ungrammatical, and cannot be construed according to the interpretation, which some contend for. What verb is understood? *Recipiant*. What noun? *Contractus*. What then becomes of the words *in his*, namely *contractibus*, unless *in* signify *among*? And, in that case, the difference between QUIDEM and QUIDAM vanishes; for the clause may Hill import, that " AMONG the preceding contracts (that is, *in SOME of them*), more than " usual diligence is exacted:" in this sense the Greek preposition seems to have been taken by the scholiast on HARMENOPULUS; and it may here be mentioned, that *diligentia*, in the nominative, appears in some old copies, as the Greeks have rendered it; but ACCURSIUS, DEL RIO, and a few others, consider the word as implying no more than diligence *in general*, and distinguish it into various *degrees* applicable to the several contracts, which ULPIAN enumerates. We may add, that one or two interpreters thus explain the whole sentence, " *in his contractibus quidam jurisconfulti et diligentiam requirunt*"⁹ but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply, that Ulpian was of a different opinion. As to the last conjecture, that only *certain cases and circumstances* are pieced by the word QUIDAM, it scarce de-

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

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

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

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

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

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

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

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

' Or 1. 5. § 2. ff. *Commod.* and 1. 23. ff. *de reg. jur.* Instead of *iravSexlM*, which is a barbarous corruption of the initial letter of *iravSexlM* many write *D*, for *Digest*, with more clearness and propriety.

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

Secondly: In contracts *reciprocally* beneficial to both parties, as in those of SALE, HIRING, PLEDGING, PARTNERSHIP, and the contract implied in JOINT-PROPERTY, such care is exacted, as *every prudent man commonly takes of his own goods*; and, by consequence, the vendor, the hirer, the taker in pledge, the partner, and the co-proprietor, are answerable for ordinary neglect.

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

' *Spondet diligentiam*, say the Roman lawyers, *gerendi negotio* parent.

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

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

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

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

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

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

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

The *triple* diviſion of neglects had alſo been highly cenſured by ſome lawyers of reputation. ZASIUS had very juſtly remarked, that neglects differed in *degree*, but not in *Ipecies*; adding, " that he had no objection to uſe the words " *levis* and *leviſſima*, merely as terms of pradice " adopted in courts, for the more eaſy diſtinction " between the different degrees of care ex- " acted in the performance of different con- " tracts †:" but DONELLUS, in oppoſition to his maſter *Duaren*, infiſted that *levis* and *leviſſima* differed in ſound only, not in ſenſe; and attempted to prove his aſſertion triumphantly by a regular fyllogiſm ‡; the minor propoſition of which is railed on the figurative and inaccurate manner, in which poſitives are often uſed for ſuperlatives, and converſely, even by the bed; of the old *Roman* lawyers. True it is, that, in the law *Contractus*, the diviſion appears to be

* " Ego certe hac in re cenſentibus accedo, vix quidquam " generalius definiri poſſe; remque hanc ad *arbitrium judicis*, " prout res eſt, referendam." p. 141.

† ZAS. *Singul. Reſp.* lib. i. cap. 2.

‡ " Quorum definitiones ecedem ſunt, ea inter ſe ſunt " eadem; *levis* autem culpa? et *leviſſima* una et eadem defi- " nitio eſt; utraque igitur culpa eadem." *Comm. Jur. Civ.* lib. xvi. cap. 7.

two fold only, DOLUS and CULPA ; which differ in *speciest* when the first means *actual fraud and malice*, but in *degree* merely, when it denotes no more than *gross neglect*; and, in either case' the second branch, being capable of *more and less*, may be subdivided into *ordinary* and *flight*; a subdivision' which the law *Si ut certo* obviously requires: and thus are both laws perfectly reconciled'

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

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

' *Essai sur la Préfaction des Fautes*, à Paris, chez Satxgrain, 176'.

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

This author sharply reproves the *triple* division of negligeds, and seems to disregard the rule concerning a benefit arising to *both*, or to *one*, of the contracting parties; yet he charges *Godefroï* with a want of due clearness in his ideas, and with a palpable misinterpretation of several laws. He reads *in his quidhm et diligentiam*; and that with an air of triumph; insinuating, that *quidhm* was only an artful conjecture of *Cujas* and *Le Conte*, for the purpose of establishing *their* system; and he supports *his own* reading by the authority of the *BASILICA*; an authority, which, on another occasion, he depreciates. He derides the absurdity of *permitting negligence* in any contradi, and urges, that such *permijjion*, as he calls it, is against express law: " now, " says he, where a contract is beneficial to both " parties, the doctors *permit flight* negligence, " which, how flight soever, is still *negligence*, " and ought always to be inhibited/' He warmly contends, that the *ROMAN* laws, properly understood, admit only *two* degrees of diligence; one, measured by that, which a *provident and attentive father of a family* uses in his own concerns; another, by that care, which

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

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

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

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

' *Oeuvres de M. Pothier*, à Paris, chez DEBURE : 28 volumes in *duodécimo*, or 6 in *quarto*. The illustrious author died in 1772.

and M' POTHER honoured it with a short but complete answer in the form of a *General Observation on his Treatise* } declaring, at the same time, that *he would not enter into a literary contest*, and apologizing for his fixed adherence to the Ancient system, which he politely ascribes to *the natural bias of an old man in favour of opinions formerly imbibed*. This is the substance of his answer: " that he can discover n', kind of absurdity in the usual division of *negligence* and *diligence*, nor in the *rule*, by which different degrees of them are applied to different contracts; that to speak with strict propriety, negligence is not *permitted* in any contract, but a *less rigorous conjunction* prevails in some than in others; that a *hirer*, for instance, is not considered as *negligent*, when he takes the same care of the goods hired, which the generality of mankind take of their own; that the *letter to hire*, who has his reward, must be presumed to have demanded at first no higher degree of diligence, and cannot justly complain of that *inattention*, which in another case might have been culpable; for a *lender*, who has no reward, may fairly exact from the borrower that *extraordinary* degree of care, which a very

' It is printed apart, in fourteen pages, at the end of his treatise on the *Marriage-contract*.

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

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

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

fet down a few general remarks on the contro-
 verfy: particular obfervations might be multi-
 plied without end.

The only *effential* difference between the fyf-
 tems of GODEFROI and LE BRUN relates to the
 two contradts, 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 honefty*: now, in this refpect,
 the error of the *fecond* fyftem has been proved
 to demonftration; and the author of it himfelf
 confeffes ingenuoufly, that the other part of it
 fails in the article of *Marriage-portions*'.

In regard to the divifion of neglected and care
 into *three* degrees or *two*, 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 ^a 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 *omif-*
fions of which are *as many* neglects -, excluſively
of grofs neglect, which he likewife admits, for
 the *culpa leviffima* only is that, which he repu-

* See p. 71. note; and p. 126,

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

The disquisition amounts, in fact, to this: from the barrenness or *poverty*, as LUCRETIVS calls it, of the *Latin* language, the single word CULPA includes, as a generick term, various degrees or (shades of *fault*, which are sometimes distinguished by epithets, and sometimes left without any distinction; but the *Greek*, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law *Contractus* actually use the words *pasvpta* and 'Vc'xi i', which are by no means synonymous, the former implying a certain *carelessness of mind* or *remissness of attention*, while the second imports a higher and more culpable degree of *negligence*'. This observation, indeed, seems to favour the system of GODEFROI; but I lay no great

* See pages 32. 73. 7'. 149.

† *Bastica*, 2, 3, 23. See *Demosth.* 3 *Phil. Rei/ke's* edit. I. 112. 3. For *levissima culpa*, which occurs but once in the whole body of *Roman law*, *pasvpta* seems the proper word in *Græck*; and it is actually so used in the *Bastica*, 60. 3. 5. where mention is made of the *Aquilian law*, in *quâ*, says ULPIAN, it *levissima culpa venit*. D. 9. 2. ''.

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

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

the poffeffbr, whether by delivery from the owner, which is a proper *bailment*, or from any other perfon, by finding', or in confequence of fome diftind contrad.

Sir JOHN HOLT, whom every *Englijhmwi* fhould mention with refped, and from whom no *Englijh* lawyer fhould venture to difflht without extreme diffidence, has taken a comprehensive' * view of this whole fubject in his judgment on a celebrated cafe, which fhall foon be cited at length ; but, highly as I venerate his deep learning and fingular fagacity, I fhall find myfelf constrained, in fome few inftances, to differ from him, and fhall be prefumptuous enough to offer a correction or two in part of the dodrine, which he propounds in the courfe of his argument †.

His divifion of bailments into *fix* forts appears, in the firft place, a little inaccurate; for, in truth, his *Jifth* fort is no more than a branch of his *thirds* 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

' Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 1'1. 1 Leon. 22'. 1 Cro. 219. *Mulgrave and Ogden*.

† Lord Raym. 912.

Latin names, one or two of which lord HOLT has omitted' i. DEPOSITUM, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. MANDATUM, or *commijjion*; when the mandatory undertakes, without recompence, to *dojome aEt* about the things bailed, or fimply to *carry* them; and hence Sir HENRY FINCH divides bailment into *two* forts, to *keep*, and to *employ*'. 3. COMMODATUM, or *loan for ufe*; when goods are bailed, without pay, to be *ufed* for a certain time by the bailee. '. PRGNORI ACCEPTUM; when a thing is bailed by a debtor to his creditor in *pledge*, or as a fe- curity for the debt. 5. LOCATUM, or *hiring*, which is always for *a reward*; and this bailment is either, 1. *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 pur- pofe of being *carried* from place to place, either to a *publick* carrier, or to a *private* perfon.

I. The mod ancient cafe, that I can find in our books, on the doftrine of DEPOSITS (there were others, indeed, a few years earlier, which turned on points of pleading), was adjudged in

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

Upon this case lord HOLT observes, " that " he cannot see, why the bailee should not be " charged with goods *in* a chest as well as with " goods *out of* a chest; for," says he, " the " 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 case as " in the otherf." The very learned judge was

' Mayn. Edward II. 275. Fitz. Abr. tit. Detinue, 59.

† Lord Raym. 914.

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

would, therefore, be *gross* negligence in a depository to leave such a deposit in an open antichamber, and *ordinary* neglect, at least, to let them remain on his table, where they might possibly tempt his servants; but no man can proportion his care to the *nature* of things, without knowing them: perhaps, therefore, it would be no more than *flight* neglect, to leave out of a drawer a box or casket, which was neither known, nor could justly be suspected, to contain diamonds; and DOMAT, who prefers the opinion of TREBATIUS, decides, " that, in such a case, the depository would only be obliged to restore the casket, as it was delivered, without being responsible for the contents of it." I confess, however, that, anxiously as I wish on all occasions to see authorities respected, and judgment holden sacred, BONION'S case appears to me wholly incomprehensible; for the defendant, instead of having been *grossly* negligent (which alone could have exposed him to an action), seems to have used at least *ordinary* diligence; and, after all, the loss was occasioned by a *burglary*, for which no bailee can be responsible without a very special undertaking. The plea, therefore, in this case was good, and the replication, idle; nor could I ever help suspecting a mistake in the last words *alii quod non*; although RICHARD DE WINCHEDON, or whoever was the

compiler of the *table* to this Year-book, makes a distinction, that, " if jewels be bailed to me, and " *I put them into a casket, and thieves rob me of " them in the night-time,* I am answerable ; not " if they be *delivered* to me in a chest sealed " up ;" which could never have been law, for the next oldest case, in the book of *Affise*, contains the opinion of chief justice THORPE, that " a general bailee to *keep* is not responsible, " *if the goods be stolen,* without his gross neglect*;" and it appears, indeed, from FITZ-HERBERT, that the party was driven to this issue, " whether the goods were taken away by " *robbers.*"

By the *Mosaic* institutions, " if a man delivered to his neighbour MONEY or STUFF to " *keep,* and it was *stolen* out of his house, and the " thief could not be found, the master of the " house was to be brought before the judge, and " to be discharged, if he could swear, that he " had not *put his hand* unto his neighbour's " goodsf," or, as the Roman author of the L E X D E I translates it, *Nihil se nequiter geffiffe*‡ but a distinction seems to have been made between a

* 29. Aff. 28. Bro. Abr. tit. Bailment, pi. 7.

† Exod. xxii. 7, 8.

‡ Lib. 10. De Deposito. This book is printed in the same volume with the *Theodosian Code*, Paris, 1586.

ftealing by *day* and a ftealing by *night*'; and " if CATTLE were bailed and ftolen (by *day*, I " prefume), the perfon, who had the care of "t them, was bound to make reftitution to the " owner †;" 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 flieep can hardly be ftolen in the *day-time* without fome negled of the fhepherd; and we find that, when JACOB, who was, for a long time at leaft, a bailee of a different fort, *as he bad a reward*, loft any of the beafts intrufted to his care, LABAN made him anfwer for them " whether ftolen by " day or ftolen by night†."

Notwithftanding the high antiquity, as well as the manifelt 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 his own*" whence he advifes all depofitaries to make fuch a fpe-

' Gen. xxxi. 39. † Exod. xxii. 12.

' Gen. xxxi. 39.

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

SOUTH COTE declared in detainue, that he had delivered goods to BENNET, *to be by him SAFELY kept*: the defendant confessed SUCH delivery, but pleaded in bar, that a certain person STOLE them out of his possession; the plaintiff replied, protesting that he had not been robbed, that the person named in the plea was a SERVANT of the defendant, and demanded judgement; which, on a general demurrer to the replication, he obtained. " The reason of the judgement, says lord " COKE, was, because the plaintiff had delivered " the goods to be SAFELY kept, and the defendant had taken the charge of them upon himself, by accepting them on SUCH a delivery." Had the reporter flopped here, I do not see

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

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

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

* Lord Raym. 911. margin.

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

* I Cro. 815.

† " Alia est furti ratio; id est si non casui, sed levi culpæ, forme ascribitur." Gothofr. Comm. in L. Contractus, p. 145. See D. 17. 2. 52. 3. where says the annotator, " Adversus latrones parum prodeit custodia; adversus furem prodest potest, si quis advigilet." See also POTH. Contrat de Louage, n. 429. and Contrat de Pret a usage, n. 53. So, by justice Cot-

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: *impetus prcedonum*, fays ULP IAN, *a nullo praftantur*.

Mr. Juftice POWELL, fpeaking of SOUTH-COTE'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 *he has 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 meant by St. GERMAN, when he fays, " that,

tefime, " Si jeo grante byens a un home a garder a mon oeps, " fi les byens per fon *mefgarde* font embles, il fera charge a moy " de nufmes les byens, mez s'il foit *robbe* de melines les byens, " il eft excufable per le ley." 10 Hen. V I. 21.

* Ld. Raym. 912. † 2 Sho, pl. 166.

" if a man *have nothing* for keeping the goods
 " bailed, and promise, at the time of the delivery,
 " to restore *them safe at his peril*, he is not re-
 " sponsible for *mere casualties*;" but the rule
 extracted from this passage, " that *special ac-*
 " ceptance to keep SAFELY will not charge the
 " bailee against the acts of *wrongdoers*" to
 which purport HOBART also and CROKE are
 cited, is too general, and must be confined to
 acts of violence.

I cannot leave this point, without remarking,
 that a *tenant at will*, whose interest, when he has
 it rentfree, the *Romans* called *PRECARIUM*, stands
 in a situation exactly parallel to that of a depo-
 sitary ; for, although the contract be for *his bene-*
fit, and, in some instances, for *his benefit only*,
 yet he has an *interest* in the land till the will is
 determined, " and, our law adds, it is the folly of
 " the lessor, if he do not restrain him by a special
 " condition : " thence it was adjudged, in the
Countess of Sbrewsbury's case, " that an action
 " will not lie against a tenant at will *generally*, if
 " the house be burned through his neglect[‡];"
 but, says justice POWELL, " had the action been
 " founded on a *special* undertaking, as that, in
 " consideration that the lessor would let him live

* Doct. and Stud. dial. 2. chap. 38.

† Com. 135. Ld. Raym. 915.

‡ 5 Rip- 13 b.

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

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

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 com-
 mit even a *grofs* neglect in regard to his own
 goods *as well as* tholē bailed, by which *both* are
 loft or damaged, *he cannot be faid to have violated*
good faith, and the bailor muft impute to his
 own folly the confidence which he repofed in fo
 improvident and thoughtlefs a perfon†.

To this principle, that a depofitary is anfwer-
 able *only* for *grofs* negligence, there are fome ex-
 ceptions.

Firft, as in Southcote's cafe, where the bailee,
 by a *fpecial* 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‡;" but the

' POTH. *contrat de Depot*, n. 29. Sticrnh. *de Jure Sueon*,
 1. 2. C 5.

† Bract. 99. b. Juftin. *Inft.* 1. 3. tit. 15,

‡ L. *ContraEluSy* 23. D. *de reg' jur.*

opinion of CECTSUS, that an agreement *to difpenfe with deceit* is void, as being contrary to good morals and decency, has the affent both of U L - PIAN and our *English* courts*.

Secondly; when a man fpontaneoufly and officioufly propofes to keep the goods of another, *he may prevent the owner from intruſting them with a perſon of more approved vigilance*; for which reaſon *he takes upon himſelf*, according to JULIAN, *the riſk of the depofit, and becomes reſponſible at leaf for ordinary neglect, but not for mere casualties†*.

Where things are depofited through neceffity on any fudden emergence, as a fire or a ſhipwreck, M. LE BRUN infits, " that the depofitary muſt " anſwer for *lefs than grofs* neglect, how careleſs " foever he may be in his own affairs ; ſince the " preceding remark, that *a man, who repofes confidence in an improvident perſon, muſt impute " any loſs to his own folly*, is inapplicable to a " caſe, where the depofit was not optional; and " *the law ceaſes with the reaſon of it‡*" but that is not the *only* reaſon; and, though it is an additional miſfortune, for a man in extreme haſte and deep diſtreſs to light upon a ftupid or inat-

* Doct. and Stud. dial. 2. chap. 38.

† D. 16. 33 1. 35.

‡ *De la Preſtation da Fautes*, p. 77.

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 cafes, and was therefore punifhed at *Rome* 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 *flight*, or even *ordinary*, negligence; and my opinion is confirmed by the authority of LABEO, who requires no more than *good faith* of a *negotiorum geflor*, when " affectione coactus, ne bona mea diftrahantur, " negotiis fe meis obtulerit."

Thirdly; when the bailee, improperly called a *depofitary*, either *direcdly* demands and receives a rewardyòr *his 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 inn-keeper 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 ftipulated 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 *flight* negligence; and this bailment, indeed, is rather a *loan* than a depofit, n whatever light it may be confidered by the parties. Suppofe, for example, that *Charles*, 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 purpoie, and that *George*, being obliged to go immediately into the country, defires *Charles* 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 recoiled 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, confidently with common fenfe and common honefty, " that an action on " the cafe lay againft a man, who had not performed his promife of redelivering, or delivering 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 profefſion *grumbled*, as lord HOLT fays, at fo abfurd a reverfal; which was itfelf moft juftly revcrfed a few years after, and the firft decifion folemnly eftablihed†.

Among the other curious remains of *Atlick* law, which philologers have collected, very little relates to the contracts, which are the fubject of this effay; but I remember to have read of DEMOSTHENES, that he was advocate for a perfon, with whom *three* men had depofited fome valuable utenfil, of which they were joint-owners; and the depofitary had delivered it to *one* of them, of whofe knavery he had no fufpicion;

* Yelv. 4. 50. 128.

† 2 Cro. 667. *Wbeatly* and *Low*.

upon which the other two brought an action, but were nonfuited on their own evidence, that there was a *third* bailor, whom they had not joined in the fuit; for, the truth not being proved, DEMOSTHENES infifted, *that his client could not legally reftore the depofit, unlefs all three proprietors were ready to receive it*; and this doctrine was good at *Rome* as well as at *Athens*, when the thing depofited was in its nature incapable of partition: it is alfo law, I apprehend, in Weftminfter-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 answer " that it was criminal even *to harbour a thought* of with-holding depofited goods from " the owners, who claimed themf;" 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*, mull in due time be reftored."

II. Employment by COMMISSION was alfo known to our ancient lawyers; and BRACTON, the belt writer of them all, expreffes it by the *Roman*

' D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4.

† Herod. VI. 86. Juv. Sat. XIII. 199.

word, *Mandatum*; now, as the very effence of this contra, is the *gratuitous* performance of it by the bailee, and as the term *commiffion* is alfo pretty generally applied to bailees, who receive *hire* or *compenfation* for their attention and trouble, I fhall not fcuple 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 ufe of it. The great diftinction then between one fort of *mandate* and a *depojit* is, that the former *lies in fejanee*, and the latter, limply *in cujlody*: whence, as we have already intimated, a difference often arifes between the degrees of care demanded in the one contraft 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 his undertakings* the omiffion of fuch diligence may be, according to the nature of the bufinefs, either *ordinary*, or *flighty* 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 faith* itfelf

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

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

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

* Yearb. 11. Hen. IV. 33.

† Yearb. 3. Hen. VI. 36. b. 37. a. Stath. Abr. tit. Actions *fur le cas*, pi. 20.

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

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

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

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

* Yearb. 19. Hen. VI. 49.

† D. 13. 6. 17. 3.

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

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

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

Bro. Abr. tit. Action fur le Case, 72.

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

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

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

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

† *P.* 361.

This argument is juftly repreſented by my learned friend, the annotator *on the Firſt Inflitute*, as " a moſt maſterly view of the whole ſubje6l of " bailment';" and, if my little work be conſidered merely as a commentary on it, the ſtudent may perhaps think, that my time and attention have not been unuſefully beſtowed.

For the deciſion of the principal caſe, it would have been ſufficient, I imagine, to inſert, that the point was *not new*, but had already been determined; that the writ in the REGISTER, called, in the ſtrange dialed of our forefathers, *De pipa vini carianda* † was not ſimilar, but identical; for, had the reward been the *effence* of the action, it muſt have been infered in the writ, and nothing would have been left for the declaration but the ſtating of the day, the year, and other circumſtances; of which RASTELL exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickſet hedge*, which the defendant" had promiſed to raiſe, *without any conſideration alledged*; and ifſue was joined on a traverse of the negligence

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

† Reg. Orig. 110. a. ſee alſo no. b. *De equo infirmo fanando*, and *De columbari reparando*.

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

Now the *reason* assigned by the learned judge for the cases in the *Register* and *Year-books*, which were the same with COGGS and BERTNARD, namely, " that the party's SPECIAL *assumpsit* and undertaking obliged *himself* to do " the thing, that the bailor came to no damage by his neglect," seems to intimate, that the omission of the words *salvo et securo* would have made a difference in this case, as in that of a *deposit*; but I humbly contend, that those words are implied'

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 had a flock to keep, which he fuffered through negligence to be drowned*, neither a reward nor a fpecial undertaking are ftated*: that cafe, 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 non-fefance*†.

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 objected that the defendant was ftated as a *farrier*, and muft be

Yearb. 2 Hen. VII. 11.

† *Stath. Abr. tit. Action fur le cas, pl. 11.* By juftice Pafton,
 "fi un ferroure 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."

presumed to have acted in his trade, yet chief justice ROLLE intimates no such presumption; but says expressly, that " an action on the case " lies upon this matter, *without alledging any confederation*: for the *negligence* is the cause of " action, and not the *assumpsit**.

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

* I Ro. Abr. 10.

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

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

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

* " In privatis rebus, si quis rem mandatam non modo *ma-*
" *liti*osius gessisset, fuit quaestus aut commodi causa, verum etiam
" *negligentius*, eum majores summum admisisse dedecus existi-
" mabant: itaque *mandati* constitutum est iudicium, non minus
" turpe quam furti." Pro S. Rosci. p. 116. *Glaug.*

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

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

* Doct. and Stud. dial 2. ch. 38. Bract. 99. a. b. In Ld. Raym. 916. where this passage from Bracton is cited by the chief justice, *mutuant* is printed for *commodatam* but what then can be made of the words *ad IPSAM restituendam*? There is certainly some mistake in the passage, which must be very ancient, for the oldest MS. that I have seen, is conformable to Fattel's edition. I suspect the omission of a whole line after the word *precium*, where the manuscript has a full point; and possibly the sentence omitted may be thus supplied from *Justinian*, whom Bracton copied: " At is, qui *mutuum* accipit, obligatus remanet," si forte incendio, &c. *Inft.* 3.13.3

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

cumspfection, which he would expect from a riding-mafter or an officer of dragoons'.

From the rule' that a borrower is anfwerable for *flight* neglect, compared with the diftinction before made between fimple *theft* and *robbery*, it follows, that, if the borrowed goods be ftole 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 notwithstanding his *extraordinary* care. The example, given by JULIAN, is the firft and beft that occurs : *Cams* borrows a filver ewer of *Titius*, and afterwards delivers it, that it may be fafely re-tored, to a bearer of fuch approved fidelity and warineffe, that no event could be lefs expected than its being ftole ; 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 injur id*. 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 *fight* neglect of the chain and feals.

Although the laws of *Rome*, with which thofe

¹ Dumoulin, traft. *De to quod intereft*, n. 185.

see p. 370. and note†.

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

* D. 7. 1. 1. Ld. Raym. 916,

† Poth. *Pret a Usage*, n. 55. Puf. with Barbeyrac' notes, B. 5. C. 1. § 6.

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

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

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

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

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

There are other cases, in which a borrower is chargeable for *inevitable mischance*, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. For example, if the house of *Caius* be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer, which he had borrowed of *Titius*, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would consequently have been preferred, had he been owner of them both: even if his urn be the more precious, he must either leave it, and bring away the borrowed vessel, or pay *Titius* the value of that, which he has lost; unless the alarm was so sudden, and the fire so violent, that upon deliberation or selection could be justly expected, and *Caius* had time only to snatch up the first utensil, that presented itself.

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

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

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

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

the nits agamit as many of equal fame, ana eacrr
 fide difpiays great ingenu and addrefs in tlm
 jüridical tournament D'AVEZAN fupports tfie
 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 *hazard* in general, proceed-
 ing 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 paflage, I cannot fatisfy
 myfelf, that, either in the *Cuflomary Provinces* of
 FRANCE, or in ENGLAND, a borrower can be
 chargeable for all events *without bis confent une-*
quivocally given: if *Williâm*, indeed, had faid to
Paul alternatively, "I promife, on my return to
 ' *Oxford*, either to reftore your horfe or to pay
 " you thirty guineas," he mull: *in all events* have
 performed one part of this difjundive obliga-
 tion'; but, if *Paul* had only faid, " the horfe,
 " which I lend, you for this journey, is fairly
 " worth thirty guineas," no more could be im-
 plied from thofe words, than a defign of pre-
 venting 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 contraft 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 use, in which the lender has a *common intereft* with the borrower: in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence; as, if *Stephen* and *Philip* invite some common friends to an entertainment prepared at their joint expence, for which purpose *Philip* lends a service of plate to his companion, who undertakes the whole management of the feast, *Stephen* is obliged only to take *ordinary* care of the plate; but this, in truth, is rather the innominate contract *do ut facias*, than a proper *loan*.

Agreeably to this principle, it must be decided, that, if goods be lent for the *sole* advantage of the *lender*, the borrower is answerable for *gross* neglect only; as, if a passionate lover of music were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; but here again, the bailment is not so much a *loan*, as a *mandate*; and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument without any malice or very culpable negligence, he would not be bound to indemnify the *amateur*, as he was not in want of the instrument,

and had no particular desire to use it. If, indeed, a poor artist, having lost or spoiled his violin or flute, be much distressed by this loss, and a brother-musician 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 less careful of it than any other borrower : on the contrary, he is bound, in consequence at least, to raise his attention even to a higher degree; and his negligence ought to be construed with rigour.

By the law of MOSES, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence*, or the *presence*, of the OWNER; for, says the divine legislator, " if a
" man borrow ought of his neighbour, and it be
" hurt or die, *the owner thereof not being with it*,
" he shall surely make it good; but, if the *owner*
" thereof *be* with it, he shall *not* make it good' : " now it is by no means *certain*, that the original word signifies the *owner*, for it *may* signify the *posseffor*, and the law *may* import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but, if it was intended, that the borrower should always

answer for casualties, *except in the case*, which must rarely happen, of *the owner's preference*, this exception seems to prove, that no casualties were meant, but such as *extraordinary* care might have prevented; for I cannot see, what difference could be made by the preference of the owner, if the force, productive of the injury, were wholly irrefragable, or the accident inevitable.

An old *Athenian* law is preserved by DEMOSTHENES, from which little can be gathered on account of its generality and the use of an ambiguous word*; it is understood by PETIT as relating to guardians, mandataries, and commisioners; and it is cited by the orator in the case of a guardianship. The *Athenians* were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

IV. As to the degree of diligence, which the law requires from a *pawnee*, I find myself again obliged to differ from Sir EDWARD COKE, with whose opinion a similar liberty has before been taken in regard to a *depository* for that very learned man

* περί τῶν καθ' ὅπως τις, ὁμοίως ἀφισκάνηται, ὥσπερ αὐτὸς ἔχει. *Reiske's edition*, 855. 3. Here the verb καθ' ὅπως, may imply *flight*, or *ordinary*, neglect; or even *fraud*, as *Petit* has rendered it.

lays it down, that, " if goods be delivered to " one as a *gage* or *pledge*, and they be ftolen, " he fhall be difcharged, becaufe *he hath a pro-* " *perty* in them ; and, *therefore*, he ought to " keep them *no otherwife than his own*:" I deny the firft proportion, the reafon, and the conclufion.

Since the bailment, which is the fubjed of the prefent article, is beneficial to the *pawnee* by fecuring the payment of his debt, *and* to the *pawnor* 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 mult confequently be refponfible for *ordinary* neglect'f. 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 ufe of his treatife, obferves three or four times, " that " he was an *old* author ‡;" but, although he had been a civilian, yet he was alfo a great common-lawyer, and never, I believe, adopted the rules and expreffions of the *Romany* except when they coincided with the laws of *England*

' I Inft. 89. a. ' Rep. 83. b. † Brath 99. b'

' Id. Raym. 915, 916. 919.

in his time: he is certainly the *best* of our juridical clailicks; and, as to our *ancient* authors, if their doctrine be *not* *lax*, it must be left to mere historians and antiquaries; but, if it remain unimpeached by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages. The doctrine in question has the full assent of lord HOLT himself, who declares it to be "*Sufficient*, if the pawnee use *true*, and *ordinary*, diligence for restoring the goods, and that, so doing, he will be indemnified, and, notwithstanding the loss, shall resort to the pawnor for his debt." Now it has been proved, that "a bailee cannot be considered as using *ordinary* diligence, who suffers the goods bailed to be taken by *stealth* out of his custody;" and it follows, that "a pawnee shall not be discharged, if the pawn be simply *stolen* from him; but if he be forcibly *robbed* of it *-without his fault*, his debt shall not be extinguished.

The passage in the *Roman* institutes, which BRACTON has nearly transcribed, by no means convinces M. LE BRUN, that *hypothesis* and a borrower are not responsible for *one and the same* degree of negligence; and it is very certain, that

ULPIAN, fpeaking of the *Actio pignoratitia*, ufes thefe remarkable words: " Venit in hac actione " et *dolus et culpa* UT in *commodate*, venit et cuf- " 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 adverbative: there feems, however, no occafion for fo hazardous a mode of criticifm. ULPIAN has not faid, " *talis culpa qualis* in *commodato*;" nor does the word UT imply an *exa*ct refemblance: he meant, that a pawnee was anfwerable for *negleMy* and gave the firft inftance, that occurred, of another contrad, 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 ufefully* and diftinguifhes it from COMMODATUM, whence the borrower *folely* derives advantage'.

It is rather lefs eafy to anfwer the cafe in the book of Affife, w'hich feems wholly fubverfive of my reafoning, and, if it ftand unexplained, will break the harmony of my fyftem+; for there, in

' Before, p. 370. † 29 Aff. pl. 28.

an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, " that it was delivered to him " in *gage* for a certain sum of money; that he " had put it among his other goods; and that all " together had been *ftolen* 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 *ftealing*, and that the creditor refused to accept it," on which fact issue was joined; and the reason, assigned by the chief justice, was, that, " if a " man bail goods to me *to keep*, and I put them " among my own, I shall not be charged, if they " *be ftolen*." To this case I answer : first, that, if the court really made no difference between a *pawnee* and a *depository*, they were indubitably mistaken ; for which assertion I have the authority of BRACTON, lord HOLT, and St. GERMAN, who ranks the taker of a *pledge* in the same class with a *hirer* of goods' ; next, that in a much later case, in the reign of HEN. VI. where a *hiring of custody* seems to be meant, the distinction between a *theft* and a *robbery* is taken agreeably to the *Roman law*†; and, lastly, that, although in the strict propriety of our *English* language, to *steal* is to take *clandestinely*, and to *rob*

' Doct. and Stud, dial 2. ch. 38.

† Before, p. 370. notef.

is to feize by *violence*, corresponding with the Norman verbs *embleer* and *robber*, yet those words are sometimes used inaccurately; and I always suspected, that the case in the book of *Ajifife* related to a *robbery*, or a taking *with force*; a suspicion confirmed beyond any doubt by the judicious BROOK, who abridges this very case with the following title in the margin, " Que ferra " al perde, quant les biens font *robbes!*" and, in a modern work, where the old cases are referred to, it appears to have been settled, in conformity to them and to reason, " that if the pawn be laidⁱ up, and the pawnee be *robbed*, he shall not be " answerable†:" but lord COKE seems to have used the word *ftolen* in its proper sense, because he plainly compares a pawn with a deposit.

If indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he shall be responsible for it; and, after a *tender* and *refusal* of the money owed, which are equivalent to actual *payment* the whole property is instantly *revested in the pledgor*, and he may consequently maintain an action of *trover*; it is said in a most useful work, that by such tender and refusal the thing pawned " ceases to be a pledge and " becomes a *deposit*, ;" but this must be an error

5."

ⁱ Abr. tit. Bailment, pl. 7. † 2 Salk. 522.

X 29 Aff plⁱ 28. Yclv. 179. Ratcliff Davis,

§ Law of Nift prius,, 72.

of impreffion; for there can never be a *depoſit* without the owner's conſent, and a *depoſitary* would be chargeable only for *groſs* negligence, whereas the pawnee, whoſe ſpecial property is determined by the wrongful detainer, becomes liable *in all poſſible events* to make good the thing loſt, or to relinquifh his debt'.

Thereaſon, given by COKE for his doctrine, namely, " becauſe the pawnee has a *property* in " the goods pledged," is applicable to every other ſort of bailment, and proves nothing in regard to *any partiẽular fyzies*; for every bailee has a temporary *qualified* property in the things, of which poſſeſſion is delivered to him by the bailor, and has, therefore, a poſſeſſory action or an appeal in his own name againſt any ſtranger, who may damage or purloin them-j' By the *Roman* law, indeed, " even the poſſeſſion of the " depoſitary was holden to be that of the perſon " depoſiting;" but with us the general bailee has inqueſtionably a *limited* property in the goods intruded to his care: he may not, however, uſe them on any account without the conſent of the owner, either expreſſly given, if it can poſſibly be obtained, or at leaſt ſtrongly preſumed; and this preſumption varies, as the thing is likely to be better, or worſe, or not at all af-

' Lcl. Raym. 917. † Ycarb. 21 Hen. VII 14. b. 15. a.

fect, by usage; since, if *Caius* deposit a *setting-dog* with *Titius*, he can hardly be supposed unwilling, that the dog should be used for partridge-shooting, and thus be confirmed in those habits, which make him valuable; but, if *clothes* or *linen* be deposited by him, one can scarce imagine, that he would suffer them to be worn; and, on the other hand, it may justly be inferred, that he would gladly indulge *Titius* in the liberty of using the *books*, of which he had the custody, since even moderate care would prevent them from being injured. In the same manner it has been holden, that the pawnee of goods, which will be *unpaired* by usage, cannot use them; but it would be otherwise, I apprehend, if the things pawned actually *required* exercise and a continuance of habits, as sporting-dogs and horses: if they cannot be hurt by being worn, they may be used, but *at the peril* of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and she wear them at a publick place, and be *robbed* of them on her return, she must make them good: " if she keeps " them in a bag," says a learned and respectable writer, " and they are *stolen*, she shall not be " charged;" but the bag could hardly be taken *privately and quietly* without her omission of or-

dinary diligence; and the manner, in which lord HOLT puts the case, establishe my fifth-tern, and confirms the answer just offered to the case from the Year-book; for, " if she keep the jewels," says he, " *lockediip* in her cabinet, and " her cabinet be *broken open*, and the jewels taken " thence, she will not be answerableV Again; it is said, that, where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge,; and this doctrine must be equally applicable to a general bailee, who ought neither to be injured nor benefited in any respect by the trust undertaken by him; but. the *Roman* and *French* law, more agreeably to principle and analogy, permits indeed both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reasonable charges of their nourishment ‡, It follows from these remarks, that lord COKE has assigned an inadequate reason for the degree of diligence, which is demanded of a pawnee; and the true reason is, that the law requires nothing *extraordinary* of him'

' [Ld. Raym. 9ry.](#) † Ow. 12'.

‡ Poth. *Depot*, n. '7. *Nantiftnwit*, n. 35'

But, if the receiver In pledge were the only bailee, who had a *special property* in the thing bailed, it could not be logically inferred, " that, " *therefore*, he ought to keep it merely as his " own:" for, even if *Cuius* have an absolute undivided property in goods, jointly or in common with *Septimius*, he is bound by natural, as well as positive, law to take *more* care of them *than of his own*, unless he be in fact a prudent and thoughtful manager of his own concerns; since every man ought to use *ordinary* diligence in affairs, which interest *another* as well as himself: " *Aliena negotia*," says the emperor CONSTANTINE, " *exado officio geruntur*."*

The conclusion, therefore, drawn by Sir EDWARD COKE, is no less illogical than his premises are weak; but here I must do M. LE BRUN the justice to observe, that the argument, on which his whole system is founded, occurred likewise to the great oracle of *English* law; namely, that a person, who had a *property* in things committed to his charge, was only obliged to be *as careful of them as of his own* goods; which may be very true, if the sentence be predicated of a man *ordinarily* careful of his own; and, if that was LE BRUN'S hypothesis, he has done little more than adopt the system of GODE-

FROI, who exacts *ordinary* diligence from a *partner* and a *co-proprietor*, but requirés a *higher* 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 husbandry and a widow's raiment to be given in pawn, deserve to be imitated as well as admired. The diftinction between *pledging*, where poffeffion is transferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally *Attick*; but fcarce any part of the *Athenian* laws on this iubject 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 preferred at *Cambridge*, which contains a collection of queries in *Turkifh*, together with the decifions or conciſe anfwers of the MUFTI at *Conjlantinople*: it is commonly imagined, that the *Turks* have a tranflation in their own language of the *Greek* code, from which they have fupplied the defeds of their *Tartarian* and *Arabian* jurifprudence';

but **I have not met** with any **fuch** tranflation, although I admit the conjecture to be highly probable, and am perfuaded, that their numerous treatifes on *Mahomedan* law are worthy on many accounts of an attentive examination. The cafe was this : " *Zaid* had left with *Amru* divers " goods in pledge for a certain fum of money, " and fome *ruffians*, having entered the houfe of " *Amru*, took away his own goods together " with thofe pawned *by Zaid*." Now we muft neceffarily fuppofe, that the creditor had by *his 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 alk, " whether, *fince the debt became* " *exlinct 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 *Othmafi* court answered with the brevity ufual on fuch occafions, O L - M A Z , *It cannot be*'. This cuftom, we muft con-

' Publ. Libr- Cambr. MSS. Dd, ' . 3. See Wotton, L L . *Hywel Dda*. lib. 2. cap. 2. § 29. note x. It may poffibly be the uſage in *Turkey* to *ftiputate* " ut amiffio pignoris liberet de- " bitorem," as in C. ' . 2 4. 6.

fefs, of propofing cafes both of law and confci-
ence 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 leaft important of the live, whether
we confider the infinite convenience and daily
ufe of the contract itfelf, or the variety of its
branches, each of which (hall now be fuccinctly,
but accurately, examined.

1. *Locatio*, or *locatio-conductio*, RET, is a
contract, by which the hirer gains a tranfient
qualified property in the *thing* hired, and the
owner acquires an abfolute property in the fti-
pend, or price, of the hiring; fo that, in truth,
it bears a ftrong refemblance to the contract of
emptio-venditio, or SALE; and, fince it is advan-
tageous to *both* contracting parties, the harmo-
nious confent of nations will be interrupted, and
one object of this effay defeated, if the laws of
England {hall be found, on a fair inquiry, to de-
mand of the hirer a *more than ordinary* degree of
diligence. In the molt recent publication, that I
have read on any legal fubject, it is exprefsly
laid, " that the hirer is to take *all imaginable*
" care of the goods delivered for hire*:" the

' Law of *Nift Pruits*, 3d edition corrected, 72.

words *all imaginable*, if the principles before established be just, are too strong for practice ever in the strict case of *borrowing*; but, if we take them in the mildest sense, they must imply an *extraordinary* degree of care; and this doctrine, I presume, is founded on that of lord HOLT in the case of COGGS and BERNARD, where the great judge lays it down, "that, if goods are let out for a reward, the hirer is bound to the UTMOST diligence, such as the MOST diligent father of a family uses*." It may seem bold to controvert so respectable an opinion; but, without interfering on the palpable injustice of making a borrower and a hirer answerable for precisely the same degree of neglect, and without urging, that the point was not then before the court, I will engage to show, by tracing the doctrine up to its real source, that the *dictum* of the chief justice was entirely grounded on a grammatical mistake in the translation of a single Latin word.

In the first place, it is indubitable, that his lordship relied *solely* on the authority of BRAC-TON; whose words he cites at large and immediately subjoins, "*whence it appears, &c.*" now the words, "*talis ab eo defideratur custodia,*" "*qualem DILIGENTISSIMUS paterfamilias fuis*

* Ld. Raym. 916.

" rebus adhibit," on which the whole question depends, are copied exactly from JUSTINIAN*, who informs us in the *proeme* to his Institutes, that his decisions in that work were extracted principally from the Commentaries of GAIUS; and the epithet *diligentissimus* is in fact used by this ancient lawyer †, and by him alone, on the subject of hiring, but GAIUS is remarked for writing with energy, and for being fond of using superlatives, where all other writers are satisfied with positives" so that his forcible manner of expressing himself, in this instance as in some others, misled the compilers employed by the Emperor, whose words THEOPHILUS rendered more than literally, and BRACTON transcribed; and thus an epithet, which ought to have been translated ordinarily diligent, has been supposed to mean extremely careful. By rectifying this mistake, we restore the broken harmony of the pandects with the institutes, which, together with the code, form one connected work§, and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to adopt the interpretation of M. DE FERRIERE, who ima-

* Brach 62. b. Justin. Inst. 3. 25. 5. where *Theophilus* has
ὁ σφόδρα ἐπιμελίστατος.

† D 19. 2. 25. 7. ‡ Le Brun, p. 93. § Burr. 425

gines, that both JUSTINIAN and GAIUS are speaking only of cafes, which from *their naturer* demand *extraordinary* care "

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

If *Caius* 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 ftable open at night, the horfe be *ftolen*, he muft anfwer for it; but not if he be *robbed* of it by highway-men, 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 coachman, *Caius* is difcharged from all attention to the horfes, and remains obliged only to

* Inft. vol. V. p. 138.

†

Exod. xxii. 15,

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

' Since the negligence of a fervant, *acting under his mafters directions exprefs or implied*, is the negligence of the mailer, 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-furnished lodging, and his guefts, or fervants, while they aft 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, whose opinion on this point was generally adopted, made the mafter liable, only *when he was culpably negligent in admitting carelefs guefts or fervants*, whose bad qualities he ought to have known †: but this diftinction muft have been perplexing enough in practice; and the rule, which, by making the head of a family anfwerable indiscriminately 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

* Salk. 282. Ld. Raym. 619. † D. 19, 2. 11.

in some particular instances *. It may here be observed, that this is the only contract, to which the *French*, from whom our word *bailment* was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire is by them called *bail a loyer*, and the letter for hire, *bailleur*, that is, *bailor*, both derived from the old verb *bailler*, to deliver; and, though the contracts, which are the subject of this essay, be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as an orchard, a garden, or a farm, be letten by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preferring the trees, plants, or implements, that *every prudent person* would use, if the orchard, garden, or farm, were his own.

2. *Locatio OPERIS*, which is properly subdivisible into two branches, namely, *faciendi*, and *mercium vendendarum*, has a most extensive influence in civil life; but the principles, by which the obligations of the contracting parties may be ascertained, are no less obvious and rational, than the objects of the contract are often vast and important †.

* Poth. *Louage*, n. 193.

† It may be useful to mention a nicety of the *Latin* language in the application of the verbs *locate* and *conduce*: the em-

If *Titins* deliver filk or velvet to a tailor for a fuit of clothes, or a gem to a jeweller to be fet or engraved, or timber to a carpenter for the rafters of his houfe, the tailor, the engraver, and the builder, are not only obliged to perform their feveral undertakings in a workmanly manner': but, *fince they are entitled to a reward*, either by exprefs bargain or by implication, they muft 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 liable, the bailees are anfwerable for the lofs of the horfe, if it be occafioned by the *ordinary* negleit of themfelves or their fervants. It has, indeed, been adjudged, that, if the horfe of a gueft be lent to *pafture by the owners defire*, the innholder is not, *as fuch*, refponfible for the lofs

ployer, who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum* but *conductor operis*. HEINECC. in *Pand.* par. 3. § 320. So, in *Horace*,

" Tu fecanda marmora

' Locas"—

which the ftonchewer or mafon *conduxit*.

* 1 Ventr. 268. erroneoufly printed 1 Vern. 268. in all the editions of *BI. Comm.* II. '52. The innumerable multitude of inaccurate or idle references, in our bed reports and law-tracts, is the bane of the ftudent and of the practitioner.

of him by *theft* or accident'; and, in the case of MOSLEY and FOSSET, an action against an agifter for keeping a horfe *fo negligently that it was ftolen*, is faid to have been held maintainable *only* by reafon of a *fpecial* affumption †; 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 agiftment, *leave open the gates of* " *his field*, in confequence of which neglect " they ftray and are ftolen, the owner has an " action against him:" it is the fame, if the innkeeper fend his gueft's horfe to a meadow *of his own accord*, for he is bound to keep fafely all fuch things as his guefts depofit *within his 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*.

* 8 Rep. 32. Cayla's cafe, † Mo. 543. 1 Ro. Abr. 4,

‡ Reg. Orig. 105. a. Noy, Max, ch. '3.

Although a stipend or reward in *money* be the effence of the contract called *Iocatio*, yet the same responsibility for neglect is justly demanded in any of the *innominate* contracts, or, whenever a valuable consideration of any kind is given or stipulated. This is the case, where the contract *do ut des* is formed by a *reciprocal bailment for use*, as if Robert permit Henry to use his *pleasure-boat* for a day, in consideration that Henry will give him the use of his *chariot* for the same time; and so in ten thousand instances, that might be imagined, of *double bailments*: this too is the case, if the *absolute* property of one thing be given as an equivalent for the *temporary* or limited property of another, as if Charles give George a brace of pointers for the use of his *hunter* during the season. The same rule is applicable to the contract *facto ut facias*, where two persons agree to perform *reciprocal works*; as if a mason and a carpenter have each *respectively* undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house, this is the contract *do ut facias*, or *facio ut des*; and, in all these cases, the bailees must answer for the omission of *ordinary* diligence in preserv-

ing the things, with which they are intrusted: fo, when *Jacob* undertook the care of *Laban's* flocks and herds for no lefs a reward than his younger daughter, whom he loved fo paffionately, *that feven years were in his eyes like a few days*, he was bound to be juft as vigilant, 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 another gainful contract* ; and, though an innholder be not paid in money for fecuring the traveller's trunk, yet the *queft facit ut faciat*, and alights at the inn, not folety 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 fhip receive their fare for " the paffage of travellers, and an innkeeper " his pay for the accommodation and entertainment of them, but have no pecuniary reward for the *mere cuftody* of the goods be-

* P. 375, 376.

" longing to the paffengers or guefts, yet they
 " are obliged to take *ordinary* care of thofe
 " goods; as a fuller and a mender are paid for
 " their *fkill only*, yet are anfwerable, *ex locato*,
 " for *ordinary* neglect, if the clothes be loft or
 " damaged*."

In whatever point of view we confider this bailment, no more is *regularly* demanded of the bailee than the care, which *every prudent man* takes of his Own property; but it has long been holden, that an *innkeeper* is bound to 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 per/on whatever* †; nor fhall he difcharge himfelf from this refponfibility by a refusal to take any care of the goods, *becaufe there are fufpected perfons in the houfe, for whofe conduct he cannot be anfwerable*‡: it is other wife, indeed, if he refufe admiffion to a traveller, becaufe he really has no room for him, and the traveller, neverthelefs, infill upon entering, and place his baggage in a chamber without the keeper's confent §'

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. 'l. 9. 5. and 12 Mod. '87.

† Yearb. 10 Hen. VII. 26. 2 Cro. 189.

X Mo. 78. § Dy. 153. b. 1 And. 29.

negligence in that respect is highly culpable/ and he ought to answer *civilly* for their acts, even if they should *rob* the guests, who sleep in his chambers'. Rigorous as this law may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them. Hence the Praetor declared, according to POMPONIUS, *his desire of securing the public from the dishonesty of such men*, and by his *edict* gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except *damno fatali*, or by *inevitable accident* ' and ULPIAN intimates, that even this severity could not restrain them from knavish practices or suspicious neglect †.

' I Bl. Comm. 430. † D. 4.9. 1. and 3.

In all such cases, however, it is competent for the innholder to repel the *presumption* of **his** knavery or default, by *proving* that he took *ordinary* care, or that the *force*, which occasioned the loss or damage, was truly *irrefragable*.

When a private man demands and receives a compensation for the *bare custody* of goods in his warehouse or store-room, this is *not* properly a *deposit*, but a *hiring of care and attention* : it may be called *locatio custodice*, and might have been made a distinct branch of this last sort of bailment, if it had not seemed useless to multiply subdivisions; and the bailee may still be denominated *locator operæ*, since the *vigilance and care*, which he lets out for pay, are in truth a *mental operation*. Whatever be his appellation, either in *English* or *Latin*, he is clearly responsible, like other interested bailees, for *ordinary* negligence; and, although St. GERMAN seems to make no difference in this respect between a *keeper of goods for hire* and a *simple depositary*, yet he uses the word *DEFAULT*, like the *CULPA* of the *Romans*, as a generical term, and leaves the *degree* of it to be ascertained by the rules of law*.

In the sentence immediately following, he makes a very material distinction between the two contracts ; for, " if a man, says he, have

* *Doct. and Stud.*, where before cited

" *a certain recompense* for the keeping of goods,
 " and promise, at the time of the delivery, to
 " *redeliver them safe at his peril*, then he shall
 " be charged with *all chances*, that may befall;
 " but, if he make *that* promise, and have
 " *nothing* for keeping them, he is bound to *no*
 " *casualties*, but such as are wilful, and happen
 " *by his own default*:" now the word PERIL,
 like *periculum*, from which it is derived, is in
 itself ambiguous, and sometimes denotes the *srijk* of

inevitable mischance, sometimes the *danger* arising from *a want of due circumsppection*; and the *stronger sense* of the word was taken in the first case *against him, who uttered it*; but, in the second, where the construction is favourable, the *milder sense* was justly preferred'. Thus, when a person, who, if he were wholly *uninterejled*, would be a *mandatary*, undertakes for a *reward* to perform *any work*, he must be considered as bound still more strongly, *to use a degree of diligence adequate to the performance of it*: his obligation must be rigorously construed, and he would, perhaps, be answerable for *light* neglected, where no more could be required of a *mandatary* than *ordinary exertions*. This is the case of commissioners, factors, and bailiffs, when their undertaking *lies infefance*, and not simply

in *custody* : hence, as peculiar care is demanded in removing and raising a fine column of granite or porphyry, without injuring the shaft or the capital, GAIUS seems to exact *more than ordinary* diligence from the undertaker of such a work for a stipulated compensation'. Lord COKE considers a factor in the light of *zervanti* and thence deduces his obligation; but, with great submission, his *reward* is the true reason, and *the nature of the business* is the just measure, of his duty f ; which cannot, however, extend to a responsibility for *mere accident* or *open robbery* ; and, even in the case of *theft*, a factor has been holden excused, when he showed, " that he had *laid up* the goods of his principal " in a warehouse, out of which they were " *stolen* by certain malefactors to him unknown §."

Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for hire must be supposed to have engaged himself for *a due application of the necessary art*: it is his own fault, if he undertake a work above his strength ; and all, that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor*

' D. 19. 2. 7. f ' Rep. 8'. *Ld. Raym.* 918.

‡ I Inst. 89. a. § 1 Vent. 121, *Vere and Smith*.

pperis faciendi'. I conceive, however, that; where the bailor has not been deluded by any but himself, and voluntarily employs, in one art a man, who openly exercifes another, his folly has no claim to indulgence; and that, unlefs the bailee make falfe pretentions, or a *fpecial* undertaking, no more can fairly be demanded of him than the beft of his ability†. The cafe, which SADI relates with elegance and humour in his *Guliftan* or *Raje-Garden*, and which PUFENDORF cites with approbation‡, is not inapplicable to the prefent fubject, and may ferve as a fpecimen of *Mahomedan law*, which is not fo different from ours, as we are taught to imagine: ' A man, who had a dif-
' order in his eyes, called on a *farrier* for a re-
' medy; and he applied to them a medicine
' commonly ufed for *his* 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 *af*,
" he would never have employed a *farrier* "
' and SADI proceeds to intimate, that, " if a
"t perfon will employ a common *mat-maker* to
" weave or embroider a *fine carpet*¹, he muft
"t impute the bad workmanfhip to his owii
" folly§."

' *Spondet, fay the Roman lawyers, peritiam artis.*

f P. 381. ' De Jure Nat. et Gent. lib. 5. cap. 5. § 3,
§ Rofar. Polit. cap. 7. There arc numberless traits in

In regard to the difthiction before-mentioned between the nonfeſance and the wVfeſance of a workman', it is *indifputably* clear, that an action lies in *both* caſes for a reparation in damages, whenever the work was undertaken for *reward*) either actually paid, *exprefſly* ftipulated, or, in the caſe of a *common* trader, *ſtrongly implied*; of which BLACKSTONE gives the following inſtance: " If a *builder* promiſes, " undertakes, or aflumes to *Caius*, that he will " build and cover his houſe within a time limited, and fails to do it, *Caius* has an action " on the caſe againſt the builder for this breach " of his expreſs promiſe, and ſhall recover a " pecuniary ſatiſfaction for the injury ſuſtained " by ſuch delayf-." The learned author meant, I preſunv', a *common* builder, or ſuppoſed a *confideration* to be given; and for this reaſon I forbore to cite his doctiine as in point on the ſubjed of an action for the nonperformance of a *mandatary*†'

Before we leave this article, it ſeems proper to remark, that every bailee for *pay*, whether

Arabucki, *Perſtan*, and *Turhi/h*, on every branch of jurisprudence; from the beſt of which it would not be difficult to extract a complete ſyſtem, and to compare it with our own; nor would it be leſs eaſy, to explain in *Perſtan* or *Arabick* ſuch parts of our *Engliſh* law, as either coincide with that of the *Aſtaticks*, or are manifeſtly preferable to it.

" P. 382, etc. † ,iComm. 157. ‡ P. 383,38', 3S5.

conductor rei or *conductor operis*, muſt be ſuppoſed to know, that the goods and chattels of his bailor are in many caſes *dijlrainable* for rent, if his landlord, who might otherwiſe be ſhamefully defrauded, find them on the premiſes'; and, as they cannot be diſtrained and fold without his *ordinary* default *at leaf*, the owner has a remedy over againſt him, and muſt receive a compenſation for his loſſe: even if a *depoſitary* were to remove or conceal *his own* goods, and thoſe of his depoſitor were to be ſeized for rent-arriere, he would unqueſtionably be bound to make reſtitution; but there is no obligation in the bailee *ioſuggeſt wife precautions againſt inevitable accident*; and he cannot, therefore, be obliged to *advife inſurance from f re*; much leſs to *inſure* the things bailed without an authority from the bailor.

It may be right alſo to mention, that the diſtinction, before taken in regard to *loans* ‡, between an obligation to reſtore the *ſpecifick* things, and a power or neceſſity of returning *others equal in value*, holds good likewiſe in the contracts of *hiring* and *depoſiting*: in the firſt caſe, it is a regular *bailment*; in the ſecond, it becomes a *debt*. Thus, according to ALFENUS in his famous law, on which the judicious

' Burr. 1798. etc. † 3. Bl. Comm. 8. ‡ P. 392.

BYNKERSHOEK: has learnedly commented, " if
 " an ingot of filver be delivered to a filver-
 " fmith to make an urn, the *whole* property is
 " transferred, and the employer is only a *credi-*
 " *tor* of metal equally valuable, which the
 " workman engages to *pay* in a certain fhape' :"
 the fmith may confequently apply it to his own
 ufe ; but, if it perifh, even by unavoidable mif-
 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 other-
 wife, 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 *fpecifically* redelivered in the
 form of a cup or a ftandifh.

3. *Locatio openſ* MERCIUM VEHENDARUM
 is a contraft, 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 hire* ought, by the rule, to be
 refponſible 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 *robbery*'
 " only when he had travelled by ways *danger-*

' D. 19. 2. 31. Bynk. Obs. Jur, Rom. lib. VIII.

"ous for robbing, or driven by *nighty* or at any "inconvenient hour": but, in the commercial reign of ELIZABETH,, it was resolved, upon the same broad principles of policy and convenience that have been mentioned in the case of *innholders*, "that, if a *common carrier* be robbed "of the goods delivered to him, he shall answer "for the value of them†."

Now the *reward* or *hire*, which is considered by Sir EDWARD COKE as the reason of this decision, and on which the principal stress is often laid in our own times, makes the carrier liable indeed, for the omission of *ordinary* care, but cannot extend to *irresistible force* and, though some other bailees have a *recompense*, as *factors*, and *workmen for pay*, yet, even in *Woodliffe's Case*, the chief justice admitted, that *robbery* was a good plea for a *factor* though it was a bad one for a *carrier*: the true ground of that resolution is the *publick employment* exercised by the carrier, and the danger of his combining with *robbers* to the infinite injury of commerce and extreme inconvenience of society ‡.

The modern rule concerning a *common carrier*, is that "nothing will excuse him, except the

' Doct. and Stud, where often before cited.

† 1 Inst. 89. a. Mo. '62. 1 Ro. Abr. 2. *Woodliffe and Currijs*.

‡ Ld. Raym. 917, 12 Moa. 487,

" *act of God*, or of *the King's enemies**;' but a momentary attention to the principles must convince us, that this exception is in truth part of the rule itself, and that the responsibility for a loss by *robbers* is only an exception to it: a carrier is *regularly* answerable for neglect, but not, *regularly*, for damage occasioned by the attacks of *ruffians*, any more than for *hostile* violence, or unavoidable *misfortune* ; but the great maxims of policy and good government make it necessary to *except* from this rule the case of *robbery*, lest confederacies should be formed between carriers and desperate villains with little or no chance of detection.

Although the *Act of God*, which the ancients too called *Dei Causa* and *Vim divinam*, be an exception, which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place *inevitable accident*: religion and reason, which can never be at variance without certain injury to one of them, assure us, that " not a gull of wind blows, nor " a flash of lightning gleams, without the " knowledge and guidance of a superintending " mind ;" but this doctrine loses its dignity and sublimity by a technical application of it,

* Law of Nift Prius, 70, 71.

which may in some instances border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous.

In a recent case of an action against a carrier, it was holden to be no excuse, " that the ship " was tight, when the goods were placed on " board, but that a rat, by gnawing out the " oakum, had made a small hole, through " which the water had gushed* ;" but the true reason of this decision is not mentioned by the reporter: it was in fact *at least ordinary* negligence, to let a rat do such mischief in the vessel; and the *Roman* law has, on this principle, decided, that, " si fullo vestimenta polienda " acceperit, eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere†,"

Whatever doubt there may be, among civilians and common-lawyers, in regard to a *casquet*, the contents of which are concealed from the DEPOSITARY ‡, it seems to be generally understood, that a common carrier is answerable for the loss of a box or parcel, be he ever so ignorant of its contents, or be those contents ever so valuable, unless he make a special acceptance § ; but gross fraud and imposition by the bailor will deprive

* I Wils. part I. 281. Dale and Hall.

† D. 19. 2. 13. 6. ‡ Before, p. 362, 36', 366.

§ 1 Stra. 145. Titchburn and White.

him of his action, and if there be proof, that the parties were apprized of each other's intentions, although there was no personal communication, the bailee *may* be considered as *special* acceptor: this was adjudged in a very modern case particularly circumstanced, in which the former cases in *Ventris*, *Alleyne*, and *Carthew* are examined with liberality and wisdom; but, in all of them, too great stress is laid on the *reward*, and too little on the important motives of *public utility*, which alone distinguish a *carrier* from other *bailees for hire**.

Though no substantial difference is assignable between carriage by *land* and carriage by water, or, in other words, between a *waggon* and a *barge*, yet it soon became necessary for the courts to declare, as they did in the reign of JAMES I., that a *common hoy man*, like a common *waggoner*, is responsible for goods committed to his custody, even if he be *robbed* of them; but the reason said to have been given for this judgement, namely, because *he had his hire*, is not the true one; since, as we have before suggested, the *recompense* could only make

* Burr. 2298. *Gibbon and Paynton*. See 1 Vent. 238. All. 93. Carth. 485.

† Hob. ca. 30. 2 Cro. 330. *Rich and Kneeland*. "The first case of the kind, said lord Holt, to be found in our books." 12 Mod. '80.

him liable for *temerity* and *imprudence*, as if a bargemafter were rashly to fhoote a bridge, *when the beut of the weather is tempeftuous*; but not for a *mere casualty*, as if a hoy in good condition, {hooting 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 refilled † : the *publick* employment of the *hoyman*, and that *diftruft*, which an ancient writer juftly calls the *finew 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 hardfhip : " 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 lea; yet it was refolved, that
" he fhould anfwer for it ‡ : " now I cannot help

*' I Stra. 128. Amies and Stevens.

†' Palm. 5'8. W. Jo. 159. See the doctrine of *inevitable accident* moil learnedly difcufied in *Defid. Heraldii Animadv.* in *Salmafii* Obferv. in Jus Att. et Rom. cap. xv.

‡ All. 93.

fufpecting, that there was proof in this cafe of *culpable negligence*, and probably the casket was both *fmall* and *light* enough, to have been kept longer on board than other goods; for, in the cafe of *Grave/end* 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 weight*' 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 fhip; 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 engaged to carry ;" and, though the mailer was

entirely blameless, yet for MATTHEW HALE and, his brethren, having heard both civilians and common-lawyers, and, among them, Mr. HOLT for the plaintiff, determined, on the principles just before established, that the bailor ought to recover*. This case was frequently mentioned afterwards by lord HOLT, who said, that " the declaration was drawn by the greatest pleader " in *England* of his time."

Still farther: since neither the *element*, on which goods are carried, nor the *magnitude* and *form* of the carriage, make any difference in the responsibility of the bailee, one would hardly have conceived, that a diversity could have been taken between a *letter* and any other thing. Our common law, indeed, was acquainted with no such diversity; and a *private* post-master was precisely in the situation of another carrier; but the statute of CHARLES II. having established a *general* post-office, and taken away the liberty of sending letters by a *private* post†, it was thought, that an alteration was made in the obligation of the post-master *general*; and, in the case of *Law and Cotton*, three judges determined, against the fixed and well-supported opinion of chief justice HOLT, " that the post-master was *not*

* I Ventr. 190. 238. Raym. 220.

† Ld. Raym. 920.

‡ 12 Cha. II. ch. 35. See the subsequent statutes.

" answerable for the loss of a letter with exchange-bills in it*:" now this was a case of ordinary neglect, for the bills were stolen out of the plaintiff's letter *in the defendant's office*†; and, as the master has a great salary for the discharge of his trust; as he ought clearly to answer for the acts of his clerks and agents; as the statute, professedly enacted for safety as well as dispatch, could not have been intended to deprive the subject of any benefit, which he before enjoyed; for these reasons, and for many others, I believe that CICERO would have said, what he wrote on a similar occasion to TREBATIUS, " Ego tamen " SCÆVOLÆ affentior‡." It would, perhaps, have been different *under the statute*, if the post had been robbed, either by day or by night,

* Carth. '87. 12 Mod. '82.

† In addition to the authorities, before cited, p. 370. note (f), for the distinction between a loss by *theft* and by *robbery*, see Dumoulin) tract. *De eo quod intercst*, note 184. and ROSELLA CASUUM, 28. b. This last is the book, which St. German improperly calls *Summa Roselia*, and by misquoting, which he misled me in the passage concerning *the fall of a house*, p. 396. The words of the author, Trovamala, are these: " Domus tua minabatur ruitiam; domus corruit, et interficitequum tibi commodatum' certenonpoteftdicaufusfortuitus; quia diligentiffimus reparaflet domum, vel ibi non habitafflet; fi autem domus non minabatur ruinam, fed impetu tempeftatis valida corruit, non est tibi imputandum."

‡ Epist, ad Fam. VII. 22-

when there is a necessity of travelling, but even that question would have been disputable; and here I may conclude this division of my essay, with observing, in the plain but emphatical language of St. GERMAN, " that all the former diversities be granted by secondary conclusions derived upon the law of reason, *without any statute made in that behalf*, and, peradventure, laws and the conclusions therein be the more plain and the more open ; for *if any statute were made therein*, I think verily, more doubts and questions would arise upon the *statute*, than doth now, when they be only argued and judged after the common law' - "

Before I finish the *biographical* part of my essay, in which I undertook to demonstrate, " that a perfect harmony subsisted on the interesting branch of jurisprudence in the codes of nations *most eminent for legal wisdom*," I cannot forbear adding a few remarks on the institutions of those nations, who are generally called *barbarous*, and who seem in many instances to have deserved that epithet: although traces of sound reasoning and solid judgement appear in most of their ordinances.

By the ancient laws of the WISIGOTHS, which are indeed rather obscure, the " keeper o'

Doct. and Stud, dial. 2, chap. 38. last sentence.

† P. 375.

" a horfe or an ox for *hire*, as well as a *hirer* for
 " *ufe*, was obliged, if the animal *perifhed*, 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 altera-
 tion in the capitularies of CHARLEMAGNE and
 LEWIS *the Pious**, where the *Mojaick* law be-
 fore cited concerning a *borrower* may alfo be
 found†. In all thefe codes a *depoſitary* of gold,
 filver, or valuable trinkets, is made chargeable,
 if they are deſtroyed *by fire*, and *hiſoivn* goods
 perifh *not* with them; a circumſtance, which
 ſome other legiſlators have confidered as *conclu-*
Jive evidence of grofs neglect or fraud : thus, by
 the old *Britijhtrctct*, called the book of CYNAWG,
 a perſon, who had been *robbed* of a depoſit, was
 allowed to clear himſelf by making oath, with
 compurgators, that he had no concern in the rob-
 bery, *unleſs he had faved his own goods*; and it
 was the fame, I believe, among the *Britons* in
 the caſe of a loſs by *fire*, which happened with-
 out the fault of the bailee ; although HOWEL *the*
Good ſeems to have been rigorous in this caſe,
 for the ſake of publick ſecurity†. There was

* Lindenbrog, L.L. *Wlfigoth.* lib. 5. tit. c. § 1, 2, 3. and
 L.L. *Baiuvar.* tit. 14. § 1, 2, 3, '. *Capitul.* lib. 5. § 20'.

† *Capital*, lib. 6. § 22. Exod. xxii. 14, 15.

‡ L.L. *Hywcl Dda*, lib. 3. cap. '. § 22. and lib. 3. cap.
 3. § '0. See alſo *Stiemh.* De Jur. Sveon. p. 256, 257.

one regulation in the *northern* code, which I have not seen in that of any other nation: if precious things were deposited and *ftolen*, time was given to fearch for the thief, and, if he could not be found within the time limited, a *moiety* of the value was to be paid by the depofitary to the owner, " ut damnum ex medio uterque "fuftineret*."

Now I can fcarce perfuade myfelfy that the phrafe ufed in thefe laws, fi *id perierit*, extends to a perifhing by *inevitable accident*; nor can I think, that the old *Gotbick* law, cited by STIERN-HOOK, fully proves his affertion, that " a depofitary was refponfible for *irrefiftible force*;" but I obferve, that the military law-givers of the north, who entertained very high notions of good faith and honour, were more ftrict 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 ftates, 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†.

* L L. *Wiftgoth*, lib. 5. tit. 5. § 3.

† L L. *Longbard*. lib. 2. tit, 55. § 35. *Canftit. Neapol.* 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 *Britifh* power, depends on a ftrict obfervance of them.

It is pleating 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 *fucceffion* to *property*, the *punifhment* 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*.

* " Hæc omnia, fays GROTIUS, *Romanis* quidem congruunt legibus, fed non ex illis primitus, fed ex *equitate naturalī*, veniunt: quare eadem apud alias quoque gentes reperire eft." De Jure Belli ac Pacis, lib. 2. cap. 12. § 13.

Thus, it is ordained by the fages of *Hinduftan*, that " a depofitor fhall carefully inquire into " 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 *fpoiled by unforefeen accident*, or *burned*, " or *ftolen*; UNLESS he *conceal* any part of them, " 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 *Sorrower* 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†: in another place, it is provided, that, if a *pledge* be damaged or loft *by unforefeen accident*, the creditor fhall nevertheless recover his debt with intereft, but the

Gentoo Laws, chap. IV. See before, p. 373.

† Same chapter. See before, p. 397.

debtor fhall not be entitled to the value of his pawn'; and that, if the pledgee *ufe* the thing pledged' he fhall pay the value of it to the pledgor in cafe of its lofs or damage, whilft he ufes it†,

In the fame manner, if a perfon *hire* a thing for *ufe* or if any *metal* be delivered to a *work-man*, 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‡.

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

* Chap. I. Sect. I. Before, p. 415. 416.

† Chap. I. Sett. II. Before, p. '09.

‡ Chap. IV. and Chap. X. Before, p. 418, 421.

Thus have I proved, agreeably to my undertaking, that *the plain elements of natural law, on the subject of BAILMENTS, which have been traced by a short analysis, are recognised and confirmed by the wisdom of nations*'; and I hasten to the third, or *synthetical*, part of my work, in which from the nature of it, most of the *definitions* and *rules*, already given, must be repeated with little variation *in form*, and none in *substance*: it was at first my design, to subjoin, with a few alterations, the *Synopsis* of DELRIO; but finding, that, as BYNKERSHOEK expresses himself with an honest pride, *I had leisure sometimes to write, but never to copy*, and thinking it unjust to embellish any production of mine with the inventions of another, I changed my plan; and (shall barely recapitulate the doctrine expounded in the preceding pages, observing the method, which logicians call *Synthesis*, and in which all sciences ought to be explained.

I. To begin then with *definitions*: I. BAILMENT is a *delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use, for which they were bailed, shall have elapsed or be performed*.

2. DEPOSIT is a *bailment of goods to be kept for the bailor without a recompense*.

' Before, p. 328 and 337.

3. MANDATE is a *bailment* of goods, without reward, to be carried from place to place, or to have fame aft performed about them.

4. LENDING FOR USE is a *bailment* of diking for a certain time to be ufed by the borrower without paying for it.

5. PLEDGING is a *bailment* of goods by a debtor to his creditor to be kept till the debt be difcharged.

6. LETTING TO HIRE is †. a *bailment* of A THING to be ufed by the hirer, for a compenfation in money ; or, 2. a letting out of WORK and LABOUR to be done, or CARE and ATTENTION to be bestowed, by the bailee, on the goods bailed' and that for a pecuniary recompense; or, 3. of CARE and PAINS in carrying the things delivered from one place to another for a ftipulated 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 ufe or gift of another thing in confideration of care and labour, and converfely.

8' ORDINARY neglect is the omiffion of that care, which every man of common prudence, and

capable of governing a family, takes of his own concerns.

9. *GROSS neglect is the want of that care, which every man of common sense, how inattentive soever, takes of his own property.*

10. *SLIGHT neglect is the omission of that diligence, which very circumspect and thoughtful persons use in securing their own goods and chattels.*

• I. A *NAKED CONTRACT* is a contract made without *consideration* or *recompense*.

II. The *rules*, which may be considered as *axioms* flowing from natural reason, good morals, and sound policy, are these :

1. A bailee, who derives *no benefit* from his undertaking, is responsible only for *GROSS neglect*.

2. A bailee, who *alone* receives *benefit* from the bailment, is responsible for *SLIGHT neglect*.

3. When the bailment is *beneficial* to *both* parties, the bailee must answer for *ORDINARY neglect*.

4. A *SPECIAL AGREEMENT* of any bailee to answer for *more or less*, is in general valid.

5. *ALL* bailees are answerable for *actual FRAUD*, even though the contrary be stipulated.

6. No bailee shall be charged for a loss by

inevitable ACCIDENT or irrefutable FORCE, except by special agreement.

7. ROBBERY *by force* is considered as *irrefutable* but a loss *by private STEALTH* is *prefunctive* 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 suit for every DAMAGE occasioned by an INJURY.

11. The negligence of a SERVANT, acting by *his master's express or implied order*, is the negligence of the MASTER.

III. From these rules the following propositions are evidently deducible:

1. A DEPOSITARY is responsible only for GROSS neglect; or, in other words, for a *violation of good faith*.

2. A DEPOSITARY, whose character is known to his depositor, shall not answer for *mere neglect* if he take *no better care of his own goods*, and *they also* be spoiled or destroyed.

3. A MANDATARY to carry is responsible only for GROSS neglect, or a *breach of good faith*.

4. A MANDATARY to perform, a work is bound to use a *degree of diligence adequate to the performance of it*.

5. A man cannot be compelled by ACTION

(6 perform his promise of engaging in a Deposit
Or a MANDATE.

6: A reparation may be obtained by suit for
DAMAGE occasioned by the *nonperformance* of a
promise to become a DEPOSITARY or a MAN-
DATARY

7. A BORROWER FOR USE is responsible for
SLIGHT negligence.

8. A PAWNEE is answerable for ORDINARY
neglect.

9. The HIRER of a THING is answerable for
ORDINARY neglect.

10. A WORKMAN for HIRE must answer
for ORDINARY neglect of the goods bailed,
and apply a *degree of SKILL equal to his un-
dertaking*.

11. A LETTER to HIRE of his CARE and
ATTENTION is responsible for ORDINARY neg-
ligence,

12. A CARRIER for HIRE, by *land or by wa-
ter*, is answerable for ORDINARY neglect.

IV. To these *rules and provisions* there are
some *exceptions*:

1. A man, who *spontaneously* and *officially*
engages to *keep*, or to *carry*, the goods of an-
other, though *without reward*, must answer for
SLIGHT neglect,

2. If a man, through *strong persuasion* and
with *reluctance*, undertake the execution of a

MANDATE, no more can be required of him than a *fair exertion of his ability*.

3. A L L bailees became reſponſible for loſſes by CASUALTY or VIOLENCE, *after their refuſal* to return the things bailed on a LAWFUL DEMAND.

4. A BORROWER and a HIRER are anſwerable in ALL EVENTS, if they *keep* the things borrowed or hired *after the ſtipulated time, or uſe* them *differently* from their agreement.

5. A DEPOSITARY and a PAWNEE are anſwerable in ALL EVENTS, if they *uſe* the things depofited or pawned.

6. An INNKEEPER is chargeable for the goods of his gueſt *within his inn*, if the gueſt be *robbed* by the *ſervants* or *inmates* of the keeper.

7. A COMMON CARRIER, by *land* or by *water*, muſt indemnify the owner of the goods carried, if he be *ROBBED* of them.

V. It is *no* exception, but a *corollary*, from the *rules*, that "every bailee is reſponſible for a " loſs by ACCIDENT or FORCE, however *inevitable* or *irreſiſtible*, if it be *occafioned* by that " *degree of negligence*, for which the nature of " his contract makes him generally anſwerable ;" and I may here conclude my diſcuſſion of this important title in jurisprudence with a general and obvious *remark* ; that "all the pre-

"ceding rules and propofitions may be diverfified to *infinity* by the *circumftances* of every particular cafe ;" on which circumftances it is on the *continent* the province of a judge 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 *deposited*, 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 only; and if it had been proved, that the bailee had kept *his own pictures of the fame fort* in the fame place and manner, and that *thy too* had been fpoiled, a new trial would, I conceive, have been granted; and fo, if no more than SLIGHT neglect had been committed, and the jury had, nevertheless, taken upon themfelves to decide againft law, that a bailee *without reward* was refponfible for it.

Should the *method* ufed in this little trad be approved, I may poffibly not want inclination,

* 2 Stra. 1099, Mytton and Cook

if I do not want leisure, to discuss in the same form every branch of *English law, civil and criminal* *U* private and publick; after which it will be easy to separate and mould into distinct works, the three principal divisions, or the *analytical, the historical, and the synthetical*, parts.

The great system of jurisprudence, like that of the Universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain *elements*, either the wise *maxims* of national policy and general convenience, or the *positive* rules of our forefathers, which are seldom deficient in wisdom or utility if *LAW* be a science, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of *reason*; but, if it be *merely* an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and He will become the greatest lawyer, who has the strongest habitual, or artificial, *memory*. In practice, law certainly employs *two* of the mental faculties; *reason*, in the primary investigation and decision of points *entirely new*; and *memory* in transmitting to us the reason of sage and learned men, to which our own ought invariably to

yield, if not from a becoming modefty, at leaft from a juft attention to that object, for which all laws, are framed, and all focieties intituted, THE GOOD Of MANKIND..

ADVERTISEMENT.

AFTER I had finished the preceding tract, to the satisfaction of several friends, but not to my own, I was informed, that the learned CHRISTIAN THOMASIIUS had published a dissertation on the same subject with the following title: *De Ufu pructico Doctrinæ difficillimæ Juris Romani de Culparum Præftatione in Contractibus*; HALÆ, MDCCV. The fame of the author, and the high applause, which the very sensible *Bynkerhoek* bestows on him, impreſſed me with a most favourable idea of his work, and with a strong desire to procure it; but, to my extreme disappointment, I cannot find it in any library, publick or private, in the Metropolis or in either of our Universities: I have sent for it, however, to *Germany*, and, when I receive it, (shall take a sincere pleasure, either in correcting such errors, as it may enable me to detect in my essay, or in confirming the system, which I have adopted, by so respectable an authority.

THE CASES.

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AN INQUIRY
INTO
THE LEGAL MODE
OF
SUPPRESSING RIOTS,
WITH
A CONSTITUTIONAL PLAN
OF
FUTURE DEFENCE


Res videos quo modo se habeant: orbem terrarum, imperiis,
distributis, ardere bello; urbem sine legibus, sine iudicibus,
sine jure, sine fide, relictam direptioni et incendiis.

CIC. Epist. ad Fam. 4. 1.



AN INQUIRY
INTO
THE LEGAL MODE,
OF
SUPPRESSING RIOTS.

IT has long been my opinion, that, in times of national adversity, those citizens are entitled to the highest praise, who, by personal exertions and active valour, promote at their private hazard the general welfare; that the second rank in the scale of honour is due to those, who, in the great council of the nation, or in other assemblies, legally convened, propose and enforce with manly eloquence what they conceive to be salutary or expedient on the occasion; and that the third place remains for those persons, who, when they have neither a necessity to act, nor a fair opportunity to speak, impart in writing to their countrymen such opinions as their reason approves, and such knowledge as their painful researches have enabled them to acquire.

With these restrictions, the sword, the tongue, and the pen, which have too often been employed by the worst passions to the worst purposes, may become the instruments of exalted virtue; instruments, which it is not the right only, but the duty, of every man to use, who can use them; paying always a sacred regard to the laws of that country, which he undertakes to defend, to advise, or to enlighten.

A sense of this duty and a consciousness of this right have impelled me, with no views, as it will be readily believed, of ambition or interest, much less from any factious motive, to take up that instrument, which I have stated as the least honourable of the three, and to present the publick with a few considerations on a subject no less interesting at the present hour than important to all future ages.

Having unhappily been a vigilant and indignant spectator of the late abominable enormities; having seen the senate besieged, and the senators insulted ; the laws of our country defied, and the law of nations violated; having beheld the houses of our truest patriots and most respectable magistrates either destroyed, assailed, or menaced; having passed a whole night encircled by the blazing habitations of unoffending individuals, and by the flames of those edifices which publick justice had allotted to various classes of of-

fenders; having lamented over ' great metropolis exposed for many days to the fury of a licentious rabble; having believed the noblest commercial City in the world to be in danger of a second conflagration; having in vain sought access to the courts at Westminster in full term, and to the houses of parliament in full session; having, in a word, been witness to horrors, all the concurrent causes of which are not easy to be known, and all the consequences of which are less easy to be predicted; I could not but see at length, with a mixed sensation, between anguish and joy, the vigorous and triumphant exertion! of the executive power; and I admitted the necessity of those exertions, whilst I deplored it.

Every well-disposed man, and lover of tranquillity, must have rejoiced, that, on the ninth of June, the peaceable and terrified inhabitants of this noble Capital might enjoy repose; that the valuable effects, which many had removed and some had even buried, might be replaced; that the artisan might resume his implements, and the student, his books; that justice had reascended her seat; and that order was succeeding to confusion, harmony to discord; but every honest man and lover of his country must have grieved that a whole week was then before us, in which the necessary adjournment of the Commons who would otherwise have been deliberating or

the state of the metropolis and the kingdom; had left us under a power, which, whatever it might be in form and in effect, was in truth and substance, dictatorial.'

In this awful interval a question occurred to me, which must naturally have presented itself to many others : " Whether the still-subsisting " laws and genuine constitution of ENGLAND " had not armed the *civil state* with a power ' sufficient, if it had been previously understood " and preptred, to have suppressed ever so formidable a riot without the intervention of the " *military*"

If no such power legally existed in the state our system, I thought, must be defective in a most essential point; since no people can be really and substantially free, whose freedom is *to precarious*, in the true sense of the word, as to depend on the protection of the soldiery; and even our protestors, who for several days possibly could not, but certainly did not, act at all, might have been necessarily called away, in the most dangerous moment, to defend our coasts and maritime towns: if, on the other hand, such a power of self-protection did exist, our laws, I concluded, must have been disgracefully neglected, and ought to be restored to full vigour and energy.

A very short inquiry enabled me to answer

the question, at least to my own satisfaction, *in the affirmative*; and it is the result of this inquiry, which I now request the public to accept with the indulgence due to an occasional production, and with the attention due to a subject of general importance.

This then is the proposition, which I undertake to demonstrate : " That the common, and " statute, laws of the realm, in force at this day, " give the *civil* state in every county a power, " which, if it were perfectly understood and " continually prepared, would effectually quell " any riot or insurrection, without assistance from " the *military*, and even without the modern " riot-act."

To this proposition I shall strictly, and, as far as I am able, logically confine myself; avoiding all parade of legal or antiquarian learning, and omitting all such disquisitions as might answer the purpose of ostentation, which I disdain, but not of utility, which alone I seek: should the curious and intelligent reader be desirous of investigating the powers of magistrates and of courts in recording riots and punishing rioters, and of tracing the history of our ancient and modern laws for the preservation of public tranquillity, from that of king *IN A* to that of *GEORGE* the First, he will receive ample information from the various books of authority, which I shall

have occasion to cite in the course of my argument.

It is in every one's mouth, that, on all violent breaches of the peace, the sheriff of the county is not only authorized but commanded to raise the *Poffe Comitatus*, and forcibly to suppress the tumult; but, if most of those, who use this expression, will examine their own minds, they will presently perceive, that they utter words, which convey to them no distinct idea, and that the *power of the county*' like many other powers in nature and jurisprudence, is very ill ascertained, and very imperfectly comprehended. Logicians give us an admirable rule, "*that we should seek after a clear, precise and complete conception of things, as they really exist in their own nature and in all their parts, and should not always imagine that there are ideas, because there are words*:" let us apply this rule to the case before us, and endeavour to form a luminous, fixed, comprehensive notion of the power in question; without supposing that we comprehend it, merely because we know, that, besides its *Latin* name, it is called in Norman French, *Volar del Countee*, and sometimes, *Aide del pais-f.*

We cannot begin our investigation under a

more certain or more respectable guide, than Chief Justice FINEUX, whose words I (shall transcribe from that most venerable repository of genuine *English* wisdom, the Year books':
 " At the beginning," says that learned Judge,
 " all the administration of justice was in one
 " hand, namely, in the Crown; then, after the
 " multiplication of the people, that administration
 " was distributed into counties, and the
 " power was committed to a deputy in each
 " county, namely, the Viscount, or Sheriff; who
 " was the King's deputy to preserve the peace;
 " and thus it is, that all people must, in obedience
 " to him, be ready in defence of the
 " realm, when enemies come: thus too was he
 " assigned to be a conservator of the peace, to,
 " punish malefactors, to defend the realm when
 " enemies invade it, to be attendant on the King
 " in war-time, and to cause all people in his
 " county to go with the King to defend the
 " land against enemies."

Who the people are, that the laws of England required, and still require, to be *ready* and obedient to the Sheriff on all occasions of public disturbance, we learn from the judicious antiquary, LAMBARD, who cites and adopts the opinion of Mr. Marrow delivered in a work,

which I suppose to have been a reading 'eft the ftatute 13 Hen. IV. His opinioit was, " that the " juftices of the peace, fheriff or under fheriff, " ought to have the aid and afliftance of all " knights, gentlemen, yeomen, labourers, fer- " vants, apprentices, and likewile of wards, and " of other young men above the age of fifteen " years; becaufe all of that age are bound to " have *hamefs*, or armour, by the ftatute of " Winchefter*'.

What effect the fubfequent repeal of the ftatutes of armour might have on the reafon afligned by Mr. Marrow for his opinion, it is needlefs to inquire; for it feems obvious, that the ftatutes of JAMES I. removed the *necejjity* only, and not the *propriety*, of having arms, or, to ufe the very words of the old aft, *ar mure pur la pees garder*; and the dodrine in *Lambard* is generally underftood to be law†. The paflage above-cited appears, however, to have milled 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*†; whereas the patent of afliftance, cited by *Dalton*", commands barons, earls, and dukes, to be *auxiliaries et re'*

Lamb. Eiren. 316. † Dalt. c. 95.

' #Comm. 3". ' Comm. 122. , . || C. 1.

fpondentes to the Sheriff in all things belonging to his office.

The power of the county, therefore, includes the *whole civil* ftate, from the duke to the peasant; 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 fuppreff it, their ad is not only legal but laudable; and the colour of their clothes, or the nature of their arms, make no kind of difference; but, when they are *in truth* called out by the executive magiftrate, and are *in jact* no more than inftruments in the hands of their commanders, their afts 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; but it seems consonant to reason as well as truth.

This power of the county, of which we may now begin to form a distinct idea, is mentioned, as well known and well understood, in a variety of statutes, which were confirmatory of the common law; and some parts of which I shall cite in the original languages, how barbarous or inelegant soever they may appear to a classical eye.

Theftat. Westm. i. c. 17. ordains "qe levif-
" counte ou le bailiff, prise ove luy *payer defon*
" *countee*, ou de fa bailie, voit eflayer de faire le
" plevin des averes a celuy qe prit les averes."
And that of Westm. 2, c. 39. is more peremp-
tory in cases of resistance to the execution of
civil process: " Multoties etiam dant responsum,
" quod non potuerunt prosequi preceptum regis
" propter resistenciam potestatis alicujus magna-
" tis, de quo caveant vicecomes de caetero, quia
" hujusmodi responsio multum redundat in de-
" decus domini regis; et, quam cito ballivi fui
" testificantur, quod invenerunt hujusmodi re-
" sistenciam, statim omnibus omiffis, assumpto
" fecum *posse comitatus* fui, eant in propria per-
" sona ad faciendam executionem." By the 17
Rich. II. c. 8. it is enacted, that, in case of any
tumult or disorder, " a plus tost qe viscontz
" et autres ministres le roi poent 'ent avoir

" coniflance, 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 mefleours, et les mettent en
 " prifone tanqe due execution de leie foit fait
 " de eux, et, e touz feignurs et autres 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 aflemblee
 " ou rout des gentz encontre la loie fe face en
 " aucune partie del roialme, les juftices de paix,
 " trois ou deux de eux a meyns, et le vifcont
 " ou fourth vifcont del countee, ou tiel riot aflem-
 " 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, al-
 though it fpeak of *three* 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 enabled for the prevention of mifchief which
 might enfue, if a juftice were to wait for others.
 It has alfo been adjudged, that, under the word
tniniflers, in the ftat. 17 Rich. II. c. 8. juftices
 of peace are comprifed'; and fo are *conftables*,

* 14 Hen. VII. 10. Crompt. '6. b. †Crompt. '6. a.

by the opinion of *Fitzherbert* cited by *Crompton* and confirmed by the Year book i Hen. VII. 10; where it is laid down, that " *conftabularii* " *villa fuper affraiam poffunt levare 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 *Poffe*, who muft attend fuch fummons under pain of a heavy fine and imprifonment; for, by the flat. 2 Hen. v. c. 8. it is provided, " *qe* " *les lieges du roi efteantz fufliceantz pur tra-* " *vailer en le countee, ou tielx routes afsemblez* " *ou riotes font, foient affiftantz asjuftices, com-* " *miffioners, vifcont, et foutez-vifcont, de mefme* " *le countee, qant ilz ferront reafonablement* " *garniz, pur chivacher, ove les ditz juftices,* " *commiffioners, et vifcont ou foutez-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 rknked by Sir *William*

Dlackftone under the clafs of *contempts againft the kings 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 witneffes in matter of law*†, 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 aflbciate himfelf with the power fo affembled, and from the principles of natural juftice, which will neither *require men to do impoffible things*, nor *refufe them the means of performing what they are commanded to perform*, from thefe obligations and thefe principles it infantaneoufly follows: Firft;

That the fheriff or other peace-officer is bound to *reife fuch* a power as will effedually quell the tumylt either really exifting or juftly feared.

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

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

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 *ufe* of fuch weapons, as are beft adapted to the fuppreſſion of tumults.

Fifthly; That, ſince the *mufket* and *bayonet* are found by experience to be the moll effectual arms, all perfons, who conſtitute the power of a county, are bound to be competently ſkilled in the ufe of them.

Sixthly; That, ſince the only fafe and certain mode of uſing them with effed is by ading *in a body*, it is the duty of the whole civil ftate to know the platoon-exercife, and to learn it in companies.

As *no authority*, according to CHARRON, *can stand without reason*, so we find, by constant experience, that no reason can surmount the passions and prejudices of men without the aid of authority; and I am happy in believing, that both of them perfectly coincide in support of the foregoing propositions: first, therefore, I shall prove them by citing cases, which have been solemnly adjudged, together with the opinions of learned lawyers, whose works are much respected in our courts of justice; and, next, I shall inquire, whether those cases and opinions have been over-ruled or shaken by any subsequent decisions, or acts of the legislature.

The earliest resolution upon the subject, that has occurred to me, was in a case, which the very learned and judicious *Brook* thought *worthy of note* in his time, and which, in the present time, deserves peculiar attention. It is reported in *French* in the first page of the Year book 3 Hen. VII and it is manifestly the same with that afterwards abridged in an imperfect *Latin* note printed, out of its place, in the tenth page of the same book; though *Brook* seems to have considered them as different, or rather not to have observed their identity; for, in the title of his Abridgement just alluded to, he gives them

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 confident ftate of it.

JOHN 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, *John 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 Heningbam*, and three other perfons, dire6iing 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 (beep, which they delivered to *Deins*; and, in order to make delivery of the goods and cattle which remained, they affembled all the inhabitants of five adjacent vills; who, in number *three hundred*, arrayed in a warlikemanner, and armed with brigandines Jackets of mail, and GUNS, united and affociated themfelves, and marched' to the place where the cattle were detained.; but did not proceed to any other ad of violence.

*Modo guerrino arraiati fe univcrunt et affociavcrunt, et iter fuumarriperunt,*3 Hen. VII. 1. 10.

! For this imagined breach of the peace, and military array, an indictment was preferred in the King's Bench against the plaintiff in replevin, the sheriff and his bailiff, and the persons who had assisted them; but the court unanimously adjudged, that the indictment was void; founding their judgement, as it seems, on the reasons advanced by serjeant *Keble*, whose argument it may be proper to state at large,

" As to the plaintiff in replevin, said he, no
 " wrong was committed by him; for the eschea-
 " tor, when he took the goods, after the *Nan*
 " *Molejlando* had been delivered to him, acted
 " unlike an officer; since it was his duty, in that
 " instant, to surcease his process: *Deins*, there-
 " fore, was perfectly justified in complaining to
 " the sheriff, and must consequently be dis-
 " charged from this indictment.

" Nor did the sheriff transgress his duty in exe-
 " cuting the replevin; for, when the party came
 " to him, he could not know, whether he was an
 " outlaw or not; or whether or no the escheator
 " had seized the cattle in the King's right; which
 " ought to have been shown by the King's offi-
 " cer. The bailiff too must be discharged; for
 " the servant is in the same condition with the
 " master; and, as the sheriff cannot do every
 " thing himself, his deputy must have the same
 " power with him.

" In regard to his assembling three hundred
 " men, *that was no illegal act*" for every man is
 " bound to assist the sheriff and his bailiff; to
 " support him in executing the King's writs;
 " and to give him aid in all cases of need; *and*
 " *this by common law and common reason*, not-
 " withstanding the statutes of Westminster the
 " first and second. So, if *any man* refuse to as-
 " sist the sheriff at his *request*, he shall be fined,
 " whether it be to execute process, or to appre-
 " hend felons."

The Court agreed, that the bailiff had as good
 a right to raise the power as the sheriff himself;
 because it is all one office and one authority.

It was urged, " that, if men assemble with
 arms and *do nothing*, it shall be intended, that
 " they assembled with a bad design;" but it was
 answered, that in some cases the presumption
 might be just; in others, not: thus the use of
 armour on particular occasions, as on Midsum-
 mer eve in London, and at other times for sport,
 is not punishable; and, here, the cause of the
 assembly appears, *namely to execute a replevin*.
 Even if they had acted, yet their assembly was
 lawful in the beginning; and such assemblies are
 not illegal as *are not to the tenor of the people of*

Ceo neft incontre la ley: So Brook reports his words, tit.
 Riots, 2.

our lord the king; which words ought to be in every indictment for an unlawful affembly.

Another point was touched upon by the king's ferjeants: "that the fheriff cannot take with " him *fo many* armed men, but only a *reafonable* " party;" to which it was anfwered, that, if he were fo refrained, he might be in great jeopardy and peril of his life; and for this reafon, *he may take as many as he pleafes at his 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 *fecond* 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 *apprehending felons*, there would have been no debate on the legality of the act; and, after an argument at the bar, the former doubt was entirely removed.

*The ftatute of *Marlbridge*, c. 21. feems here to be meant' the words *poft querimoniam factam* not being' ufed in flat. Weftm. 2.

The next is the case of a riot at *Drayton Buffet* in *Staffordshire*, determined in the Star-chamber in the twenty-fourth of Elizabeth, and cited more than once by *Crompton*'; who says that the court resolved, 1. That, if the two justices, nearest to the place where the riot is committed, do not act as they are required by flat. 13 Hen. IV. c. 17. each of them {hall pay an *hundred* pounds; and the other justices of the same county, where the tumult was, shall be fined for not suppressing it, *if there was any default in them*. 2. That the sheriff and justices of peace may take as many men in armour as are necessary, WITH GUNS, and so forth, and *kill the rioters*, if they will not yield themselves; for the flat. 13 Hen. IV. c. 17. says, that they *MUST arrest them*; and, if the justice's, or any of their company, kill any of the rioters, who will not surrender themselves, it is no offence in them.

This case of *Drayton Buffet*, which is also cited and approved by *Sir Matthew Hale*', incontestably demonstrates my *third* corollary.

In the 3rd or 3^d of Elizabeth (for the date is differently reported by some transposition of the figures) the doctrine in *Beddingfield's* case

was fully recognized and established by the decision in the case of *St John*, or *Gardener*†; which, being subsequent to the stat. 33 Hen, VIII. c. 6. prohibiting the use of *hand-guns*, clearly shows, that no alteration in the ancient law was made by that prohibition.

The case was this: *Gardener* had obtained a judgement against *St. John*, and procured a writ of execution directed to the sheriff of *Bedford*, who made a warrant to *Gardener*'s own brother as a special bailiff; but, resistance being justly feared, the bailiff armed himself with a *dagge*, or short gun. It happened that *St. John* was a justice of peace for *Bedfordshire*, and seems to have had that *little learning*, which, in law rather more than in poetry, is a *dangerous thing*, especially when it is coupled with knavery; for, having notice how the bailiff was armed, he contrived to have him seized by his servants, and brought before himself as the next justice; when, by colour of his office and the statute of Henry VIII. he committed the officer, who came to arrest him, until he should pay ten pounds, one moiety to the queen, and another to the informant. The bailiff having removed himself by *habeas corpus*, and the whole matter being disclosed to the court, it was resolved, " that the sheriff or any of his mi-

* 5. Rep. 71. 72. †Cro. EH. 821, 822.

" nifters, in execution of juftice
 "dagges or *hand-guns*, or other weapons mva-
 " five or defenfive, the fame not being refrained
 " by the general prohibition of the ftatute; for,
 " if it were, *no juftice would be adminiftered.*"

By ftronger reafon fuch weapons may be car-
 ried 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 hand-guns*, 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 appolite to the objeet of our inquiry, that I fhall make no apology for citing it in the very words of the learned reporter': " Upon an afsembly of *all the juftices*
 " and *barons* at Serjeant's Inn this Eafter term
 " (39 Eliz.), on Monday the 15th of April, this
 " queftion was moved by *Anderfou*, Chief Juftice of the Common Bench; *Whether men may*
 " *arm themfelves to fuppreff riots and rebellions,*
 " *or to refift enemies, and endeavour of themfelves*
 " *to fuppreff or refift fuch difturbers of the peace*
 " *and quiet of the realm* ; and, upon good deli-

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 *Northampton*, 2 Edw. III. c. 3. which enacts, that *none be Jo hardy as to come before the king's juftices or other minifters of the king in the execution of their office with force and arms, nor to bring force in affray of the peace, or to ride or go armed by nig/it or day, EXCEPT the fervants of the king in his prefence, or the minifters of the king in the execution of his precepts, or of their office, and thofe who are in their company affifting them, OR UPON CRY MADE FOR WEAPONS TO KEEP THE PEACE, and this in places where accidents happen, upon the penalty in the fame ftatute contained; where- by it appeareth, that, upon cry made for weapons to keep the peace, EVERY MAN, where fuch accidents happen, for breaking the peace, may by law arm himfelf againft fuch evil-doers; but they took it to be the more difcrete way for every one in fuch a cafe to be afliftant to the juftices, fheriffs, or other minifters of the king in the doing of it."*

Highly as the authority of Sir John Popham defervesto be refpetted, it is to be wifhed, that Lord Anderfonhimfelfhad given us a full account

of his own opinion with that of the other judges; but he has left us no more than a short note¹ to the same effect with the preceding report. This case also is cited by *Hale*[†], and the very words in *Pojham* are transcribed by Sir *John Kelyng* in his report of *Lymerick's* case[‡]. I think it a strong proof of my *fourth* corollary, respecting the necessity of being *prepared* at all times to keep the peace; but, if a particle of doubt on that head can remain, it will be diffipated at once by the statute of Westm. i.e. 9. by which, as it is cited by Crompton[§], "purveu est, qe touz continualment foient prestez et appareillez al maundement et al somons des viscountes, et al crye del pais de fuire et darefter felons, qant mestier ferra, auxibien dedeins franchises come de hors; et ceux, qe ceo ne ferront, et de ceo foient atteintz, le roi prendra a, eux grave-ment;" whence it should seem, that ALL SUBJECTS, who are not *continually prest, or ready*, for the orders of the sheriff on an alarm in the country, are exposed to the royal displeasure and to a severe penalty; and the word *prest* (which in modern times has been either ignorantly or intentionally confounded with the participle passive of the verb *to prest*) is used for *prepared* by Chief Justice FINIEUX in a passage before cited:

2 And. 67. † 1 H. P. C. 53. ‡ Kel. 76. § 124. 2.

I am aware, however, that *communalment* is the usual reading; which will give a sense rather less forcible, " that all men *generally* shall be " ready and accoutred *at* the summons of the " sheriff;" but this amounts to the same thing; for how can a man be armed and apparelled *in an instant on a sudden alarm*, unless his weapons and accoutrements were previously at hand?

The opinions of the learned, which form the second branch of my proofs, can add little weight to *four* cases of such authority, as those of *Bedingfield*, *Urayton Basset*, *St. John*, and the *Case of Arms*: indeed, these cases seem to have been the guides of *Lambard* and *Dalton*, *Hale* and *Hawkins*; who all agree, that " it is referred to " the discretion of the sheriff, under-sheriff, or " other person authorized to raise the *posse*, how " many men they will assemble, and how they " shall be armed, weaponed, or otherwise furnished " for the business;" that " private persons may " arm themselves in order to suppress a riot, and " that all, who attend the justices in order to " quell a tumult, may take with them *such weapons as shall enable them to do it effectually*†; " that, lastly, in executing process or apprehending rioters, they may, by the common law,

* *Lamb. Eiren.* 317. *Dalt. c.* 95. † ¹ *Hawk. P. C. c.* 65.

" beat, wound, or kill, any of the-opponents or
 " infurgents, who 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 fifth and fixth propofitions, which I con-
 sider 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 fua credendum eft;"
 and the following citation from Mr. WIND-
 HAM'S elegant introduction to his *Plan of Dif-*
cipline for the Norfolk Militia will be thought as
 convincing as any paffage in Fitzherbert or
 Brook. " About the beginning of this century,
 " fayshe, the troops in Europe were univerfally
 " armed with firelocks; to which, 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 '
 " *ceffity of a grot regularity and uniformity*, in
 " the manner of ufing thofearms, became appa-
 " rent: it was foon difcovered, that thofe troops,
 " which could make the brifkeft fire, and fuftain
 " it longeft, had a great fuperiority over others
 " lefs expert; and, likewife, that *the efficacy and*

power of fire , did not confifi in random and feathering foots made without order, but in the fire of a body of men at once, and that properly timed and directed. It was therefore *neceffary* to exercise the troops in loading quick, and firing together by the word of command; but, as the awkwardnefs, carelefshefs, and rashnefs, of young foldiers (if left to themselves) must occasion frequent accidents, and *the los of many of their own party* , by the unskilful manner of using their fire-arms, especially in the hurry of an engagement, it became a matter of *indispensable neceffity* to teach foldiers an *uniform* method of performing every action that was to be done with the musket, that they might all do it in *the most expeditious and of easy manner*"

Should any doubt be raised as to the legality of *affembling* for this purpose, and should the words of Sir *Matthew Hale*, whom of all men I respect the most, be opposed to me, that, " where people are assembled in great numbers " armed with weapons offensive, or weapons of " war, if they march thus armed in a body, if " they have chosen commanders or officers, if " they march *cum vexillis explicatis* or with " drums or trumpets, and the like, it maybe " considerable, whether the greatness of their " numbers, and their continuance together doing " these acts, may not amount to *more guerrino*

" *arraiat*, or a levying of war'," which may be construed an encroachment on the prerogative of the crown †; the answer is no less obvious than decisive, in the language of BRACTON, that, *Voluntas et propositum distinguunt maleficia*‡; that, the intent being good, the act cannot be bad; and that *Bedingfeld's* case is an express authority for the legality of " marching armed in a body " *more guerrino arraiati*," even for the purpose of executing a civil process, to which there is just expedition of violent resistance. So necessary, indeed, is *order* and *disciplinam* directing the exertions of an armed assembly, that the statutes 3 and 4 Edw. VI. c. 5. and 1 Mary, c. 12. (which are no longer in force, but were the models of the well-known riot-act) expressly authorise the sheriffs, justices, mayors, and bailiffs, " to raise power and array them in manner of war " against the rioters:" and here I may again apply those found maxims, to which I before alluded: 1. That *the law requires no impossible things*; but it is impossible to join the power and suppress a riot effectually, without being at least moderately skilled in the use of fire-arms, and ready in the common evolutions. 2. That, *when the law permits or enjoins the performance of any act, all the means of performing it are also*

* 1 H.P. C. 131. † 3 Inst. 9. ‡ L. 3 c. 14 § 13.

permitted or enjoined; but the law doth permit and command *every fubject of this realm* to arm himfelf and ufe his arms with effect for the fuppreffion of tumults: the conclufion, in both forjns of reafoining, follows too clofely and too evidently to admit of a doubt.

That the four cafes, on which I have relied, have never been fhaken 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 aft 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 flood like a rock amid the conflict of ftatutes rolling upon ftatutes.

Neither of the ftatutes of Weftminfter had any effect on the decifion in *Bedingfield's* cafe; nor was that of *St. John* at all influenced by the fubfequent prohibition of hand-guras; nor the *Cafe of Arms* by the ftatute of *Northampton*; and though the aft of queen *Mary* was continued during the life of *Elizabeth*, yet Sir *Matthew Hale* obferves, that, " the cafe of *Drayton* " *Baffet* was not within that ftatute, nor de- " pending on it*.' In the fame manner ferjeant

¹ H. P. C. 495.

Hawkin remarks, In conformity to *Hale* and to reason, which will very seldom be found at variance, "that the stat. 1. Geo. I. c. 5. commonly " called the riot-act, being wholly in the affirmative, cannot be thought to take away any part " of the *authority* in the suppressing of a riot, " which was before that time given either to " officers, or *private persons*, by the common law " or by statute*,"

Having shown the nature and extent of the *Poffe Comitatum*, and proved that it is required by law to be equal in its exertion to a well-disciplined army, I have established the proposition, which I undertook to demonstrate:- " That the " common and statute laws of the realm, in force " at this day, give the *civil* state in every county " a power, which, if it were perfectly understood " and continually prepared, would effectually " quell any riot or insurrection, without assistance " from the *military*, and even without the " modern riot-act."

One side, therefore, of the distressing alternative, to which I was reduced, concerning the *precariousness* of *English Freedom*†, is happily removed; but the other side remains, " that our " laws have been disgracefully neglected, and " ought to be restored to full vigour and " energy."

* 1 P. C. c. 65. † P. 466. ‡ P. 464.

To what fatal cause must we ascribe our neglect so shameful and so dangerous? I answer boldly, yet, I hope, without arrogance, since I use the very words of BLACKSTONE, "to the vast accumulation of force arising from the riot-act and "the annual expedience of a standing army";" which has induced a disposition, cherished by the indolence natural to man, and promoted by the excessive voluptuousness of the age, to look up solely for protection to the executive power and the soldiery; a disposition, which must instantly be shaken off, if any spark of virtue remain in our bosoms; for, although we are happy in a prince, who "will never harbour a thought or "adopt a persuasion in any the remotest degree "detrimental to the liberty of *Britain*†," yet in free states a military power must ever be an object of jealousy; and, since our excellent constitution will be claimed by our posterity as their best inheritance, we must act with a provident care, lest, two centuries hence, the fable of the horse should be verified in our descendants, who may be in need of protection against their protestors, and be forced to carry *barneys*, notwithstanding the repeal of the statute of *Winchester*.

For the history of the riot-act, so laboured and

⁴ Comm. 434. † 1 Bl. Comm. 337.

fo raeficttual, I muft refer my reader to the incomparable author, whom I fo frequently cite, the commentator on the laws of *England*; who cxpreffes his jealoufy and difapprobation of it with no lefs delicacy than wifdom': in refpe6i to the number of capital felonies created by it, which *Blackftone* feems highly to have difapproved, I fhall fay nothing, as it is not my prefent fubjeft; but I may, with all due reverence for the legiflature in the firft year of GEORGE 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 unneceflary, as it only affirms " our ancient law, which had pretty well guarded " againft any violent breach of the peace†." 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 *reftoring our laws to their full vigour and evergy*, and of providing for

our future defence, I fhall certainly fubmit it to the difcretion of my countrymen who are bound by thofe laws; and (hall only fuggeft to them the following plan; after premifmg, 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 " too fevere*."

THE PLAN.

I.

Let all fuch perfons in every county of **ENG-**
LAND as are included in the power of that coun-
ty, and *are of ability to provide themfelves with*
arms, and pay for learning the ufe of them, be
furnifhed each with his *mufket* and *bayonet*' and
their neceffary appendage

¹ Hawk. P. C. c. 65.

LEGAL MODE OF

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, ftreet-firing, and the various evolutions neceffary in action.

III.

Let the companies be taught, in the mod private and orderly manner, for two or three hours early every morning, until they are competently (killed in the ufe of their arms: let them not, unneceffarily, march through ftreets or high-roads, 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 uſing them for the fuppreſſion of riots, whenever the ſheriff, under-ſheriff, or peace officer ſhall raife the power, or there ſhall be *a cry made for weapons to keep the peace*.

V.

Let the *caution*, prefixed to this plan, be di-

ligently observed, and the law, contained in the preceding citations, be held ever sacred: nor let any *private* person presume to raise the power of the county', which is the province of the sheriff, under-sheriff or magistrate; although *a cry for weapons to keep the peace* may be made in cases of extreme necessity, and in them only, by *private persons*.

"VI.

If any mark of distinction in dress shall be thought expedient, that the several companies may know each other, in the forcible suppression of a riot, let such a regulation be severally referred, with any other rules that may be necessary, to a committee chosen out of each company.

The great advantages of such associations are so apparent, that I shall forbear at present to expatiate on them; but shall be satisfied with applying to them what PULTON says of the old tilts and jousts, " that the cause, beginning, and " end thereof do tend to the laudable exercise of " true valour and manhood, and to the encouragement and enabling of the actors therein to " defend the realm and the peace thereof;" and with observing, in their words of the stat. 33.

¹ Hale, H. P. C. 601. † De Pace, 25. b.

Hen. VIII. c. 6, that the muiket 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' expert them, however, chiefly from thofe, whofe indolence may induce them rather to feek protection from a power able to cruft them, than to protect themfelves by joining a power provided by free and equal laws; or from thofe, who, as MILTON fays, " have betaken themfelves to ftate-aflfairs
 " 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 answer; 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 jealousies, or imaginary confequences: the fole queftion is, " whether the doctrine expounded in thefe pages *be law*;" if it be, there is no room for deliberation, fince it is a maxim, that *no man muft think himfelf wifer than the law*, which is the gathered wifdom of many ages; and

so favourable is the *common* law of ENGLAND to the rights of our species, which it is unhappily become the fashion to deride and vilify, that, if any man will broach a position in favour of genuine, rational, manly freedom, I will engage to supply him with abundant authorities in support of it.

I persuade myself, that infinite good must result from the general adoption of my plan; and that no possible evil can be mixed with it, as long as the cautions and restrictions before suggested shall be duly observed, and our excellent constitution be kept in its just balance at that nice point, which is equally removed from the pernicious extremes of republican madness, aristocratical pride, and monarchical folly; nor have I any scruple to confess, that, as every soldier in ENGLAND is at the same time a citizen, I wish to see every citizen able at least, for the preservation of public peace, to act as a soldier: when that shall be the case, the LIBERTY OF BRITAIN will ever be unshaken; for this plain reason—it will be unassailable.

The security, and consequently the happiness of a free people do not consist in their belief, however firm, that the executive power will not attempt to invade their just rights, but in their consciousness that any such attempt would be wholly ineffectual.

S P E E C H

TO

THE ASSEMBLED INHABITANTS OF

THE COUNTIES OF

MIDDLESEX AND SURRY,

THE CITIES OF

LONDON AND WESTMINSTER,

AND THE BOROUGH OF

SOUTH WARK.

XXVIII MAY, M.DCC.LXXXII.

ADVERTISEMENT.

HAVING been informed, that parts of my Speech on the 28th of May at the London Tavern were thought obfture, yet important, I have endeavoured to recollect what I then took the liberty to fay, and have confented to let the argument go abroad in its rude and unpolifhed ftate. What offence this publication may give, either in parts or in the whole, is the laft and leaft, of my cares: my firft and greateft is, to peak on all occafions what I conceive to be juft and true.

A
S P E E C H
ON
THE REFORMATION-OF PARLIAMENT.

MY LORD MAYOR,

So far am I from rising to intimate the flighted shade of dissent from this respectable and unanimous assembly, or the minutest disapprobation of the two resolutions proposed, that I despair of finding words sufficiently strong to express my joy and triumph at the perfect harmony, with which the first of them has already passed, and to which the second will, I trust, be thought equally entitled: but, on the last reading of the proposition now before you, it struck me, that, although it was in *substance* unexceptionable, yet, it might easily be improved in *form* by the insertion of two or three words referring to the preceding resolution, and thus be rendered more conducive to our great object of generally declaring our concurrent sense, and avoiding any chance of disunion upon specific points- Every

propofition, intended, to meet with univerfal concurrence, ought, to have three diftinguifhing properties; it fhould be juft, fimple, comprehensive: without juftice, it will be rejected by the wife and good; without fimplicity, it will involve complex matter, on which the wife 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 representation 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 diffentient voice on that ground; fo fimple, that it affords no fcope or fubjeft for cavil; fo comprehensive, 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 fuggeft.

Ought not the *fecond* propofition, " that the " *fenfe* of the people fhould be taken this fummer in order to prepare their *feveral* petitions," to be fomewhat refrained in the generality of the expreffion? It is juft, but rather *too* comprehensive: *the fenfe of the people* is a phrafe of meafurelefs compafs, and may include their *feveral* opinion', however fpecifick, however dif-

cordant. This is the very evil, which we are anxious to prevent; since we all agree, that no particular mode of reformation should be preferred to the house, lest they should reject; for no other reason, some good plan, which, if left to the operation of their own minds, they may probably adopt. Might not the sentence be thus corrected, " that the sense of the people should " be taken *on the preceding resolution* V But this I offer as a mere suggestion to wiser heads, and will not trouble the assembly by shaping it into a motion: indeed, if both resolutions be taken together, and it be understood, that we mean to recommend petitions on the *general* ground, in order to shun that fatal rock, *diversifying* *opinion on particulars*, I desire no more, and am very little solicitous about accuracy of expression; hoping at the same time, although the *five* circles here assembled have no right or pretension to take the lead in the nation, yet that the other counties, districts, and towns in *Great Britain* will approve our idea, and not disdain to follow our example: in that event I smile at the thought of a miscarriage, and am confident, that, with concurrence, perseverance, and moderation, the people of *England* must prevail in a claim so essential to their liberty, and to the permanence of an administration, who profess to govern with their confidence.

Here I should regularly cease; especially, as I now labour under the pressure of the epidemical complaint, which alone can have prevented this meeting from being as numerous as it is respectable: it could not prevent my attendance, for, in health or in sickness, I am devoted to your service; and I (shall never forget the words of an old *Roman*, LIGARIUS; who, when the liberties of his country were in imminent danger, and when a real friend to those liberties was condoling with him on his illness at so critical a time, raised himself on his couch, seized the hand of his friend, and said, *If you have any business worthy of your/elves, I am well.*

It was not in truth my design to have spoken at all this evening; but, since I have risen to explain a sudden thought, I will avail myself of your favourable attention, and hazard a few words upon the *general* question itself: on the smallest intimation of your willies, I will be silent. Numbers will have patience to hear, who have not time to read; besides, that it is always easier to speak than to write; and, as to myself, a very particular and urgent occasion, which calls me for some months from *Englatid*, will deprive me of another opportunity to communicate my sentiments in either form, until the momentous object before us shall be made certainly attainable through the concord, or for ever lost

and irrecoverable through the disagreement, of the nation.

The *only specious* argument, that I have anywhere heard, against a change in the parliamentary representation of the people, is, that, " a *constitution*, which has stood for ages, ought " not to be altered."

This objection appears on a superficial view so plausible, and applies itself so winningly to the hearts of *Englishmen*, who have an honest prejudice for their established system, without having in general very distinct ideas of it, that a detection of *the sophism*, for such I engage to prove it, becomes absolutely necessary for the promotion of your glorious enterprise.

I will rife your impatience; for, though I am aware, that allusions to history and interpretations of old statutes are not very proper in addresses to popular assemblies; yet, when popular assemblies take upon them, as they justly may, to act and resolve upon constitutional points, they are bound to seek or to receive information, lest their actions should be rash and their resolutions ill-founded. A power exerted through passion or caprice, without a deep knowledge of the business in hand, and a fair application of the intellectual faculties, is a *tyrannical* power, whether it be regal, aristocratical, or *popular* ' and the prevalence of any such power, by the overbearing

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 fpirit, 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 every 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 proportion is true in one fenfe of the word *conftitution*, and falfe in the other; and the fenfe, in which it is true, is inapplicable to the queftion. It is true, that the *fpirit* of the conftitution ought not to be changed: it is falfe, that the *form* ought not to be corrected; and I will now demonftrate, " that the fpirit of our conftitution requires a " representation 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 conliitution, 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 fyftem 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 exclusively to landed property, it admitted the *low eft freeholders* to the due enjoyment of that ineftimable right, without which it is a banter to call a *man free*; the right of voting in the choice of deputies to affift in making 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 I conceive to have been the right of every freeholder, even by the feudal polity, from the earlieft time; and the ftatute of HENRY IV. I believe to have been merely declaratory: an act which paffed in the *Seventb* year of that prince, near

four hundred years ago, ordains, that, " *all* they, who are present at the county court, as well *fuitors* *duly summoned* for the same cause, as *others*, shall proceed to the election of their knights for the parliament." *All futors*, you see, had the right; and *all freeholders* were *fuitors* in the court, however low the value of their freeholds. Observe all along, that one pound in those days was equal to ten at lead in the present time. Here then is a plain declaration, that minuteness of *real* property created no harsh suspicion of a dependent mind; for a harsh suspicion it is, and, by proving too much, proves nothing.

What caused the absurd, yet fatal, distinction between property, personal and real? The feudal principle. What created another odious distinction between *free* and *base* 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 (locked? The feudal principle. What excludes the holders of beneficial leases? The feudal principle. What made personality, in those times, of little or no estimation? The feudal principle. What raised the silly notion, that the property, not the person, of the subject, was to be represented? The feudal principle. What prevented the large provision in

the aft of *Henry IV.* by which *all freeholders* 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 qualifying fpirit of our conftitution. Now, if we find that this demon was himfelf in profecution of time fubdued, as he certainly was by the extension of commerce under *Elizabeth*, and the enlarged conceptions which extended commerce always produces, by the revival of learning, which 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 *fpirit of our conftitution, all Englifhmen, having property of any kind or quantity, are entitled to votes in chufing parliamentary delegates.* The form foon received a cruel blemifh; for, in the *eighth* of *HENRY VI.* the property of fuitors qualified to vote, was reftained to "*forty ihil-'* 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 invafion of clear popular rights, and therefore in a high degree unconfitutional: it is alfo a difgraceful confeffion of legislative weaknefs; for the evil,

pretended to be remedied by it, was, that the county elections were *tumultuary*. What! could not the wisdom of the legislature suggest a mode of preventing tumult, if the laws already subsisting had been insufficient for that purpose, without {halting the obligation of all future laws, by narrowing the circle of those, who, being affected by them, ought by natural equity to assist in framing them? Ridiculous and indefensible!

In the *twelfth* of CHARLES II. the mighty fabric of the feudal system was shaken from its basis; but, though its ramparts were overthrown, its connexions and covered ways destroyed, and its very foundations convulsed, yet the ruins of it have been found replete with mischief, and the mischief operates, even while I speak.

At the Revolution, indeed, the good spirit of the constitution was called forth, and its fair principles expanded: it is only since that auspicious event, that, although we may laugh, when lawyers call their vast assemblage of sense and subtilty the *perfection of human wisdom*, yet we shall deride no man, who asserts the constitution of *England* to be in theory the most perfect of human systems—in theory, not in practice; for, although you are clearly entitled to all the advantages, which the *principles* of the constitution give you, while you claim those advantages by

cool and decent petition, yet, either from some unaccountable narrowness in the managers of the Revolution, or from the novelty and difficulty of their situation, they left their noble work so unfinished, and the feudal poison so little exterminated, that, to use the words of your favourite poet, they "scotched the snake, not killed it." Who could have imagined, that, in the *eighteenth* of GEORGE II. the statute of *Henry VI.* would have been adopted and almost transferred? Who could have dreamed, that, in the *thirty-first* of the same king, the last act would have been recited and approved, with a declaration added, that no tenant by copy of court roll should vote at an election for knights of the shire under penalty of fifty pounds? It was the accursed feudal principle, which suggested these laws, when the fairest opportunity presented itself of renovating the constitution. Another gale has now sprung up; and, unless you catch it while it blows, it will be gone for ever.

I have proved, unless I delude myself, "that the spirit of our constitution requires representation of the people nearly equal and nearly universal." Carry this proposition home with you, and keep it as an answer to those, who exclaim "that the constitution ought not to be changed." I said *nearly* universal; for I admit, that our constitution, both in form and spirit, requires *some* pro-

petty in electors, either real or personal, in possession or in action ; but I consider a *fair trade* or *profession* as *valuable property*, and an *Englilhman*, who can support himself by honest industry, though in a low station, has often a more independent mind than the prodigal owner of a large encumbered estate. When *Prynne* speaks of *every inhabitant and commoner*, to whom he supposes that the right of voting originally belonged, I cannot persuade myself, that he meant to include such as, having nothing at all, and being unable or unwilling to gain any thing by art or labour, were supported by alms.

If modern authorities be demanded in aid of my opinions, I shall only mention the great judge, Sir *William Blackstone*, and I mention him the more willingly, because he never professed democratical sentiments, and, though we admire him as the systematical arranger of our laws, yet we may fairly doubt the popularity of his political notions: nevertheless, he openly allows in his *Commentary*, " that the spirit of our constitution is in favour of a more complete representation of the people." This too is allowed by the very man, who, in another tract, intimates an opinion, " that the value of freeholds themselves should be greatly advanced above what is now required by law to give the proprietor a voice in county elections." I told you, that

all reasoning from the statute of *Henry VI*; proved too much, and, consequently, nothing; for, who now would bear the idea of disqualifying those electors of *Surry* and *Middlesex*, whose freeholds were not of the annual value of twenty pounds?

I hear a murmur among you, and perceive other marks of impatience. Indulge me a moment, and I will descend; but let me not be misapprehended. I do not propose to conclude with a specific motion: it is my deliberate opinion, confirmed by my observations on the event of your applications to reduce the influence of the Crown, that your petitions and resolutions must be *very general*. In my own mind I go along with you to the full length of your wishes. If the present system of representation be justly compared to a tree rotten at the heart, I wish to see removed every particle of its rottenness, that a microscopic eye could discern. I deride many of the fashionable doctrines: that of *virtual* representation I hold to be *affair* folly; as childish, as if they were to talk of *negative* representation, and to contend, that it involved any *positive* idea. Substitute the word *delegation* or *deputation*, instead of representation, and you will instantly see the absurdity of the conceit. Does a man, who is *virtually*, not *actually*, re-

presented, delegate or depute any person to make those laws, which may affect his property, his freedom, and his life? None; for he has no suffrage. How then is he represented according to the principles of our constitution? As well might a *Roman* tyrant have urged, that all his vassals were represented in his person: he was augur and high priest; the religious state was, therefore, represented by him: he was tribune of the people; the popular part of the nation were, therefore, represented. he was consul, dictator, master of the horse, every thing he pleased; the civil and military states were, therefore, concentrated in him; the next deduction would have been, that the slaves of his empire were free men' There is no end of absurdities deducible from so idle a play upon words.

That there may be an end of my address to you, which has been too long for the place and occasion, but too short for the subject, I resume my seat with a full conviction, that, if united, and dependent on Yourself alone, you must succeed; if divided, or too confident in others, you must fail Be persuaded also, that the people of *England* can only expect to be the happiest and most

OF PARLIAMENT.

glorious, while they are the freeft, and can only become the freeft, when they fhall be the moft virtuous, and moft enlightened, of nations.

TO

London,, May 14, 1782.

SIR,

I TAKE the liberty of submitting to your ferious attention the *Plan of National Defence* lately fuggeted by government, compared with a *different* plan now approved, though fubject to revifion, by a *Company of Loyal Englifhmen*, of which I have the honour to be One. You will instantly 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, unconditional, and big with alarming confequences; too *expenfive* for the treafury, who have no treafures to lavifh, and too *diftruftful* 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 fane-tioned*, 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
 manly fpirit, and excite a liberal emulation, in
Englifh gentlemen, yeomen, and traders, but
 the actual defcent of *three united armies* on
 our coafts, they will *then* vainly follicit that pro-
 tedion for their houfes and families, which they
now have in their own hands, on a glorious in-
 vitation from the Firft and Bell of Magiftrates.

I am, etc.

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
 Bilhops.

HEADS OF A PLAN

For raffing Corps in feveral principal Towns in Great Britain, inclofed in a Letter from the EARL OF SHELBURNE to the CHIEF MAGISTRATES of feveral Cities and Towns.

1st. 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,

2^d. 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.

3^d. 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 his Majefty

5th. A proper number of Serjeants and Corporals from the army to be appointed for the Corps in each town, in proportion to their numbers.

6th. The faid Serjeants and Corporals, as well

as the Adjutant of Town-Major, to be in the Government pay,

7th. The men to exercise frequently, either in battalions, or by companies, on Sundays, and on Holidays, and also after their work is over in the evenings.

8th. Arms, accoutrements, and ammunition, to be furnished at the expence of Government, if required.

9th. Proper magazines, or storehouses, to be chosen or erected in each town, for keeping the said arms, &c.

10th. The arms and accoutrements to be delivered out at times of exercise only, and to be returned into the storehouses as soon as the exercise is finished.

11th. The Adjutant or Town-Major to be always present at exercise, and to see that the men afterwards march regularly, and lodge their arms in the storehouses.

12th. Proper penalties to be inflicted on such as absent themselves from exercises, as well for disobedience of orders, insolence to their officers, and other disorderly behaviour.

13th. The above Corps not to be obliged, on any account, or by any authority whatever, to move from their respective towns, except in times of actual invasion or rebellion.

14th. His Majesty fhall then have, power to order the faid corps to march to any part of Grèit Britain, as his fervices may require'.

15th. They are, on fuch occafions, to act eitherfeperately, or in conjunction with his Majefty '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.

17th. They are to be fubjed 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 fetvice to have a penfion for life.

20th. The time of fervice to be named'

SKETCH OF A PLAN

Tor raising a Constitutional Force in the Towns, Cities, and Counties of Great Britain-, being an Answer, Article by Article, to the Plan annexed.

I ft, AGREED, *with this addition*—And other Battalions, or Companies, to be alfo voluntarily formed out of the *Hundreds, Tythings, and Harris lets, of each county*, in proportion to its extent and populoufnefs.

2d. The *Officers*, and, in fome companies, the *men*, to enrol themselves, from among the *Gentry, Yeomanry' and Subftantial Houfebolden*, and the Officers to be commiffioned refpectively by the *High Sheriff, and Chief Magiftrate*, of each county and town.

3d. The *ranks* of the Officers to be proportioned to their *contributions* to a fund raifed for purpofes mentioned in fubfequent articles.

4th. An Adjutant or Town-Major in each county or town, to „*elected by the Officers*.

5th. *Agreed*, for the purpofe of *drilling* the men, Until a certain number of the *volunteers* can be qualified to ad as Serjeants and Corporals.

6th. The said Drill-Serjeants and Corporals *from the army to continue* in the pay of government; but the Adjutants and Town-Majors to be paid *if they desire pay*, out of a *fund* voluntarily raised for that purpose in the several counties and towns.

7th. Agreed.

8th. Arms, Accoutrements, and Ammunition, to be furnished at the expence *of the counties and towns, if required*; or of the *officers*, if they are generously disposed,

9th. The said arms, &c. to be kept by each man, in *his own house*, for his *legal* protection.

10th. Rejected.

11th. The *officers* to take care, after exercise, that the men march regularly, and return home with their arms.

20th. Agreed, *with this addition*—A set of *Laws, or Articles*, to be drawn up by the Officers, and *subscribed or openly consented to* by the men, *after a distinct reading and explanation of each article.* " *Consensus facit Legem.*"

13th. Agreed, the words *counties* or being inserted after the word *respective*.

14th. The *high sheriff* of each *county*, and *chief magistrate* of each *town*, shall then (on due notice to government) have power to order the said corps to march to any part of

Great Britain, as the *publick* 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 Go 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 *without* pay, to wear fome mark of diftinction, and the officers to ferve at *their own* expenfe.

17th. Agreed, in cafe of *aftualinvafion* 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 proclaimed* and *recorded* by the *theriffs* of their feveral *counties*, or the *chief magiftrates* of their corporate *towns'* and the men to receive a comfortable fubfiftence at their own homes, with a fixed *annuity for life* out of the voluntary fund.

19th. The *widows*: and *children* of Officers and Men killed in the fervice *againft invaders* to have alfo *penfions for life*.

20th. The companies called out as above to be discharged *ipfo facto*, as soon as the *invaders* are *repelled*, or the *particular service terminated*.

A Company of LOYAL ENGLISH
GENTLEMEN.

THE
PRINCIPLES OF GOVERNMENT,
IN
A DIALOGUE
BETWEEN
A GENTLEMAN AND A FARMER.

ADVERTISEMENT.

A' SHORT defence hath been thought necessary, againſt a violent and groundleſs attack upon the FLINTSHIRE COMMITTEE, for having teſtified their approbation of the following Dialogue, which hath been publickly branded with the moſt injurious epithets; and it is conceived, that the ſure way, to vindicate this little Tract from ſo unjuſt a character, will be as publickly to produce it.—The friends of the Revolution will inſtantly ſee, that it contains no principle, which has not the ſupport of the higheſt authority, as well as the cleareſt reaſon.

If the doctrines which it flightly touches, in a manner ſuited to the nature of the Dialogue, be " ſeditious, treafonable, and diabolical," Lord Somers was an incendiary, *Locke* a traitor, and the *Convention-parliament* a pandemonium; but, if thoſe names are the glory and boaſt of *England*, and if that convention ſecured our liberty and happineſs, then the doctrines in queſtion are not *only juſt and rational* but *conſtitutional* and *ſalutary*; and the reproachful epithets belong wholly to the ſyſtem of thoſe, who ſo groſsly miſapplied them.

THE

PRINCIPLES OF GOVERNMENT.

F . W H Y should humble men, like me, sign or fet marks to petitions of this nature ? It is better for us Farmers to mind our husbandry, and leave what we cannot comprehend to the King and Parliament,

G. You can comprehend more than you imagine ; and, as a *free member of a free fate* , have higher things to mind than you may conceive.

F. If by *free* you mean *out of prison*, I hope to continue so, as long as I can pay my rent to the 'quire's bailiff; but what is meant by a *free ftate*?

G. Tell me first what is meant by a club in the village, of which I know you to be a member.

F. It is an assembly of men, who meet after work every Saturday to be merry and happy for a few hours in the week.

G. Have you no other object but mirth?

F. Yes; we have a box, into which we con-

tribute equally from our monthly or weekly savings, and out of which any members of the club are to be relieved in sickness of poverty; for the parish officers are so cruel and unfeeling, that it were better to starve than apply to them for relief.

G. Did they, or the 'quire, or the parson, or all together, compel you to form this society?

F. Oh! no—we could not be compelled: we formed it by our own choice.

G. You did right——But have you not some head or president of your club?

F. The master for each night is chosen by all the company present the week before.

G. Does he make laws to bind you in case of ill temper or misbehaviour?

F. He make laws! He bind us! No; we have all agreed to a set of equal rules, which are signed by every new comer, and were written, in a strange hand by young *Spelman*, the lawyer's clerk, whose uncle is a member.

G. What should you do, if any one member were to insist on becoming *perpetual* master, and on altering your rules at his arbitrary will and pleasure?

F. We should expel him.

G. What, if he were to bring a ferjeant's guard, when the militia are quartered in your

neighbourhood, and infill upon your obeying him?

F. We fhould refift, if we could ; if not, the fociety would be broken up.

G. Suppofe that, with his ferjeant's guard, he wete to take the money out of the box or out of your pockets?

F. Would not that be a robbery?

G. I am feeking information from you. How fhould you aft 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 flick, 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; excep' that it would be eafier to refrain one man, **than**

a number; but we should be the majority with justice on our side.

G. A word or two on another head. Some of you, I presume, are no great accountants.

F. Few of us understand accounts; but we trust old *Lilly* the schoolmaster, whom we believe to be an honest man; and he keeps the key of our box.

G. If your money should in time amount to a large sum, it might not perhaps be fall, to keep it at his house or in any private house.

F. Where else should we keep it?

G. You might chuse to put it into the funds, or to lend it the 'quire; who has lost so much lately at *Newmarket*, taking his bond or time of his fields as your security for payment with interest.

F. We must in that case confide in young *Spelman* who will soon set up for himself, and, if a lawyer can be honest, will be an honest lawyer,

G. What power do you give to *Lilly*, or should you give to *Spelman* in the case supposed?

F. No power. We should give them both a due allowance for their trouble, and should expect a faithful account of all they had done for us;

G. Honeft men may change their nature. What, if both or either of them were to deceive you.

F. We fhould remove them, put our truſt in better men, and try to repair our loſs.

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 ſubject; for I never thought about it'

G. Though you never thought before on the ſubject, yet you may be able to tell me, why you ſuppoſe men to have aſſembled, and to have formed *nations, communities, or Jiates*, which all mean the ſame 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 themſelves or their neighbours, but chiefly to ſecure themſelves from danger, and to relieve their wants.

Ct. 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 preſume, is not born with a hundred hands.

G. When a prince of the blood fhall in any countrey be fo diſtinguiſhed 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 aifemble?

F. Yes; but the army muft have been formed by their own choice. One man or a few can never govern many without their confent.

G. Suppose, however, that a multitude of men, afsembled in a town or city, were to chufe a King or Governor, might they »ot give fiim high power and authority?

F. To be fure; but they would never be fo mad, I hope, as to give him a power of making their *laws*.

G. Who 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 lbciety were fo large, that all could not meet in the fame place?

F. A greater number muft chufe a lefs.

G. Who fhould be the chufers?

F. All, who are not *upon the parifo*. In our club, if a man afks 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 afsembly 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 *free hold* in any county of forty fhillings a year ?

F. I have nothing in the world but my cattle, implements of hufbandry, 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 adl honeftly, I may defy the laws'

G, Can you be ignorant, that the parliament, to which members are fent by this county, and by the next market-town, have power to make new laws, by which you and your family may be ftripped of your goods, thrown into prifon, and even deprived of life?

F, A dreadful power! I never made inquiries, having bufincfs of my own, concerning the bufir,efs of Parliament, but imagined, that the laws had been fixed for many hundred years.

G. The common laws, to which you refer, are equal, juſt, and humane; but the King and Parliament may alter them, when they pleaſe.

F. The King ought, therefore, to be a good man, and the Parliament to conſiſt of men equally good.

G. The King alone can do no harm; but who muſt judge the goodneſs of Parliament-men ?

F. All thoſe whoſe property, freedom, and lives may be affected by their laws.

G. Yet fix men in ſeven, who inhabit this kingdom, have, like you, no votes; and the petition, which I deſired you to ſign, has nothing for its object, but the reſtoration of you all to the right of chuſing thoſe law-makers, by whom your money or your lives may be taken from you. Attend, while I read it diſtindly.

F. Give me your pen—I never wrote my name, ill as it may be written, with greater eagereſs.

G. I applaud you, and truſt, that your example will be followed by millions. Another word before we part. Recolledt your opinion about your club in the village, and tell me what ought to be the confequence, if the King alone were to 'faſt on making laws, or on altering' them at his will and pleaſure.

F. He too muſt be expelled.

G. Oh! but think of his standing army and of the militia, which now are his in substance, though ours in form.

F. If he were to employ that force against the nation, they would and ought to resist him, or the state would cease to be a state.

G. What, if the great accountants and great lawyers, the *Lillys* and *Spelmans*, of the nation were to abuse their trust, and cruelly injure, instead of faithfully serving, the publick?

F. We must request the King to remove them, and make trial of others, but none should implicitly be trusted.

G. But what, if a few great lords or wealthy men were to keep the king himself in subjection, yet exert his force, lavish his treasure, and misuse his name, so as to domineer over the people, and manage the Parliament.

F. We must fight for the King and ourselves.

G. You talk of fighting, as if you were speaking of some rustic engagement at a wake; but your quarter-staffs would avail you little against bayonets.

F. We might easily provide ourselves with better arms.

G. Not so easily; when the moment of resistance came, you would be deprived of all arms; and those who should furnish you with

them, or exhort you to take them up, would be called traitors, and probably put to death.

F. We ought always, therefore, to be ready; and keep each of us a strong firelock in the corner of his bed-room,

G. That would be legal as well as rational, Are you, my honest friend, provided with a musket?

F. I will contribute no more to the club, and purchase a firelock with my savings.

G. It is not necessary—I have two, and will make you a present of one with complete accoutrements.

F. I accept it thankfully, and will converse with you at your leisure on other subjects of this kind.

G. In the mean while, spend an hour every morning in the next fortnight in learning to prime and load expeditiously, and to fire and charge with bayonet firmly and regularly. I say every *morning*; because, if you exercise *too late in the evenings* you may fall into some of the legal snares, which have been spread for you by those gentlemen, who would rather secure game for their table, than [liberty for the nation.

F. Some of my neighbours, who have served in the militia, will readily teach me; and, per

haps, the whole village may be persuaded to procure arms, and learn their exercise,

G. It cannot be expected, that the villagers should purchase arms, but they might easily be supplied, if the gentry of the nation would spare a little from their vices and luxury.

F. May they turn to some sense of honour and virtue!

G. Farewell, at present; and remember, " that a free state is only a more numerous and " more powerful club, and that he only is a free " man, who is member of such a state."

F. Good morning, Sir! You have made me wiser and better than I was yesterday; and yet, methinks, I had some knowledge in my own mind of this great subject, and have been a politician all my life without perceiving it.

THE CHARACTER

OF

JOHN LORD ASHBURTON.

THE publick are here presented not with a fine picture, but a faithful portrait, with the character of a memorable and illustrious man, not in the style of panegyrick on a monument, but in the language of sober truth, which friendship itself could not induce the writer to violate.

JOHN DUNNING (a name to which no title could add lustre) possessed professional talents which may truly be called inimitable; for, besides their superlative excellence, they were peculiarly his own; and as it would scarcely be possible to copy them, so it is hardly probable that nature or education will give them to another. His language was always pure, always elegant; and the best words dropped easily from his lips into the best places with a fluency at all times astonishing, and, when he had perfect health, really melodious: his style of speaking consisted of all the turns, oppositions, and figures, which

the old Rhetoricians taught, and which *Cictrw* frequently practifed, but which the auftere and folemn fpirit of *Demoflhenes* refufed to adopt from his hrft matter, and feldom admitted into his orations, political or forenfick.

Many at the bar and on the bfench thought this a vitiated flyle; 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 repentful, and animated the drowfy: this drew fmiles even from fuch as were the objeds of it; fcattered flowers over a defert; and, like fun-beams fparkling on a lake, gave fpirit and vivacity to the dulled and leaft interefting caufe. Not that his accomplifhments, 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 ftrong. His knowledge too was equal to his imagination, and his memory to his knowledge. He was no Id's deeply learned in thefublime principles of jurifprudence and the particular laws of his country, than accurately (killed in the tainute, but ufeful, practice of all our different courts. In the nice conduct of a complicated

cause, no particle of evidence could escape his vigilant attention, no shade of argument could elude his comprehensive reason. Perhaps the vivacity of his imagination sometimes prompted him to sport where it would have been wiser to argue; and, perhaps, the exactness of his memory sometimes induced him to answer such remarks as hardly deserved notice, and to enlarge on small circumstances which added little to the weight of his argument: but those only who have experienced can, in any degree, conceive the difficulty of exerting all the mental faculties in one instant, when the least deliberation might lose the tide of action irrecoverably. The people seldom err in appreciating the character of speakers; and those clients who were too late to engage DUNNING on their side, never thought themselves secure of success, while those against whom he was engaged were always apprehensive of a defeat.

As a lawyer, he knew that Britain could only be happily governed on the principles of her constitution, or publick law; that the regal power was limited, and popular rights ascertained by it; but that the aristocracy had no other power than that which too naturally results from property, and which laws ought rather to weaken than fortify: he was, therefore, an equal supporter of

juft prerogative, and of national freedom, weighing both in the noble balance of our recorded conftitution. An able and afpiring ftatefman, who profeffed the fame principles, had the wifdom to folicit, and the merit to obtain, the friendship of this great man; and a connexion, planted originally on the firm ground of fimilarity in political fentiments, ripened into perfooal affection which nothing but death could have diffolved or impaired. Whether in his minifterial ftation he might not fuffer a few prejudices in fenfibly 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 imcandid, 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 converfation than his juft fhare, and was always candidly attentive, when it was his turn to be a hearer. His enmities were ftrong, yet placable;

but his friendships were _____ eternal; and in his affections ever subdued his judgment, it must have been in cases, where the fame or interest of a friend were nearly concerned. The veneration with which he constantly treated his father, whom his fortunes and reputation had made the happiest of mortals, could be equalled only by the amiable tenderness which he showed as a parent. He used to speak with wonder and abhorrence of Swift, who was not ashamed to leave a written declaration, "that he could never be fond of children;" and with applause of the caliph, who, on the eve of a decisive battle, which was won by his valour and wisdom, amused himself in his tent with seeing his children ride on his scimitar, and play with his turban, and dismissed a general, as unlikely to treat the army with lenity, who durst reprove him for so natural and innocent a recreation.

For some months before his death, the nursery had been his chief delight, and gave him more pleasure than the cabinet could have afforded: but this parental affection, which had been a source of so much felicity, was probably a cause of his fatal illness. He had lost one son, and expected to lose the other, when the author of this painful tribute to his memory parted from him with tears in his eyes, little hoping to see him again in a happier state.—As he perceives,

without affectation, that his tears now fteal from him, and begin to moisten 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.

END OF THE SIXTH VOLUME.

