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SOME
CONSIDERATIONS
ON THE
Law of Forfeiture,
FOR
HIGH TREASON.

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M DCCXLV.
SOME CONSIDERATIONS ON THE LAW OF FORFEITURE, &c.

The People of England have ever entertained so high a Veneration for their Form of Government, as to submit to it from the same Spirit, which has been cheerfully shewn in its Defence. To this Felicity of Temper and Conduct it is owing, that their groundless Jealousies soon die away, when they find the Ministers of State pursuing strictly the Intention of that Law, which is acknowledged in every Instance to be the best Rule, however opposite to transient Opinions, or momentary Wishes. The Prerogative itself, tho' in the antient Exercise scarce to be distinguished from Tyranny, yet thus circumscribed, has been esteemed of General Advantage; and those great Men, who asserted our Liberties, at the Beginning of the Civil Wars meant nothing more than to reduce it to its just Bounds, with-
(2)

out a Thought of offering the least undue Violation to it. In Resumptions, which have been strong Legislative Acts to rescind Grants made by the Crown, to the Disgrace of him who wore it, a Saving was always expressed to the Royal Power of Granting in the most unquiet Times. The Conduct of the Lords (a Body, whose Privileges have been the Source of Jealousy) as to the Case of the Aylesbury Men in a late Reign, when the Two Houses of Parliament appealed against each other to the Throne and to the Public, gained the Applause of the People even against that great and deserved Favourite, their own Representative; because that House acted in Support of legal Rights, and the ancient Jurisdiction of Parliament. These Instances prove, that, well knowing the Wisdom of their Ancestors in modelling the Constitution with an admirable Equality, they were desirous to transmit it down to their Posterity, as a thing sacred and unalterable. In this they proceeded on the tenderest Regard to the Welfare of the Realm, and to a Truth too often experienced in our History, that when old Foundations are weakened, or Landmarks removed, tho' with plausible Designs to secure or extend Liberty, the English Subject is the Loser by every Innovation.

But the Heat of honest Men being once raised, and the cooler Passions of artful Men dissembled by a specious Zeal for that, which lies not at their Hearts, the calm Voice of Reason and the Law finds no Attention; and Persons of less Understanding, incited by the Example of
of their Betters, add greatly to the Weight of that Clamour, which for a time has ever been too strong for Argument. Nor in these is it worthy of Admiration; since enlarged Views are requisite on Matters of General Concernment, which few are enabled to form either by Nature or Education, and from which more are called off by the nearer Prospect of a narrow and imaginary Self-interest. As the worst Evils of Society flow from short-sighted or perverted Judgments, the Constitution, with a Policy peculiar to itself, encourages every Method of popular Instruction. A Freedom of Debate in Parliament tends to clear and lay open the Grounds of public Proceedings; and the Liberty of the Press is as naturally fitted to the Support of good Governments, as to the Ruin of bad. Measures, that carry with them a fallacious Appearance of Lenity, are exposed by this Means; and those, which carry with them the Form of Severity, but have the Substance of Strength and Safety, are set in their just Light for the Approbation of the People. In the last Case, it is a Matter of Expectation and Necessity; because whatever has the Air of Severity, is seemingly repugnant to the Genius of a free Government, and ungrateful to generous Minds, above all, to Englishmen, trained in the Principles, and celebrated for the Exercise, of Humanity. Besides, in an Age fond of Liberty, but impatient of those salutary Restraints of Law, which alone make Liberty either lasting or valuable, it is natural to suppose, that some would...
be for throwing down the Fences, which may controll irregular Attempts; and therefore, no wonder, if such as mean to repair and keep them in Order, should become the Object of their Censure. That Censure ill-understood, and not properly refuted, might make an Impression, and overcome the national Affection for the Law, if coloured by fair Pretences; especially, if receiving Strength from the concurrent Sense of the Patrons of Liberty, who have declared against the Multiplication of Penalties; tho' it be one thing to multiply and extend them, another to maintain those Terrors, which have been, in all times, esteemed the Safeguard of Government. Every well-regulated State, whether built on Maxims of Absolute Monarchy or Freedom, is provided with this Safeguard, without which it were liable to perpetual Disorder from the desperate Sallies of Resentment, or the daring Projects of Ambition. Here too our own Constitution preserves its usual Excellence; and, being framed with much Wisdom and Equity as to the Crime of Treason, it seems difficult to account for their Conduct, who, in the Parliament of the Seventh of Queen Anne, were for abolishing that Punishment of the Crime, which has subsisted for Ages past, is interwoven with the first Principles, and intimately connected with the Foundations of our Policy. The greatest Men of the Time opposed it in the House of Lords; and, when the Temper of the Commons was such, that they would not have passed the Bill, which was of great Moment to Scotland,
Scotland, without the Clause to abolish the Forfeiture of Real Estates in Cases of High-Treason, very artfully proposed an Amendment to suspend its Operation, persuaded that the Prudence of succeeding Parliaments would take occasion to repeal it. The same Debate revived in the last Session; and the Bill for making it Treason to correspond with the Pretender's Sons, or any of their Agents, has carried that Suspension to a probably remoter Period, by an Addition made in the same House, and approved in the other. Nevertheless, even this gentle, and almost necessary, Alteration, to give Life and Vigor to the Law, in a Juncture the most Critical, created a Dissatisfaction in some Minds, of which it may not be unseemly to examine the Grounds. Indeed, it has been represented with so many Consequences of Terror, that it requires a better Authority than that of a private Writer, to explain the Reasonings, on which it stands: In the mean time he hopes it may be allowed him to speak what he thinks the Truth; and, with Deference to those who have received contrary Prejudices, to shew, that, in this Instance, they forget both a becoming Reverence of their Ancestors, and Care of their Posterity.

In entering upon the Argument of Forfeiture, it will be said, it is a strange Endeavour to defend that, which is inconsistent with the first Principles of Natural Justice; and therefore, whilst an Objection, that touches the jugulum causæ, is not removed, Arguments from Policy, and the concurring Practice of Nations, come too
too early; and must be considered as weak artificial Reasoning, opposed to the strong natural Dictates of Sense.

But why contrary to Justice? The Answer is, that the Innocent ought not to suffer for the Guilty.

It is not the Purpose of this Essay to attempt a Justification of any Instances, in which the Laws of Forfeiture may, in some Countries, have been carried to an Extremity, as little to be reconciled with Principles of Policy, as of Clemency or Justice. Amongst the Persians and Macedonians, not only the Criminals, convicted of Treason, were put to Death, but all their Relations and Friends. The Descendants of Antiphon the Orator were disqualified from advancing themselves, by their own Merit, to Estates and Offices in Athens. The Posterity of Marius’s Faction were excluded by a Law of Sylla from the same Privilege.

When these are laid out of the Case, what is the Force of the Answer? It clearly results into this, that those Rights, and that Power of transmitting Property, which are derived from the Favour of Society, may not be bestowed upon such Terms, as shall bind the Possessor to his Duty, and, for the Breach, be subjected to Forfeiture.

But this is to offer strange Violence, both to the Constitution of Society, and the Conclusions of Reason.
If we consider accurately the Nature of human Punishment, we shall find it attended with unavoidable Imperfections.

How short is our Discernment? The Surface of Things and Actions is alone exposed to our View: The inward Thoughts, the habitual Temper, which form the greater Part of moral Conduct, are entirely concealed from us. It is for this Reason, that Laws assign the same Name, Nature, and Penalty, to all Offences, which bear a stric Conformity in outward Resemblance, tho' intrinsically varying from one another by a thousand Circumstances, known only to the Searcher of Hearts.

How much shorter is our Power? We can estimate the Offence more exactly, than we can proportion the Punishment. In regard to a Man's self, Death is the last, which can be inflicted for the most malignant and extensive Crimes. But in regard to others, this Power, limited as it is, minutely traced into its Consequences, operates perhaps further than we wish; since in no case can it be confined to the Criminal, without reaching beyond him to some connected with him by Friendship, Interest, Consent, or Nature. What is still more, it is not only impossible to disjoin these Connections; but, however that were possible, it is even necessary to Complicate them. Society was founded on this Necessity; it is likewise supported, even while it suffers, by it; and when they are thus Complicated, whatever happens to One, must be mutual
ual to All. In the Instance of a King and his People; a King executes by his Subjects, and, in Quarrels with Foreign States, they suffer various Evils, for the Weakness or Iniquity of his Government. In the Case of a Corporation; the Sense of the Majority, or of a chosen Number, ordinarily determines the Body. On account of Faults committed in their Corporate Capacity, their Markets, Gates, Fortifications, Harbours, are liable to Forfeiture; and yet many innocent Members may suffer in the Effect of such Forfeiture.

To the First of these Cases it will be said that Princes own no Superior; and, therefore, in Contests with one another, cannot be separated, for the Purposes of Justice, from their People. To the Second, that tho' the guilty and innocent Members of the Corporation are under the same Sovereign Authority, and might be discriminated, yet the Corporate Body cannot be punished for wrong Acts, but by the Loss of those Privileges, which extend to all. But, in the Case of Father and Children, the Discrimination might easily be made, and Justice satisfied: Yet the Father commits Treason, and forfeits that Estate, which probably might have Descended to his Children.

It may be answered in the First Place, that this Punishment, being a Pillar of Society, agreeably to the Genius of the whole Edifice, is erected on the great Principle of Society itself, namely, to make the natural and social Affections a Control upon irregular and selfish Passions. In the Next,
that nothing is a Punishment, which does not affect a Right, strictly so called. To make the Innocent suffer for the Guilty, and to inflict that on the Guilty, which, in its Consequences, may affect the Innocent, are very different and unequal Considerations. "Every thing, says Puffendorf *, which causes a Sorrow or Lofs, is not properly Punishment. It is a Misfortune to be reduced to Poverty by a Crime, which caused the Magistrate to set a large Fine upon the Father of a Family; but not a Punishment. How many are there, who come into the World without the Expectation of a Patrimony? How many, who lose all they have by War, Fire, or Shipwreck?"—Now, since the Children have no Right but from the Father, if he holds the Property till his Death, or through him, there is no Injury done, when he is justly deprived of that Wealth, which was acquired under the Protection of Society, to be transmitted to his Posterity in stated Rules of Descent by positive Institution; and of those Honours, which are the Rewards of good Conduct, the Pledges of future Faith. These Benefits may be considered as the Gifts of civil Government; but Life and Liberty are the Gifts of Nature, and should never be taken away because of the Parents Offence: nor should a Subject be made incapable of Employments, without some Crime committed by himself. Such Severities are unwise, as well as unequitable. A Difference therefore must be observed between the

*L. viii. c. 3. §. 30.

C com-
common Liberties and natural Rights of a Subject, and the peculiar Distinctions of Society; and it is not to be said, Men are punished, when these latter Advantages, which themselves neither acquired nor merited, have, by reason of the "civil Qualification of their Blood" (as a great Lawyer * of our own has expressed it), been brought into View by the DeserF of one Ancestor, and are intercepted by the Crimes of another.

If it be thought, that what is here said is built on a Mistake, and that the Right of Inheriting is conferred by the Law of Nature; it may seem proper to shew the contrary with as much Clearness and Brevity, as the Subject will admit; the rather, because the greatest Writers on the Natural Law are extremely perplexed upon it, and have found it difficult to free their Reasonings from Ambiguity of Words, mutual Cavils, and the Prejudices arising from civil Policy. The Law of Nature is used in two Senses; either as determining certain Regulations to be absolutely necessary for supporting the Purposes of Nature, and Constitution of Things, previous to civil Compact; or as natural Reason, intimating to Men, that, in settling civil Compacts, they should act by the Light of that Reason, and not by arbitrary Caprice. Now the Right of Inheriting is founded by Society upon the greatest Reason, or on natural Principles, but is not a Right of Nature. To illustrate the Proposition particularly, let these Things be considered: 1. That the End of Property is Subsistence, by which End Nature has bounded our

* Lord Chief Justice Hale.
Pretensions to it, however Society may inlarge them. Hence we cannot assume more than we use, nor hold it longer than we live, and are capable of using it. And in this no Alteration arises from Circumstances of Improvement. It is enough, that the Thing improved becomes more advantageous to our selves, and that we pay to Nature the Acknowledgments of Industry for the liberal Profusion of her Gifts.

2. That the Manner of acquiring Property, in a State of Nature, is by Occupancy; an Act of the Body, not of the Mind, which last would give a Title to Property too precarious and disputable. 3. That in the transferring of Property, the Consent expressed gives a Right to the Alienee against the Alienor; and Occupancy confirms that Right against every one else. But in the Case of Descent, where is the Expression of Consent in the Alienor? It will be said, That the Affection and Relationship of the Deceased will create a Presumption of Consent. This is carrying the Matter very far, to say that the Law of Nature, in a State of Nature, transfers Property by Presumption, in like manner as a Civil Law in a State of Society. Where is the Occupancy to complete the Transfer? That Title may accrue to some other more diligent than the Heir, unless we will suppose Nature so careful as to keep Possession for him. In a Word, is it not more rational to say, that Transmission by Descent is that Act of Positive Law, which prevents the Property of the Deceased from reverting to the common Stock? But it may
may be objected, That this Manner of arguing sets the Principles of Nature at Variance with one another: She expects from every Man the Nourishment of his Children, till they are able to support themselves. If he should die before that Period, will she not assist him to complete his Views by transferring his Property to them? The Answer is obvious. Upon the Principles here mentioned, Nature points out another way. If he foresees the Event of his Death probable, he may make conditional Gifts and Alienations to his Friends, whilst he lives, for the Support of his unassisted Children. If, through Chance or Inadvertence, he neglect it, the Law of Benevolence, that fundamental Principle, requires such, as are nearest in blood and Affection to the Deceased, to take upon themselves this Care: nay, lays it, in a State of uncorrupt Nature, upon the Consciences of those, under whose Notice the Orphans may fall; so that Nature has not left this compassionate Case unconsidered, unprovided. Yet, suppose that Property descends by the natural Law; if the Children are grown up, and able to maintain themselves before the Father’s Death, they stand in no need of this Succession; and by that Principle, which confines Property to Subsistence, and a Capacity of using, they are even barred from accepting it. If they are weak and unable, tho’ the Property descend, they cannot occupy it. How then are the Children better provided for in this than in the other way, reasoning upon the Matter as in a State of Nature?

We
We may carry it still further, and shew, that if the Right of Inheriting be not considered as a Right conferred by Society, the greatest Absurdities must be charged upon the Civil Laws of all Countries.

1. If the Right of Inheriting is a natural Right, as arising from the Principle of Affection and Relationship, not positive Institution, then it cannot be confined to a Man's Children, but, in Failure of Issue, must extend to all his Relations, in their several Degrees. Now that is no Law to regulate Men, either in a State of Nature or Society, which does not extend to particular Cases; and Nature will not suppose a Right of Inheriting, without any Rule to go by in the Application and Conferring of it. That Rule can be but one; yet Civil Laws have pursued a thousand different Ways, contrary to the Law of Nature, according to this Reasoning.

2. If the Right of Inheritance came in by the Law of Nature, we may, for Argument-sake, imagine the Descent carried on through several Generations. In Consequence, Prescription must give a Right; otherwise antient Pretences of wrongful Possession might be set up, in order to divest the present Owner. But then the Law of Nature would be destructive of itself: For, is it not contrary to natural Principles, that a Just Right shall be barred by any Length of Time, and the Accident of not demanding it? Or, omitting that Consideration, can Prescription determine the Matter, without Civil Judicatures, to whom it may be pleaded? Has Nature decided how many Years shall limit or bar
bar a Right, any more than in what Order In-
heritances shall descend? If it has, Civil Laws
would do well to follow its Provisions, instead
of differing from one another and themselves.
Nor let it be said, that Disputes about prior
Occupancy are exposed equally to the Objection
of raising War amongst Men, as Disputes about
Inheritances; because, without the Principle of
prior Occupancy, there could be no such thing,
in a State of Nature, as the Acquisition of Pro-
PERTY at all. And, therefore, any Disputes, which
might be supposed to arise from it, are to be
considered as a necessary Evil, whilst that State
remains. But the Right of Inheriting is not a
Manner of acquiring Property necessary for the
Subsistence of Mankind, and to support the
Purposes of Nature. 3. Laws have always
distinguished between Jura Sanguinis and Jura
bæreditaria; considering the one as instituted
by Nature, the other, by civil Compact. The
Roman Law says, Hæres est Nomen Juris, Filius
Nomen Natura; and Cases might be cited out
of it, which were affected by this Maxim. In
the Law of England, the same Distinction is
clearly made. If a Man attainted be mur-
dered by a Stranger, the Son shall not have the
Appeal, because it is given to the Heir: Yet, if
he is murdered by the Son, the Crime is Petty-
Treason, because the Relation of a Son re-
 mains. If a Man is attainted, and have a Char-
ter of Pardon from the King, so as to be ca-
pable of being returned upon a Jury between
his Son and another, the Challenge, on ac-
count of Consanguinity, continues; notwith-
standing
Standing the Corruption of Blood is not taken away by the Pardon. Now, if the Right of Inheriting be a Right of Nature, the Name of an Heir cannot be separated from that of a Son, but they must stand and fall together, because *Jura Sanguinis nullo Jure Civili dirimi possunt*. But against this Reasoning we have the Authority of Two Systems of Civil Law, which are the accumulated Wisdom of many Ages, and the noblest Efforts of human Reason since the Creation of the World.

The Right of Inheriting being proved of Civil Institution, it may naturally occur to one, who turns his Thoughts upon this Subject, that the Rules, which govern the Course of it, were contrived for the Benefit of the Children; and, therefore, ought not to be obstructed by the Demerit of the Father.

But, if we may resort to the Elements of Society for the principal Reasons, on which the Power of transmitting Property stands, without being thought guilty of Refinement, they seem to be Two; and neither of them has any Relation to the Children. One, that when those Things, in which a Man had gained Property for his Subsistence, ceased to be his in the Course of Nature, the nearest Relation should take Possession, lest the Eagerness to contend for the Right of first Occupancy might turn the State of Society into a State of War. The other, that, when every Individual gave up natural Rights, as the Protection of Society was due to him, for submitting his own Revenge to public Justice, so this Power was conferred.
conferred upon him as one Recompence, for pursuing his private advantage in many respects, where Nature interferes not, subordinately to the Good of Society; and to make the advantages, so acquired, more permanent than in a natural state, by extending the enjoyment, as it were, beyond the bounds of nature. How just therefore is it that he, who has not only ceased to pursue that good, but taken measures to destroy it, infringing the original contract, should forfeit the protection, and lose the recompence he gained by it? And if the rules of descent, tho' in their effect and secondary view, beneficial to the children, owe their institution to reasons, which solely regard society, why may not reasons of the same nature account for the interruption of them?

One may observe further, that the course of descent is equally obstructed by one sort of alienation as another; and if the benefit of the children was the only or chief source of legal descents, it will follow, that there ought to be no such thing as a power of alienating, in any manner, vested in the Father: A consequence, which, it will readily be allowed, should be guarded against; both as it would destroy the mutual and necessary dependence of families, and introduce perpetuities so dangerous to that circulation of property, which animates all social industry. Hence it is, that a man's posterity are not only indebted to the laws of that country, which gave them birth, for a capacity of inheriting, but, by the same laws, are commonly left in the power of the father.
Father, as to their receiving actual benefit from that capacity. In England, a Tenant in Fee-Simple may charge, waste, or sell his Estate, and convey it away for ever from his Heirs. He may devise it by Will; and, unless in Cases of Fraud, the Law will not interpose to make it void. A Tenant in Tail is Master of his Estate, if he pursues the Methods of Conveyance proper to it. In these Instances, it may seem very hard, that any Man should dispose of a Fortune from his Posterity; and yet the Law having put them out of the Father's Power, as to every Grant, which they receive from the Kindness of another, and the honest Fruits of personal Merit, it wisely forbears to break in upon that Law of Nature, which allows a Freedom of Alienation; and expects no more from the Father, than that he conduct the Child thro' the Weakness of Infancy to a Condition of supporting himself by his own Labour and Attention. Shall it then be in his Breast to alienate in the Forms of Law, as Interest or Humour leads him? and shall not his Attempts to dissolve Society be equitably construed, for Reasons of public Usefulness, a virtual Intention of exerting his utmost Power to alienate those Benefits, which might have been derived thro' his Channel from the Favour of Society? Is it fit or reasonable, that he only should have Advantage in the Privilege so freely indulged to him; and that they, who indulge it, even
after he has abused it, should receive none from that Equity, by which it is framed and supported?

Indeed the Alienation by Forfeiture is more extensive than any other, because it is attended with the Loss of Honours, which cannot otherwise be aliened; and the Corruption of Blood stops the Course of regular Descent, as to Estates, over which the Criminal could have no Power, because he never enjoyed them.

As to Honours, they have so far been thought alienable in former Times, as that a Man might restore them to that Fountain, from which they flowed. But tho' they are not alienable, like most Inheritances, since that would be to debase and prostitute them, yet they seem peculiarly the proper Object of Forfeiture: for, being, in a stricter Sense than other Kinds of Property, the Gift and Creation of Society, the Terms, on which they are given, must be entirely subject to its Power. And is it not natural and politic, that a Distinction bestowed only for the Praise of them, who do well, should be forfeitable, on the Commission of Crimes, for a Terror to Evil-doers?

As to the Corruption of Blood, it may suffice to say thus much of it here; that if a Man is not capable of transmitting Property, acquired by himself, to an Heir, it seems a necessary Consequence in Reason, which is the Ground of Law, that he shall not be capable of receiving from an Ancestor, either to enjoy or to transmit;
transmit; for however Society may effectuate any Man's compassionate Intention, who would make a Gift to the Traitor's Posterity, yet the Law, which is consistent upon every Occasion, and only to be moved by Considerations, that affect the Whole, will not make an Effort of itself to supply that connecting Link in the Chain of Descent, which has been struck out of it for the Traitor's Infamy, and the public Benefit. Thus Society, by making the Loss of those Rights it confers upon every Man, a Penalty for the greatest Crime, which can be committed against his Country, interests every Relation and Dependent in keeping him firm to the general Tranquillity and Welfare; at the same time, it gives him an Occasion of reflecting, that when he sets about it, he must break thro' every private as well as public Tye; which enhances his Crime, whilst it is an Aggravation of his Punishment. Nay more, he may hope to escape from the Justice of his Country with his own Life, if that alone were to be forfeited; but the Distress of his Family will pursue him in his securest Thoughts, and abate the Ardour of Resolution. Many Instances there are of Men, not ashamed to commit base and selfish Enormities, who have retained a Tenderness for their Posterity by the strong and generous Instinct of Nature. The Story of Licinius Macer, who was Father to Calvus the great Orator, is very remarkable, as related by a Roman Annalist. Having gone thro' the Office of Praetor, and governed a Province, he was accused, upon returning home, of Extortion and Abuse.
Abuses of his Power. The very Morning of his Tryal he strangled himself, after having sent Word to Cicero, who was preparing to plead against him, that, being determined to put an End to his Life before Sentence, tho' the Penalty did not extend to taking it away, the Prosecution could not go on, and his Fortune would be saved to the Benefit of his Son.

Upon the Whole then, Where is the Wrong? It is agreeable to Justice to bestow Rights upon Condition. It is the Wisdom of Governments to lay hold on human Partialities.

But it is not enough to rest upon Arguments, to prove there is nothing in Forfeitures of this kind inconsistent with Justice. It must likewise be proved, that they are agreeable to the Practice and Genius of the freest States. This is doubtless an Argument of much Importance, and likely to have the greatest Weight with those, who are more ready to suspect a Fallacy in strong Reasons, than great Authorities. It may be necessary to be large in shewing it, because it has been relied on to a contrary Purpose.

In the Jewish Republic there are Instances, in which Children were destroyed, by the Interposition of Providence, for the Crimes, and to increase the Sufferings, of their Fathers. This by no means furnishes an Inference to the Nature of human Punishments, being inflicted by the Hand of God, with an express Prohibition to the Civil Magistrate to imitate it, and founded on the particular Constitution of that State. But the Forfeiture of inheritable Estates stands upon other Reasons, and was consequent on a Judg-
ment pronounced and executed by the ordinary Magistrate. The Restitution to Mephibosheth by David, and the Confiscation of Naboth's Vineyard by Ahab, are Examples of it; and tho' both suffered unjustly, yet had their Tryal been conducted with Openness and Impartiality, there had been no Danger from the mistaken Jealousy of the King, or the Oppression of the Tyrant. In the time of Ezra, after the extraordinary Providence was, in a great measure, departed from the Jews, there is an Evidence of it in that public Act of the State, by which all, who had married foreign Wives, were to make their Appearance before the Elders in three Days, under pain of forfeiting their whole Substance.

By the Constitution of Athens there were three Sorts of Infamous *, which was a Term of Art in their Law. 1. Those, who aimed to introduce Tyranny, as in the Case of such as aided Pisistratus. 2. Those, who owed Money to the Public, and neglected or refused to pay it. 3. Those, who had received Bribes, behaved ill in Sea or Land Fights, thrown away their Shields in Battle; all such were banished, and deprived of every Immunity, both they, and their Posterity. It is true, Judgment of Forfeiture was only inflicted discretionarily in the first and third Kind of these Infamies, but followed in Judgment of Law as to the second. Plutarch tells us, that Themistocles, for concealing the treasonable Correspondence of Pausanias with the King of


Persea,
Persia, forfeited his whole Estate, to the Value of Eighty or One hundred Talents, to the Athenian Treasury; and his Children took refuge in Persia. Thus, if before Sentence pronounced, especially in the Case of Murder, a Man fled from Justice into perpetual Exile, the Consequence was, a Forfeiture and Sale of Estate by the proper Officers for the Use of the public Coffers. It was another Law with them, that any Magistrate corrupting others to advise, or himself advising, the People to abrogate the Laws Criminal, should forfeit his Substance, himself and his Posterity be outlawed, and subject to be destroyed with Impunity. They looked upon these to be the Pillars of the Commonwealth, and that it was the Magistrate's peculiar Duty to uphold them. Demosthenes * accused a Man before the People, who had proposed a Vote, by which Fines and Forfeitures were, in effect, to be taken away. He speaks of the Guard, which had been set on that Part of the Constitution by the Care of their Legislators; and assigns a very artful and flattering Reason to the Athenians of a Law, which made it Forfeiture to propose the Restitution of Persons in particular Circumstances of Guilt; that "the Legislator, knowing the natural Lenity "and Compassion of his Countrymen, would "not expose the public Safety to the Pretences "or Abuse of it."

By the Roman Law, the Crimen læse Majestatis † comprehended many Branches, of which

* Dem. adv. Timocrat. † Manut. de Leg. Rom. Par. 1557.
the *Crimen Perduellionis* was, in all respects, the most severely distinguished, and at first the only Capital. It was so from the earliest Times of the Republic; and is marked out as such by the Laws of the Twelve Tables; which is not only an Evidence of the Practice in *Rome*, but of the Regard had to it in *Greece*, from whose Commonwealths, particularly *Athens*, those Laws were borrowed. By Capital, amongst the *Romans*, was meant, not only the Punishment of Death, but the *Minutio Capitis*, which, in the largest Sense, included the Loss of all Capacities, and a Forfeiture * of Estate to the Treasury; because, as the Digest phrases it, "*Qui Civitatem amisit, Hæredem habere non potest*;" He who has lost the Rights of a Citizen, can have no Heir; it being considered by the *Roman* Law, as a Privilege conferred by Society, to transmit Property. This Crime of Treason was punished both by Death and Forfeiture. The Case of *Sp. Mælius*, in *Livy*, is expressly to this Purpose: He is said to have been put to Death for aiming to destroy the Republic, and his Estates sold, which he had applied to the most unworthy Use. When the

* Bishop *Burnet*, in the Second Volume of his History, p. 522, where he says, that Forfeiture was never the Practice of free Governments, lays it down, that "it was an Invention under the Tyranny of the Emperors, who had a particular Revenue called the *Fisc*, from whence it was called Confiscation." To this one may oppose the Words of *Cujacius* — *Fiscus erat Populi, nunc Imperatoris. Cujac. ad L. Jul. Maj.* Which intimates, that Forfeiture was a known Punishment during the Republic. It was then called *Bonorum Publicatio*. But the Bishop seems to have been misled by the late Origin of the Word, to imagine the Thing itself was introduced no earlier.

Sentence.
Sentence of Forfeiture passed upon any Man, without depriving him of Life, it was given in the Form of Interdicting from Fire and Water. Cicero's Estates were confiscated by that Form proposed to the People after his false Step of withdrawing from Rome, and not by any express Words in it, but by the legal Operation. Antony, Dolabella, Lepidus, were adjudged Enemies to the Commonwealth, and their Estates confiscated. Even Caesar, who was for mitigating the Penalties on the Catilinarian Conspirators, moved a Confiscation of all their Property to the public Coffers. This particular kind of Majesty was held in such Horror, that Encouragement was given to Accusers. By Law, the Informer had his Pardon, if an Accomplice; nay, if his Accusation was against a Magistrate in Office, provided he were capable, his Reward was that Magistracy: If the Accused was only a Magistrate elect, he was allowed a Seat in the Senate, and to give his Opinion in the Rank of that Magistracy. The Accused was immediately disabled from paying, selling, alienating; and no Dignity was exempted from the severest Methods of Examination. What is still more, this was the only Charge, which pursued a Man's Memory and Posterity; for, in case he died while the Affair was depending, his Heirs were obliged to defend it: Otherwise Confiscation ensued, as if the Crime were admitted or confessed.

Thus it stood in Matters of Treason thro' the best Ages of the Commonwealth. The Cornelian and the Julian Laws were the first, which made several
Several other Species of Majesty capital, as well as _Perduellio_. As to public Crimes not within that Description, these _Laws_ seem chiefly designed to confirm, or perhaps inlarge, the _Sanction of those_, which had been growing up gradually, to guard against Offences, as Corruption increased, Public and private Force, the one with Arms, the other without, were punished with the utmost Severity: the first by perpetual Banishment to some certain Place (_deportatio_), which was accompanied with Loss of all Rights and Capacities, and Forfeiture of Estate; the other with a Confiscation of One Third.

By the _Cornelian Law_, the Murder of a Father or Patron was capital: and by the _Julian_, the Murder of any Citizen was punished with intire Confiscation and Banishment.

The Crime of Peculate, or Embezzlement, by the same Law, was punished in like Manner. _Papinian_ says, a Proceeding was allowed for this Crime against a Man's Heirs. And long before that, in the Instance of _Scipio Africanus_, Brother to _Africanus_, a Fine so heavy was set upon him, being charged with having concealed Part of the rich Booty brought home from _Asia_, that his Estate would not suffice to pay it: and, in such Crimes, they were often sentenced to refund four times the Value.

The _Laws_, which concerned Abuses in the Government of the Provinces, were equally strong: so were those concerning Bribery in Elections and Judicature, concerning _Deceit_,

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(which branched out into many Particulars) and clandestine Meetings.

This is a short State of the Laws, which had the Penalty of Forfeiture during the Republic. *Augustus* introduced little or no Alteration. In the single Case of *Cassius Severus*, being much galled by the Licentiousness of his Writings and Conversation, he caused the Matter of Libels to be treated capitally as an Affair of Majesty. For the rest, the Mildness of his Nature inclined him, and the Liberty of *Rome*, so lately lost, made it his Interest, not to deviate in Matters of this high Importance from the Constitution of his Country. At the same time, he saw his own Security, and the Tranquillity of the State, depended on the exactest Support of them. *Tacitus* *, in describing the Progress of the Laws of Majesty, and their undue Extension in the Reign of *Tiberius*, expresses himself in this Manner: "Nomen apud veteres idem, sed alia in judicium veniebant, si quis proditio exercitum, aut plebem seditionibus, denique malè gestà Rep. majestatem Populi Romani minuisset. Facita arguebantur, dicta impune erant." The great Point, on which he insists, is, the Difference between the Crimes, of which Men were accused under the Commonwealth, and the Tyrants, who oppressed it. An unguarded Saying was Treason against Emperors; but in the free State a Man could only be accused of Actions, which had a direct Ten-

dency to overturn Government. And it is to
be observed of this Historian, who writes in
the Spirit of Liberty, and censures with great
Strength and Weight, that he never excepts to
the Punishment of Forfeiture, as either a new
Institution of those Times, or unjust and impo-
litic in its own Nature. The succeeding Princes
framed several Laws, which carried these
Offences to an Height of unjustifiable Severity.
Arcadius and Honorius enacted one, which has
been branded by the Civilians, as eminent above
all for its Cruelty: The most remarkable Terms
of it were, "That the Intention of conspiring
should be punished without any Overt-act;
that they who presumed to intercede for
those accused of Treason should be disgraced;
that not only the Estates of the Criminals
should be confiscated, but their Sons ren-
dered incapable of inheriting from the Mo-
ther, or any Relations, or even of taking by
the Will of a Stranger; that they should be
perpetually infamous, and disqualified from
aspiring to Honours and Dignities, or claim-
ing the same Privileges of legal Credit with
other Men in judicial Contests; that, in a
Word, the very holding of their Lives was
to be taken for a Mark of Imperatorial Mer-
cy; and yet, it is said, their Condition shall
be such, as to make Life a Punishment, and
Death a Comfort."

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Some of the later Emperors by Law mitigated these, and even the antient and more just Severities; but we neither find such Severities, nor Mitigations, whilst the Republic existed. This is easy to be accounted for. Different Emperors, according to their Tempers of Mind, or Maxims of Administration, might hope to render the arbitrary Power, by which they governed, secure or agreeable, by influencing the Fears, or engaging the Affections, of their People; by setting forth Terrors to Resistance, or Pretences of Lenity to Submission. But the great Men of the Republic, considering the Exigencies of Government, and knowing, that the Freedom and Excellence of their Constitution deserved all Reverence from those, who lived under it, and inviolable Protection from those, who regulated or administered it, disdained to act otherwise than upon one Model, according to the Rules of Justice, and true Prudence; not the Dictates of Cruelty, or false Clemency.

We have seen, that the Forfeiture of Estates for a Man's Heirs, as well as himself, is not inconsistent with Justice. Strong presumptive Arguments have been drawn from the Condition of human Nature, the Law of the Jews, Athenians, and Romans, to shew it agreeable to Policy; which will receive great Strength from a View of the Feudal Law, especially when deduced from its Source, and applied to the English Constitution.

The Policy of Feuds was founded on Principles, which ought to prevail in the Foundation
tion of all Policies, mutual Defence and Freedom. It was contrived by those, who sprung from that great Seminary of Nations, the North, as an Association to preserve and enjoy Conquests. The General or Prince, claiming to himself the Sovereign Property, parcelled out the Lands to his Commanders, who again made smaller Divisions to others, under a Condition of stipulated military Services, and of express Fealty, to be true to the Lord; but that lower Fealty to be governed by their Regard to a more comprehensive, which centred in the Prince, and in a Support of the great Ends of the Constitution. The Potentates of the more Western Parts, disturbed by the Success of so formidable a Confederacy, resolved to turn this Policy against the Inventors, and to dispose of themselves and their Country in the same manner. In Matters of mutual Importance, Aid was to be mutual; and, in consequence of the Fealty, which injoined it, the Feud or Parcel of Land, enjoyed by the Stipendiary, was taken to be a Security for the exact Performance of his Engagements. Now it followed from the Military Relation thus begun, that the Lord must have great Interest in the Vassal’s Qualifications. Hence the Feud could not be aliened either in Whole, or in Part, without his Consent: It might not be sold, exchanged, mortgaged, incumbered, or devised. On the other hand, the Lord could not dispose of the Seigniory without the Vassal’s Consent; for it is certain, that he would, in his Turn, be much concerned in the Wisdom
Wisdom and Temper of his Master. In both Cases, the Freedom and Necessity of this Policy required a most faithful Observance of the several Parts of this Relation. If the Vassal failed in his Services, or in performing his Fealty, or endeavoured to disunite the Bands of Duty and Connection, by wasting or transferring the Feud, or, in general, did any thing to injure his Honour, Person, or Estate, it was forfeited and resumable. If the Lord proved guilty of Injustice or Oppression, his Seigniory was forfeited by the same Law, and the Tenant was to transfer his Fealty to the Lord next above him, or to the Prince, as the supreme Guardian. These Obligations were expected from all, who had any Part assigned them, tho' but by the Tenure of the Plough or Husbandry, in promoting the common Welfare.

Such are the Principles and the Engagements of this Policy, which not only run thro' all that intricate Variety of Feuds in Countries, where it was preserved purest, but even where it received a large Tincture from the particular Customs of Nations, which adopted it. It is not material to inquire, whether the Policy was received in England before or after the Conquest. The Disputes between the Learned are endless. Something of the same Kind is admitted to have been maintained amongst us very early, even by the warmest Advocates for the Norman Original of it in England. Sir H. Spelman *, in his Treatise of Tenures,

* C. 21 — 23.
allows, that an Oath was taken, not of Fealty indeed, but to defend the Lord of the Territory, and for Lands, as it were, held in Socage, but not by Knights Service. It is true likewise, that there was no Feudal Escheat; yet a memorable Law of Canute expresses a Punishment resembling it: "Qui fugiet a domino suo vel socio pro timiditate in expeditione navali vel terrestri, perdat omne quod fium est, & suam ipsius vitam; & manus mittat dominus ad terram, quam ei dederat; & si terram hereditarium habeat, ipsa in manum regis transeat." Here the hereditary Lands are given to the King as a Regal Escheat; for, according to Sir H. Sp. the Saxon Bocland being held of nobody, and hereditary, could not escheat to any Lord; tho' a temporary Estate, in which the Lord had the Inheritance by Reversion, might. This Punishment must therefore, clear of Feudal Notions, be justified upon the Principles, and for the Security of Government. But, taking it, that the Feudal Law (from whence some Kinds, and many Circumstances, of Forfeiture are unquestionably derived) was received in England after that Period commonly called the Conquest; it was not imposed, but came in by free and national Consent, at a Parliamentary Meeting, in the Eighteenth Year of the Reign of William the First; the Law enacting it is observed, by a learned and judicious Writer*, to be penned, as if the King were merely

* Wright of Ten. p. 56.
passive, the more clearly to express the Consent of the Commune Concilium to so considerable an Alteration; for the rest are worded in another Manner, and seem to mention the Commune Concilium, only in reference to that Law. But, by several of these, the King engages, in favour of the Tenants, to make no unjust Talties or Exactions, and to demand no other than such Services, as are purely feudal, and for the Benefit of the Kingdom. Thus the Policy of Tenures, as adopted in England, has nothing precarious or illiberal. Even the Villeins, who were Bondmen to the Saxons, by being admitted to Homage and Fealty, received Infranchisement, obtained Freedom of their Persons, and an Use of occupying their Lands; and by successive Statutes, were advanced to some Account in the State.

The Escheats of Hereditary Lands for Petty-Treason, and Felony, arose from the Feudal Law; so that where Tenants held immediately of the King, any Devolutions for these Crimes were properly Escheats; but, upon Commission of High-Treason, the Lands and Tenements, which came to him, were not Escheats, but Forfeitures given to him by the Common Law, derived from the Saxon Times, not depending upon Feuds. These, of whatever kind, fell into his Hands, without any regard to the Seigniory of his Lords. The original Feudal Law * supposes no Escheat or Forfeiture, but to the immediate Lord, even in Crimes, which

* P. 117.

concern
concern the Prince or Proprietary. The Reason of the Law of England seems to be, that Lords, being, in many respects, answerable for the Tenants Misbehaviour, were considered, as having failed in their Duty to the State, by making Choice of an ill inclined Feudatory; and were induced, by this Penalty, to observe a more than ordinary Care, in the Election of Persons to so great a Trust. The same Reason had Weight in Cases of Felony, where the Land should return to the Lord, and he might remit the Crime or Escheat; yet because a Neglect is supposed, on his Part, in the Appointment of a Tenant, the Land, and a Power to waste it, shall belong to the King a Year and a Day, in Prejudice of the Lord. Among the Saxons, there was no Escheat of inheritable Land in Felony, and Sir H. Spelman* thinks the Kentish Gavelkind Maxim, of the Father to the Bough, and the Son to the Plough, was universal. But in Matters of Treason, which strike at the Foundations of Policy and Government, even Gavelkind Lands are forfeitable, and always were; which is derived from those antient Lawgivers, as well as the Privilege in Felony.

It has been shewn, from the Nature of the Feudal Policy, that the great Principle of the Law of England, that all Lands bear a Reference to the King, as having the Supremum Dominium, is founded on the greatest Wisdom, and a true Regard to the common Safety. On this Account it is said, that Fealty could not be dispensed with; and tho' sworn only to the Lord, yet its Virtue and Effects operated, to the Benefit of the

* C. 23.
Whole. Hence the Observance of it was a main Article of Inquiry in the Lord's Court. For the same Reason, it is laid down, that the direct Dominion cannot be alienated from the politic Capacity of the King; that Fee has its Name from Fealty; that no Covenant can be made against performing it; that tho' the Oath be spared, yet it must tacitly go along with it; that the Failure in this is the Loss of it. It has been suggested too, that a Government thus depending on Fealty, and the Neglect of it attended with such a Punishment, was the earliest Constitution of England; and the good Effects arising from it might induce our Ancestors, with more Readiness, to embrace a Policy, which promised to convey the same happy Effects with greater Certainty, as it seemed to have this Advantage over the antient Form, that it cemented all Orders of Men more closely, and enforced their Connection more minutely; they were however not aware, that it would soon be made a Pretence for the Introduction of those burdensome Services, which occasioned all the Uneasinesses of succeeding Reigns. Sir H. Spelman *, in one place, expressly says, it is not his Opinion, that the Conqueror introduced Feuds or military Services in a general or less strict Sense, but the Law of Tenures in its full Extent; and those Services, which were the Grievances. The Nation soon felt the Weight, and threw it off in the Reign of his Son Henry the First, who, in his Charter, abolishing Wardship, Marriage, Relief, and other Fruits of Tenure, reduced the Policy to its pure State, and

* Tr. of Ten. c. 28.
original Intention. They revived again by Degrees, and were, at different Times, limited and restrained by our Kings, being in themselves not at all essential to this Form of Government, but destructive of it, in breaking the Spirits of the People by Oppression, and giving it the Air of Slavery, when it was founded on Principles of Liberty. The Stat. 12 Car. II. c. 24. has since abolished even the military Services; and the Feud or Fee is much varied from its first Institution in the Course of Time and Law. It may then be objected, That the Principle of the Law of England, which supposes all Lands derived mediately or immediately from the Crown, is no more than a Fiction; and the military Services being abolished, and the Crown-Lands dispersed amongst the People, the Reason of it ceases.

1. As to its being a Fiction, it is very true, the Right of the People of England to their Property does not depend upon, nor was in Fact derived from, any Royal Grant. The Reception of the Feudal Policy, in this Nation, exactly answers the Definition of a * Fiction; which is some Supposition in Law, for a good Reason, against the real Truth of a Fact, in a Matter possible to have been actually performed, according to that Supposition. This being admitted, what follows? It will be urged, "That Fictions of Law are to convey Benefit, not Injury, to the Party using or adopting them; and that this is a preposterous


Fiction,
"Fiction, which tends to the Ruin of Families, by putting their Estates, for the Fault of one Ancestor, into the Power of the Crown." It has been shewn, that the Forfeiture of Lands for Treason was known in England before the Introduction of this Policy (whatever might be the Case in respect of other Crimes); and even after was never modelled upon the Rules of it. But, not to decline arguing the Matter upon strict Feudal Notions, it will be necessary to try this Fiction by Maxims, which are in Law the Boundary of Fictions. Does it prejudice the Right of Strangers? That cannot be said. Such Right is saved, both by the Intention of the Common Law, and the express Words of Statutes. And, as to the Interest of the Heir, it is derived from that of the Ancestor, and intimately connected with it. Is this Fiction strained to a Purpose, which does not naturally flow from it? Neither can that be said. For it is the very Point and Consequence of the Principle, that, when the Tenant hath broke through his Engagements, the Land should return to him, of whom it is originally holden. In every Law, which has the public Advantage for its Object, it may happen, that private Interests shall interfere and suffer. Yet, if it be a Suffering, because of a just and necessary Sanction, it must not be considered as an Injury; the End of that Sanction being to heal the Pravity, and deter from the Imitation, of bad Conduct. And thus the Feudal Policy, a Fiction, bringing Forfeiture along with it, may be considered as conveying Benefit to the Nation, and those who adopted it.

2. It
2. It is a Maxim in Law, That Fictions are not to be maintained beyond the Reason, which gave Rise to them. And it may be said, "That the Abolition of Tenures by Knights Service, and the Fruits of them, has destroyed the Reason of this Principle." But has not the Stat. 12 Car. II. declared all the Ground of England to be held in Common Socage? And is not Fealty due for Socage-Lands? And is it not agreeable to the Ends and Welfare of Government, that it should be due? What were the Aids, formerly granted and assessed in Parliament, for the Support of the King's Wars? Or, What is the Land-Tax, now annually raised for the Current Service, but of Feudal Original? A Kind of general Escuage or Commutation for Service, according to the Provisions of Magna Charta? Is then the Policy, or the Reason of it, ceased? What is this but a Regard to the Defence, Security, and Honour, of the Realm? It was thought in the Feudal Law, that a Man, who had once violated the sacred Relation he engaged in for the public Benefit, ought to be excluded from it. Does the Reason subsist no longer? The Strength of the Kingdom is in the Landed Interest. Every Man, who shares in it, has Influence over his Tenants and Followers, and, in a greater or a less Proportion, may prove an useful Friend, or a dangerous Enemy. If he has malignant Dispositions to the Laws and Government working in his own Mind, it is probable they will not stop there, but he will communicate
municate and infuse the Poison into others, till his Schemes are mature for Action, and break forth to the Terror, if not to the Ruin, of his Country.

These are the Principles of the Feudal Policy, as far as it may be necessary for us to consider them with a View to the present Question. They are Principles of Freedom, of Justice, and Safety: the English Constitution is formed upon them. Their Reason will subsist, as long as the Frame of it shall stand; and, being maintained in Purity and Vigour, will preserve it from the usual Mortality of Governments.

Let not then the Materials of this noble Fabric, designed by the Wisdom, and erected, at infinite Hazard, by the Bravery, of our Ancestors, become the Object of Aversion and Hatred, or be held in Dishonour and Contempt. Formerly, the Evidences of our Constitution were perverted to support the Maxims of Slavery; they were abused to varnish over the Purposes of Licentiousness. Happy it is for us, that we live, when the Maxims of the one are exposed, the Purposes of the other disclaimed. And, whilst those Evidences are not destroyed, Conclusions, justly deduced from them, will prevail to latest Times, against the Artifice of false Reasoning, the Efforts of vain Ambition, and the Corruptions of a careless Posterity.

This Policy has been received, and subsists, in almost all Countries of Europe, tho’ differently
ently modelled and disguised; in some so de-
formed, as to be abused to Purposes of the
hardest Oppression. The Constitution of Ger-
many is free. What is the Ban of the Empire,
but a Process of Forfeiture, issued by the Em-
peror against Princes, who, breaking the fun-
damental Laws, are deprived by the Judgment
of the States, both they and their Posterity?
Matthew, Servant to Henry IV. of France, and
the Historian of his Death, says, that he once
asked an Avoyer, or supreme Magistrate in
Switzerland, how the Crime of Treason came
to be so rare amongst them; "Because, an-
swered the other, we punish Traitors with the
utmost Rigour, and exterminate their Fami-
lies." In Holland Confiscations are, in Judg-
ment of Law, for certain Offences. An excellent
Writer has been guilty of a Mistake, who says *
they are redeemable for an Hundred Guilders.
The contrary is well known; and it would be
to turn legal Punishments of High Crimes into
a jest, were a Redemption of that Kind allow-
ed. This is not only the Case in the separate
Administration of many of the Provinces; but
we are told, by one of the best Writers † on
the Constitution of the Low Countries, That
the Council of State condemns any Officer, who
abuses a public Trust in the Finances, the Ar-
mies, the Negotiations, or Justice of the Re-
public, to the heaviest Penalties, by Fine, suited
to the Crime, the Exigency, and Example.
And it is much the same Thing to the Chil-

* Burnet's Hist. of his Times, 2d Vol. p. 522.
Children of a Criminal, whether the Fortune of the Family is taken from them by Judgment of entire Forfeiture, or by a discretionary Sentence condemning to a severe Fine, which may equal or exceed the Value of it. This Difference between them is observable, that in Crimes, where the Forfeiture is to be limited by the varying Discretion of the Judges, a Man may flatter himself, before he contracts the Guilt, with some specious and tempting Arguments (which we are dextrous enough to invent, when we wish to impose upon ourselves), that the Consequences of this Kind may be less severe than the Event proves them. But in Crimes, to which it is annexed as an established Punishment, there is no room for such Arguments; and he may read the certain Consequences in that Law, which, as it is the inflexible Judge, so it ought to be the invariable Measure, of his Actions.

Thus we may reason from the Practice of free States. Yet one might frame a plausible Objection here: "To what End serves a mixed Government, if such Severities are expedient to support it? In popular Governments, they may be expedient to deter private Men from conspiring to set up Tyranny; in Kingdoms, a Democracy. Schemes of Civil Policy, which are founded on Extremes, must be maintained by them." This is so far from being rightly argued, that a mixed Government unites and confirms the Reasons under both. Where Things are exactly balanced, the stronger Defence is necessary to protect the several Estates, that
that no one may break in upon the Privileges allowed to any other. And, as the Law of England is framed with such singular Felicity; the two Defects common to Republics, a Want of Power to pardon, or, at least, the Difficulty of procuring Pardon, are supplied, which guards against a rigorous Severity; and the Oppression in State Crimes, common to Monarchies, is prevented by the well-tempered Course of Proceeding, which guards against a dangerous Injustice. Of these Particulars something shall be said hereafter.

It will be proper to examine, in this Place, what Estates, and what Rights of Property, were forfeitable by the Feudal Law; and, in comparing the Notions of the Law of England with it, this Matter will receive the clearest Illustration.

1. All Goods and personal Things, as Money, &c. being a Man's own; and applicable to any Purposes he pleases, have been esteemed a proper Subject of Forfeiture. They were taken to be the Produce of the Feud, belonging to it; and were forfeitable, either in Whole or in Part, for Offences of inferior Moment.

2. Feuds, or Estates in Land, whether for Years, for Life, or descendible. 1. In Crimes, that concerned the Lord or Feud, whether the Feud was novum vel antiquum *, that is, first granted to the Offender, or derived from an Ancestor, it was open to the Lord. 2. In Crimes, that concerned others, if the Feud were an-

tient, it went to the next Branch of the Family; if new, it was open to the Lord, because Feuds, in the first Instance, unless it were expressly provided otherwise, could only descend without inclining to a Collateral. In both Cases, the immediate Heirs of the Criminal were excluded. In this last Species of Crimes, the antient Feud went to the next of Kin, tho' the Consent of the Lord, as well as his, was necessary to the ordinary Surrender or Alienation of it. In the former, it returned to the Lord, tho' the Consent of the next of Kin, as well as of the Lord, was necessary to the same Ends; so that the Power of conveying an antient Feud from a Man's Heirs, except by Crime, was not absolute in him, without the Consent of both these. And yet, in one Kind of Offences, there is a Devolution to the Collateral, without the Intervention of the Lord; and in the other Kind, there is a Devolution to the Lord, without the Intervention of the Collateral. This Corruption of Blood, by which a Man cannot have an Heir, introduced a very important Consequence into Feudal Descents, That where-ever it became necessary for one, who would make Title to another, to derive the Estate through an attainted Person, except where the Person claiming was particularly described in the Investiture, the Attainder was a Bar to his Title; as in the Case of a Grandchild, claiming an Estate, in Fee, from the Grandfather, the Son having committed Treason, and dying, in the Life of the
the Grandfather. Some Feudists have not been willing to allow this Case, on account of its Hardship: And Craig*, a very able and elegant Writer on the Law of Feuds, is displeased with the Judgment in Scotland, which determined the Question in that Country. He intimates, that this may seem strange, the Son having never been in Possession, nor being capable of it. And it must be admitted, there is a seeming Hardship: Yet because of the Rule of Evidence in Descents, by which the Son must necessarily be named in conveying the Descent, the Grandchild is excluded. The same Reason governs the Case of an Estate descending from the Uncle to the Nephew. But he goes further, and says, That, allowing this must be so upon legal Notions, yet, at least, the Estate might have descended to the next of Kin, instead of escheating to the Crown (of whom it seems, in the Case he states, to have been immediately held), since it would not be necessary to convey thro' the Criminal, or his Heirs, who are to be considered no more, than if they had never existed.

If this Reasoning be thought material, it may be said in Answer, 1. By way of general Foundation, that it is a Principle in all States, where a Man is neither a Subject by Birth or express Compact, or has voluntarily renounced the mutual Obligations, to consider him as not within their Obedience, or even Notice. But where he has forfeited his Civil Rights by Crime, he is regarded as still subject to their Power; and, in every respect, within the strict Consideration of the Law. 2. That the antient Common Law of England clearly proceeds upon this Principle. Where a Man was not

* De Jur. F. l. 3. Tit. 6. § 11; G 2 capable
capable of Civil Rights by Nature; as an Alien born, being unknown to the Law, he was excluded from inheriting; and the next of Kin within the Allegiance, who did not claim under him, was admitted; or, where he had incurred Civil Disabilities by his own voluntary Act not criminal, as one who entered into Religion, or abjured the Realm, he was taken to have undergone a Civil Death, and the next in Course of Descent entered. But where he is attainted of Treason or Felony, the Law will not pass him over, and marks him out in rei exemplum & infamiam. For this Reason it is, that tho' he was never in Possession, nor those who claim under him more capable of inheriting than he, by reason of the consequential Disability, yet the Estate will be interrupted in its Course to the Collateral, and escheat. For it is determined in all the Law-Books, and allowed by the learned Writer himself, that if the Father of Two Sons, of which the eldest is attainted, die seised of an Estate of Inheritance, and both survive him, the younger Brother will not be Heir to the Father, because the eldest cannot be passed over. This Case would be the same, supposing the attainted Brother dead at the Time of the Father’s Decease, if he left Children, since their Right of Representation, which must correspond to the Circumstances of him who is represented, would operate so far as to impede the Descent. 3. One may venture to say, it is more probably beneficial to the immediate Heirs, on whom the Hardship is thought principally to lie, that the Estate should fall into the King’s Hands, than to the collateral Branch; because, in that Course, there can be little Hope of Restitution, and it might expose King
Families to endless Jealousy and Disunion. The King receives more Advantage from Acts of Mercy, than the Coming in of Forfeitures: and it is most agreeable to Reason and Policy, that the Disposition of them should belong to him, who is in Law considered as the Fountain of Justice, and Guardian of the public Safety. This Consideration might be one Inducement, amongst others, to that Petition of the Commons, 21 Edw. III *, in which they pray the King, not to alienate his Franchises. At Common Law, many Lords had, by Special Grant, or in Right of their Counties Palatine, Royal Escheats of the Lands, held within their Franchises, of Persons attainted against the King. Hence it became their Interest, from a Desire of enlarging their Possessions, to pursue Offenders with an unbecoming Violence, and the Lenity of the Crown was precluded by their private Right.

3. Titles, Dignities, and Honours, were forfeited, as following the Reason of Lands, being originally derived out of them, or annexed to them by Tenure.

4. The Loss of Dower, by the same Law, arises from every Circumstance, which destroys the Right of the Heir, except it be any Act done by the Heir himself. A Woman was to be endued of the Lands, whereof the Husband stood seised at his Death. She had an Eviction, in case of any Alienation made, not effected by Livery and Seisin; but when the Crime of the Husband, or Lord, occasioned Forfeiture, the one taking place before the Death of the Husband, to destroy his Seisin; the other, perhaps, after his Death, and before Assignment of Dower made to her; the Right of the Heir being, in either Case, destroyed, her own, tho' generally favoured most highly, subsisted no longer.

* Cott. Rec. p. 58.
The Law of England, which is compounded out of many Systems of Law and Custom, agrees, in some respects, with the Law of Feuds; in others, has a manifest Advantage over it.

All Forfeitures for High-Treason belong to the King: and by the Use made of this Prerogative, it should seem, that he is intrusted with it for the Purpose of Restitution to the Traitor's Family (as it may appear right from Circumstances), to reward the Merit of those, who have been faithful to himself and the Commonwealth, or to be applied to public Services, as either his own Wisdom shall direct, or the Parliament advise.

1. As to the Forfeiture of Goods, and Things personal, which the Party has or is intitled to in his own Right, these, being entirely in a Man's own Power, or descending to Executors, and not his Heirs, very properly follow the Conviction. Before Sentence, he may apply them to the Payment of Debts, to the Subsistence of himself and Family, and is prevented only from a fraudulent Sale to disappint the Forfeiture.

2. As to the Forfeiture of Lands *, by the Common Law, all Lands of Inheritance, which the Offender held in his own Right, and all Rights of Entry to Lands, in the Hands of a Wrong-doer, came to the King, by Attainder of High-Treason. The Inheritance of Things not holden as Rents-charge, &c. is also forfeited; for, in this Crime, the Tenure is not material. But if a Person committing it hath, at the Time of the Trea-son committed, only a bare Right of Action to Lands, or a Right to reverse a Judgment

* Hale's H. P. C. 23.
against him by Writ of Error; this Right, neither at Common Law, nor by the Statute 33 H. VIII. is given to the King; because of the Danger in unsettling Possessions, and the Possibility of Prejudice to Strangers. In like manner, no Right of Entry to Lands, of which there is a Tenant by Feoffment, or other Title, no Use (except only Lands conveyed fraudulently to avoid the Forfeiture) nor Condition of Re-entry, were liable to be forfeited previously to that Statute; neither could Lands in Tail, after the Statute Westm. 2. de Donis, except for the Life of Tenant in Tail, till 26 H. VIII.

Before the Statute de Donis, Estates Tail, being only Fee-simples conditional, were exposed to Forfeiture like Estates absolute. By the Words of it, quod voluntas donatoris, &c. a Perpetuity was made, and the Donee restrained to alienation or forfeit. In a short time it appeared, how much these Perpetuities were against the Reason of the Common Law, and the true Policy of the Kingdom. But the great Men not being easily induced to make an Alteration in Parliament, the Judges found a Way of cutting off an Entail by a Common Recovery, which was a Case held to be out of that Law. Another Wound given to these Perpetuities, was, by the Statute 4 H. VII. which made a Fine with Proclamations to be a Bar to the Issue in Tail, and so repealed that Clause of the Statute de Don. quod finis ipsos jure fit nullus. When it was in the Power of Tenant in Tail
Tail to alien, there could be no Reason, why his Estate, over which he was become Master, should not be forfeitable; for it was under the Notion of his being without Power to alien, that Estates Tail were, at first, privileged: but the frequent Attainders, during the Disputes between the Houses of York and Lancaster, made Parliaments cautious of letting in new Forfeitures. However, after the complete Union of the Houses in Henry VIII. by Construction of the Statute 26 H. VIII. c. 13. Estates Tail were made liable in Cases of Treason, where the Party was attainted by Confession, Verdict, or Outlawry *; and by the Statute 33 H. VIII. upon any manner of Attainder.

There is no Occasion to state all the Cases, either letting in Forfeitures, or limiting them under the extensive Words of the Statutes of H. VIII. It suffices, that the Principle, on which they stand, is uniform, and agreeable to Justice; viz. that the Offender’s Rights and Interests shall be forfeited, to the Prejudice of himself and his Heirs, to whom the Common Law intends no Favour, and whom the Statute expressly excludes from any Benefit of the Saving Clause; but that the greatest Tenderness should be used in preserving the Rights of Creditors and Strangers. Indeed, in respect of Lands, Forfeiture has a Relation to the Time of committing the Offence, so as to avoid all subsequent Charges and Alienations; which may be

* 3 Co. Dower’s Case.
the Cause of Hardship to Persons, who have been unwarily engaged with the Offender; but, in Laws of public Justice, it is impossible to provide for every Case of private Compassion: and the Cruelty and Reproach must lie on the Part, not of the Law, but of the Criminal; who, conscious, that his Offence might soon be laid open, had the Inhumanity to involve others in the Consequences of that Iniquity, which proves fatal to himself.

There remains a material Difference to be noted, between the Case of a Fee-tail and a Fee-simple; which is, that, notwithstanding the Forfeiture of Lands entailed by an Attainer, yet the Blood is not corrupted, as to the Issue in Tail. Therefore, if the Son of the Donee in Tail be attainted of Treason, during the Life of the Father, and die, having Issue, and then the Father dies, the Estate shall descend to the Grandchild, notwithstanding the Attainer: but it is otherwise in the Case of a Fee-simple, as has been shewn in speaking of the Fenthal Law. The Reason is obvious; because the Forfeiture of Estates Tail came in by Statutes, which do not extend to bring consequential Disabilities on the Heir, in relation to those Estates, where they have not been in the Offender's Possession; and that of Fee-simples is at Common Law, which corrupts the Blood in Cases of Treason; so that no Person, who must make his Derivation of Descent to or thro' the Party Attaint, can inherit. But, where-ever he need not be mentioned in the Conveyance of De-

* 3 Co. Dowtie's Case.
scent, as between Two * Sons of an attainted Father, nothing hinders one Brother from inheriting to the other; since, agreeably to the Rule of Law, the Descent is immediate: he can make himself Heir to the Person last seised, without the Mention of the Father.

All this is clear: yet it may be said, "that the old Law, as to impeding Descents, has been altered in a Case somewhat resembling it, in the Case of Aliens. Antiently the Estate should sooner escheat, than an Alien might make Title to it himself, or convey one to another. But the Statute 11 and 12 W. and M. C. 6. clears the Interruption of Descent in favour of natural-born Subjects." This stands upon a single Reason. Lands descending to an Alien might not be taken by him, because the King could not oblige his Person and Services. And it seemed hard, that Subjects, within the Allegiance, who claimed under him, should be disabled from conveying Descent by the Operation of a Reason, of which the very Reverse was true, as to themselves. But who are the Aliens enabled for this Purpose? Aliens (as the Law says) by the Act of God, the Fortune of Climate, the Decree of Nature. And in favour of whom are they enabled? Of such, as are not at all affected by the Reason, which excludes Aliens. But were the same Ability given to attainted Persons, it would be to admit those to a legal Right, who, tho' bound to the Community by Nature, moral Duty, and Experience, have disclaimed the Law, and are disclaimed by it, and by

* 1 Ventr. 413.
their own voluntary Act have shewn themselves Aliens in Affection. It would likewise be in favour of Heirs, whose Interest, in this Case, is not separated from that of the Ancestor, both upon the general Notion, that the latter can bind the Right of the former, at his Pleasure, in many Instances, and upon the particular Arguments unavoidably affecting both, which have been drawn from Justice, and the public Good.

To shew how expedient these Punishments are thought, and how much the Law considers them as essential to its own Preservation, it may not be improper to observe, that a Corruption of Blood, by Attainder, is a Thing of so high a Kind, as that the King's Pardon can only restore, as to Issues born after; but an Act of Parliament is necessary for the Restitution of Blood, in its full Nature and Extent. That Corruption, however, goes only to Estates descending. So it was in the Feudal Law. Nothing the Heir takes, by Purchase, is affected. He is capable by Devise, or under Settlements. But here the Law of England is more consistent with itself; because, by it, all forfeitable Lands are alienable in other Ways, than by Forfeiture: whereas, in the feudal Policy, they were forfeited, tho' not alienable or chargeable, in any Way by the sole Will and Power of the Tenant.

3. Titles of Honour and Dignities, by Tenure, were always forfeitable in the Law of England, as following the feudal Reason of Lands.
Lands. And those, which are by Writ and Patent, whether to the Heirs General, or in Tail Male, are forfeited by the Corruption of Blood, which impedes the Descent, and renders a Family ignoble. The Right of Peerage is a special Trust reposed by the Crown for the Support of Government; and even before the 26th H. VIII. (within which, an Honour granted to a Man, and the Heirs Males of his Body, has been resolved by all the Judges to be forfeitable), it was not protected by the Statute de Donis, like Lands entailed, because of the Condition tacitly annexed to the State of Dignity; in the same manner, as if Tenant in Tail of an Office of Trust misuse or use it not, it is liable to Forfeiture by Force of the Condition; as has been laid down in several Books*. Besides, it seems politically fit, that the Estate being gone, the Honours should be taken away, because Wealth is necessary to support their Dignity, and without it they are an Incumbrance and a Prejudice.

4. As to the Loss of Dower, it is to be justified in our Law, on the general Principle, that Society may bestow Rights on what Limitations it thinks fit, for its own Safety, and on the Strength of the Conjugal Ties to deter Men from Treason. In the Feudal Law, it is supported, not only by these Principles, but by artificial Reasoning; because the Loss of Dower arises from every Circumstance, which destroys the Right of the Heir. But by our Law,

* Nevil's Case, 7 Co.
Power is substantially affected, after the Title to it accrues, by no Act of the Husband, except the Crimes of Treason.

These are the Severities, by which the English Constitution binds the Observance of itself upon the Fears of Men, when better Principles have lost their Effect upon the Conscience. They are established to bear some Proportion to the Greatness of the Crime, that he may thus suffer, as Lord Coke says *, "who intended to tear and destroy the Majesty of Government." It remains to produce some Arguments, to shew, why the Law should continue the same in respect of Treason, as it is; what Security it gives, beyond all other Laws, against the ill Use; and what large Abatements it affords of these Severities.

An Objection may probably be made, that, to one of a plain Understanding, the Cases, which have been mentioned of impeding Descents by Corruption of Blood, carry with them a Severity to be justified upon no sound Principles, and are governed by artificial Construction.

To this there are Two Answers: 1. From a general Principle already laid down in this Essay, that the Laws of Descent, as positive Institutions of Society, may be regulated on such Conditions, as seem best to itself; and being previously marked out, and uniformly interpreted, no Man has real Cause to complain.

2. In all Laws, there are Cases, which depend upon artificial Reasoning. If the general

* 3 Inst. p. 211.

Ground-
Ground-work be just and solid, tho' some hard cases are taken in, or governed by that Reasoning, they are often not to be remedied or avoided, without Danger. The fundamental Rule of Evidence in Descents, that whoever would make Title to an Estate, must prove himself Heir to the Person last seised, is held sacred. The Principle, that no one, who has committed Treason, can have an Ancestor or an Heir, is equally wise, and reconcilable with Justice. When these Maxims concur in any Case, they form what is, in legal Phrase, an Impediment from Corruption of Blood. And they are antient and extensive Maxims. The best Lawyers of all Ages have been so sensible of the inviolable Regard due to legal Principles, that they have thought it more suited to the Genius of Laws to relieve by Fiction, than to depart from Principles. The Jus Postliminis of the Roman Lawyers, which reconciled the known Rule, that no Slave was capable of making a Will, with the Case of a Citizen taken in War, supposing him, if he returned home, always to have remained free, or, if he died in the Enemy's Hands, to have died before he became captive; is a celebrated Instance of this. The transitory Actions of the Law of England furnish another Instance of it. It is an excellent Constitution, that all Issues shall be tried in the County, where the Cause of Action arises, for the sake of bringing Justice home to the Parties, and for the Attendance of Jurymen and Witnesses: yet, because that may often be
inconvenient, the Plaintiff is admitted in many Cases, to lay and try his Action in what Place or County he pleases. Now, the End and Extent of these Fictions is observable. They both except particular Cases out of general Principles, the one for the Advantage of those, who have fought gallantly in Defence of their Country; the other, for the Furtherance of Justice; yet with Safety to those Principles. But no Fiction could be invented in this Case, without a Subversion of Principles, and that not in favour of one, who has defended his Country, but to preserve and transmit the Inheritance of him, who would have betrayed or destroyed it. Thus one may argue, without resorting to the Maxim, that the King's Right shall not be barred by any Fiction; the Mention of which, on this Occasion, would carry less of Reason than Authority. Indeed, the Legislative Power may, by positive Statutes, alter the Common Law, and limit the Operation of its Principles: and the Proviso, in the 7th Ann. c. 21. by which the Offender can forfeit a Real Estate only for his own Life, was designed to make that Alteration. But, whenever it takes place, let what will follow be observed:

1. It is considerable, that since the Forfeiture of Real Estates has a Relation to the Time of committing the Offence, a Man having lost all Power over them from the Moment of his Guilt, that Act will give Treason the Effect of a Settlement. The Ancestor's Iniquity will convey a Benefit to the Heir; which is an Ab-
Furtherry allowed in the Law of no Country, and subverts the Order of Nature.

2. It is defective, and inconsistent with itself. For the Forfeiture of Personal Estates will stand intire. So that if a rich Trader of London, who has no Estate in Land, commits Treason, the Custom of the City, which makes a Disposition of his Fortune for the sake of his Heirs, is defeated: Which cannot be justified on any Principles, that do not equally go to take away Real Estates for the like Crimes.

3. It will bring strange Inconsistencies into the Law, whose Severities are, at present, applied in proportion to the heinous Nature and Effect of Crimes. Treasons of the highest Kind occasion Forfeitures in the Manner which has been stated: Inferior Treasons, as those relating to the Coin, do not extend to Corruption of Blood, and Loss of Dower. Petty Treason extends to all, except the Loss of entailed Estates. The higher Felonies to all, except Loss of Estates Tail, and Dower. Some Felonies are allowed the Benefit of Clergy, which saves Life, and the Inheritance of Lands, tho' not the immediate Profits; and discharges under certain Terms. Sometimes, where Clergy is not allowed, there is a Saving against Corruption of Blood, Loss of Dower, and Disheirship of the Heir. And some are followed by no Forfeiture, even of Goods or Chattels. Shall then severer Penalties be inflicted on him, who has deprived the meanest Subject of his Life, than on him, who has attempted
attempted to throw his Country into Confusion, to stop the Sources of Government, and to render those Rights and that Protection precarious, which alone give a Value to Life itself?

But it will be said, for the sake of maintaining a lost Argument, That it is to be wished all Forfeitures were abrogated. Be it so. And let the rest of Europe imagine to themselves, and be astonished, either that the Virtue of the English Nation is so great, as to make the ordinary Sanctions of legal Authority superfluous; or, that those Iniquities, which weaken Government, and cancel all the Bonds of Nature and Society, are of such extensive Influence, as to prepare an Impunity for themselves to the Completion of our Ruin.

It is impossible to debate this Matter, without entering into the general Arguments in Defence of the antient Constitution; tho' what gave occasion to the Debate, was only a temporary Provision in Support of it. And, as to the Act of the last Session, relating to the Pretender's Sons, which contains that Provision, those, who had the Honour of framing it, proceeded upon the most generous Views; the Safety of this Establishment, and an Abhorrence of every Attempt to overthrow it. To have exempted this Treason from the Policy of Forfeiture, had been doubtless very strange. And it would have seemed equally strange, that in a Bill, which concerns the Sons, the proper Sanction, originally given to it, should last only till the Father's Death, and not till
the Death of those, who stand in his Place, and are particularly interested in the Purpose, and guarded against by the Intention, of it. To this one may add, that neither the Pretender, nor his Family, if, by any calamitous Reverse for this Nation, they succeed in their Designs, will think themselves bound by the Proviso in the Seventh of Queen Anne, nor by any Laws made since the Revolution. Why then should not the same Terrors be set on the Side of the Protestant Succession, as are in the Hands of its Enemies, and which have been the Safeguard of our Kings from the Foundation of the Monarchy?

*Cicero* has Words very applicable to this Purpose: "When, says he, we are intreated to have Mercy on the Posterity of a Traitor, what Security is given, that ourselves shall not undergo the most cruel Punishments, if the Crimes of the Father should prosper?"
The Notions of *Cicero*, occasionally scattered in his Works, are very wise upon this Subject; and the more to be regarded, because he never shewed a Warmth of Spirit in Circumstances, which required Coolness, to perplex the Measures, heighten the Resentments, or inflame the Sedition, of his Times; but reserved it to second the Efforts of his own Prudence, in conducting Affairs of great Difficulty, and last- ing Importance, to his Country. In one of the Orations he intimates, in a few Words, that Laws of Terror, in the *Roman* Commonwealth, had the Appearance of the severest Justice, with the
the Intention and Effects of Mercy; "That the Fear might extend to all, but the Punishment to few." True it is, they contain a Power, to be exerted only in the Dangers of the State; like Goliab's Sword in the Tabernacle, not to be taken down but on Occasions of high Necessity; at other Times it should lie sheathed and untouched in the Statute-Book; as the same great Writer phrases it, in tabulis tanquam in vagina reconditum. If one may judge of the Spirit of the Law of England by the Declarations of its Professors, it ought not to be forgotten, that my Lord Coke delivers no Maxim with greater Pleasure than this of Cicero; and repeats it in several Parts of his Institutes. But the most pregnant Arguments of Lenity are to be found in the Law itself:

1. In the Tenderness shewn to the Posterity of Offenders, in respect of Settlements in Trust to preserve Remainders, and Declarations of Uses on Recoveries. Few Families are without them, especially such as are formed for great Things; and Men, who enter into desperate Engagements, are commonly cautious enough to protect their Estates in that Manner. The Law affords Means of avoiding the hardest and most exceptionable Cases of Forfeiture. Instead of Dower, Jointures are become general, which Forfeiture does not affect. The Grandfather may, by Will, devise his Estate in Fee-

* Ut metus videlicet ad omnes, parva ad paucos perveniret. Orat. pro A. Cluent.

12 simple
simple to his Grandson, and so may the Uncle to his Nephew, affected by the Corruption of the Father's Blood; and they are capable of taking. Nor is it of small Advantage to the Heir, that the Death of the Ancestor, before Conviction, discharges all Proceedings and Forfeitures. He can then be attainted only by Act of Parliament. It has been intimated, that the antient Roman Law was much harder in this Matter.

II. In the exact Justice, which is shewn to the Offender himself. And that in Two Ways:

1. By the Clearness and Certainty of those Laws, which mark out the Crime. An Overtact of some Statute-Treason must be laid in the Indictment, and proved in Evidence by Two Witnesses, whose Competency is laid under many Restrictions for his Benefit. No Man is to be reasoned out of his Life and Fortune by Analogy, enhancing Misdemeanors into Treason; as was antiently the Case even in ordinary Courts of Justice.

2. By the Fairness of the Trial; the Independence of the Judges; the Presentment of one Jury, the Verdict of another; admitting the Prisoner's Witnesses, by Oath, to the same Means of legal Credit with those for the Crown; and the Limitations of Three Years for calling any Man to Account, except in one Case, mentioned in an Act of Parliament. These Things, as they are regulated in our Law, reconcile all the Points of Wisdom and Justice, in not making Guilt less obnoxious, but Innocence more
more safe. A considerable Part of the Security against the Abuse of Forseitures, is owing to that excellent Stat. 7 W. III. c. 3. which has, in several Particulars, improved the Trial of Commoners, and lessened the Power of the Crown in that of the Lords. The Consequence has answered the good Intention of the Framers, that Men might be tried for all which is dear to them, *fine judicum sævitia, aut temporum injamia*, without Cruelty in the Judges, or Dis-honour to the Times. Let the Argument then against this Punishment have been formerly as specious as it might, it can scarce be colourable now. To diminish it, after giving the greatest Latitude of Defence, would furnish a real Encouragement to Treason, by making a greater Provision for the Safety of those, who are accused of it, than of other capital Crimes less pernicious, and disappointing the most weighty Sanctions of that Law, which punishes the Traitor.

III. In the Tenderness shewn to the Offender, by allowing a Resort for Pardon in the Prerogative of the Crown. For, tho' Laws are not to be framed on Principles of Compassion to Guilt, yet Justice, by the Constitution of England, is administered in Mercy. It is the great Duty required from the King by his Coronation-Oath, and that Act of his Government, which is most entirely his own, and personal. According to the Expression of the celebrated Lord Strafford, "The King condemns no " Man: The great Operation of his Sceptre" is
"is Mercy." In most Republics, this Power, if it subsist at all, is so restrained, and difficulty exerted, as to be attended with the worst Defects. In Holland, without a Stadtholder there is no such Power of pardoning, notwithstanding it is essential to Policy; as necessary as Justice itself; and giving it a Perfection and Amiability, which some have thought not originally belonging to its Nature. The Emperor Hadrian understood it so well, that, in Consideration of the particular Circumstances of Albimus's Children, he granted them Portions out of the Confiscation, saying, "That his Authority was better strengthened by gaining the Affections of Men, than by enriching his Coffers." There is no Character more branded in History, than that of an inexorable Prince, who can suffer so divine a Power, intrusted for the Good of his People, to lie dormant. His own Interest is little understood by him; and his Conduct becomes, to the last Degree, absurd, as well as detestable, if he governs a free People; since it is not only to carry Justice, in some Instances, to the Height of Injury; but it is, in respect of himself, to be dangerously just. In England, this Prerogative is generously exercised; nor can it be regarded as a contemptible Abatement of the Severity of Forfeitures, both because the Law, reposining a Confidence in the King, will not suppose him inclined to act wrong in the Things submitted to his Wisdom, and because, ever since the Union of the Two Houses of

York
York and Lancaster, it has been employed to the Peace and Preservation of the Subject, not rigidly with-held to his Destruction. The Clemency of the Crown has appeared not only in Pardons passed under the Great Seal, but in the previous Consent always given to Bills of Restitution, as well as the final Approbation of them. The Records of Parliament, even in the worst Times, are not wanting in Examples of it; in good Times it has shone forth with the brightest Lustré. From some of those Bills we may observe, that, within a few Years after the Ancestor's Attainder, Families have been restored, as if they had merited it by their Modesty and Prudence. Hence they have been enabled to retrieve their lost Honour by memorable Services; and are held obliged to a discretionary Lenity for the Enjoyment of Inheritances, which, descending in the ordinary Course, might have provoked dangerous Emotions of Family Pride, or partial Regard to their Ancestor; would have furnished Gratifications of Rage, or Instruments of Revenge, instead of composing to Peace, or raising the Sentiments of Gratitude; a Gratitude heightened by the Reflection, that these Inheritances had been justly forfeited to the Laws of their Country.

If we may consult foreign Annals on this Point, we shall find a remarkable Illustration of it related by Mariana *, in the Conduct of King John of Portugal, who, upon an Occasion, which might have urged arbitrary

* L. 24. c. 10.
Princes to great Lengths of Jealousy and Revenge, tempered Justice with Mercy to his own Honour, and the Advantage of his Kingdom. He used to say, that Government either found Princes wise, or made them so; and, being grown unpopular from a Severity of Temper, and Freedom of Expression, many of his Nobles, with the Duke of Braganza at their Head, carried on a formed Conspiracy against him. He concealed his Knowledge of it for some time; and, when it was breaking out into Action, seized and punished several, and their Estates were forfeited. The Duke of Visco, his Cousin-German, suffered for the Plot. But, instead of with-holding his Estate from the Family, he engaged their Affection by giving it to his Brother Emanuel, and raised up an admirable Instrument, for the Good of Portugal and himself, in one, who might have proved a factious and alienated Subject. Emanuel succeeded him in the Throne, restored the Duke of Braganza's Children, regulated the Execution of the Laws, and brought all the Wealth of the West-Indies into Portugal, by encouraging the Discovery of the Brazils. Something like this has happened not unfrequently in Kingdoms governed at the despotic Pleasure of the Prince. How much oftener has it taken Place in England, a limited Monarchy; and with what greater Probability will the Blessing be secured to us, since that Settlement of the Nation, which added new Life to the Liberties of the People, reduced the Constitution
stitution to its right Basis, and gave it its proper Force and Energy. In such Circumstances, we may apply to the Throne, what was said by an antient Poet of the Altar erected by the Athenians to Compassion:

— Mitis posuit Clementia sedem,
Et miseri fecere sacram—
Huc vieti bellis, scelerumque errore nocentes,
Conveniunt, pacemque rogant—

Upon these Principles the Objection on the Part of the Crown, as if its being vested with this Power were of no Moment to the Hopes of Families, seems rationally answered. It cannot be denied, that, in History, there are a few Examples, but principally destructive to the Authors, in which our Princes have, in Matters of Treason, preferred dark, hurtful, and cruel Counsels to open, wise, and just Proceedings. They are not to be insisted upon. There is a Decency required, in reciting the Faults of past Times. We may look back for Information and Warning, and even for Re-proof, but not Inveective. An Alteration of Circumstances renders their Renewal almost impossible; and, surely, it may be said, without Offence or Flattery, that, whether it be pursued at large, or passed over in Silence, it is a Subject, which neither the most suspicious Friend can call invidious, nor the most malignant Enemy will think to be expedient, in this Reign.

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The great Lawyers of the Kingdom, Men wisely and conscientiously zealous for national Rights, have expressed the highest Veneration for the Law of Treason established in England; and seem more concerned for the Certainty of it, than to lessen the Severity. Lord Hale * says, "That Treason, being the greatest Crime against Faith and Duty, is deservedly branded with the highest Ignominy, and subjected to the greatest Penalties, which the Law can inflict." Lord Coke, in the Beginning of his Third Institute, enumerates the Names of the principal Judges who sat in Westminster-Hall at the Time of making the Stat. 25 Edw. III. and those subsequent Statutes made as Opportunity offered, in Confirmation of it, to destroy arbitrary Determinations, which endeavoured to elude it. "All these, says he, we have named in Honour of them and their Posterities, for that they were great Furtherers of these excellent Laws concerning Treason. This was done, that the fair Lilies and Roses of the Crown might flourish, and not be stained by severe and sanguinary Statutes." Why severe, and why sanguinary? Because the Description of Crimes †, by which a Man might expose himself to Penalties, was so various and uncertain, that no one knew how to speak, act, or behave himself, in any Manner. But, had he disapproved the Forfeiture of Real Estates, in Cases of High-

* H. P. C. I. p. 56.
† Stat. 1 H. IV.

Treason,
Treason, as unjust, he never would have commended Laws, as clear from sanguinary Stains, which refer expressly to that Policy.

It may be mentioned, as an Argument for abolishing the Severity of the Punishment, that it is ill proportioned to the Crime; for, by the Law of England, Treason is applied to the Person and Administration of the Prince: by the Law of Rome, to the State and People. And *Nat. Bacon*, a partial and systematical Writer on the Constitution, says, that, amongst our Ancestors, *"Treachery against the Country was Death, and Forfeiture of the whole Estate, both Real and Personal; against the King, it was only Loss of Life, and Personal Estate; from whence he concludes, that Majesty was not yet arrived at its full Growth."* There seems little Necessity to shew, that, agreeably to legal Notions, the Safety and Repose of the Kingdom are highly interested in the Preservation of the Person and Government of the King. Many of the Forms of the Constitution are referred to him, but the Substance is for the Benefit of the Whole. Crimes, which concern the Public, and even Injuries to private Subjects, are supposed to be against his Peace, Dignity, and Crown. What then can be meant by State Treasons, in Contradistinction to those marked out by the Law of England? It is difficult to find a Meaning, except one, of which the Consequences are such, that had Bacon seen them, as a consistent Republican, he must have immediately disowned

* Bac. on the Gov. of England, p. 61.*
it. The free and enquiring Spirit of this Age has led Men to search the antient and forgotten Parts of History for Epithets and Parrelles to Ministers. They have read, how, in one Part of Britain, before the Act for improving the Union, a Man might be accused of High Treason, under a Law against "impugning the Authority of the Three Estates, or "procuring any Innovation or Diminution of "it." They have read, how the Spencers in Edward the Second's Time, Mortimer in the Reign of Edward the Third, the Duke of Gloucester, Earl of Arundel, Tresilian, and others, in the Reign of Richard the Second, were convicted of Treason in Parliament, as the Record sets forth, for "approaching Royal Power, subverting the Realm, and fundamental Laws;" Expressions which found well in Party Papers, as the Sportings of Fancy, to exercise the Sagacity, and flatter the Vanity, of Readers; but, when used as the adequate Description of Crimes in Courts of Justice, become too serious, and may be attended with the most fatal Mischiefs. Under such general Words arose all the Common Law, or State Treasons, constructive and arbitrary Treasons; into which every Offence, that either was, or seemed to be, a Breach of Allegiance, and the Laws, might be raised by Interpretation and Consequence. These have long been Strangers to the Kingdom, ever since Lord Strafford's Attainder, and above Two hundred Years before; and it is to be expected from the Wisdom and Justice of Parliaments ever will be. As the Penalties,
of which so much has been said, are at present applied by Statute, those who mean well to their Country, and take care to inspire their posterity with the same good Intentions, can suspect no Danger to Innocence; and they will think it of little Moment to solicit the Approbation of those who do not. Yet, if one might suppose State Treasons revived, who would engage in public Busines, that values Repose, has Wealth to forfeit, and Dignities to aggravate his Fall? A mistaken Opinion, that he was acting within Law, might be the Ruin of him; and it would become a regular and necessary Part of the Proceedings, as formerly in Scotland, to argue, in a solemn Way, the Relevancy of the Charge, before any Evidence was offered of the Fact. But it were better to have no Law, nor Penalties to enforce Law, nor the very Form of civil Society, than to receive only an ensnaring Protection from it.

After all, it will be asked, Suppose there had been no Forfeiture by the antient Constitution, would it have been thought right to institute it now? This Question can scarcely be answered. Who knows what Government may require in some Periods? As the antient Discipline of Rome degenerated, new Terrors were expedient on the Side of Law. Yet it is one thing to take off old Restraints, another to impose new. And the Conclusion is not just, that because the Doubt might be considerable for Reasons of Policy, whether such a Severity should be tried in the first Instance; therefore it ought to be abrogated
abrogated after the wholesome Effects derived from it, and the Approbation of Ages. There is nothing in the Virtue of the present Times, which claims so particular a Respect. It is observed by Cæsar, in his Speech against putting the Catilinarian Conspirators to Death, that those who spoke before him in the Debate, for superseding the ordinary Forms of Law, had caught the Attention of the Senate, by pathetic Descriptions of Sacrilege, Rapine, and the Ruin which must have ensued to the Commonwealth, had the Treason been effected; to which he opposes the Danger of Deviations from the old and regular Method of Proceeding. Certain it is, the honest Senators, not interested in the fortunate Success of the Conspiracy, as History has supposed him to be, thought that Danger of the most Weight, which he attempted to diminish. Cæsar had a difficult Part to take, and more Art could not have been shewn upon the Subject. But had he lived in this Age and Country, to defend the Abolition of Forfeitures, he would modestly have owned the Difficulty too much for his Art; in a Case, where both the Danger of encouraging Traitors and removing Foundations concur, to invent Arguments against such as arise from a Regard to that supreme Law, the Safety of the People; and to that antient Method of punishing, which scatters salutary Terrors round the Throne.

These Reasonings may appear to some more than sufficient. Yet, perhaps, others will not be
be wanting, who may think, that by the Dread of this Severity, Resistance will be made very difficult; and Governments ought to be calculated with a View to the Infirmitities of those who govern. The Maxim is true; but never was extended to prove it necessary, that Resistance should be easy. Government is not to be carried on without Confidence. It is liable to Abuse, but ought not for that Reason to be exposed to Ruin. Religion itself, tho' of the most perfect Purity in its Origin, and not of human Institution, has been made a Cover to the worst Purposes. And yet who ever said, there should be no such thing as Religion for a Controul to Mens Actions? Even putting the Argument in the strongest Light, Resistance ought to be difficult. If it were not, Men might be inflamed by slight Faults, by personal Affronts, by private Sufferings, to disturb their Country. And when we consider, in the best Cause, what Confusion, what Violence, what Cruelty ensues, it cannot be thought on without Horror. But we may go further, and say, That in the worst Juncture of Affairs, when the Constitution is affected, when tyrannical Designs are openly avowed, and supported by every Injustice, the Dread of this Severity will not create a Terror sufficient to prevent good Men from resiling: on the contrary, by inspiring Caution, and retarding Resistance, till it is become mature, it facilitates and secures the Consequences. A Man's Fears always bear Proportion to his Hopes, and one kind of Passion or Weight of
Considerations is balanced with another. In good times it is admitted, when men are moved by ambition or resentment, private and partial affections, they will be deterred from engaging by private considerations. But in bad times, when they are moved by a love of liberty, order, and the common good, arguments addressed to private fears will not weigh down public affections.

To conclude; a terror of this nature against treason was particularly adapted to those ages, in which it has either been introduced or enforced. It was fitted of old to the genius of the northern nations, who, despising their own lives, were only to be moved by a generous regard to their posterity. It is fitted to the genius of these times, when persons are to be touched in that dearest part, themselves and their families; and the love of our country is held a weakness, and mistaken principle of action. Men will be made averse to desperate engagements, by a tenderness, which, whether derived from inclination, vanity, or virtue, is of equal moment. They pretend to be against the continuance of this terror from the same tenderness; not aware, that to confess the power of the affection is to vindicate the wisdom of the law. But, to speak plainly, reason has mark'd out the due office of this affection, as of all others. When separated from the pursuit of public good, nothing can be more false and dangerous; when united with it, nothing more just and beneficial. Nay, the fullest, as well
well as truest, Indulgence of the Affection arises from this Union. The Honour of a Family is less obscured by the Punishment than the Crime; and whoever regards his own Fame, and their lasting Interest, will best provide for both, in laying every Check on the malignant and deceitful Passions, which produce the Crime, and in afflicting to maintain, by the most affecting Sanctions, the Tranquillity and Safety of his native Country. Nor let it be called Court-Adulation and Cowardice, to secure these extensive Benefits. What is Flattery, and what is Cowardice, but either artfully to indulge, or tamely submit to the Passions and Humours of Men, against Reason, and the Dignity of human Nature? But, if that be Flattery in public Conduct, which can bear a rational Examination upon Principles of Liberty, strengthens the old Foundations, supports the legal Awe and Authority of Government, every wise and honest Man would be placed in the Rank of such Parasites. Could one of this Turn of Mind pry into the Depths of Futurity, and see any of his degenerate Family entertaining traitorous Designs, his Grief would be considerable, but his Indignation would be greater. He would grieve to see the Fruits of his Industry sacrificed to the Ambition of one; but he would call to mind, that as they were acquired, enjoyed, transmitted, by the Protection and Favour of Society, they were due to the public Safety, when abused to the Destruction of it. He must receive Pleasure from reflecting, that
the Law of his Country would so far regard his Honour, as not to own the Traitor's Descent from him; and tho' he would compassionately innocent Posterity, yet knowing the Law to have the Resources of Clemency, as well as the Severities of Justice, he would hope, that these might merit Restitution by their Temper and Innocence; or, at least, run the Race of their Ancestors, and gain new Riches and Honours by the same Virtues.

Instances there are in History, in which Nations, jealous of their Privileges, have consented by new Penalties suited to an Occasion, and more strongly enforced, than any, which the Law of England furnishes, to secure the Government established. Henry the Third of France, a Prince of the mildest Nature, as Davila informs us, in a full and free Convention of the States at Blois, being much pressed by the League *, enacted the severest Laws against Treason. It is true, those Laws did not save him; but he owed his Ruin to the entering into Engagements with the League, his Violation of them afterwards, and the treacherous Manner, in which he sacrificed the Head of the Party to his own Safety. If the Instances of this Kind are not rare, and sometimes have proved successful, the rather ought we to strengthen antient and constitutional Terrors on the Side of that Establishment, which has been obtained with much Labour, and has so

* Briffon Code D'Henry III. L. 8. often
often employed the Wisdom of Parliament, the Wealth and Valour of the Nation. Most of the Civil Troubles, which have filled the Annals of our Kings with so many Lessons of Warning, took their Rise from the Disunion of the Nobles, whose private Attachments led them to follow different Standards, while the Expectation of the People, being equal from both Parties, inclined them to wish for Repose under some one Family, rather than the Victory of either. But where the Experience, as well as the Expectation, is unequal, where the Genius of a Family has been for Generations repugnant to that of the People, where this natural Repugnance has been heightened by the Policy of arbitrary Courts, the Servility of foreign Nations, the Protection of determined Enemies; by the basest Maxims of Superstition, dispensing with the Obligations, or eluding the Sanctions of true Religion, who cannot but applaud such Means of giving Vigour to the Law, that it may prove a Defence proportioned to the Greatness of our Enjoyments? We have a Religion to lose, founded on Principles of Purity, of Freedom, and Mercy: We have a Constitution of Government, the best formed to convey Peace and Happiness to Mankind: We have Honour to lose, of which, the Monuments of former Ages shew, that as large a Patrimony as any Country can boast, is descended from our Ancestors. These are Considerations, which cannot but affect good Men to the Heart: they
especially concern such as are called to the public Service in Parliament. A brave Soldier would be covered with Confusion, to desert the Post assigned him by his General in a Day of Battle; so every one of these is equally incapable to desert that Station, in which the Choice of the Crown or the People has placed him, a Guardian of the public Liberty. And as he would appear in the Field, if the Necessity of the Times required it, against Traitors, who should invade these invaluable Rights, he is animated by the same Zeal, to lend his Voice and his Power to arm the Law with that Terror, which may prevent the dangerous Necessity.

—— Nova Bella moventes
Ad pænam pulchra pro Libertate vocabit.
Virg.

Let it be remembered further, that this Zeal for Liberty, which opposes itself to the Lovers of Tyranny or Licentiousness, inspires a due Regard to the rational Assertors of it. And have not the Defenders of Revolution Principles, and the Protestant Succession, a just Claim to so important a Security against any, who, in a future Time, shall attempt to eradicate and destroy either?

But these Considerations should particularly weigh with us, when a Foreign Power has made a strong, tho' vain, Effort, even previous to a Declaration of War, in Contempt of the most sacred Leagues, to shake the firm Allegiance
(77)

Giance of the Subject, to alter the Government of this Kingdom, and to gratify a shameless Perfidy, and a ruinous Ambition. If the Fleets and Armies of that Power are sent out with a Pretence of supporting Allies and Friends, it means only to extend and aggrandize itself. Examples of other Countries too clearly shew, that they, who court and rely upon this Friendship, nourish a Strength which will prove one Day their Destruction. Vainly they flatter themselves, to confine the Consequences to their Enemies. When once the Torrent passes its proper Bounds, those, who have given it Vent, are the first to be born away in the Rapidity of its Course. The Glories of the French Monarchy have never been built upon the Justice or Moderation of its Princes; and, when they have given Assistance to a Neighbour Nation with generous Professions, their Design has uniformly been to subvert the natural Manners and Independence of that Nation. The People of England have expressed their Sense of this Truth: The Parliament have seconded their Indignation by a salutary Law. In the mean time it is not to be doubted, that the Attempts of Enemies, who hate our good Faith, and envy the Sources of our Strength, may raise a Spirit of Watchfulness both in the Prince and People: And as, on the one hand, they will engage the Royal Family on the Throne to think their Security depends on a Lenity, Wisdom, Integrity of Government; so, on the other,
other, they will engage the Nation to a Temper of Calmness and Loyalty; and induce every private Man to reflect, that the Love of our Country comprehends and ennobles all the private Relations and Partialities of Life; and whatever tends most effectually to perpetuate the Laws of it, tends, at the same time, to perpetuate his own Name, Wealth, Honours, and Posterity.

FINIS.