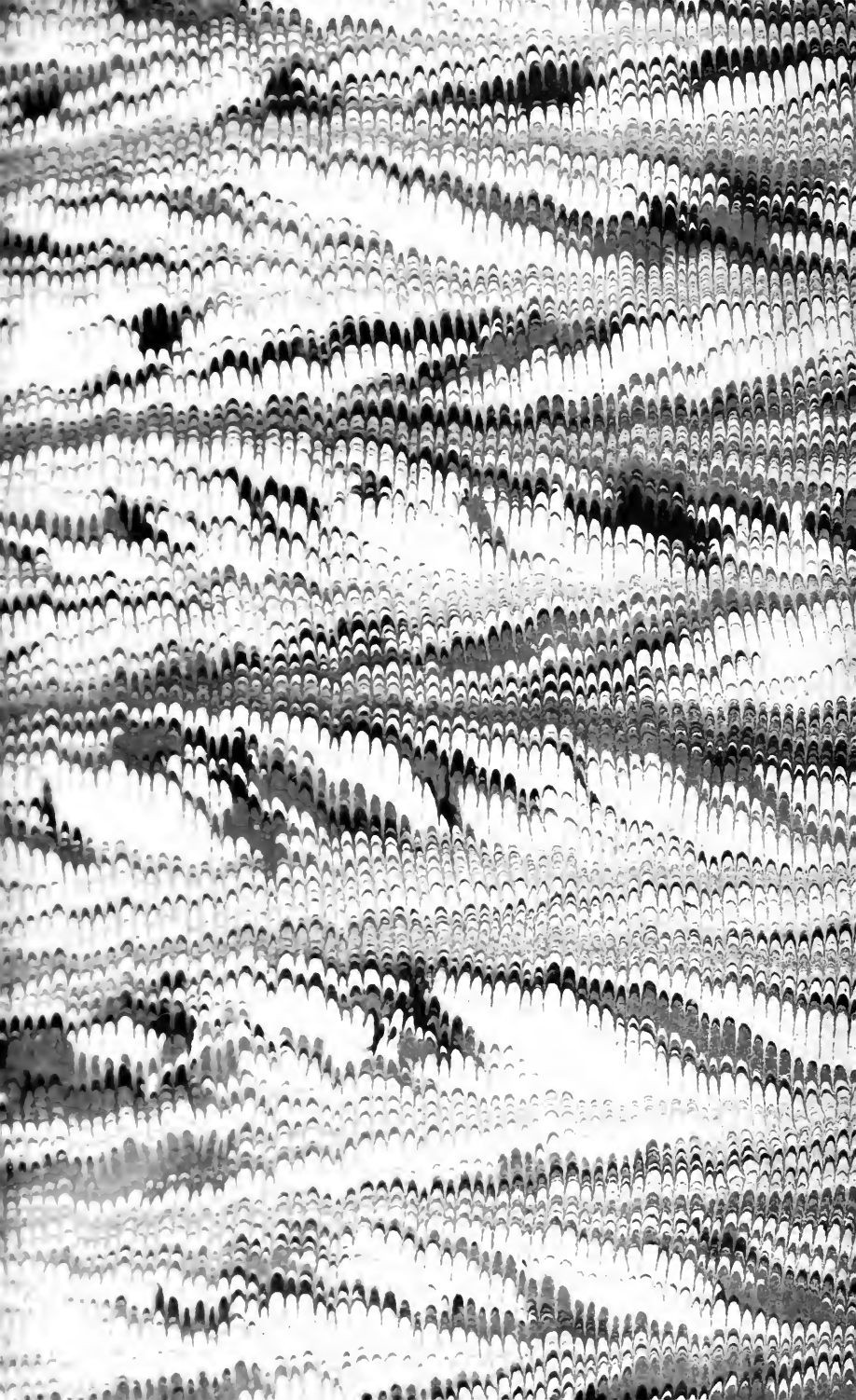

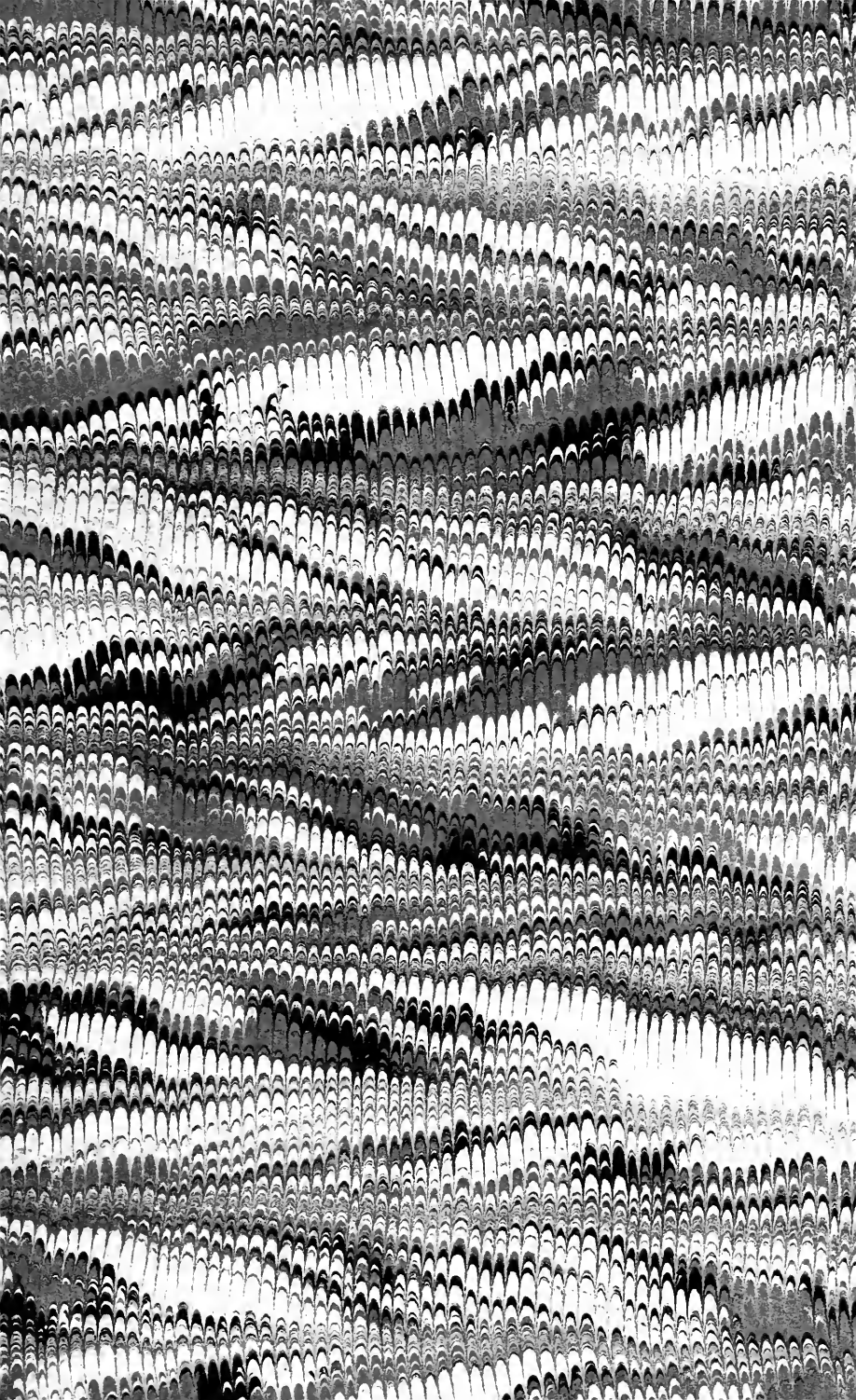

COMMENTARIES

ON

THE CONSTITUTION

AND

Laws of England,

INCORPORATED WITH THE

POLITICAL TEXT

OF THE LATE

J. L. DE LOLME, LL.D. ADVOCATE:

BY

THOMAS GEORGE WESTERN, ESQ., F.R.A.S.
OF THE MIDDLE TEMPLE.

THIRD EDITION,

REVISED AND CORRECTED TO THE PRESENT TIME.

LONDON:
JOHN RICHARDS & CO., LAW BOOKSELLERS,
194, FLEET STREET.

1841.

TO

HER MOST EXCELLENT MAJESTY, QUEEN VICTORIA.

MADAM,

WITH the warmest emotions of gratitude, I humbly place at your Majesty's feet these Commentaries upon the Constitution and Laws of England.

THE patronage which your Majesty has in so flattering a manner condescended to bestow upon my humble exertions, not only by subscribing to this Work, but also in commanding that it should be dedicated to your Majesty, has called forth these emotions in a degree which it far exceeds my feeble powers adequately to express.

IN these Commentaries I have studied to avoid all party feelings and political prejudices, with the fervent hope that they may attract your Ma-

jesty's attention, and with the view of affording such useful information to all classes of your Majesty's subjects as shall tend to promote their attachment and veneration for their Country, their Queen, their Religion, and their Laws.

That Almighty God may grant your Majesty every Divine and human blessing, with protracted length of years, in prosperity, and peace, to govern your Majesty's vast empire, is the ardent prayer of,

Madam,

Your Majesty's

Most devoted and faithful

Subject and Servant,

Thomas George Western.

TEMPLE,
(1, FIG TREE COURT.)
May, 1838.

PREFACE.

THE excellent Treatise of M. De Lolme upon the Constitution of England, has long been acknowledged as the best written work upon that subject; indeed, some have gone so far as to say, that it deserved to be written in letters of gold. The first edition was published in the year 1775, and the fourth edition (with the political and partly historical text of which these Commentaries are incorporated,) was published in 1784, and was dedicated to his late Majesty King George III. It met with universal approbation, even from men of opposite parties; and was also published on the Continent of Europe, where it was equally well received.

THE great political changes and events that have occurred in Europe since M. De Lolme wrote, are familiar to all. Those events, and the great constitutional changes that have occurred in England, have rendered M. De Lolme's Treatise of little value, as affording information at the present day, save as it

gives a view of the Constitution at the time he wrote. A bare reprint of his work, therefore, at this day, would be almost valueless; but the political, and a part of the historical portion, of the Treatise, with the arguments upon the superior excellence of the English Constitution over that of every other nation, shewing that it is the only Constitution fit for a great state and a free people, remain as vivid and as applicable as at the time they were written.

It was therefore suggested to the Writer, by some kind and flattering friends, that this valuable work might be restored to its original utility; that it might receive at this day its meed of approbation, by incorporating the changes that have been made in the Constitution since the work was written, with the political text of M. De Lolme's work; and that it would increase its usefulness, if the book could be made supplementary to the Commentaries of Sir William Blackstone, (which in like manner have become of little value as affording present information), by introducing the new legal constitution, in such a concise form, that the whole subject should be comprised in a single volume. To this suggestion was added the most distinguished offers of support.

The Writer, although aware that his great experience might enable him to engage with the legal portion of such an undertaking, yet, from the magnitude of the subject, and from his not having been accustomed to political

matters, felt a diffidence that discouraged him, independent of the large expense that must necessarily follow. He was, however, still further pressed to the undertaking; and notwithstanding the anticipated labour and expence, the encouragement he received overcame his scruples. He commenced the task, and the illustrious and distinguished patronage that followed compelled him to complete it. This affords him an opportunity of tendering his most grateful and sincere thanks to those Noblemen and Gentlemen, who have condescended to afford him that encouragement.

With these preliminary remarks, the Writer respectfully submits that a good Index will instruct the reader not only much better, but in a more pleasing manner, what he may expect to find in this work, than a long Preface: he has, consequently, sacrificed the Preface to the Index, which he has endeavoured to make as copious as possible.

The Writer therefore ventures respectfully to submit, that it will be only necessary for him to make the reader acquainted with the portions of M. De Lolme's work that he has preserved, and the new matter that he has introduced. To distinguish these parts in a simply intelligible manner, without perplexing the reader, was at first a matter of some difficulty, as very many parts of M. De Lolme's text are greatly altered. He has therefore adopted the plan of denoting in the margins, the pages preserved of the original text.

The greatest alterations and new matter will be found in the first Book, of which Chapters IV. X. and XI. are necessarily new; and as a means of preserving as much as possible the text of M. De Lolme entire, or nearly so, where it could be done, the Writer has divided some of the chapters into sections, making M. De Lolme's text (which he has invariably with the greatest diffidence altered as little as circumstances have compelled him) the first section; and he has written a second or even a third section, where the subject seemed to require further elucidation, in accordance with the constitution and laws of the country at the present day. The Writer's notes are distinguished by figures.

The Writer claims but little merit for himself: he is greatly indebted to many authors of established fame and authority, whose names appear in the Index and in the body of the work, to whom credit alone is due for many of the commentaries.

The Writer has added an Appendix containing all the new code of laws regulating real property and testamentary dispositions, without which it would have been imperfect as a supplement to the Commentaries of Sir William Blackstone; and should this volume be favourably received by the public, it is his intention to add another, upon such other laws of the country as this cannot treat upon, so as to make that supplement complete.

With these explanations, the Writer throws himself

upon the indulgence of a liberal and discerning public. He sensibly feels his presumption in undertaking such a task, and is fully aware that he is incapable of doing complete justice to the subject. He will only add, that the more the English Constitution is investigated, the better it will be understood, and the better it is understood, the more it will be valued. All ranks and classes of persons should get at a knowledge of its fundamental principles, because every Englishman is interested in the preservation of the Government; without that knowledge, he exposes himself to the censure and inconvenience of living in society, without understanding his own relation to it, and hence political discontents; with it, he will be convinced that "England is the favoured soil which early received the seeds, gradually nourished the plant, and, at length, matured, the only TREE OF LIBERTY, that has been found to shelter beneath its branches, person, property, and life, from the scorching beams of every kind of tyranny."

TEMPLE,
(1, FIG TREE COURT,)
May, 1838.

ADVERTISEMENT

TO THE

SECOND EDITION.

THE flattering manner in which the first edition of this Work has been received, and the very illustrious and distinguished support with which it was honored, demands the author's most grateful thanks.

To the gracious patronage of Her Majesty the Queen, the author sensibly feels that he is indebted for much of that support.

" As the mathematician, the better to discover the proportions he investigates, begins with freeing his *equation* from *coefficients*, or such other quantities as only perplex without properly constituting it; so it may be advantageous, to the inquirer after the causes that produce the equilibrium of a government to have previously studied them, disengaged from the apparatus of fleets, armies, foreign trade, distant and extensive dominions: in a word, from all those brilliant circumstances which so greatly affect the external appearance of a powerful society, but have no essential connexion with the real principles of it.

" It is upon the passions of mankind, that is, upon causes which are unalterable, that the action of the various parts of a state depends. The machine may vary as to its dimensions; but its movement and acting springs still remain intrinsically the same; and that time cannot be considered as lost, which has been spent in seeing them act and move in a narrower circle."

Since the publication of the first Edition, it has become necessary to revise and correct the chapters " On the Law that is to be observed in England in regard to Civil Matters."

The " Act for abolishing Arrest for Debt on Mesne Process in Civil Actions, except in certain cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England"—is most entitled to consideration. This statute (1) the Author has explained in the present Edition, B. 1, c. 2, ss. 1 & 2; and, so far as this Work will admit, he has done so *practically*, for the benefit of the student, and without (he trusts) being tiresome to the scientific or general reader.

The humane changes made in the criminal laws, by further abolishing the punishment of DEATH (2), the Author has shewn in B. 1, c. 14.

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(1) See a Commentary upon this statute, practically shewing its effect upon persons and property, with a full Analysis; also the New Rules made by the Insolvent Debtors' Court, by the Author.

(2) See the Author's observations upon Human Punishment, how it may be considered with regard to its power, end, and measure. B. 2, c. 11, p. 377.

ADVERTISEMENT.

The present much to be lamented collision between the House of Commons and the Court of Queen's Bench the Author has noticed in B. 1, c. 9, s. 2, p. 332.

The Author cannot refrain from expressing how much his labours (which he found of no ordinary magnitude,) have been lightened by the very kind encouragement afforded him, and which he hopes may be continued to him through the present Edition.

MIDDLE TEMPLE:
(4, GARDEN COURT,)
Feb. 1840.

TO

HIS MOST GRACIOUS MAJESTY

ERNEST, KING OF HANOVER,

DUKE OF CUMBERLAND,

&c. &c. &c.

SIRE,

I humbly place at Your Majesty's feet this Third Edition of my Commentaries on the Constitution and Laws of England.

IT is to me a source of much pride and gratification that Your Majesty has condescended to notice and approve my humble labors, and command this Dedication.

IT is well known how greatly Your Majesty is devoted to the Constitution and Laws of England; and although Your Majesty is seated upon the Throne of Your Majesty's Hereditary Dominions, yet the interest Your Majesty continues

to take in every thing English, is a sure proof that Your Majesty's attachment to the Country, its Constitution and Laws, remains unabated.

That Your Majesty may long reign over a peaceful and happy people, and that it shall please Divine Providence to restore Your Majesty's Son, The Prince Royal of Hanover, to the blessing of Health, is the fervent prayer of Your Majesty's

Very humble and grateful Servant,

THOMAS GEORGE WESTERN.

Temple, (4, Garden Court),
May, 1841.

ADVERTISEMENT

TO THE

THIRD EDITION.

A THIRD Edition of this Work having been called for, the Author has the pleasing duty of returning his very grateful thanks for the continued patronage bestowed upon his humble labours.

The Author would still be wanting in gratitude, were he not in an especial manner to notice the favourable reception the work has met with on the Continent; and the approbation which the SOVEREIGNS of EUROPE have condescended to give it. He takes this opportunity of returning them his most humble acknowledgments.

In the *East*, also, his gratitude is due. The circumstance of the work having been translated into the EGYPTIAN Language by the order of MEHEMET ALI, is, to the Author, a source of high gratification; and a proof, (if any such were wanting), that Literature, of whatever nation or color, is encouraged by HIS HIGHNESS the PASHA.

The Author avails himself of the present opportunity to express his grateful thanks to His Highness.

To the Public *Press*, the Author has also a debt of gratitude to pay; he is very sensible of the unmerited encomiums that have been bestowed upon him by Journals of all parties. "To procure one's notions and opinions to be attended to, and approved by the circle of one's acquaintance, is the universal wish of mankind. To diffuse these notions farther to numerous parts of the Public, by means of the Press, or by others, becomes an object of real ambition." The great ambition of the Author, however, is to be useful to mankind at large; and if in that he has succeeded, his highest wish is gratified.

Temple,
(4, Garden-Court,)
May, 1841.

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THE

CONSTITUTION OF ENGLAND.

BOOK I.

A SURVEY OF THE VARIOUS POWERS INCLUDED IN THE ENGLISH CONSTITUTION, AND OF THE LAWS BOTH IN CIVIL AND CRIMINAL CASES.

CHAPTER I.

Causes of the Liberty of the English Nation. Reasons of the difference between the Government of England and that of France, before the Revolution there in the reign of Louis XVI. In England the great power of the Crown under the Norman Kings created an Union between the Nobility and the People.

When the Romans, attacked on all sides by the barbarians, were reduced to the necessity of defending the centre of their empire, they abandoned Great Britain, as well as several other of their distant provinces. The island, thus left to itself, became a prey to the nations 6
inhabiting the shores of the Baltic; who, having first destroyed the ancient inhabitants, and for a long time reciprocally annoyed each other, established several sovereignties in the southern part of the island, afterwards called England, which at length were united under Egbert into one kingdom.

The successors of this prince, denominated the Anglo-Saxon princes, among whom Alfred the Great and Edward the Confessor are particularly celebrated,
7 reigned about two hundred years. Though our knowledge of the principal events of this early period of the English history is in some degree exact, yet we have but vague and uncertain accounts of the nature of the government which those nations introduced.

It appears to have had little more affinity with the present constitution than the general relation common indeed to all the governments established by the northern nations,—that of having a king and a body of nobility; and the ancient Saxon government is "left us in story (to use the expression of Sir William Temple on the subject) but like so many antique, broken, or defaced pictures, which may still represent something of the customs and fashions of those ages, though little of the true lines, proportions, or resemblance (*a*)."

It is at the æra of the Conquest that we are to look for the real foundation of the English constitution. From that period, says Spelman, "*novus sectorum nascitur ordo* (*b*)." William of Normandy having defeated

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(*a*) See his Introduction to the History of England.

(*b*) See *Spelman, of Parliaments.* It has been a favourite thesis with many writers, to pretend that the Saxon government was, at the time of the Conquest, by no means subverted; that William of Normandy legally acceded to the throne, and, consequently, to the engagements of the Saxon kings; and much argument has in particular been employed with regard to the word Conquest, which, it has been said, in the feudal sense, only meant acquisition. These opinions have been particularly insisted upon in times of popular opposition; and, indeed, there was a far greater probability of success in raising among the people the notions (familiar to them) of legal claims and long-established customs, than in arguing with them

Harold, and made himself master of the crown, sub- 8
verted the ancient fabric of the Saxon legislation; he 9

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from the no less rational, but less determinate and somewhat dangerous doctrines, concerning the original rights of mankind, and the lawfulness of at all times opposing force to an oppressive government.

But if we consider, that the manner in which the public power is formed in a state is so very essential a part of its government, and that a thorough change in this respect was introduced into England by the Conquest, we shall not scruple to allow that a new government was established. Nay, as almost the whole landed property in the kingdom was at that time transferred to other hands, a new system of criminal justice introduced, and the language of the law moreover altered, the revolution may be said to be such as is not paralleled in the history of any other country.

Some Saxon laws, favourable to the liberty of the people, were indeed again established under the successors of William; but the introduction of some new modes of proceeding in the courts of justice, and of a few particular laws, cannot, so long as the ruling power in the state remains the same, be said to be the introduction of a new government; and as, when the laws in question were again established, the public power in England continued in the same channel where the Conquest had placed it, they were more properly new modifications of the Anglo-Norman constitution, than they were the abolition of it; or, since they were again adopted from the Saxon legislation, they were rather imitations of that legislation, than the restoration of the Saxon government.

Contented, however, with the two authorities I have above quoted, I shall dwell no longer on a discussion of the precise identity or difference of two governments, that is, of two ideal systems, which only exist in the conceptions of men. Nor do I wish to explode a doctrine, which, in the opinion of some persons, giving an additional sanction and dignity to the English government, contributes to increase their love and respect for it. It will be sufficient for my purpose, if the reader shall be pleased to grant that a material change was, at the time of the Conquest, effected in the government then existing, and is accordingly disposed to admit the proofs that will presently be laid before him, of such change having prepared the establishment of the present English constitution.

exterminated or expelled the former occupiers of lands, in order to distribute their possessions among his followers, and establish the feudal system of government, as better adapted to his situation, and indeed the only one of which he possessed a competent idea (1).

This sort of government prevailed also in almost all the other parts of ancient Europe. But instead of being established by dint of arms, and all at once, as in

---

(1) Power naturally follows property. This change of landholders alone gave a great security to the Norman government. But William also took care, by the new institutions that he established, to retain for ever the military authority in those hands which had enabled him to acquire the kingdom. He introduced into England the feudal polity which he found established in France and Normandy, and which, during that age, was the foundation both of the stability and of the disorders in most of the monarchical governments of Europe. He divided all the lands of England, with few exceptions, beside the royal domain, into baronies, and he conferred these, with the reservation of stated services and payments, on the most considerable of his followers. The Barons, who held immediately of the Crown, shared out part of their lands to other foreigners, who were denominated knights or vassals, and who paid their lord the same duty and submission in peace and war which he owed to his sovereign. None of the native English were admitted into the first rank; the few that retained any landed property were, therefore, glad to be received into the second, and, under the protection of some powerful Norman, to load themselves and their posterity with a grievous servitude for estates which had been transmitted free to them from their ancestors.—(*Dr. Russ. Mod. Eur., Part I., Letter* 23). The proprietors of land under the Anglo-Saxon princes were subject only to these obligations, viz. to attend the King with their followers in military expeditions, to assist in building or defending the royal castles, and to keep the highways and bridges in a proper state of repair, (*Hickesi Dissertat., Spelman Reliquiæ*), emphatically called *the three necessities*, as they certainly were, in a government without regular troops, and almost without revenue.—(*In not. Id.; M. West; M. Paris; Bracton, lib. i. cap.* 11 ; *Fleta, lib. i. cap.* 8).—EDITOR.

England, it had only been established on the continent, and particularly in France, through a long series of slow successive events: a difference of circumstances this, from which consequences were in time to arise as important as they were at first difficult to be foreseen.

The German nations who passed the Rhine to conquer Gaul were in a great degree independent; their princes had no other title to their power but their own valour and the free election of the people; and, as the latter had acquired in their forests but contracted notions of sovereign authority, they followed a chief, less in quality of subjects than as companions in conquest.

Besides, this conquest was not the irruption of a foreign army, which only takes possession of fortified towns; it was the general invasion of a whole people in search of new habitations; and as the number of the conquerors bore a great proportion to that of the conquered, who were at the same time enervated by a long peace, the expedition was no sooner completed than all danger was at an end. After dividing amongst themselves 11
what lands they thought proper to occupy, they separated, and though their tenure was at first only precarious, yet, in this particular, they depended not on the King, but on the general assembly of the nation (*c*).

Under the kings of *the first race*, the fiefs, by the mutual connivance of the leaders, at first became annual, afterwards held for life. Under the descendants of

(*c*) The fiefs were originally called *terræ jure beneficii concessæ;* and it was not till under Charles le Gros that the term *fief* began to be in use.—*See* BENEFICIUM, *Gloss. Du Cange.*

Charlemagne they became hereditary (*d*). And when at length Hugh Capet (2) effected his own election to the prejudice of Charles of Lorrain, intending to render the crown, which in fact was a fief, hereditary in his own family (*e*), he established the hereditaryship of fiefs as a
12 general principle; and from this epoch authors date the complete establishment of the feudal system in France.

On the other hand, the lords who gave their suffrages to Hugh Capet forgot not the interest of their own ambition. They completed the breach of those feeble ties which subjected them to the royal authority, and became everywhere independent. They left the King no jurisdiction either over themselves or their vassals; they reserved the right of waging war with each other: they even assumed the same privilege in certain cases with regard to the King himself (*f*); so that, if Hugh Capet,

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(*d*) *Apud Francos vero, sensim, pedetentimque, jure hæreditario ad hæredes subinde transierunt feuda; quod labente sæculo nono incipit.—See* FEUDUM, *Du Cange.*

(2) Hugh Capet seized the crown of France on the death of Lewis V., uncle to Duke Charles of Lorrain, to whom the right of succession belonged; but he being a vassal of the empire, the nobility held that a sufficient reason for excluding him. Hugh Capet possessed the dukedom of France, which extended as far as Touraine. He was also Count of Paris, and the vast domains which he held in Picardy and Champagne gave him great authority in those provinces. He brought more strength to the crown than he derived from it. The royal domain was then reduced to the cities of Laon and Soissons, and a few other disputed territories.—(*Glab. Hist. sui Temps*).—EDITOR.

(*e*) Hottoman has proved beyond a doubt, in his *Francogallia*, that, under the two first races of kings the crown of France was elective. The princes of the reigning family had nothing more in their favour than the custom of choosing one of that house.

(*f*) The principal of these cases was, when the King refused to appoint Judges to decide a difference between himself and one of his

by rendering the crown hereditary, laid the foundation of the greatness of his family, and of the crown itself, yet he added little to his own authority, and acquired scarcely any thing more than a nominal supe- 13
riority over the number of sovereigns who then swarmed in France (*g*).

But the establishment of the feudal system in England was an immediate and sudden consequence of that conquest which introduced it. Besides, this conquest was made by a prince who kept the greater part of his army in his own pay, and who was placed at the head of a people over whom he was an hereditary sovereign,—circumstances which gave a totally different turn to the government of that kingdom.

Surrounded by a warlike though a conquered nation, William kept on foot part of his army. The English, and after them the Normans themselves, having revolted, he crushed both; and the new King of England, at the head of victorious troops, having to do with two

---

first Barons, the latter had then a right to take up arms against the King; and the subordinate vassals were so dependent on their immediate lords, that they were obliged to follow him against the lord paramount. St. Louis, though the power of the crown was in his time much increased, was obliged to confirm both this privilege of the first Barons, and this obligation of their vassals.

(*g*) "The grandees of the kingdom," says Mezeray, "thought that Hugh Capet ought to put up with all their insults, because they had placed the crown on his head; nay, so great was their licentiousness, that, on his writing to Audebert, Viscount of Perigueux, ordering him to raise the siege he had laid to Tours, and asking him by way of reproach, who had made him a Viscount? that nobleman haughtily answered, *not you, but those who made you a king.* [Ce n'est pas vous, mais ceux qui vous ont fait roi]." Many of his vassals had more real power than himself.—EDITOR.

14 nations lying under a reciprocal check from the enmity they bore to each other; and, moreover, equally subdued by a sense of their unfortunate attempts of resistance, found himself in the most favourable circumstances for becoming an absolute monarch; and his laws, thus promulgated in the midst, as it were, of thunder and lightning, imposed the yoke of despotism both on the victors and the vanquished (3).

He divided England into sixty thousand two hundred and fifteen military fiefs, all held of the crown; the possessors of which were, on pain of forfeiture, to take up arms and repair to his standard on the first signal; he subjected not only the common people, but even the barons, to all the rigours of the feudal government; he even imposed on them his tyrannical forest laws (*h*).

He assumed the prerogative of imposing taxes. He invested himself with the whole executive power of go-
15 vernment. But what was of the greatest consequence, he arrogated to himself the most extensive judicial power, by the establishment of the court which was

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(3) He even entertained the difficult project of totally abolishing their language. He ordered the English youth to be instructed in the French tongue in all the schools. The pleadings in the Supreme Courts of Judicature were in French; deeds relating to property were after prepared in the same language; so were the laws. No other tongue was used at court; it became the language of all fashionable societies, and the natives affected to excel in it.—(1 *Hume, Hist. Eng.; Ingulph. Hist., p.* 71).—EDITOR.

(*h*) He reserved to himself an exclusive privilege of killing game throughout England, and enacted the severest penalties on all who should attempt it without his permission. The suppression, or rather mitigation, of these penalties was one of the articles of the *Charta de Foresta*, which the Barons afterwards obtained by force of arms. *Nullus de cætero amittat vitam, vel membra, pro venatione nostra.*—(*Ch. de Forest. art.* 10).

called *Aula Regis* (4), a formidable tribunal, which received appeals from all the courts of the barons, and decided, in the last resort, on the estate, honour, and lives of the barons themselves; and which, being wholly composed of the great officers of the crown, removable at the King's pleasure, and having the King himself for president, kept the first noblemen in the kingdom under the same control as the meanest subject (5).

Thus, while the kingdom of France, in consequence of the slow and gradual formation of the feudal government, found itself in the issue composed of a number of parts simply placed by each other, and without any reciprocal adherence, the kingdom of England, on the con-

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(4) *Aula regia*, or *aula regis*, so called by *Bracton* and other ancient authors.—(*Brac. l.* 3, *tr.* 1, *c.* 7).—EDITOR.

(5) There is one work now extant that does honour to the memory of William. I allude to the Doomsday Book, still preserved in the Exchequer, which contains the general survey that he had ordered of all the lands of England, except the four northern counties of Northumberland, Cumberland, Westmoreland, and part of Lancashire. It shews their extent in each district, their proprietors, tenures, and value. The quantity of meadow, pasture, wood, and arable land, and in some counties the number of tenants' cottages and slaves of all denominations. It also shews their rents and taxations. By this book, which he commenced (according to the Red Book in the Exchequer) with the advice of his Parliament in 1080, and finished in 1086, he was enabled to ascertain the military strength of the country, and the revenues to be derived from it. The reason of this survey, we are informed by historians, was, that every man should be satisfied with his own right, and not usurp with impunity what belonged to another.

The book, it is said, however, did not originate with William, as King Alfred composed a similar one about the year 900, of which William's is almost a copy. Its authority upon points of tenure hath never been disputed. It consists of two volumes, which are deposited in the Chapter-House at Westminster, where it may be consulted by any person.—EDITOR.

trary, from the sudden and violent introduction of the same system, became a compound of parts, united by the strongest ties; and the regal authority, by the pressure of its immense weight, consolidated the whole into one compact indissoluble body.

To this difference in the original constitution of France and England, that is, in the original power of
16 their kings, we are to attribute the difference so little analogous to its original cause of their present constitutions. This furnishes the solution of a problem which, I must confess, for a long time perplexed me, and explains the reason why, of two neighbouring nations, situate almost under the same climate, and having one common origin, the one has attained the summit of liberty, the other gradually sunk under an absolute monarchy (6).

In France the royal authority was indeed inconsiderable; but this circumstance was by no means favourable to the general liberty. The lords were every thing, and the bulk of the nation were accounted nothing. All those wars which were made on the King had not liberty for their object, for of this the chiefs already enjoyed too great a share; they were the mere effect of private ambition or caprice. The people did not engage in them as associates in the support of a cause common to all; they were dragged blindfold, and like slaves, to the standard of their leaders. In the meantime, as the

(6) This observation will not apply at the present day as regards France. The Editor has, however, considered it right to preserve the original text of this chapter (which the reader will apply to France previous to the French Revolution). It shews how liberty had then perished in France, and how it grew up in England.—See also note by the Editor at the end of this chapter.

laws, by virtue of which their masters were considered as vassals, had no relation to those by which they were bound as subjects; the resistance, of which they were made the instruments, never produced any advantageous 17
consequence in their favour, nor did it establish any principle of freedom that was applicable to them.

The inferior nobles, who shared in the independence of the superior nobility, added the effects of their own insolence to the despotism of so many sovereigns; and the people, wearied out by sufferings, and rendered desperate by oppression, at times attempted to revolt. But being parcelled out into so many different states, they could never perfectly agree either in the nature or the times of their complaints. The insurrections, which ought to have been general, were only successive and particular. In the meantime the lords, ever uniting to avenge their common cause as masters, fell with irresistible advantage on men who were divided; the people were thus separately, and by force, brought back to their former yoke; and liberty, that precious offspring, which requires so many favourable circumstances to foster it, was every where stifled in its birth (*i*).

At length, when by conquests, by escheats, or by 18
treaties, the several provinces came to be *reunited* (*k*) to the extensive and continually increasing dominions of

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(*i*) It may be seen in Mezeray, how the Flemings, at the time of the great revolt, which was caused, as he says, "by the inveterate hatred of the nobles (*les gentils hommes*) against the people of Ghent" were crushed by the union of almost all the nobility of France.—(*See Mezeray, Reign of Charles VI.*)

(*k*) The word re-union expresses, in the French law or history, the reduction of a province to an immediate dependence on the crown

the monarch, they became subject to their new master, already trained to obedience. The few privileges which
19 the cities had been able to preserve were little respected by a sovereign who had himself entered into no engagements for that purpose; and, as the reunions were made at different times, the King was always in a condition to overwhelm every new province that accrued to him, with the weight of all those he already possessed.

20 As a farther consequence of these differences, between the times of the reunions, the several parts of the kingdom entertained no views of assisting each other. When some reclaimed their privileges, the others, long since reduced to subjection, had already forgotten theirs. Besides, these privileges, by reason of the differences of the governments under which the provinces had formerly been held, were also almost every where different: the circumstances which happened in one place thus bore little affinity to those which fell out in another; the spirit of union was lost, or rather had never existed; each province, restrained within its particular bounds, only served to ensure the general submission; and the same causes which had reduced that spirited nation to a yoke of subjection, concurred also to keep them under it.

Thus liberty perished in France, because it wanted a favourable culture and proper situation. Planted, if I may so express myself, but just beneath the surface, it presently expanded, and sent forth some large shoots; but, having taken no root, it was soon plucked up. In England, on the contrary, the seed, lying at a great depth, and being covered with an enormous weight, seemed at first to be smothered; but it vegetated with the greater force; it imbibed a more rich and abundant nourishment; its sap and juice became better assimi-

lated, and it penetrated and filled up with its roots the whole body of the soil. It was the excessive power of the King which made England free, because it was this very excess that gave rise to the spirit of union, and of concerted resistance. Possessed of extensive demesnes, the King found himself independent; invested with the most formidable prerogatives, he crushed at pleasure the most formidable barons in the realm. It was only by close and numerous confederacies, therefore, that these could resist his tyranny; they even were compelled to associate the people in them, and make them partners of public liberty.

Assembled with their vassals in their great halls, where they dispensed their hospitality, deprived of the amusement of more polished nations, naturally inclined, besides, freely to expatiate on objects of which their hearts were full, their conversation, as a consequence, turned on the injustice of the public impositions, on the tyranny of the judicial proceedings, and, above all, on the detested forest laws.

Destitute of an opportunity of cavilling about the 22
meaning of laws, the terms of which were precise, or rather disdaining the resource of sophistry, they were naturally led to examine the first principles of society; they inquired into the foundations of human authority, and became convinced that *power*, when its object is not the good of those who are subject to it, is nothing more than the right of the strongest, and may be repressed by the exertion of a similar right.

The different orders of the feudal government, as established in England, being connected by tenures exactly similar, the same maxims which were laid down as true against the lord paramount, in behalf of the lord of an

upper fief, were likewise to be admitted against the latter in behalf of the owner of an inferior fief; the same maxims were also to be applied to the possessors of a still lower fief; they further descended to the freeman, and to the peasant; and the spirit of liberty, after having circulated through the different branches of the feudal subordination, thus continued to flow through successive homogeneous channels; it forced a passage into the remotest ramifications; and the principle of
23 primeval equality became every where diffused and established: a sacred principle, which neither injustice nor ambition can erase, which exists in every breast, and, to exert itself, requires only to be awakened among the numerous and oppressed classes of mankind.

But when the barons whom their personal consequence had at first caused to be treated with caution and regard by the sovereign, began to be no longer so; when the tyrannical laws of the conqueror became still more tyrannically executed, the confederacy, for which the general oppression had paved the way, instantly took place. The lord, the vassal, the inferior vassal, all united; they even implored the assistance of the peasants and cottagers; and the haughty aversion with which, on the Continent, the nobility repaid the industrious hands who fed them (7), was in England compelled to yield to the pressing necessity of setting bounds to the royal authority.

The people, on the other hand, knew that the cause they were called upon to defend was a cause common to all; and they were sensible, besides, that they were

(7) The nobles of Europe considered their family disgraced by marriage with a plebeian.—EDITOR.

necessary supporters of it. Instructed by the example of their leaders, they stipulated conditions for 24
themselves; they insisted that, for the future, every individual should be entitled to the protection of the laws; and thus did those rights with which the lords had strengthened themselves, in order to oppose the tyranny of the crown, become a bulwark which was in time to restrain their own (8).

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(8) It is maintained in this chapter, that the Conquest was the real era of the formation of the present English government; and as this position is at variance with many writers, who consider that William *legally* acceded to the throne, the present writer offers the following further observations upon this subject, which the reader will find very fully treated upon in *Dr. Russell's History of Modern Europe, Part i., Letters* 19 & 23.

After the English had shaken off the Danish yoke, which they did upon the death of Hardicanute, they recalled from Normandy Edward, son of Ethelred, surnamed the Confessor, who had been educated in Normandy by his uncle Richard, Duke of Normandy; and having contracted many intimacies with the natives of that country, as well as an affection for their manners, the court of England was soon filled with Normans, who were distinguished by the royal favour, and had great influence in the national councils.

Harold, the son of Earl Godwin, the most powerful nobleman in the kingdom, by his political and fortunate conduct found himself in a condition to aspire to the crown. His competitors for the succession were, Edgar Atheling, the sole surviving heir to the crown, and William, Duke of Normandy, the king's cousin; but the first was a youth, whose inability was thought sufficient to set aside his claim, and the second a foreigner. Edward's prepossessions hindered him from supporting the pretensions of Harold, and his irresolution from securing the crown to the Duke of Normandy, whom he secretly favoured; he therefore died without a successor, and Harold immediately stepped in to the vacant throne.

William of Normandy founded his claim to the English crown on a pretended will of Edward the Confessor in his favour, which he fortified with an oath, extorted from Harold when shipwrecked on the coast of France, that he would never aspire to the succession,

and by which he bound himself to support the pretensions of William.

After the defeat and death of Harold at the battle of Hastings Edgar Atheling, with all the chief nobility, repaired to William's camp, and requested him to accept the crown, which they then considered as vacant; and he was crowned in all due form in Westminster Abbey. He took the oath administered to the Anglo-Saxon Kings, "to preserve inviolate the constitution, and govern according to the laws."

It is said that he hesitated whether he should accept the crown from the nobility and clergy, or owe it solely to his own sword, and thus avoid taking the oath; but that he was advised to moderate his ambition, sensible that the people, when they saw they had to contend for their *free* constitution, and not merely for the person who should administer their government, would fight with double fury when they found that their dearest interests, their liberty, and their property, were at stake. (*Gul. Pictav.*).

Thus he possessed the throne by a pretended will of King Edward, and an irregular election of the people, abetted by force of arms.—EDITOR.

CHAPTER II.

A Second Advantage England had over France—it formed one undivided State.

It was in the reign of Henry I., about forty years 24
after the Conquest, that we see the above causes beginning to operate. This prince, having ascended the throne to the exclusion of his elder brother, was sensible that he had no other means to maintain his power than by gaining the affection of his subjects; but, at the same time, he perceived it must be the affection of the whole nation: he, therefore, not only mitigated the rigour of the feudal laws in favour of the lords, but also annexed as a condition to the charter he granted, that the lords should allow the same freedom to their respective vassals. Care was even taken to abolish those 25
laws of the Conqueror which lay heaviest on the lower classes of the people (*a*).

Under Henry II. liberty took a farther stride; and

(*a*) Amongst others, the law of the *Curfew*. It might be matter of curious discussion, to inquire what the Anglo-Saxon government would, in process of time, have become, and of course the government of England be at the present time, if the event of the Conquest had never taken place; which, by conferring an immense as well as an unusual power on the head of the feudal system, compelled the nobility to contract a lasting and sincere union with the people. It is very probable that the English government would at this day be the same as that which long prevailed in Scotland, (where the king and nobles engrossed, jointly or by turns, the whole power of the state), the same as in Sweden, the same as in Denmark, countries whence the Anglo-Saxons came.

the ancient *trial by jury*, a mode of procedure which is at present one of the most valuable parts of the English law, made again, though imperfectly, its appearance (1).

Henry II. also, in consequence of the usurpations of the clergy upon the liberties of the people, instituted the Constitutions of Clarendon, to determine at once the controversies which had daily multiplied between the civil and ecclesiastical jurisdictions.

These Constitutions were passed in a national and civil assembly, and fully established the superiority of the legislature over all papal decrees and spiritual canons (2). He also undertook the conquest of Ireland, and annexed that kingdom to the English crown; and after he had been victorious in all quarters, and become absolute master of his English dominions, he set about improving the laws, and providing for the happiness and security of his subjects. Among many salutary laws which he passed, was an equitable one, that the goods of a vassal should not be seized for the debt of his lord, unless the vassal was surety for the debt; and that, in cases of insolvency, the rents of vassals should be paid to the creditors of the lord, and not to the lord himself. He also divided England into four divisions; and ap-

(1) The trial *per pais*, or by the country, is supposed to have been in use long before the time of Alfred. This mode of trial appears to have been first instituted in England by William the Conqueror, and is commonly dated from the period of the Conquest. It had been established among the Danes by a law of Regnerus, surnamed Lodbrog, since the year A. D. 820, and was carried by Rollo the Dane, when he took possession of Normandy, into that Duchy. This opinion is, however, contrary to that of Blackstone, who, speaking of the trial by jury at the time of the Norman invasion, says—"the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors."

(2) M. Paris, Hist. Quad.—EDITOR.

pointed itinerant judges to go the circuit in each division, and to decide the causes in the counties, after the example of the commissaries of Louis VI. and the *missi* of Charlemagne, which had a direct tendency to curb the oppressions of the barons, and to protect the inferior gentry and common people in their property. He also demolished the new-erected castles of the nobility, and published a decree, called *an Assize of Arms*, by which all his subjects were obliged to put themselves in a situation to defend themselves and the realm.

But these causes, which had worked but silently and slowly under the two Henries, who were princes in some degree just, and of great capacity, manifested themselves at once under the despotic reign of King John. The royal prerogative, and the forest laws, having been exerted by this prince to a degree of excessive 26
severity, he soon beheld a general confederacy formed against him. And here we must observe another circumstance, highly advantageous as well as peculiar to England.

England was not, like France, an aggregation of a number of different sovereignties; it formed but one state, and acknowledged but one master, one general title. The same laws, the same kind of dependence, consequently the same notions, the same interests, prevailed throughout the whole. The extremities of the kingdom could at all times unite to give a check to the exertions of an unjust power. From the river Tweed to Portsmouth, from Yarmouth to the Land's End, all was in motion; the agitation increased from the distance like the rolling waves of an extensive sea; and the monarch, left to himself and destitute of resources, saw himself attacked on all sides by an universal combination of his subjects.

No sooner was the standard up against John, than his very courtiers forsook him. In this situation, finding no part of his kingdom less irritated against him than another, having no detached province which he could engage in his defence, by promises of pardon or
27 of peculiar concessions, the trivial though never failing resources of government, he was compelled, with seven of his attendants, all that remained with him, to submit himself to the disposal of his subjects: and he signed at Runemede (*b*) the Charter of the Forest, together with that famous charter which, from its superior and extensive importance, is denominated *Magna Charta.*

By the former, the most tyrannical parts of the forest laws were abolished; and by the latter, the rigour of the feudal laws was greatly mitigated in favour of the lords. But this charter did not stop there; conditions were also stipulated in favour of the numerous body of the people, who had concurred to obtain it, and who claimed, with sword in hand, a share in that security which it was meant to establish. It was hence instituted by the Great Charter, that the same services which were remitted in favour of the barons, should be in like manner remitted in favour of their vassals. This charter established, moreover, an equality of weights and measures throughout England; it exempted the mer-
28 chants from arbitrary imposts, and gave them liberty to enter and depart the kingdom at pleasure; it even extended to the lowest orders of the state, since it enacted that the *villain* or bondman should not be subject to the forfeiture of his implements of tillage. Lastly, by the thirty-ninth article of the same charter, it was

(*b*) Anno 1215.

enacted, that no subject should be exiled, or in any shape whatever molested, either in his person or effects, otherwise than by judgment of his peers, and according to the law of the land (*c*); an article so important, that it may be said to comprehend the whole end and design of political societies: and from that moment the English would have been a free people, if there were not an immense difference between the making of laws and the observing of them.

But though this charter wanted most of those supports which are necessary to ensure respect to it; though it did not secure to the poor and friendless any certain 29
and legal methods of obtaining the execution of it, (provisions which numberless transgressions alone could, in process of time, point out); yet it was a prodigious advance towards the establishment of public liberty. Instead of the general maxims respecting the rights of the people, and the duties of the prince, (maxims against which ambition perpetually contends, and which it sometimes even openly and absolutely denies), here was substituted a written law, that is, a truth admitted by all parties, which no longer required the support of argument. The rights and privileges of the individual, as well in his person as in his property, became settled axioms. The Great Charter, enacted at first with so much solemnity, and afterwards confirmed at the beginning of every succeeding reign, became like a general

(*c*) "Nullus liber homo capiatur, vel imprisonetur, vel dissesietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis; aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus, justitiam vel rectum."—*Magna Chart.* cap. 29.

banner perpetually set up for the union of all classes of the people; and the foundation was laid on which those equitable laws were to rise, which offer the same assistance to the poor and weak as to the rich and powerful (*d*).

30 Under the long reign of Henry III., the differences which arose between the king and the nobles rendered England a scene of confusion. Amidst the vicissitudes which the fortunes of war produced in their mutual conflicts, the people became still more and more sensible of their importance, and so did, in consequence, both the king and barons also. Alternately courted by both parties, they obtained a confirmation of the Great Charter, and even the addition of new privileges, by
31 the *Statutes of Merton and of Marlebridge.* But I hasten to reach the grand epoch of the reign of Edward the First, a prince who, from his numerous and prudent laws, has been denominated the English Justinian.

Possessed of great natural talents, and succeeding a prince whose weakness and injustice had rendered his reign unhappy, Edward was sensible that nothing but a

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(*d*) The reader, to be more fully convinced of the reality of the causes to which the liberty of England has been here ascribed, as well as of the truth of the observations made at the same time on the situation of the people of France, needs only to compare the Great Charter, so extensive in its provisions, and in which the barons stipulated in favour even of the bondmen, with the treaty concluded at St. Maur, October 29, 1465, between Louis XI. and several of the princes and peers of France. In this treaty, which was made in order to terminate a war that was called a war for the public good (*pro bono publico*), no provision was made but concerning the particular power of a few lords; not a word was inserted in favour of the people. It may be seen at large in the *pièces justificatives* annexed to the *Mémoires de Philippe de Comines.*

strict administration of justice could, on the one side, curb a nobility whom the troubles of the preceding reign had rendered turbulent; and, on the other, appease and conciliate the people, by securing the property of individuals. To this end, he made jurisprudence the principal object of his attention; and so much did it improve under his care, that the mode of process became fixed and settled; Judge Hale going even so far as to affirm, that the English laws arrived at once, *et quasi per saltum*, at perfection, and that there was more improvement made in them during the first thirteen years of the reign of Edward, than in all the ages since his time.

But what renders this æra particularly interesting, is, that it affords the first instance of the admission of the deputies of towns and boroughs into parliament (*e*).

Edward, continually engaged in wars, either against 32
Scotland or on the Continent, seeing moreover his demesnes considerably diminished, was frequently reduced to the most pressing necessities. But though, in consequence of the spirit of the times, he frequently indulged himself in particular acts of injustice, yet he perceived that it was impossible to extend a general oppression over a body of nobles, and a people who so well knew how to unite in a common cause. In order to raise subsidies, he was obliged to employ a new method, and to endeavour to obtain, through the consent of the people, what his predecessors had hitherto expected from their

(*e*) I mean their legal origin; for the Earl of Leicester, who had usurped the power during part of the preceding reign, had called such deputies up to parliament before.

own power. The sheriffs were ordered (*f*) to invite the towns and boroughs of the different counties to send deputies to parliament; and it is from this æra that we are to date the origin of the House of Commons.

No writs can be found to summon knights, burgesses, and citizens to parliament before the year 1266 (49 Henry III.): knights of shires were, however, summoned under King John. In 1283 Edward I. held a parliament at Shrewsbury, where *the lords sat in a castle, and the commons in a barn.* In 1337 the lords and commons met at Eltham, in Kent, in a palace of Edward II., the remains of which are still extant. It is certainly a question, when the commons first formed a distinct assembly from the lords: parliaments or general councils have existed from the most early periods of our history; the word is derived from the French, *parler*, to speak, because it is a deliberative assembly, and means the great council of the nation. They have existed in the early ages under various names.

The Saxons called these councils *Synoth* or *Michel-synoth*, the great council, or great synod, because they were of a religious character; also, *Michel-gemoth* or *gemote*, the great assembly, and *Wittena-gemoth*, the assembly of wise men. After the Conquest they were called by the Latin names of *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis*, and sometimes *communitas regni Angliæ* (4), and finally *parliamentum*, which was the name last adopted.

Mr. Barrington, in his remarks upon the more

(*f*) Anno 1295.

(4) Glanvil, l. 13, c. 32, l. 9, c. 10; 2 Inst. 526.—EDITOR.

ancient statutes (5), observes, in contradiction to Lord Coke's etymology of the word 'parliament,' as being composed of the words *parler la ment*, 'to speak one's mind,' that it was a compound of the two Celtic words *parley* and *ment* or *mend*, both of which are to be found in Bullet's Celtic Dictionary, published at Besançon, in 1754. He renders *parley* by the French infinitive *parler*, and we use the word in English as a substantive, viz. *parley;* and *ment* or *mend* is rendered *quantité, abondance.* And he concludes that the word parliament, therefore, being resolved into its constituent syllables, may not improperly be said to signify what the Indians of North America call a *great talk.* This word *parliamentum*, it is universally admitted, was not used in England till the reign of Henry III., which is contrary to the assertion of Lord Coke (6), that the word was in use before the Conquest (7).

It is generally supposed that the origin of the house of commons may be dated from the 17th King John, (1215); but the institution of parliament is involved in great obscurity. In the First Report of the Lords' Committees upon the Peerage will be found the result of their lordships' inquiries as to the constitution of parliament, and for what purposes it was originally summoned: but it is one of those matters, to use the words of Blackstone, which "lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain." As an illustration

(5) P. 48.

(6) Co. 1 Inst. 110. a.; Co. 2 Inst. 156; 1 Com. 147.

(7) Co. 4 Inst. 12; Prynne on 4 Inst. 2. See Christian's note, 1 Blacks. Comm. 147; Taylor, Civ. Law, 70.

of this obscurity, the Magna Charta of Henry III. omits the following clause which is in the Magna Charta of King John, "that no scutage shall be imposed on the people unless by the consent of the *commune consilium* of the realm (8)."

The first writ of summons to elect and send knights and burgesses to parliament, was issued 49 Hen. III., before which there are no memorials or evidences of any such writ (9).

It must be confessed, however, that these deputies of the people were not at first possessed of any consider-
33 able authority: they were far from enjoying those extensive privileges which, in these days, constitute the house of commons a collateral part of the government; they were in those times called up only to provide for the wants of the king, and approve of the resolutions taken by him, and the assembly of the lords (*g*). But it was nevertheless a great point gained to have obtained the right of uttering their complaints, assembled in a body and in a legal way; to have acquired, in-

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(8) See *post*, Chap. 9. See also Blackstone's History of the Charters.—EDITOR.

(9) Prynne's Parl. Writs.—EDITOR.

(*g*) The end mentioned in the summons sent to the lords was, *de arduis negotiis regni tractaturi et consilium impensuri;* the requisition sent to the commons was, *ad faciendum et consentiendum.* The power enjoyed by the latter was even inferior to what they might have expected from the summons sent to them. "In most of the ancient statutes they are not so much as named; and in several, even when they are mentioned, they are distinguished as petitioners merely, the assent of the lords being expressed in contradistinction to the request of the commons."—See on this subject the *Preface to the Collection of the Statutes at Large, by Ruffhead,* and the authorities quoted therein.

stead of the dangerous resource of insurrections, a lawful and regular means of influencing the motions of the government, and thenceforth to have become a part of it. Whatever disadvantage might attend the station at first allotted to the representatives of the people, it was soon to be compensated by the preponderance the people necessarily acquire, when they are enabled to 34
act and move with method, and especially with concert (*h*).

And indeed this privilege of naming representatives, insignificant as it might then appear, presently manifested itself by the most considerable effects. In spite of his reluctance, and after many evasions unworthy of so great a king, Edward was obliged to confirm the Great Charter; he even confirmed it eleven times in the course of his reign. It was moreover enacted, that whatever should be done contrary to it should be null and void; that it should be read twice a year in the cathedrals; and that the penalty of excommunication should be denounced against any one who should presume to violate it (*i*).

At length he converted into an established law a 35
privilege of which the English had hitherto had only a

(*h*) France had, indeed, also her assemblies of the general estates of the kingdom, in the same manner as England had her parliament; but then it was only the deputies of the towns within the particular domain of the crown, that is, for a very small part of the nation, who, under the name of the *third estate*, were admitted in those estates; and it is easy to conceive that they acquired no great influence in an assembly of sovereigns who gave the law to their lord paramount. Hence, when these disappeared, the maxim became immediately established—The will of the king is the will of th law: in old French, *Que veut le roy, si veut la loy.*

(*i*) Confirmationes Chartarum, cap. 2, 3, 4.

precarious enjoyment; and, in the Statute *de Tallagio non concedendo*, he decreed, that no tax should be laid, nor impost levied, without the joint consent of the lords and commons (*k*):—a most important statute this, which, in conjunction with Magna Charta, forms the basis of the English constitution. If from the latter the English are to date the origin of their liberty, from the former they are to date the establishment of it; and as the Great Charter was the bulwark that protected the freedom of individuals, so was the statute in question the engine which protected the charter itself, and by the help of which the people were thenceforth to make legal conquests over the authority of the crown.

This is the period at which we must stop, in order to contemplate the different prospect which the rest of Europe then presented.

36 The efficient causes of slavery were daily operating and gaining strength: the independence of the nobles on the one hand, the ignorance and weakness of the people on the other, continued to be extreme; the feudal government still continued to diffuse oppression and misery, and such was the confusion of it, that it even took away all hopes of amendment.

France, still bleeding from the extravagance of a nobility, incessantly engaged in groundless wars, either with each other or with the king, was again desolated

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(*k*) "Nullum tallagium vel auxilium, per nos, vel hæredes nostros, in regno nostro ponatur seu levetur, sine voluntate et assensu Archiepiscoporum, Episcoporum, Comitum, Baronum, Militum, Burgensium, et aliorum liberorum hominum de regno nostro." *Stat. an.* 24 *Ed.* 1.—*See the Editor's note on B.* 2, *Cap.* 15, *p.* 338.

by the tyranny of that same nobility, haughtily jealous of their liberty, or rather of their anarchy (*l*). The people, oppressed by those who ought to have guided and protected them, loaded with insults by those who existed by their labour, revolted on all sides. But their tumultuous insurrections had scarcely any other object than that of giving vent to the anguish with 37
which their hearts were filled. They had no thoughts of entering into a general combination; still less of changing the form of the government, and laying a regular plan of public liberty.

Having never extended their views beyond the fields they cultivated, they had no conception of those different ranks and orders of men, of those distinct and opposite privileges and prerogatives, which are all necessary ingredients of a free constitution. Hitherto confined to the same round of rustic employments, they little thought of that complicated fabric, which the more informed themselves cannot but with difficulty comprehend, when, by a concurrence of favourable circumstances, the structure has at length been reared, and stands displayed to their view.

In their simplicity, they saw no other remedy for the national evils than the general establishment of the regal power, that is, of the authority of one common

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(*l*) Not content with oppression, they added insult. "When the gentry," says Mezeray, "pillaged and committed exactions on the peasantry, they called the poor sufferer, in derision, *Jaques bonhomme*, (goodman James). This gave rise to a furious sedition, which was called the *Jaquerie*. It began at Beauvais in the year 1357, extending itself into most of the provinces of France, and was not appeased but by the destruction of part of those unhappy victims, thousands of whom were slaughtered."

uncontrolled master; and only longed for that time, which, while it gratified their revenge, would mitigate their sufferings, and reduce to the same level both the oppressors and the oppressed.

The nobility, on the other hand, bent solely on the
38 enjoyment of a momentary independence, irrecoverably lost the affection of the only men who might in time support them; and, equally regardless of the dictates of humanity and of prudence, they did not perceive the gradual and continual advances of the royal authority, which was soon to overwhelm them all. Already were Normandy, Anjou, Languedoc, and Touraine united to the crown; Dauphiné, Champagne, and part of Guienne, were soon to follow. France was doomed at length to see the reign of Louis XI.; to see her General Estates first beccom useless, and be afterwards abolished (10).

It was the destiny of Spain also to behold her several

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(10) For a state to be powerful, the people must either enjoy a liberty founded on the laws, or the regal authority must be fixed beyond all opposition. In France, the people were slaves till the reign of Philip Augustus; the noblemen were tyrants till the reign of Louis the Eleventh; and the kings, always employed in maintaining their authority against their vassals, had neither leisure to think about the happiness of their subjects, nor the power of making them happy. *Voltaire* says, that Louis XI. did a great deal *for the regal power*, but nothing for the happiness or glory of the nation.

Louis, like the other monarchs of Europe, at the close of the fifteenth century, was better enabled to obtain supremacy by reason of his being more enlightened than his nobles: he abolished the States General, Ferdinand of Spain laid a train for the destruction of the Cortes, and Henry VII. would have abolished the English parliament. Henry VIII. obtained such supremacy, as to compel the parliament to pass a statute whereby his proclamations ad the effect of acts of parliament.—EDITOR.

kingdoms united under one head; she was fated to be in time ruled by Ferdinand of Arragon, and Charles V. (*m*). And Germany, where an elective crown 39
prevented the re-unions (*n*), was to acquire a few free cities; but her people, parcelled into so many different dominions, were destined to remain subject to the arbitrary yoke of such of her different sovereigns as should be able to maintain their power and independence. In a word, the feudal tyranny which overspread the Continent did not compensate, by any preparation of distant advantages, the present calamities it caused; nor was it to leave behind it, as it disappeared, any thing but a more regular kind of despotism.

(*m*) Spain was originally divided into twelve kingdoms, besides principalities, which by treaties, and especially by conquests, were collected into three kingdoms, those of Castile, Arragon, and Granada. Ferdinand V., King of Arragon, married Isabella, Queen of Castile; they made a joint conquest of the kingdom of Granada, and these three kingdoms thus united descended, in 1516, to their grandson Charles V., and formed the Spanish monarchy. At this æra the kings of Spain began to be absolute; and the states of the kingdom of Castile and Leon, "assembled at Toledo in the month of November, 1539, were the last in which the three orders met, that is, the grandees, the ecclesiastics, and the deputies of the towns."—*See the History of Spain, by Ferrera.*

(*n*) The kingdom of France, as it stood under Hugh Capet and his next successors, may, with a great degree of exactness, be compared with the German Empire; but the imperial crown of Germany, having, through a conjunction of circumstances, continued elective, the emperors, though vested with more high-sounding prerogatives then even the kings of France, laboured under very essential disadvantages: they could not pursue a plan of aggrandisement with the same steadiness as a line of hereditary sovereigns usually do; and the right to elect them, enjoyed by the greater princes of Germany, procured a sufficient power to these, to protect themselves, as well as the inferior lords, against the power of the crown.

But in England the same feudal system, after having suddenly broken in like a flood, had deposited, and still continued to deposit, the noble seeds of the spirit of liberty, union, and sober resistance.

So early as the time of Edward, the tide was seen gradually to subside; the laws which protect the person and property of the individual began to make their appearance; that admirable constitution, the result of a threefold power, insensibly rose (*o*); and the eye might even then discover the verdant summits of the fortunate region, that was destined to be the seat of philosophy and liberty, which are inseparable companions.

(*o*) "Now in my opinion," says Philippe de Comines, in times not much posterior to those of Edward I., and with the simplicity of the language of his times, "among all the sovereignties I know in the world, that in which the public good is best attended to, and the least violence exercised on the people, is that of England." *Mémoires de Comines, tom.* 1, *lib.* 5, *chap.* 19.

CHAPTER III.

SECTION I.—*The Subject continued.*

THE representatives of the nation, and of the whole 41
nation, were now admitted into parliament: the great point, therefore, was gained that was one day to procure them the influence which they at present possess; and the subsequent reigns afford continual instances of its successive growth (1).

Under Edward II. the commons began to annex petitions to the bills by which they granted subsidies: this was the dawn of their legislative authority. Under Edward III. they declared they would not, in future, acknowledge any law to which they had not

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(1) In the First Report of the Lords' Committee upon the Peerage, p. 252, the committee state, that the first solemn act which they had discovered, by which the constitution of the legislative assembly of the realm was distinctly described, after the charter of King John, was a statute passed in the 15th Edw. II., where it is declared, "that the matters to be established for the estate of the realm, and of the people, should be treated, established, and accorded in parliament by the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm, according as had been before accustomed." This committee also state, that the provision of the charter of King John, about summoning the *commune concilium*, appears to have been abandoned, and probably did not extend to all legislative purposes, but only to that of granting aid.—EDITOR.

expressly assented. Soon after this, they exerted a privilege, in which consists, at this time, one of the great balances of the Constitution: they impeached and procured to be condemned some of the first ministers of state. Under Henry IV. they refused to grant subsidies before an answer had been given to their petitions. In a word, every event of any consequence was attended with an increase of the power of
42 the commons; increases, indeed, but slow and gradual, but which were peaceably and legally effected, and were the more fit to engage the attention of the people, and coalesce with the ancient principles of the Constitution.

Under Henry V. the nation was entirely taken up with its wars against France; and in the reign of Henry VI. began the fatal contests between the houses of York and Lancaster. The noise of arms alone was now to be heard: during the silence of the laws already in being, no thought was had of enacting new ones; and, for thirty years together, England presents a wide scene of slaughter and desolation.

At length, under Henry VII., who, by his intermarriage with the house of York, united the pretensions of the two families, a general peace was re-established, and the prospect of happier days seemed to open on the nation. But the long and violent agitation under which it had laboured, was to be followed by a long and painful recovery. Henry, mounting the throne with sword in hand, and in great measure as a conqueror, had promises to fulfil, as well as injuries to avenge. In the meantime, the people, wearied out by the calamities they had undergone, and longing only for
43 repose, abhorred even the idea of resistance; so that

the remains of an almost exterminated nobility beheld themselves left defenceless, and abandoned to the mercy of the sovereign.

The commons, on the other hand, accustomed to act only a second part in public affairs, and finding themselves bereft of those who had hitherto been their leaders, were more than ever afraid to form of themselves an opposition. Placed immediately, as well as the lords, under the eye of the king, they beheld themselves exposed to the same dangers. Like them, therefore, they purchased their personal security at the expense of public liberty; and in reading the history of the first two kings of the house of Tudor, we imagine ourselves reading the relation given by Tacitus of Tiberius and the Roman senate (*a*).

The time, therefore, seemed to be arrived, at which England must submit in its turn to the fate of the other nations of Europe. All those barriers which it had raised for the defence of its liberty, seemed to have been only able to postpone the inevitable effects of power.

But the remembrance of their ancient laws,—of that 44
Great Charter so often and so solemnly confirmed, was too deeply impressed on the minds of the English to be effaced by transitory evils. Like a deep and extensive ocean, which preserves an equability of temperature amidst all the vicissitudes of seasons, England still retained those principles of liberty which were so universally diffused through all orders of the people, and they required only a proper opportunity to manifest themselves.

(*a*) Quanto quis illustrior, tanto magis falsi ac festinantes.

England, besides, still continued to possess the immense advantage of being one undivided state.

Had it been, like France, divided into several distinct dominions, it would also have had several national assemblies. These assemblies, being convened at different times and places, for this and other reasons never could have acted in concert; and the power of withholding subsidies,—a power so important when it is that of disabling the sovereign, and binding him down to inaction, would then have only been the destructive privilege of irritating a master, who would have easily found means of obtaining supplies from other quarters.

The different parliaments, or assemblies of these several states, having thenceforth no means of recommending themselves to their sovereign but their forwardness in complying with his demands, would have vied with each other in granting what it would not only have been fruitless, but even highly dangerous, to refuse. The king would not have failed soon to demand, as a tribute, a gift he must have been confident to obtain; and the outward form of consent would have been left to the people, only as an additional means of oppressing them without danger.

But the King of England continued, even in the time of the Tudors, to have but one assembly before which he could lay his wants, and apply for relief. *How great soever the increase of his power was, a single parliament alone could furnish him with the means of exercising it;* and whether it was that the members of this parliament entertained a deep sense of their advantages, or whether private interest exerted itself in aid of patriotism, they at all times vindicated the right of granting, or rather refusing, subsidies; and amidst the general wreck

of every thing they ought to have held dear, they at least clung obstinately to the plank which was destined to prove the instrument of their preservation.

Under Edward VI., the absurd tyrannical laws 46
against high treason (instituted under Henry VIII.) were abolished. But this young and virtuous prince having soon passed away, the bloodthirsty Mary astonished the world with cruelties, which nothing but the fanaticism of a part of her subjects could have enabled her to execute.

Under the long and brilliant reign of Elizabeth, England began to breathe anew, and the Protestant religion, being seated once more on the throne, brought with it some more freedom and toleration.

The Star Chamber, that effectual instrument of the tyranny of the two Henries, yet continued to subsist: the inquisitorial tribunal of the High Commission (2) was even instituted; and the yoke of arbitrary power lay still heavy on the subject. But the general affection of the people for a queen, whose former misfortunes had created such a general concern, the imminent dangers which England escaped, and the extreme glory attending that reign, lessened the sense

(2) "The Court of High Commission in ecclesiastical causes" was erected under the statute of this queen, which revived those of 26 and 35 Henry 8, declaring the king supreme head of the church; and although it was an inquisitorial tribunal, yet so mildly was it conducted, that it was generally held at the time that the commissioners ought to confine themselves to offences against the laws then newly made for the protection of the reformed religion, and to inflict ecclesiastical censure as a punishment rather than fine or imprisonment; and the Judges mostly gave relief to all who felt themselves aggrieved by this commission.—EDITOR.

of such exertions of authority, as would, in these days, appear the height of tyranny, and served at that
47 time to justify, as they still do to excuse, a princess whose great talents, though not her principles of government, render her worthy of being ranked among the greatest sovereigns.

Under the reign of the Stuarts, the nation began to recover from its long lethargy. James the First, a prince rather imprudent than tyrannical, drew back the veil which had hitherto disguised so many usurpations, and made an ostentatious display of what his predecessors had been contented to enjoy.

He was incessantly asserting that the authority of kings was not to be controlled, any more than that of God himself. Like Him, they were omnipotent; and those privileges to which the people so clamorously laid claim as their inheritance and birthright, were no more than an effect of the grace and toleration of his royal ancestors (*b*).

Those principles, hitherto only silently adopted in the cabinet and in the courts of justice, had maintained their ground in consequence of this very ob-
48 scurity. Being now announced from the throne, and resounded from the pulpit, they spread an universal alarm. Commerce, besides, with its attendant arts, and above all that of printing, diffused more salutary notions throughout all orders of the people; a new light began to rise upon the nation, and that spirit of opposition frequently displayed itself in this reign,

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(*b*) See his declaration made in parliament in the years 1610 and 1621.

to which the English monarchs had not for a long time past been accustomed.

But the storm, which was only gathering in clouds during the reign of James, began to mutter under Charles I., his successor; and the scene which opened to view, on the accession of that Prince, presented the most formidable aspect.

The notions of religion, by a singular concurrence, united with the love of liberty: the same spirit which had made an attack upon the established faith, now directed itself to politics: the royal prerogatives were brought under the same examination as the doctrines of the church of Rome had been submitted to; and as a superstitious religion had proved unable to support the test, so neither could an authority, pretended to be unlimited, be expected to bear it.

The commons, on the other hand, were recovering from the astonishment into which the extinction 49
of the power of the nobles had at first thrown them. Taking a view of the state of the nation, and of their own, they became sensible of their whole strength; they determined to make use of it, and to repress a power, which seemed for so long a time to have levelled every barrier. Finding amongst themselves men of the greatest capacity, they undertook that important task with method and by constitutional means; and thus had Charles to cope with a whole nation, put in motion and directed by an assembly of statesmen.

And here we must observe, how different were the effects produced in England by the annihilation of the power of the nobility, from those which the same events had produced in France.

In France, where, in consequence of the division of the people, and of the exorbitant power of the nobles, the people were accounted nothing, when the nobles themselves were suppressed, the work was completed.

In England, on the contrary, where the nobles had ever vindicated the rights of the people equally with their own,—in England, where the people had successively
50 acquired most effectual means of influencing the motions of the government, and above all were undivided,—when the nobles themselves were cast to the ground, the body of the people stood firm, and maintained the public liberty.

The unfortunate Charles was, however, totally ignorant of the dangers that surrounded him. Seduced by the example of the other sovereigns of Europe, he was not aware how different in reality his situation was from theirs: he had the imprudence to exert with rigour, an authority which he had no ultimate resources to support: a union was at last effected in the nation, and he saw his enervated prerogatives
51 dissipated with a breath (*c*). By the famous Act, called

(*c*) It might here be objected, that when, under Charles I., the regal power was obliged to submit to the power of the people, the king possessed other dominions besides England, viz Scotland and Ireland, and therefore seemed to enjoy the same advantage as the kings of France, that of reigning over a divided empire or nation. But to this it is to be answered, that, at the time we mention, Ireland, scarcely civilized, only increased the necessities, and consequently the dependence, of the king; while Scotland, through the conjunction of peculiar circumstances, had thrown off her obedience. And though those two states, even at present, bear no proportion to the compact body of the kingdom of England, and seem never to have been able, by their union with it, to procure to the king any dangerous resources, yet the circumstances which took place in both at

the Petition of Right, and a posterior Act, to both which he assented, the compulsory loans and taxes, disguised under the name of *benevolences*, were declared to be contrary to law; arbitrary imprisonments and the exercise of martial law were abolished; the Court of High Commission and the Star Chamber were suppressed (*d*); and the constitution, freed from the apparatus of despotic powers with which the Tudors had obscured it, was restored to its ancient 52
lustre. Happy had been the people, if their leaders, after having executed so noble a work, had contented themselves with the glory of being the benefactors of their country. Happy had been the king, if, obliged at last to submit, his submission had been sincere, and if he had become sufficiently sensible that the only resource he had left was the affection of his subjects.

But Charles knew not how to survive the loss of a power he had conceived to be indisputable: he could not reconcile himself to limitations and restraints so injurious, according to his notions, to sovereign

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the time of the Revolution, or since, sufficiently prove that it was no unfavourable circumstance to English liberty, that the great crisis of the reign of Charles I., and the great advance which the constitution was to make at that time, should precede the period at which the king of England might have been able to call in the assistance of two other kingdoms.

(*d*) The Star Chamber differed from all the other courts of law in this:—the latter were governed only by the common law or immemorial custom and acts of parliament; whereas the former often admitted for law the proclamations of the king and council, and grounded its judgments upon them. The abolition of this tribunal, therefore, was justly looked upon as a great victory over regal authority.

authority. His discourse and conduct betrayed his secret designs; distrust took possession of the nation; certain ambitious persons availed themselves of it to promote their own views; and the storm, which seemed to have blown over, burst forth anew. The contending fanaticism of persecuting sects joined in the conflict between regal haughtiness and the ambition of individuals; the tempest blew from every point of the compass; the constitution was rent asunder; and Charles exhibited, in his fall, an awful example to the universe.

53 The royal power being thus annihilated, the English made fruitless attempts to substitute a republican government in its stead. "A very droll spectacle it was," says Montesquieu, "*in the last century*, to behold the *impotent* efforts of the English towards the establishment of democracy. As they who had a share in the direction of public affairs were void of virtue; as their ambition was inflamed by the success of the most daring of their members, (Cromwell); as the prevailing parties were successively animated by the spirit of faction, the government was continually changing: the people, amazed at so many revolutions, in vain attempted to erect a commonwealth. At length, when the country had undergone the most violent shocks, they were obliged to have recourse to the very government which they had so wantonly proscribed"(3).

Subjected at first to the power of the principal

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(3) Montesq. Spirit of Laws, B. 3, Ch. 3. (The Editor has introduced the whole of this quotation, which in the original text is disjointed).

leaders in the long parliament, they saw that power expire, only to pass without bounds into the hands of a Protector. They saw it afterwards parcelled out among the chiefs of different bodies of troops; and thus shifting without end from one kind of subjection to another, *they were at length convinced, that an attempt to establish liberty in a great nation, by making the people interfere in the common business of government, is, of all attempts, the most chimerical* (4); *that the authority of all, with which men are amused, is in reality no more than the authority of a few powerful individuals, who divide the republic among themselves;* and they at last rested in the bosom of the only constitution, which is fit for a great state and a free people; I mean that in which a chosen number deliberate, and a single hand executes; but in which, at the same time, the public satisfaction is rendered, by the general relation 54
and arrangement of things, a necessary condition of the duration of government (5).

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(4) What have we not witnessed in France in our days! After the most complete and apparently successful overthrow of every thing that belonged to royalty and aristocracy, have we not seen Napoleon Buonaparte, a Corsican officer of artillery, seize the sceptre by desire of all parties, without conspiracy, without murmurs, and rather with the joy that attends a lawful king when he takes possession of his own inheritance, than the bloody struggle that usually paves the way for an usurper? Have we not seen this child of the Revolution build up a throne with the very stones that supported the old dynasty, proclaim from the capital of the French republic all the doctrines of arbitrary monarchy, and teach in the name of an ancient sovereign that kingly maxim that "every thing must be done FOR *the people,* but nothing BY the people?"—*Lord John Russell's Introd. Hist. Eur.* p. 63.—EDITOR.

(5) When virtue is banished, ambition invades the minds of those

Charles II., therefore, was called over, and he experienced on the part of the people that enthusiasm of affection which usually attends the return from a long alienation. He could not, however, bring himself to forgive them the inexpiable crime of which he looked upon them to have been guilty. He saw with the deepest concern that they still entertained their former notions with regard to the nature of the royal prerogative; and, bent upon the recovery of the ancient powers of the crown, he only waited for an opportunity to break those promises which had procured his restoration.

But the very eagerness of his measures frustrated their success. His dangerous alliances on the Continent, and the extravagant wars in which he involved England, joined to the frequent abuse he made of his authority, betrayed his designs. The eyes of the nation were soon opened, and saw into his projects; when, convinced, at length, that nothing but fixed and irresistible bounds can be an effectual check on the views
55 and efforts of power, they resolved finally to take away

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who are disposed to receive it, and avarice possesses the whole community. The objects of their desires are changed; what they were fond of before is become indifferent; they were free while under the restraint of the laws, but they would fain now be free to act against law; and as each citizen is like a slave who has run away from his master, what was a maxim of equity he calls rigour, what was a rule of action he styles constraint, and to precaution he gives the name of fear; frugality and not the thirst of gain now passes for avarice. Formerly, the wealth of individuals constituted the public treasure, but now this is become the patrimony of private persons. The members of the commonwealth riot on the public spoils, and its strength is only the power of a few and the licentiousness of many.—*Montesq. Sp. Laws, B.* 3, *Ch.* 3.—EDITOR.

those remnants of despotism which still made a part of the regal prerogative.

The military services due to the crown, the remains of the ancient feudal tenures, had been already abolished: the laws against heretics were now repealed; the statute for holding parliaments once at least in three years was enacted; the habeas corpus act, that barrier of the subject's personal safety, was established; and such was the patriotism of the parliaments, that it was under a king the most destitute of principle, that liberty received its most efficacious supports (6).

At length, on the death of Charles, began a reign which affords a most exemplary lesson both to kings and people. James II., a prince of a more rigid disposition, though of a less comprehensive understanding than his late brother, pursued still more openly the project which had already proved so fatal to his family. He would not see that the great alterations which had successively been effected in the Constitution rendered the execution of it daily more and more impracticable; he imprudently suffered himself to be exasperated at a resistance he was in no condition to overcome; and, hurried away by a spirit of despotism and a monkish 56
zeal, he ran headlong against the rock which was to wreck his authority.

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(6) It has been said that the Constitution of England had arrived at its full vigour, and that the true balance between liberty and prerogative was established *by law*, in the reign of this monarch. The people had as large a portion of *real liberty* as was consistent with the state of society, and sufficient power was in their hands to assert and preserve that liberty, if invaded by the royal prerogative. This was clearly shewn by the memorable events of the next reign.—EDITOR.

He not only used in his declarations the alarming expressions of absolute power and unlimited obedience; he not only usurped to himself a right to dispense with the laws; but, moreover, sought to convert that destructive pretension to the destruction of those very laws which were held most dear by the nation, by endeavouring to abolish religion, for which they had suffered the greatest calamities, in order to establish on its ruins a mode of faith which repeated acts of the legislature had proscribed,—and proscribed, not because it tended to establish in England the doctrines of transubstantiation and purgatory,—doctrines in themselves of no political moment, but because the unlimited power of the sovereign had always been made one of its principal tenets.

To endeavour, therefore, to revive such a religion, was not only a violation of the laws, but was, by one enormous violation, to pave the way for others of a still more alarming nature. Hence the English, seeing that their liberty was attacked even in its first principles, had
57 recourse to that remedy which reason and nature point out to the people, when he who ought to be the guardian of the laws becomes their destroyer: they withdrew the allegiance which they had sworn to James, and thought themselves absolved from their oath to a king, who himself disregarded the oath he had made to his people.

But, instead of a revolution like that which dethroned Charles I., which was effected by a great effusion of blood, and threw the state into a general and terrible convulsion, the dethronement of James proved a matter of short and easy operation. In consequence of the progressive information of the people, and the certainty of the principles which now directed the nation, the whole were unanimous. All the ties by which the peo-

ple were bound to the throne were broken, as it were, by one single shock; and James, who, the moment before, was a monarch surrounded by subjects, became at once a simple individual in the midst of the nation.

That which contributes, above all, to distinguish this event as singular in the annals of mankind, is the moderation, I may even say the legality, which accompanied it. As if to dethrone a king who sought to set himself 58
above the laws, had been a natural consequence of, and provided for by, the principles of government, every thing remained in its place; the throne was declared vacant, and a new line of succession was established.

Nor was this all: care was had to repair the breaches that had been made in the Constitution, as well as to prevent new ones; and advantage was taken of the rare opportunity of entering into an original and express compact between king and people.

An oath was required of the new king more precise than had been taken by his predecessors, and it was consecrated as a perpetual *formula* of such oaths. It was determined, that, to impose taxes without the consent of parliament, as well as to keep up a standing army in time of peace, are contrary to law. The power which the crown had constantly claimed, of dispensing with the laws, was abolished. It was enacted, that the subject, of whatever rank or degree, had a right to present petitions to the king (*e*). Lastly, the keystone 59

(*e*) The lords, and commons, previous to the coronation of King William and Queen Mary, had framed a bill, which contained a declaration of the rights which they claimed in behalf of the people, and was in consequence called the *Bill of Rights*. This bill contained the articles above, as well as some others, and having

was put to the arch, by the final establishment of the liberty of the press (*f*).

The Revolution of 1689 is therefore the third grand æra in the History of the Constitution of England. The Great Charter had marked out the limits within which the royal authority ought to be confined; some outworks were raised in the reign of Edward I., but it was at the Revolution that the circumvallation was completed.

It was at this æra that the true principles of civil society were fully established. By the expulsion of a king who had violated his oath, the doctrine of resistance, that ultimate resource of an oppressed people,
60 was confirmed beyond a doubt. By the exclusion given to a family hereditarily despotic, it was finally determined that nations are not the property of kings. The principles of passive obedience,—the divine and indefeasible right of kings,—in a word, the whole scaffolding of false and superstitious notions, by which the royal authority had till then been supported, fell to the ground, and in the room of it were substituted the more solid and durable foundations of the love of order, and a sense of the necessity of civil government among mankind.

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received afterwards the royal assent, became an act of parliament, under the title of an Act *declaring the rights and liberties of the subject, and settling the succession of the crown.*—Stat. 1 William & Mary, sess. 2, cap. 2.

(*f*) The liberty of the press was, properly speaking, established only four years afterwards, in consequence of the refusal which the parliament made at that time to continue any longer the restrictions which had before been set upon it.

Section II.

On the Title to the Throne.

The succession to the throne, according to the true spirit of the constitution, is *hereditary*, or the crown is descendible to the next heir on the death or demise of the last proprietor. Blackstone observes (7), "the grand fundamental maxim upon which the *jus coronæ*, or right of succession to the throne of Great Britain, depends, is, that the crown is by common law and constitutional custom *hereditary*, and this in a manner peculiar to itself, but that the right of inheritance may from time to time be changed or limited by act of parliament, under which limitations *the crown* still continues *hereditary*."

Hence the king never dies, because he lives in his successor, and according to such maxim this *hereditary succession* (so well is our constitution formed) is not an *hereditary right;* as the parliament, consisting of *king, lords, and commons*, has the power to defeat any such right, and declare the inheritance to descend upon another. There is no instance upon record wherein the crown of England has ever been asserted to be *elective*, except by the regicides at the infamous trial of Charles I. It must of consequence, therefore, be hereditary. The political theory, therefore, that "*the people* have *the right* to choose their own governors," is destroyed; and this is made more manifest by the very words of the

(7) Blackst. Comm., vol. 1, p. 191.

Declaration of Right (8), made by the lords and commons in parliament assembled upon the accession of *William and Mary*, in which the lords and commons consider it "as a marvellous providence and merciful goodness of God to this nation, to preserve King William and Queen Mary most happily to reign over us *on the throne of their ancestors*."

Here there was a vacancy of the throne by the departure of King James from England, and the two houses of parliament, in the spirit of the constitution, exercised their right to regulate the succession, by appointing a successor in the persons of King William and Queen Mary, keeping in view the *hereditary succession* in the person of the queen; and the total destruction of the political theory before named is made the more manifest, by a further clause in the same Bill of Rights of the lords and commons, by which the lords spiritual and temporal, and commons, do, *in the name of all the people*, most humbly and faithfully *submit themselves, their heirs and posterity for ever*, and do faithfully promise that they will stand to, maintain, and defend their majesties, and *also the limitation of the crown* therein specified and contained, to the utmost of their powers.

This right of the two houses of parliament to regulate the succession to the throne was established in the reign of King Henry IV., who, coming to the throne by a doubtful title, sought to strengthen it by an appeal to parliament; and by an act passed in the seventh year of that king's reign (9), it is ordained, "that the inheritance

(8) 1 William & Mary, cap. 2.
(9) Cap. 2.

of the crown and realms of England and France, and all other the king's dominions, shall be set and remain (*soit mys et demuerge*) in the person of our sovereign lord the king, and the heirs of his body issuing."

What did the republicans do, after the murder of King Charles I., to maintain their assertion that *it was the inalienable right of the people to choose their own governor?* They offered the crown to Cromwell; and who were *the people* that did offer the crown? a parliament convened by the sole authority of Cromwell, and a council composed of his own general officers. These were *the people* of that day; and if we look to *the people* of *republican France* during the *reign of terror*, where do we find them but in the same channel? If the people said nay to the orders of the republican chiefs, the *guillotine* was their answer. The history of all revolutions shews the danger of placing power in the hands of *the people.* The means by which the packed and guarded parliament of Cromwell voted a renunciation of all title, in the Stuart family, to the crown, and invested Cromwell with the title of king, are the subject of history. The republicans maintain that this was the choice of *the people.* This political theory is still held forth by demagogues, as if *the people* were really ever intended to be consulted upon the matter. Did *the people* ever meet together to choose their king? The leaders of a faction might and would say, We are *the people*, and WE *will choose for and from ourselves*, and this choice would be called the *election* of *the people.*

Montesquieu observes, "one great fault was in most of the ancient republics, that *the people* had a right to *active resolutions*, such as require some execution, a

thing of which they are absolutely incapable. They ought to have no share in the government, but for the choosing of representatives, which is within their reach: for though few can tell the exact degree of men's capacities, yet there are none but are capable of knowing in general, whether the person they choose is better qualified than most of his neighbours" (10); and the same writer, in observing upon revolutions, says (11), "If by some revolution a state has happened to assume a new form, this can seldom be effected without infinite pains and labour, and hardly ever by idle and debauched persons. Even those who had been the instruments of the revolution were desirous it should be relished, which is difficult to compass without good laws. Hence it is that *ancient institutions* generally tend to reform the people's manners, and *those of modern date*, to corrupt them. In the course of a long administration, the descent to vice is insensible, but there is no re-ascending to virtue without making the most generous efforts."

It is related of Lady Fairfax, that at the trial of Charles I., when the clerk read the bill of indictment in the name of *the people* of England, that lady rose up and interrupted him, crying out with a loud voice and great warmth, "They are liars, the tenth part of *the people* of England is not concerned in this parricide, 'tis the work of the traitor Cromwell yonder;" and Cromwell bore this violent reproach without betraying the least emotion.

The particular mode of descent of the crown cor-

(10) 1 Montesq. Sp. Laws, B. 11, Ch. 6.
(11) Id. B. 5, Ch. 7.

responds with the feudal law generally, as set out by the common law for the succession to real estates, save as regards females.

The supreme executive power is vested in a single person, king or queen, for it matters not to which sex the crown descends (12).

The crown descends lineally to the issue of the reigning monarch. It is also a constitutional rule, as in common descents, that the right of primogeniture among males shall prevail, and that males shall be preferred to females.

Upon failure of males, the eldest female issue or the lawful heir of her body takes, which is a different mode of succession to that which governs real estate, where the female issue upon such default of males take (if more than one) as joint tenants, and for this plain reason — that it would be a serious inconvenience (13).

Thus Queen Mary on the death of her brother succeeded to the crown alone, and not in partnership with her sister Elizabeth.

The *hereditary title* to the crown is not so *absolute* now as before the Revolution. At the latter time, the crown descended to the next heir without any restriction; *now*, it descends only to such heirs of the body of the Princess Sophia of Hanover, grand-daughter

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(12) Stat. 1 Mar. st. 3, c. 1.

(13) This is an ancient British custom. The ancient Britons were often led to battle by women: they paid no regard to sex in the individual who was to govern them.

Voadica generis regii femina duce, (neque enim sexum in imperiis discernunt), sumpsere universi bellum.—Tacit. in Vit. Agricolæ, s. 16.

of King James I., as are protestant members of the Church of England, and are married to none but protestants (14).

A king of this vast empire, to use the words of Lord Bolingbroke, is now strictly and properly what a king should be,—a member, but the supreme member or head, of a political body, distinct from it or independent of it in nothing. He can no longer move in a different orbit from his people, and, like some superior planet, attract, repel, and direct their motions by his own. He and they are parts of the same system, intimately joined and co-operating together, acting and acted upon, limiting and limited, controlling and controlled by one another; and when he ceases to stand in that relation to them, he ceases to stand in any.

The second act passed in his late Majesty's reign was to provide for the administration of the government in the event of the decease of his Majesty without lawful issue, and that in the due order of hereditary succession as established by the laws; by which statute it is enacted, that upon the demise of his Majesty without such issue, the privy council should forthwith cause her present most gracious Majesty Alexandrina Victoria, only daughter of his late royal highness Edward Duke of Kent, (the fourth son of his late Majesty King George III.), by Victoria Maria Louisa, Duchess of Kent, to be openly and solemnly proclaimed as sovereign of the United Kingdom of Great Britain and Ireland, in case she should have arrived at the age of eighteen years, when her minority was declared

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(14) Stat. 12 & 13 Will. 3, c. 2.

to cease, in such manner and form as the preceding kings and queens have been usually proclaimed after the demise of their predecessors, saving the rights of any issue of his late Majesty which may be born of his consort.

His late Majesty King George III., at his demise, left a large family of children: the eldest, afterwards King George IV., died without issue; the second son Frederick, the late Duke of York, also died without issue; the third son was his late Majesty King William IV., who also died without issue.

The crown would, therefore, have descended to her present Majesty's father in the true order of succession, had he been living upon the demise of his late Majesty.

The Queen Victoria, therefore, holds the crown in her own right, and has the same powers, prerogatives, rights, dignities, and duties as if she were a king (15). She is a public person exempt and distinct from any person with whom she may intermarry, and not, like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues.

The husband of a queen regnant is her subject; he may be guilty of high treason against her, but for conjugal infidelity he is not liable to the same penal restrictions as the queen; for though an illegitimate heir might succeed to the throne through the frailty of the *queen*, yet no such danger arises from the inconstancy of her husband. To violate the person of the

(15) 1 Mar. 1, stat. 3, c. 1; and see Blackst. Comm. b. 1, c. 4.

queen is high treason, not only in him who commits the crime, but in the queen also if she be consenting; and it is equally treason to compass or imagine the death of the queen regnant.

It is, however, not high treason to conspire the death of a *queen dowager*, or to violate her chastity, because the succession to the throne is not thereby endangered; yet still, *pro dignitate regali*, no man can marry her without special licence from the king or queen regnant, under pain of forfeiting his lands and goods: if she marry again, and to a subject, she does not lose her regal dignity, as is the case with peeresses when they marry commoners (16).

By the statute 12 Geo. 3, c. 11, no descendant of the body of King George II. (other than the issue of princesses married into foreign families), is capable of contracting matrimony without the previous consent of *the king* signified under the great seal, and any marriage contracted without such consent is declared void; but it is provided that any such descendant *above the age of twenty-five*, may, after twelve months' notice given to *the king's privy council*, contract and solemnize marriage *without the consent of the crown*, unless prohibited within the twelve months by both houses of parliament; and all persons solemnizing, assisting, or being present at any such prohibited marriage, incur the penalties of *præmunire*.

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(16) 2 Inst. 50.

CHAPTER IV.

SECTION I.—*Of the Legislative Power.*

IN almost all the States of Europe, the will of the 60
prince holds the place of law; and custom has so confounded the matter of right with the matter of fact, that their lawyers generally represent the legislative authority as essentially attached to the character of king; and the plenitude of his power seems to them necessarily to flow from the very definition of his title.

The English, placed in more favourable circum- 61
stances, have judged differently; they could not believe that the destiny of mankind ought to depend on a play of words, and on scholastic subtilties: they have therefore annexed no other idea to the word *king* or *roy*, a word known also to their laws, than that which the Latins annex to the word *rex*, and the Northern nations to *cyning*.

In limiting, therefore, the power of their king, they have acted more consistently with the etymology of the word; they have acted also more consistently with reason, in not leaving the laws to the disposal of the person who is already invested with the public power of the state, that is, of the person who lies under the greatest and most important temptations to set himself above them.

The basis of the English Constitution,—the capital principle on which all others depend, is, that the legis-

lative power belongs to parliament alone; that is to say, the power of establishing laws, and of abrogating, changing, or explaining them.

The constituent parts of parliament are, the King, the House of Lords, and the House of Commons.

Blackstone, in his Commentaries (1), describes the Commons as consisting of all such men of property in the kingdom as have not seats in the House of Lords, every one of which has a voice in parliament, either personally or by his representative; and that it is a matter most essential, that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of Lord Treasurer Burleigh, "that England could never be ruined but by a parliament."

Sir Matthew Hale says (2), this being the highest and greatest court, over which none other can have jurisdiction, in the kingdom, if by any means a misgovernment should by any way fall upon it, the subjects of this kingdom are left without all manner of remedy.

The ancient constitution of the House of Commons has undergone a great change by the Reform Bill. Many abuses had long prevailed in the choice of members to serve in parliament, and the object of this bill is to deprive many inconsiderable places of the right of returning members, to grant such privileges to large, populous, and wealthy towns, to increase the number of knights of the shire, to extend the elective franchise, and to diminish the expense of elections.

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(1) Of Parliaments, 49.
(2) 1 Comm. 16.

By the statute 2 Will. 4, c. 45, intitled " An Act to amend the representation of the people in England and Wales," the assembly of the representatives of England and Wales is now composed of the deputies from the different counties, cities, boroughs, and places, as hereafter shewn.

Such of the counties as are not otherwise specifically provided for by this bill, remain as before it passed, and return the same number of members. The following twenty-five counties are divided into two divisions, and return each four members, two for each division, viz.—Cheshire, Cornwall, Cumberland, Derbyshire, Devonshire, Durham, Essex, Gloucestershire, Kent, Hampshire, Lancashire, Leicestershire, Norfolk, Northumberland, Northamptonshire, Nottinghamshire, Shropshire, Somersetshire, Staffordshire, Suffolk, Surrey, Sussex, Warwickshire, Wiltshire, and Worcestershire; the following seven counties return three members each, viz.—Berkshire, Buckinghamshire, Cambridgeshire, Dorsetshire, Herefordshire, Hertfordshire, and Oxfordshire; and three Welsh counties — Carmarthen, Denbigh, and Glamorgan—return each two members; the county of York returns six members; Lincolnshire sends four members, two for the parts of Lindsey, and two for the parts of Kesteven and Holland. For the purpose of electing a county member, each of the following cities and towns, and counties thereof, are included in the counties at large in which they are situate, namely:—Carmarthen, Canterbury, Chester, Coventry, Gloucester, Kingston-upon-Hull, Lincoln, London, Newcastle-upon-Tyne, Poole, Worcester, York and Ainsty, Southampton.

The following boroughs, that formerly returned members to parliament, are disfranchised:—Old Sarum,

Newton, St. Michael's or Midshall, Gatton, Bramber, Bossiney, Dunwich, Ludgershall, St. Mawe's, Beeralston, West Looe, St. Germain's, Newport, Blechingley, Aldborough, Camelford, Hindon, East Looe, Corfe Castle, Great Bedwin, Yarmouth, Queenborough, Castle Rising, East Grinstead, Higham Ferrers, Wendover, Weobly, Winchelsea, Tregony, Haselmere, Saltash, Orford, Callington, Newton, Ilchester, Boroughbridge, Stockbridge, New Romney, Hedon, Plympton, Seaford, Heytesbury, Steyning, Whitchurch, Wootton Bassett, Downton, Fowey, Milbourne Port, Aldeburgh, Minehead, Bishop's Castle, Okehampton, Appleby, Lostwithiel, Brackley, and Amersham.

The following boroughs *now* return one member to parliament:—Petersfield, Ashburton, Eye, Westbury, Wareham, Midhurst, Woodstock, Wilton, Malmesbury, Liskeard, Reigate, Hythe, Droitwich, Lyme Regis, Launceston, Shaftesbury, Thirsk, Christchurch, Horsham, Great Grimsby, Calne, Arundel, St. Ives, Rye, Clitheroe, Morpeth, Helston, Northallerton, Wallingford, and Dartmouth.

The following places were created boroughs, which return two members:—Manchester, Birmingham, Leeds, Greenwich, Sheffield, Sunderland, Devonport, Wolverhampton, Tower Hamlets, Finsbury, Marylebone, Lambeth, Bolton, Bradford, Blackburn, Brighton, Halifax, Macclesfield, Oldham, Stockport, Stoke-upon-Trent, and Stroud.

The following places were created boroughs, which return one member:—Ashton-under-Line, Bury, Chatham, Cheltenham, Dudley, Frome, Gateshead, Huddersfield, Kidderminster, Kendal, Rochdale, Salford, South Shields, Tynemouth, Wakefield, Walsall, Warrington, Whitby, Whitehaven, and Merthyr Tydvil

Each of these boroughs includes certain boundaries, settled and described by the stat. 2 & 3 Will. 4, c. 64.

Schedule E., annexed to the act, contains a number of places which have a share in the election of a member for the shire, town, or borough which is mentioned in conjunction therewith: these places, with the borough of Brecon, include the places comprehended within the boundaries of the shire, town, or borough.

The boroughs of Shoreham, Cricklade, Aylesbury, and East Retford, include certain hundreds and divisions, described in sect. 5 of the Reform Bill.

The united boroughs of Weymouth and Melcombe Regis return only two members.

Penryn includes Falmouth, and Sandwich includes Deal and Walmer.

Swansea, Loughor, Neath, Aberavon, and Kenfig form one borough, and return one member, but none of the inhabitants to vote for a member for Cardiff.

The Isle of Wight is severed from Hampshire, and returns one member.

The principal features of this bill, as regards the right of voting at elections, are as follows:—

Tenants for life of freeholds are not entitled to vote for counties, or for cities being counties of themselves, unless in the *bonâ fide* occupation of lands, except the tenancy came by marriage, marriage settlement, devise, or promotion to office, or except the land be of the clear yearly value of ten pounds; but the act does not extend to prevent such tenants for life, who, at the time of passing the act, had or might acquire the right of voting, from retaining or acquiring such right so long as they remained seised of the land, and were duly registered.

For counties, copyholders of lands of the clear yearly value of ten pounds are entitled to vote. *Also leaseholders* of lands for the unexpired residue, whatever it may be, of any term originally created for sixty years (determinable upon lives or not) of the clear yearly value of ten pounds.

Or for the unexpired residue, whatever it may be, of any term originally created for not less than twenty years (determinable upon lives or not) of the clear yearly value of not less than fifty pounds.

Also any tenant who shall occupy any lands or tenements, for which he shall be *bonâ fide* liable to a yearly rent of not less than 50*l.*, is entitled to vote.

Taxes and rates are not charges to affect the clear rental or yearly value.

But no sub-lessee or assignee of any under-lease to vote, except in his actual occupation.

County voters need not be assessed to the land-tax.

No mortgagee or *trustee*, unless in actual possession, entitled to vote, but the mortgagor or *cestui que* trusts in possession to vote.

No person is entitled to vote for a county as a freeholder, copyholder, or leaseholder OCCUPYING his land of such value as would confer upon him the right of voting for a city or borough in which such lands may be situate, whether he has or has not acquired the right to vote for such city or borough, in respect of the same land.

In order to vote for a county, certain qualifications are made necessary, viz., registration by the overseers of the parish where the property is situate, and *actual possession* for six months previous to the last day of July in the year of registration; and no such registration is to be made, unless accompanied with the possession for

twelve months previous to the last day of July in the year when such registry is demanded. There is an enabling proviso, however, in favour of persons to whom property may have come by descent, succession, marriage, marriage settlement, devise, or promotion to a church, benefice, or to office, within such six or twelve months, entitling such person to be registered upon the lists to be made next after the right shall accrue.

For cities and boroughs. The most important clause (3) in this act, is, that in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop or other building, being either separately, or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough; that no such person shall be so registered in any year, unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such year, nor unless such person, where such premises are situate in any parish or township in which there shall be a rate for the relief of the poor, shall have been rated in respect

(3) Sec 27.

of such premises to all rates for the relief of the poor in such parish or township, made during the time of such his occupation so required as aforesaid; nor unless such person shall have paid, on or before the twentieth day of July in such year, all the poor's rates and assessed taxes which shall have become payable from him in respect of such premises, previous to the sixth day of April then next preceding; that no such person shall be so registered in any year, unless he shall have resided for six calendar months next previous to the last day of July in such year within the city or borough, or within the place sharing in the election for the city or borough, in respect of which city, borough, or place respectively he shall be entitled to vote, or within seven statute miles thereof, or of any part thereof.

Joint occupiers of premises may also vote, if the value of the premises, when divided by the number of occupiers, shall be of such an amount as shall give ten pounds for each.

Freeholders in cities or towns being counties of themselves are entitled to vote, if duly registered, and in the actual possession or receipt of rents of property for twelve months previous to the last day of July in the year of registration, (except where the property shall have come within such twelve months by descent, succession, marriage, marriage settlement, devise, or promotion to any church benefice, or to office, then as in the enabling proviso in the clause making possession and registration essential to the right of voting for a county before stated (4),) and also if resident for six months previous to the last day of July within the city or town, or within seven miles thereof.

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(4) Supra, 63.

Provision is also made regarding freeholds situate without the then present limits of such cities and towns, by the Boundary Act, so as to give the right of voting.

Burgesses and freemen of boroughs not disfranchised, and freemen and liverymen of London, entitled to vote if duly registered; but no person is to be registered in any year, unless on the last day of July in such year he shall be qualified to vote as if that were the day of election, nor unless he shall have resided six months previous to the last day of July in such year within the city or borough, or within seven miles from the polling place.

Burgesses and freemen *sharing in the election* for any city or borough must have resided six months previous to the last day of July in such year, within the sharing place or within seven miles of the specific points set out in the schedule E. 2, to the Act.

All burgesses and freemen elected, made, or admitted since the 1st March, 1831, except for birth or servitude, are *excluded* from the right of voting or of registration; and all such persons *in right of birth* are also *excluded*, unless such right be derived from some person who was or was entitled to be a freeman or burgess before the 1st March, 1831, or through some person who since then should become a burgess or freeman in respect of *servitude*.

In this clause is a proviso, that all persons theretofore entitled to vote as a burgess or freeman of Swansea, Loughor, Neath, Aberavon, or Ken-fig, for the borough of Cardiff, shall cease to vote for that borough, and be entitled to vote only for the borough composed of the former towns, subject to the provisions for a burgess or

freeman of any place sharing in the election for a city or borough.

All persons who, at the time of passing the act, had a right to vote for any city or borough, otherwise than as a burgess or freeman, or freeman and liveryman, or freeholder or burgage tenant in a city or town being a county of itself, (except as to the disfranchised places), to retain such right so long as they shall be qualified according to the then existing laws and customs of such city or borough, and if duly registered in the same manner as is directed by this act for the registration of burgesses and freemen of boroughs, and which is before stated. This clause contains the following *important proviso* (3):—That every person shall for ever cease to enjoy the rights of voting for any such city or borough, if his name shall have been omitted for two successive years from the register of voters, unless such omission shall have been caused in consequence of his having received parochial relief within twelve months next previous to the last day of July in any year, or in consequence of his absence on naval or military service (4).

A provision is also made for freeholders having votes for the borough of New Shoreham, Cricklade, Aylesbury, and East Retford, at the time of passing the act, enabling them to retain their votes subject to the same qualifications as are required by the act for borough voters, and to reside within the borough, or within seven miles thereof, for six months previous to the last day of July, as defined by the act, without which they are not to be registered.

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(3) This proviso operates as a *total disfranchisement* upon all those who may be thus neglectful.

(4) Sect. 33.

All freeholders entitled to vote for this borough, in respect of freeholds in the borough of Malmesbury, are to be inserted in the list of voters of the parish next adjoining to the parish or township in which the freehold shall be situate, and if such parish or township shall adjoin two or more parishes or townships within New Shoreham or Cricklade, then in the list of voters of the least populous of the latter places.

No freeholder or burgage tenant, (except in a city or town being a county of itself), whose right of property shall have been acquired since the 1st March, 1831, to vote for any city or borough; unless the same shall have come to or been acquired since that day, and before the passing of the act, by descent, succession, marriage, marriage-settlement, devise, or promotion to any benefice or office.

Joint occupiers of premises, in any city or borough, subject to the before-named condition, as to persons occupying premises therein entitled to vote, in case the clear yearly value shall be of an amount which, when divided by the number of occupiers, shall give not less than 10*l.* for each.

Occupiers in every city or borough may claim to be rated to the relief of the poor, whether the landlord shall or shall not be so liable, and upon the occupier paying or tendering the rates the overseers are bound to put his name upon the rate-book; if the overseer neglect or refuse to do so, the occupier shall, for the purposes of the act, be deemed to be rated from the time the rate shall have been made in respect of which he has claimed to be rated. This clause contains a proviso, that it shall not discharge any landlord from his liability to the payment of poor rates under any act of parlia-

ment, in case the tenant who shall have been rated in consequence of such claim shall not pay the rate.

No person to be registered as a voter for any city or borough who shall for twelve months previous to the last day of July have received parochial relief or other alms which by law would disqualify the person from voting.

For the purpose of registration, overseers of parishes, on the 20th of June in every year, are to fix on or near the doors of the churches and chapels within their parishes, and if there are none such, then in some conspicuous situation within the same, a notice requiring all persons, before the 20th of July in the year, having a right to vote, to transmit to them a notice of claim. In this clause is a proviso, enabling all persons after registration, who shall retain the same qualification and continue in the same place of abode, to remain upon the registry without making any new claim in any subsequent year.

For the purpose of preparing lists of county voters, the overseers of parishes, on or before the last day of July in every year, are to make out a list of all persons claiming to vote, which list is to be published in like manner as is directed for registration on the two Sundays next after the list shall be made. In this clause is a proviso, that all places, extra-parochial or otherwise, having no overseer, shall be deemed to be within the adjoining parish in the same county or the same riding, parts or divisions of a county, as such places may be situate; and if they shall adjoin two or more parishes, it shall be deemed to be within the least populous of the latter parishes; and the voters are to be inserted in the list accordingly.

For the purpose of preparing lists of borough voters, the overseers of parishes, on or before the last day of July in every year, are to make out a list of all persons entitled to vote, describing the nature of their qualification, which list is to be published in like manner as directed for publishing county lists; and they are to keep copies of such lists, to be perused by all persons without fees during a fortnight after the lists shall have been made. The same provision is made for places within cities or boroughs having no overseers as is made for the like places within counties.

Lists of all the freemen in cities and boroughs entitled to vote, are to be made, before the last day of July in every year, by the town-clerk, who is to fix such list on or near the door of the town-hall, or in some conspicuous situation on the two Sundays next after the list shall have been made; he is also to keep a copy of such list, to be perused by any person, without fee, during the two first weeks after it shall be made. In this clause is a proviso to meet cases where there shall be no town-clerk, or where he shall be dead, or incapable of acting, enabling the person executing the duties of town clerk, and, where there is no such person, then the chief civil officer to perform the duties.

For providing a List of Freemen of the City of London as are Liverymen entitled to vote, the returning officers of the city, on or before the last day of July in every year, are to require of the livery companies a list of the freemen being liverymen of such companies, and entitled to vote; this list is to be signed by the clerk of the company, who is to transmit the same, with two printed copies, to the returning officer; and they are directed to fix one copy in Guildhall, and one in the

Royal Exchange, there to remain fourteen days. The clerks of the livery companies are also to cause a sufficient number of such lists to be printed for the perusal of any person, without fee, during two weeks after they shall have been printed.

Sufficient provision is made for all *cases of omission* in any of the lists of voters, and copies of the lists are to be supplied by overseers, clerks of counties, and returning officers, to all persons applying for the same, on payment of a reasonable price.

No inquiry is permitted at the time of polling as to the right of any person to vote, except as to his identity, the continuance of his qualification, and whether he has voted before; and if a false answer is made, the party making it is deemed guilty of an indictable misdemeanour, and may be punished accordingly.

The voter may be examined on oath (or, being a Quaker or Moravian, upon affirmation), if required, on behalf of any candidate, at the time of voting; but he is not required to take any oath or affirmation, either in proof of his freehold, or of his residence, age, or other qualification, or right to vote; and no person is to be excluded from voting except by reason of its appearing to the returning officer, upon putting the before-named questions, that the person cannot satisfactorily answer them, or he shall refuse to take the before-named oath, or make the affirmation, or to take the oath or make the affirmation against bribery, or any other oath or affirmation heretofore required by the law, and not dispensed with by the present act; and no scrutiny is to be allowed by or before any returning officer with regard to votes.

Barristers are to be appointed to revise and settle all

the lists, as directed by the act, and any person, whose name shall be omitted from the list by the revising barrister, may tender his vote, which is to be recorded.

Where a complaint is made, by a petition to the House of Commons, of an undue election, the petitioner may impeach the correctness of the revised lists, which is to be determined upon by the select committee appointed for the trial of such petition; this determination is to be carried into effect by the House, and the return amended, or the election declared void, as the case may be, and the register corrected accordingly.

All election laws are declared to remain in force except as they are altered by the act, and a right of action for a penalty of 500*l.* is given to candidates, electors, and members against any officer carrying the act into execution, for any breach of duty.

This act does not extend to the universities of Oxford and Cambridge, each of which sends two members as heretofore, or to entitle any occupiers of chambers in any of the colleges or halls of these universities to vote at the election of members.

The total number of members returned by England and Wales is 500.

We have now seen the great changes which this Act of the Legislature has made in the PARLIAMENTARY CONSTITUTION OF ENGLAND AND WALES. It is not within the limits of this book, nor is it essential, in shewing what that constitution now is, to enter into what may be termed the working parts of the Act. The same constitutional changes have also taken place in Scotland and Ireland; and inasmuch as the grand principle of the Bill for each kingdom, viz. the extension of the franchise—is the same, it is equally unnecessary

to enter at large into the clauses and provisions of the Bills passed for those kingdoms.

That for SCOTLAND is the statute 2 & 3 Will. 4, c. 65, intituled "An Act to amend the representation of the people of Scotland," amended by 4 & 5 Will. 4, c. 88, further amended by 5 & 6 Will. 4, c. 78, which repeals the first act so far as it is inconsistent with the latter.

Several of the counties return each one member; other counties are combined, and each two return one member. The towns of Edinburgh and Glasgow return two members each, and the towns of Aberdeen, Paisley, Dundee, Greenock, and Perth return one member each; all the other towns and burghs are combined, and each set or district returns one member.

The right of voting for cities, boroughs, towns, and districts is taken away from the town councils or corporations, and delegates, in whom it formerly vested, and is extended directly to all persons, not subject to any legal incapacity, who shall be entitled to be registered, and to vote in a nearly similar manner to that required by the English Reform Bill. There is this difference in the qualification of a voter in Scotland, that he must have paid all *assessed* taxes up to the 6th of April previous to his exercising the franchise.

Scotland, by the Act of Union (5), heretofore sent 45 members, and now sends 53: 30 for counties, and 23 for towns and districts.

The *Reform Bill* for IRELAND is the statute 2 & 3 W. 4, c. 88, intituled "An Act to amend the representation of the people of Ireland." This kingdom,

(5) 5 Anne, c. 8; *see* 39 & 40 Geo. 3, c. 67.

which, by the Act of Union, heretofore sent 100 representatives, now sends 105, the present statute having given an additional member for each of the cities of Limerick and Waterford, the borough of Belfast, the county of the town of Galway, and the university of Dublin. The right of voting is extended to all male persons of full age, and not subject to any legal incapacity, either as freeholders or occupants of land, subject to the same qualifications, except as to taxes, as is required by the English Reform Bill. One of the qualifications for a city, town, or borough voter in Ireland is, that he must have paid all grand jury and municipal cesses, rates, and taxes (if any), "over and above and except one half year's account." There is also a reservation in this Act entitling forty shilling freeholders, who can and do register as such, to vote so long as they shall continue seised of their lands.

The total number of representatives constituting the House of Commons is 658, and, though separately elected, do not solely represent the town or county that sends them; but, when they are once admitted, they represent the whole body of the nation.

It is the ancient spirit of the English constitution that every new law is the act of the whole community: all the commons of the empire appear by their representatives, and all the lords appear in person or by proxy, the lords being supposed to have distinct interests, and to maintain the due gradation between king and people.

The qualifications required for being a member of the House of Commons are, to be born a subject of Great Britain, that every knight of the shire shall have a freehold or copyhold estate of the annual value of

600*l.*, and every citizen, burgess, and baron of the cinque ports a like estate of the annual value of 300*l.* for his own life; but these qualifications do not extend to the eldest sons or heirs apparent of peers, or to the representatives of the two universities (6).

When the king has determined to assemble a parliament, he sends an order for that purpose to the Lord Chancellor; who, after receiving it, sends a writ, under the great seal of England, to the sheriff of every county, directing him to take the necessary steps for the election of members for the county, and the towns and boroughs contained in it. Three days after the reception of the writ the sheriff must, in his turn, send his precept to the magistrates of the towns and boroughs, ordering them to make their election within eight days after the receipt of the precept, giving four days' notice of the same. And the sheriff himself must proceed to the election for the county not sooner than ten days after the receipt of the writ, nor later than sixteen.

The principal precautions taken by the law to ensure the freedom of elections, are, that any candidate who, after the date of the writ, or even after the vacancy, shall have given entertainments to the electors of a place, or to any of them, in order to his being elected, shall be incapable of serving for that place in parliament (7); and that if any person gives or promises to give any money, employment, or reward to a voter, in order to influence his vote, he, as well as the voter himself, shall

(6) See 1 Black. Com. 175.

(7) 7 Will. 3, c. 4; see 3 Lud. 455.

be condemned to pay a fine of 500*l.*, and be for ever disqualified to vote and hold office in any corporation; the faculty, however, being reserved to both, of procuring their indemnity for their own offence by discovering some other offender of the same kind (8).

All soldiers quartered in a place where an election is to be made, must be moved from it, at least one day before the election, to the distance of two miles or more, and return not till one day after the election is finished.

The legislators have not forgotten that interest as well as fear may impose silence on duty. To prevent its effects, all the legal incapacities from being a member of parliament, and which take their ground upon personal interest with the crown, (but they do not extend to officers in the army or navy, except upon any new commission), are declared by the statutes 6 Ann, c. 7; 1 Geo. I. c. 56; 15 Geo. II. c. 22; 41 Geo. III. c. 73 (9).

Such are the precautions hitherto taken by legislators for preventing the undue influence of the great prerogative of disposing of rewards and places—precautions which have been successively taken, according as circumstances have shewn them to be necessary, and which we may thence suppose are owing to causes powerful enough to produce the establishment of new ones, whenever circumstances shall point out the necessity of them. Nothing can be a better proof of the efficacy of the causes that produce the liberty of the English, than those victories which the parliament, from time to time, gains over itself, and in which the members, forgetting

(8) 2 Geo. 2, c. 24; 9 Geo. 2, c. 38; 16 Geo. 2, c. 11.
(9) See Hall. Mid. Ages, 113, n.

all views of private ambition, only think of their interests as subjects. Regarding the decisions upon *controverted elections*, an excellent regulation is now made: formerly the House decided them in a very summary manner, and the witnesses were not examined upon oath; but now, by the statute 9 Geo. 4, c. *22*, the decision is left to a committee of eleven members, formed in the following manner:—Out of the members present, who must not be less than 100, the names of 33 of that number are to be drawn from ballot boxes; out of these each candidate strikes off one, till the number is reduced to 11, who form the committee, and are sworn to try the merits of the petition: they are to elect a chairman, and to sit from day to day, and are invested with powers to send for persons, papers, and records, and to examine witnesses on oath.

In order to secure the necessary number of members, all other business in the House is to be suspended till these operations are completed, except that of swearing in members, receiving reports from this committee, and proceeding in cases of impeachment.

Section II.

Of the Legislative Power.

The House of Peers or Lords is composed of *the Lords Spiritual*, who are the two archbishops of Canterbury and York, and twenty-five bishops; and of *the Lords Temporal*, who are the Peers of the realm, under

the titles of Dukes, Marquisses, Earls, Viscounts, and Barons, being of full age.

The number of Lords Temporal is indefinite, and may be at all times increased by the sovereign.

At the present time the House consists of 435 Peers.

The *Peerage* of *Scotland*, under the Act of Union (10), elect sixteen from their body to sit in the House of Lords, but they only hold their seats during the term of a parliament. The remainder are peers of Great Britain, with all the privileges enjoyed by the peers of England, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon. This right and privilege also applies to the *Irish Peers* who are not elected to sit in the House of Lords (11), but they waive their privileges if elected and sitting as a member of the House of Commons.

The *Peerage* of *Ireland*, under the Act of Union (12), elect twenty-eight peers from their number, to sit in the House of Lords, who hold their seats for life, and four Irish bishops sitting in rotation.

The Bishops are not considered to be peers of the realm, but only lords of parliament (13); though Selden (14) and Gibson (15) both speak to the contrary (16).

The lords spiritual and temporal, though formerly spoken of as two of the estates of the realm, have, since

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(10) 5 Anne, c. 8, explained by 6 Anne, c. 23.

(11) *Robinson* v. *Lord Rokeby*, 8 Ves. 601; *Lord Milsington* v. *Lord Portman*, 1 Ves. & Beames, 419.

(12) 39 & 40 Geo. 3.

(13) 1 Blackst. Comm. 156.

(14) 3 Seld. Works, 1538, 1588, 1646.

(15) 5 Gibs. Co. c. 6.

(16) See 3 Hall. Mid. Ages, p. 9.

the reign of King James I., been as one joint or indiscriminate estate (17), although the ancient distinction still nominally continues. That king declared that the parliament consisted of the monarch and the two estates, namely, lords and commons (18); a majority will clearly bind the rest dissentient, though it should happen to consist entirely of prelates, or entirely of lay nobles (19).

The Act of Uniformity, 1 Eliz. c. 2, was passed with the dissent of all the lords spiritual (20).

The first parliament of Henry VIII. consisted of 298 members in the House of Commons; the statute 27 Hen. 8, c. 26, added to that number 27 for Wales; the 34 Hen. 8, c. 13, further added four for the county and city of Chester; the 25 Car. 2, c. 9, further added four for the county and city of Durham; the Act of Union with Scotland also added 45, and the Act of Union with Ireland 100. 180 were restored by charter in various reigns, making the total of 658 members, the number as before the Reform Bill.

In the first parliament of James I., the members of the Upper House were 78, and of the Lower House 470 (21).

The House of Lords is the principal constitutional support of the rights as well of the Crown as of the people, and at the same time it forms a barrier to withstand the encroachments of both. The nobility are the

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(17) 1 Rushw. Coll. 21; 1 Blackst. Comm. 156, Christian's note.

(18) Dyer, 60.

(19) 1 Woodd. Lect. 35; see also 3 Hall. Mid. Ages, 157, note, ed. 3.

(20) See 4 Inst. 25.

(21) 5 Parl. Hist. 11.

pillars which are reared from among the people more immediately to support the throne, and if that falls they must also be buried under its ruins, and with them all the liberties enjoyed by a free people. In our mixed and compounded constitution the House of Peers is peculiarly necessary to support the rights of the people against any encroachments that might be attempted by the other estates of the United Kingdom; and it is therefore expedient that they should form a separate body independent of those estates. If they were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions.

Since the stat. 31 Hen. VIII. c. 10, the king cannot create a new peerage with precedency above those of a more ancient date, but he can give any person not being a peer precedence above the peerage, as in the case of the King of the Belgians by his late Majesty George IV.

The *king* or *queen regnant*, for it matters not to which sex the crown descends, is the third constituent part of the parliament; and the consent of these three branches of the legislature must be had to make any law that shall bind the people.

It is the king or queen regnant alone who can convoke it, and he or she alone can dissolve or prorogue it.

In extreme cases, and when the peace of the nation has been at stake, we have two precedents where the parliament has met by its own authority, which, to remove all doubts upon the question, have been afterwards confirmed; and these are upon record. The one is that

of the Convention Parliament, which restored Charles II. a month before his return, and was confirmed by 13 Charles II. c. 7. The other is that of the Convention Parliament, which, upon the abdication of James II. in 1688, called the Prince of Orange to the vacant throne. This was also confirmed by 1 William & Mary, c. 1; so that the doubts which existed as to the validity of the acts of these convention parliaments were effectually removed by the proper constituent parts of parliament.

It is, therefore, the established law, that the king can only convoke a parliament, and this he is obliged to do at least once a year, for redress of grievances and dispatch of business. If there should be no parliament in being at the demise of the king or queen, the last parliament revives, and is to sit again for six months, unless dissolved by the successor; but as it must originally have been summoned by the Crown, this forms no exception to the general rule.

The effect of *a dissolution* is, that from that moment the parliament completely ceases to exist; the commission, given to the members by their constituents is at an end; and whenever a new meeting of parliament shall happen, they must be elected anew. *A prorogation* is an adjournment to a term appointed by the king; till which the existence of parliament is simply interrupted, and the function of the deputies suspended.

65 When the parliament meets, whether it be by virtue of a new summons, or whether, being composed of members formerly elected, it meets again at the expiration of the term for which it had been prorogued, the king either goes to it in person, invested with the insignia of
66 his dignity, or appoints proper persons to represent him on that occasion, and opens the session by laying before

the parliament the state of the public affairs, and inviting it to take them into consideration. The presence of the king, either real or represented, is absolutely requisite at the first meeting; it is that which gives life to the legislative bodies and puts them in action.

The king, having concluded his declaration, withdraws. The parliament, which is then legally entrusted with the care of the national concerns, enters upon its functions, and continues to exist till it is prorogued or dissolved. The House of Commons and that of Peers assemble separately; the latter under the presidence of the Lord Chancellor, the former under that of their Speaker; and both separately adjourn to such days as they respectively think proper to appoint.

As each of the two Houses has a negative on the propositions made by the other, and there is, consequently, no danger of their encroaching on each other's rights, or on those of the king, who has likewise his negative upon them both, any question judged by them conducive to the public good, without exception, may be made the subject of their respective deliberations. Such are, for instance, new limitations or ex- 67
tensions to be given to the authority of the king; the establishing of new laws, or making changes in those already in being. Lastly, the different kinds of public provisions or establishments,—the various abuses of administration and their remedies,—become in every session the objects of the attention of parliament.

Herein consists the beauty of the British legislature, that all its constituent parts form a mutual check upon each other. The House of Commons, that is, the people, are a check upon the nobility, and

the nobility a check upon the people, by the mutual privilege they enjoy of rejecting what the other has resolved; while the king is a check upon both, which preserves the executive from injury.

There was no single circumstance, perhaps, that tended more to involve the French nation in all the horrors of a sanguinary revolution, and make it pass under the iron yoke of military despotism, than the vote which united the three estates into one. By amalgamating the quicksilver with the gold, the revolutionary chymists completely destroyed the brilliancy of the one, the splendour and solidity of the other, and the essential properties of both. But, had the clergy and noblesse continued to sit in one house, and the *tiers état*, or representatives of the people, in another, —had both deliberated with becoming dignity, and not depreciated the royal prerogative, which empowered the king to consent to any measure, or prevent its passing into a law, it is probable that grievances would have been redressed, liberties secured, and the blood of millions spared.

Here, however, an important observation must be made. All bills for granting money must have their beginning in the House of Commons; the Lords cannot take this object into their consideration (22), but in consequence of a bill presented to them by the latter; and the Commons have at all times been so anxiously tenacious of this privilege, that they have never suffered the Lords even to make any change in the money-bills which they have sent to them; and the Lords are expected simply and solely either to accept or reject them.

(22) See *post*, 103, n.

These money-bills must be passed (if at all) as they come from the House of Commons, in respect to their matter, measure, and time, and cannot be altered in the House of Lords; and this appears to have been their right from a very early period (23). By a money-bill is meant any bill under which money is to be raised upon the subject, for any purpose or in any shape whatever, whether for the state, for private benefit, or for any district or parish, and this right or privilege has been carried in practice to an undue extent. Turnpike acts, enclosure bills, bills for canals, railroads, paving and lighting towns, or acts imposing pecuniary penalties, might, without injury to this right of the Commons taxing, themselves originate or be modified by either house of parliament (24).

The House of Lords has also a right or privilege that bills which may affect the rights of their own body must come from them, and not be altered by the Commons.

This excepted, every member in each House may propose whatever question he thinks proper. If, after being considered, the matter is found to deserve attention, the person who made the proposition, usually with some others adjoined to him, is desired to set it down in writing. If, after more complete discussions 68
of the subject, the proposition is carried in the affirmative, it is sent to the other House that they may in their turn take it into consideration. If the other House reject the bill, it remains without any effect; if they

(23) See 3 Rot. Parl. 619; but see Lord Redesdale's Obs. 7; Woodf. Par. Deb. 236; also see Commons' Journ. Vol. 9, p. 239; and Hale on Parl. 65.

(24) 3 Hats. Prec. 137.

agree to it, nothing remains wanting to its complete establishment but the Royal Assent.

When there is no business that requires immediate dispatch, the king usually waits till the end of the session, or at least till a certain number of bills are ready for him, before he declares his royal pleasure. When the time is come, the king goes to parliament in the same state with which he opened it, and while he is seated on the throne, a clerk, who has a list of the bills, gives or refuses, as he reads, the royal assent.

When the royal assent is given to a public bill, the clerk says, *Le roy le veut.* If the bill be a private bill, he says, *Soit fait comme il est desiré.* If the bill has subsidies for its object, he says, *Le roy remercie ses loyaux sujets, accepte leur bénévolence, et aussi le veut* (25). If the king does not think proper to assent to the bill, the clerk says, *Le roy s'avisera* (26), which is a mild way of giving a refusal.

In case of an act of grace, which originally proceeds from the Crown, and has the royal assent in the first stage of it, the clerk thus pronounces the gratitude of the subject, *Les prelats, seigneurs, et commons en ce present parliament assemblées, au nom de touts vous autres subjects, remercient tres humblement votre Majesté, et prient a Dieu vous donner en santé bone vie et longue.*

To facilitate the dispatch of business, the royal assent to bills is more commonly given by commission, which the king is empowered to grant by statute 33 Hen. VIII. c. 21, by his letters patent.

When the king has declared his different intentions, he prorogues the parliament. Those bills which he has

(25) See 1 Blacks. Comm. 184 —Ed. (26) See *post*, 393.

rejected remain without force; those to which he has assented become the expression of the will of the highest power acknowledged in England; they have the same binding force as the *édits enrégistrés* have in France, and as the *populiscita* had in ancient Rome; in a word, they are laws. And though each of the constituent parts of the parliament might, at first, have prevented the existence of those laws, the united will of all the three is now necessary to repeal them (27).

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(27) Mr. De Lolme, in his observations upon law fictions, which the present writer has omitted now that they are abolished, takes occasion to say, that "it is a fundamental principle with the English lawyers, that parliament can do every thing except making a woman a man, or a man a woman." The writer has considered it necessary to preserve this assertion, although introduced in this (perhaps nevertheless its proper) place, because Professor Christian, in his notes to Blackstone's Commentaries, vol. 1, p. 160, has rather roughly handled it. Blackstone, in his observations upon the absolute despotic power which must in all governments reside somewhere, says, that parliament can, in short, do every thing that is not naturally impossible, and, therefore, some have not scrupled to call its power, by a figure rather too bold, the *omnipotence of parliament*. The professor in his note upon this passage remarks, that *De Lolme* has improved upon this, and has (he thinks) unwarrantably made the assertion: he says the *omnipotence of parliament* signifies nothing more than the supreme sovereign power of the state, or a power of action uncontrolled by any superior. In this sense *the king*, in the exercise of his prerogatives, and the *House of Lords*, in the interpretation of laws, are *also omnipotent*, that is, free from the control of any superior provided by the Constitution.

Sir Matthew Hale, in his Jurisdiction of the Lords' House of Parliament, p. 49, observes, that "this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if, by any means, a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy, and this must remain so long as the Constitution shall exist."

There is no *inherent right* or *supreme power* in the people to remove or alter the legislature, should it abuse its trust. Mr. Locke

and other theoretical writers have held, that in such a desperate case, there remains still inherent in the people a supreme power to remove or alter the legislature, when they find the legislature act contrary to the trust reposed in them; for when such trust is abused, it is thereby forfeited, and devolves to those who gave it. This may be just enough in theory, but in practice impossible, without putting an end, at the same time, to the whole form of government established by the people. As between individuals, it would be impracticable without the aid of the law.

The parliament, therefore, may be said to be absolute and without control, for, *as the people* cannot lawfully alter the whole, neither can they *change or destroy any particular branch* of the legislature.

We are taught by experience of ancient and modern times, that all changes in a government, brought about by illegal violence, invariably terminate in the arbitrary despotism of one military tyrant.

CHAPTER V.

Of the Executive Power.

When the parliament is prorogued or dissolved, it 71
ceases to exist; but its laws still continue to be in force; the king remains charged with the execution of them, and is supplied with the necessary power for that purpose.

It is however to be observed, that, though in his political capacity of one of the constituent parts of the parliament, that is, with regard to the share allotted to him in the legislative authority, the king is undoubtedly sovereign, and only needs allege his will when he gives or refuses his assent to the bills presented to him; yet, in the exercise of his powers of government, he is no more than a magistrate, and the laws, whether those that existed before him, or those to which, by his assent, he has given being, must direct his conduct, and bind him equally with his subjects.

I. The first prerogative of the king, in his capacity 72
of supreme magistrate, has for its object the administration of justice.

1°. He is the source of all judicial power in the state; he is the chief of all the courts of law, and the judges are only his substitutes; every thing is transacted in his name; the judgments must be with his seal, and are executed by his officers.

2°. By a fiction of the law, he is looked upon as the universal proprietor of the kingdom; he is in consequence deemed directly concerned in all offences; and for that reason prosecutions are to be carried on, in his name, in the courts of law.

3°. He can pardon offences, that is, remit the punishment that has been awarded in consequence of his prosecution.

II. The second prerogative of the king, is, to be the *fountain of honour*, that is, the distributor of titles and dignities: he creates the peers of the realm, as well as bestows the different degrees of inferior nobility. He moreover disposes of the different offices, either in the courts of law, or elsewhere.

III. The king is the superintendant of commerce; he has the prerogative of regulating weights and measures; he alone can coin money, and give a currency to foreign coin.

73 IV. He is the supreme head of the Church. In this capacity, he appoints the bishops, and the two archbishops; and he alone can convene the assembly of the clergy. This assembly is formed, in England, on the model of the Parliament; the bishops form the upper house; deputies from the dioceses and from the several chapters form the lower house; the assent of the king is likewise necessary to the validity of their acts, or canons; and the king can prorogue, or dissolve, the convocation.

V. He is, in right of his crown, the generalissimo of all the sea or land forces whatever; he alone can levy troops, equip fleets, build fortresses, and fill all the posts in them.

VI. He is, with regard to foreign nations, the re-

presentative, and the depositary, of all the power and collective majesty of the nation; he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper.

VII. In fine, what seems to carry so many powers to the height, is, its being a fundamental maxim, that THE KING CAN DO NO WRONG: which does not signify, however, that the king has not the power of doing ill, or, as it was pretended by certain persons in former times, that every thing he did was lawful; but only 74
that he is above the reach of all courts of law whatever, and that his person is sacred and inviolable (1).

(1) This ancient and fundamental maxim or legal apophthegm, is not to be understood as if every thing transacted by the government was of course just and lawful, but means only two things:

First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution; and,

Secondly, it means that the prerogative of the crown extends not to do any injury, it is created for the benefit of the people, and therefore cannot be exerted to their prejudice. (*Plowd.* 487). Should any person have a just demand upon the king in relation to property, he must petition him in the Court of Chancery, where right will be administered as a matter of grace, but not of compulsion. So, in regard to public oppression, impeachments and indictments may be preferred against his ministers or advisers.

Professor Christian observes, that the inviolability of the king is essentially necessary to the free exercise of those high prerogatives which are vested in him, not for his own private splendour and gratification, as the vulgar and ignorant are too apt to imagine, but for the security and preservation of the real happiness and liberty of his subjects. (1 Blacks. Comm. 246, n. 2; see Co. 2 Inst. 186; 3 Id. 146; 4 Inst. 71; 11 Somers' Tracts, Sir W. Scott, ed. 281). —EDITOR.

CHAPTER VI.

SECTION I.—*The Boundaries which the Constitution has set to the Royal Prerogative.*

74 IN reading the foregoing enumeration of the powers with which the laws of England have entrusted the king, we are at a loss to reconcile them with the idea of a monarchy, which, we are told, is limited. The king not only unites in himself all the branches of the executive power,—he not only disposes, without control, of the whole military power in the state,—but he is moreover, it seems, master of the law itself, since he calls up, and dismisses, at his will, the legislative bodies. We find him therefore, at first sight, invested with all the prerogatives that ever were claimed by the most absolute monarchs; and we are at a loss to find that liberty which the English seem so confident they possess.

But the representatives of the people still have, and that is saying enough, they still have in their hands,
75 now that the constitution is fully established, the same powerful weapon which has enabled their ancestors to establish it. It is still from their liberality alone that the king can obtain subsidies; and in these days, when every thing is rated by pecuniary estimation, when gold is become the great moving spring of affairs, it may be safely affirmed, that he who depends on the will of other men, with regard to so important an

article, is, whatever his power may be in other respects, in a state of real dependence.

This is the case of the king of England. He has, in that capacity, and without the grant of his people, scarcely any revenue. He has the prerogative 76
of commanding armies, and equipping fleets—but without the concurrence of his parliament he cannot maintain them. He can bestow places and employments—but without his parliament he cannot pay the salaries attending on them. He can declare war—but without his parliament it is impossible for him to carry it on. In a word, the royal prerogative, destitute as it is of the power of imposing taxes, is like a vast body, which cannot of itself accomplish its motions; or, if you please, it is like a ship completely equipped, but from which the parliament can at pleasure draw off the water, and leave it aground—and also set it afloat again, by granting subsidies.

And indeed we see, that, since the establishment of this right of the representatives of the people to grant, or refuse, subsidies to the crown, their other privileges have been continually increasing. Though these representatives were not, in the beginning, admitted into parliament but upon the most disadvantageous terms, yet they soon found means, by joining petitions to their money-bills, to have a share in framing those laws by which they were in future to be governed; and this 77
method of proceeding, which at first was only tolerated by the king, they afterwards converted into an express right, by declaring, under Henry IV., that they would not, thenceforward, come to any resolutions with regard to subsidies, before the king had given a precise answer to their petitions.

In subsequent times we see the commons constantly successful, by their exertions of the same privilege, in their endeavours to lop off the despotic powers which still made a part of the regal prerogative. Whenever abuses of power had taken place, which they were seriously determined to correct, they made grievances and supplies, to use the expression of Sir Thomas Wentworth, go hand in hand together, which always produced the redress of them. And in general, when a bill, in consequence of its being judged by the commons essential to the public welfare, has been joined by them to a money-bill, it has seldom failed to pass in that agreeable company (*a*).

(*a*) In mentioning the forcible use which the Commons have at times made of their power of granting subsidies, by joining provisions of a different nature to bills that had grants for their object, I only mean to shew the great deficiency of that power, which was the subject of this chapter, without pretending to say any thing as to the propriety of the measure. The House of Lords have even found it necessary, (which confirms what is said here), to form, as it were, a confederacy among themselves, for the security of their legislative authority, against the unbounded use which the Commons might make of their power of taxation; and it has been made a standing order of their House, to reject any bill whatsoever, to which a money bill has been tacked.

Section II.

Of the Revenue of the Crown.

The three last sovereigns gave up to the people all their hereditary revenues during their respective lives; her present majesty has done the same; and it has long been the custom, at the commencement of every reign, to grant the king a revenue for his life; a provision which with respect to the great exertions of his power does not abridge the influence of the commons, but yet puts him in a condition to support his crown and dignity, and affords him who is the first magistrate in the nation that independence, which the laws insure also to those magistrates who are particularly interested with the administration of justice.

By statute 1 Will. IV. c. 25, intituled "An act for the support of his majesty's household, and of the honor and dignity of the crown of the United Kingdom," all the hereditary revenues in the United Kingdom, except the duties of excise on beer, ale, and cider, payable in Great Britain, and the yearly sums of 348,000*l.* and 6,500*l.* granted in lieu of those duties, also all droits of admiralty or droits of the crown and the West Indian 4½ per cent. duties, also the surplus revenues of Gibraltar and other possessions, and other casual revenues of the crown in the United Kingdom and abroad, were surrendered to and made part of the consolidated fund during the life of his late majesty; and after his decease, all such

hereditary revenues, including the duties on beer, ale, and cider, are made payable to his heirs and successors, and in lieu of these revenues his late majesty was granted a net yearly revenue of 510,000*l.* charged upon the consolidated fund, to be applied in the following manner:—For their majesties' privy purse 110,000*l.*; for salaries of his majesty's household 130,300*l.*, and for expences thereof 171,500*l.*; for special and secret service 23,200*l.*; and for pensions 75,000*l.* (1).

The queen regnant possesses lands and estates, some in right of her crown, some in right of her duchy of Lancaster, and other possessions, (not including lands held by her in right of the duchy of Cornwall, and other private possessions); but the expenses of government are so great, and the ancient means of supplying them have sunk to so inconsiderable a value; long and frequent wars (2) have left such an accumulation of public debt, that almost all the revenue is raised by taxation; and the annual amount of the civil list has in the late reigns been settled by parliament.

The queen regnant is seised of the duchy of Cornwall and its possessions until she may have a son, who will be by inheritance Duke of Cornwall, without any

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(1) By the stat. 1 & 2 Will. IV. c. 11, the present Dowager Queen Adelaide has settled upon her for life an annuity of 100,000*l.*, chargeable upon the consolidated fund; also the mansion at St. James's called Marlborough House, the Rangership of Bushy Park, and the custody of the mansion of the Honor of Hampton Court. At her decease, her representatives are to enjoy the same for one year then next.

(2) The American war cost one hundred and sixteen millions, which the nation has lost from its capital for ever.

new creation, and subject to no minority with respect to his enjoyment of these possessions (3).

George III. gave up to the public all his hereditary revenues; and the parliament(4) granted him first 800,000*l.*, and subsequently 960,000*l.* per annum for the support of his civil list; and according to Sir William Blackstone the public was then gainer of 100,000*l.* per annum.

From the Report made in December, 1837, by a Select Committee of the House of Commons, it appears that the total amount of the hereditary and temporary revenues of the crown, from the accession of George III. to the accession of her present majesty, arising from the net produce of the customs, excise, post office, and small branches of the hereditary and temporary revenues, and also from the sums settled on the sovereign in lieu of duties on various articles repealed by George II., is 101,338,877*l.* 10*s.* 7*d.*, while the total sums received during the same period by the reigning sovereigns in lieu of those revenues, including the sums granted for the civil list debt and the fees from suppressed offices, amount to 69,385,931*l.* 15*s.* 10½*d.*, being a gain to the nation during that period of a sum of nearly 32,000,000*l.*

For the first year and a quarter after the accession of George III., the hereditary and temporary revenues of the sovereign amounted to 886,381*l.* 10*s.* 0½*d.*, and the annuity received by the king in lieu of those revenues amounted to 965,517*l.* 4*s.* 9¾*d.* The proportion between these revenues and the annuity set-

(3) See the *juridical argument* of *the writer* upon the case of the *Duchy of Cornwall*, and Sir W. Clayton, and cases there cited; also the *Prince's case*, Coke's 8th Report; *Lomax* v. *Holmden*, 1 Ves. 294.

(4) 44 Geo. 3, c. 80.

tled on the sovereign in lieu of them every year afterwards changed in favour of the nation, and in the last year of the reign of His late Majesty William IV. the amount of the crown revenues was 3,248,208*l.* 1*s.* 11*d.*, while the annuity granted to his majesty for the civil list in lieu of those revenues was only 510,000*l.*; at the same time it should be taken into consideration, that this sum was granted specially for the support of his majesty's household and of the honor and dignity of the crown, and relieved from the allowances or salaries that had been paid from the civil list by former sovereigns, which had no immediate connection with the royal dignity or personal comfort of the sovereign, but which belonged rather to the civil government of the state. The civil list of the crown was, by the statute passed upon the accession of his late majesty before referred to, relieved from these expenses, which in the reign of George IV. amounted to 600,000*l.* a year, and are now provided for in supply, or from the consolidated fund; and it has not been found necessary, during the last two reigns, to apply to parliament for the means of defraying any increased expenditure beyond the amount of the annuity.

Her present most gracious Majesty Queen Victoria has also placed, without reserve, her interest in the hereditary and temporary revenues of the crown, to which she became entitled upon the demise of His late Majesty William IV., at the disposal of the nation; and the parliament have granted her majesty in lieu of those revenues an annuity of the following sums, viz.— 60,000*l.* for her majesty's privy purse (5), 131,260*l.*

(5) This amount has been the privy purse of the sovereign for above

Hen. IV. because an impeachment is made by the body of the House of Commons, which is equivalent to an impeachment *per corpus regni*, and is therefore of another nature than an accusation or appeal.

When the impeachment is brought to the Lords, they commonly order the person accused to be imprisoned, that is, that he be committed to the custody of the Sergeant-at-arms; who passes him into the custody of the Usher of the Black Rod. He is then brought by the usher to the bar of the House of Lords: when the charge against him does not amount to treason or felony, the Lords order sufficient bail to be taken for his appearance (5). When he appears, the Lords order him a copy of the articles, and assign a day for receiving his answer (6); and by the stat. 20 Geo. II. c. 30, he is allowed to make a full defence, by two counsel. The answer, like the articles, need not be prepared with any peculiar strictness of form (7). He may plead Not guilty as to part, and make other defence to the rest of the charge (8); though it is more usual to give a full and particular answer, separately, to each charge (9). The Commons reply in writing (10), and the trial proceeds, day by day, with open doors, and the proceedings may be published as they go on.

The same rule of evidence, and the same legal notions of crimes and punishments prevail, as in the

(5) 26 Hans. Parl. Deb. 1218.
(6) *Portland's case*, 14 How. State Trials, 279.
(7) *Strafford's case* and *Laud's case*, 12 Parl. Hist. 442.
(8) *Laud's case*.
(9) 14 How. State Trials, 233.
(10) 15 Id. 52.

inferior courts upon criminal prosecutions. Mr. Burke, in the impeachment of Warren Hastings, confidently advanced, that the Lords are *not* bound to observe the same rules of evidence in an impeachment; but he was over-ruled by the judges of the whole House.

Professor Christian, in his dissertation upon Mr. Burke's doctrine, maintains, that it was not only contrary to all precedent and authority, but repugnant to the first and great principles, both of the English law and constitution.

Impeachments are not framed to alter the law, but to carry it into more effectual execution, where it might be obstructed by the influence of too powerful delinquents, or unascertained in the ordinary course of jurisdiction, by reason of the peculiar quality of the alleged crimes. The judgment, therefore, is to be such as is warranted by legal principles or precedents (11).

But whatever advantage the law grants to the person impeached for his justification, it is from the intrinsic merits of his conduct that he must draw his arguments and proofs. It would be of no service to him, in order to justify a criminal conduct, to allege the commands of the sovereign; or, pleading guilty with respect to the measures imputed to him, to produce the royal pardon (12).

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(11) 3 Seld. 1651, 1652.

(12) This point, in ancient times, was far from being clearly settled. In the year 1678, the Commons having impeached the Earl of Danby, he pleaded the king's pardon in bar to that impeachment. (See Comm. Journ. 28 April and 26 May, 1679, and 6 June

Sir William Blackstone (13) says, that, after the impeachment has been solemnly heard and determined, the king's grace is not understood to be further restrained; and it was exercised after the impeachment and attainder of the six rebel lords, in 1715: three of them were, from time to time, reprieved by the Crown, and at length received the benefit of the king's pardon; and Professor Christian, in a note to this passage, shews a record, in which it is both acknowledged by the Commons, and asserted by the King, that the king's prerogative, to pardon delinquents convicted in impeachments, is as ancient as the constitution itself.

Professor Wooddeson, in his 40th lecture, observes upon the effect and reasonableness of the provision of the act of parliament of 12 & 13 Will. III. c. 2, and expresses his opinion that the king may still remit the execution of the sentence: he also asserts, that the king has exerted this prerogative in cases of impeachments since the passing of that law; that it never was intended to divest him of his general power of pardoning, so essentially inherent in his crown, and of such indispensable necessity to his subjects. This view is also taken in 2 Hall. Const. Hist. 563, ed. 2; but, notwithstanding such learned authorities, it is no where *shewn* that any conviction on an impeachment *has been pardoned* by the Crown.

1689; also 11 How. St. Tr. 766). Great altercations ensued, which were terminated by the dissolution of that parliament. It was afterwards enacted (stat. 12 & 13 Will. III. c. 2), "that no pardon under the great seal shall be pleaded in bar to an impeachment by the House of Commons."

(13) 4 Comm. 399, 400.

The three cases alluded to by Sir William Blackstone (14) were not pardoned by the Crown, but by an act of grace, 3 Geo. I. c. 19. The Commons have the power of pardoning the impeached convict, by refusing to demand judgment against him; for no judgment can be pronounced by the Lords till it is demanded by the Commons (15). The point remains, therefore, open for argument at this day. The statute is unquestionably imperative, that no pardon under the great seal shall be *pleadable* to an impeachment by the Commons. It does appear to the present writer, that the point depends upon the pardon being granted and produced in bar, *pending the impeachment*, upon which the statute runs. This was the Earl of Danby's case (16); (previous to the statute) he obtained the king's pardon, pending the impeachment, which pardon he pleaded; and it was declared illegal and void, the Commons alleging, that there was no precedent that ever any pardon was granted to any persons impeached by the Commons of high treason, or other high crimes, *pending an impeachment*, but *after the impeachment* has been solemnly heard and determined. The reasoning appears conclusive; and the statute says nothing to the contrary, that the king may exercise his prerogative, and pardon the convicted offender. It is a part of the coronation oath, that he shall execute judgment in mercy.

The decision of the Commons in the case of Warren Hastings, that an impeachment is not abated

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(14) Probably those of the Lords Carnwarth, Widdrington, and Nairn. See also 15 How. St. Trials, 767, n.

(15) 6 How. St. Trials, 762.

(16) Skin. 56; 2 Show. 335.

by a dissolution of parliament, remains also open to argument. Whether that decision be sound or not, it is very evident that, were it otherwise, a corrupt minister could always shield himself, by resorting to a dissolution.

The House of Peers is the only tribunal to which a queen consort is amenable for any solemn accusation of the king, and which we have unfortunately witnessed in modern times, when the Bill of Pains and Penalties was preferred by His late Majesty George IV. against his consort (17).

It is against the administration itself that an impeachment is carried on; it should, therefore, by no means interfere: the king can neither stop nor suspend its course; but is forced to behold, as an inactive spectator, the discovery of the share which he may himself have had in the illegal proceedings of his servants, and to hear his own sentence in the condemnation of his ministers.

An admirable expedient! which, by removing and 96
punishing corrupt ministers, affords an immediate remedy for the evils of the state, and strongly marks out the bounds within which power ought to be confined; which takes away the scandal of guilt and authority united, and calms the people by a great and awful act of justice; an expedient, in this respect especially, so highly useful, that it is to the want of the like that Machiavel attributes the ruin of his republic.

But all these general precautions to secure the rights of the parliament, that is, those of the nation itself, against the efforts of the executive power, would be vain, if the members themselves remained personally

(17) 2 Hans. Parl. Deb. 719, new series.

exposed to them. Being unable openly to attack, with any safety to itself, the two legislative bodies, and, by a forcible exertion of its prerogatives, to make as it were a general assault, the executive power might, by
97 subdividing the same prerogatives, gain an entrance; and sometimes by interest, and at others by fear, guide the general will, by influencing that of individuals.

But the laws which so effectually provide for the safety of the people, provide no less for that of the members, whether of the House of Peers, or that of the Commons. There are not known in England either commissaries who are always ready to find those guilty whom the wantonness of ambition points out, or those secret imprisonments which are, in other countries, the usual expedients of government (18). As the forms and maxims of the court of justice are strictly prescribed, and every individual has an invariable right to be judged according to law, he may obey, without fear, the dictates of public virtue. Lastly, what crowns all these precautions is, its being a fundamental maxim, "that the freedom of speech, and debates and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament" (19).

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(18) It is nevertheless remarked by Professor Wooddeson, that, however great the utility of the public ends which impeachments are designed to answer, they have been too often misguided by personal and factious animosities, and productive of alarming dissensions between two branches of the legislature. Yet in these controversial struggles the Peers seem to have steadily resisted and repelled any invasion or diminution of those rights of judicature which are so providentially reposed in them by the ancient constitution, and in the exercise of which, both in civil and criminal causes, they have so long signalised their wisdom and their justice. (Lect. 40).—EDITOR.

(19) Bill of Rights, art. 9.

The following was the Speaker's claim in the time of Queen Elizabeth:—"1st, Liberty of access for the House to the king's majesty; 2nd, pardon for himself if he should mistake or misreport any matter he was ordered to declare; 3rd, liberty and freedom of speech; 4th, exemption from all manner of arrests and suits during the continuance of the parliament, and the usual space both before the beginning and after the ending thereof, as in former times hath always been accustomed."

This form, though somewhat modified, has not been essentially altered, as will appear by the address made by the present Speaker on the 20th of February, 1837:—

"My Lords, with all humility and gratitude, I submit myself to his majesty's royal will and pleasure; and now it is my duty, in the name and on the behalf of the Commons of the United Kingdom, to lay claim, by humble petition, to the free exercise of all their ancient and undoubted rights and privileges, and more especially to those of freedom of debate, freedom from arrest for their persons and their servants, free access to his majesty whenever occasion may require it; and that his majesty will be graciously pleased to put the most favourable construction on all their proceedings; and, for myself, I am anxious, and most earnestly entreat, that, whenever I shall fall into error, the blame may be imputed to me, and not to his majesty's faithful Commons."

The House of Commons has also recently put forth a claim, and to a certain degree maintained it, of the privilege of depriving individuals of the power to defend themselves against libels, simply because the House had ordered the publication of those libels; which, with the

opinion of the Lord Chief Justice Denman, is noticed in another chapter.

To these laws, or rather conventions, between king and people, the oath following (the form of which, as it is now ordained to be taken, is settled by the statute 1 Will. & Mary, s. 1, c. 6), which the king takes at his coronation; a compact which, if it cannot have the same precision as the laws above mentioned, yet in a manner comprehends them all; and has the farther advantage of being declared with more solemnity.

The archbishop, or bishop, shall say—"Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes of parliament agreed on, and the laws and customs of the same?" The king or queen shall say—"I solemnly promise so to do."

Archbishop or bishop—"Will you, to your power, cause law and justice in mercy to be executed in all your judgments?" King or queen—"I will."

Archbishop or bishop—"Will you, to the utmost of your power, maintain the laws of God, the true profession of the Gospel, and the Protestant reformed religion as established by law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?" King or queen—"All this I promise to do" (20).

After this, the king or queen, laying his or her hand

(20) See Neale's History of the Puritans, 285, as to the question whether the sovereign can refuse his assent to acts of the legislature prejudicial to the estate of the church.—EDITOR.

upon the Holy Gospels, shall say—"The things which I have here before promised I will perform and keep: So help me God!"—and then shall kiss the book (21).

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(21) It is also ordained by the statute 1 Will. & Mary, s. 2, c. 2, that every king and queen, being of the age of twelve years, who shall succeed to the imperial crown of these realms, shall, on the first day of the meeting of their first parliament, or at their coronation (which shall first happen), make, subscribe, and audibly repeat the declaration against popery, as prescribed by stat. 30 Car. II. st. 2.—The Act of Settlement requires both the declaration and oath by those who succeed under it. Hence, to speak here in reference to my observations in Book 2, ch. 5, sec. 2, *the church and state must be kept united. The protestant persuasion is the tenure by which the sovereign holds the crown.*—EDITOR.

CHAPTER IX.

SECTION I.—*Of Private Liberty, or the Liberty of Individuals.*

100 WE have hitherto treated only of general liberty, that is, of the rights of the nation as a nation, and of its share in the government. It now remains that we should treat particularly of a thing, without which this general liberty, being absolutely frustrated in its object, would be only a matter of ostentation, and even could not long subsist: I mean, the liberty of individuals.

Private liberty, according to the division of the English lawyers, consists, *first*, of the right of property, that is, of the right of enjoying exclusively the gifts of fortune, and all the various fruits of one's industry; *secondly*, of the right of personal security; *thirdly*, of the locomotive faculty, taking the word liberty in its more confined sense (1).

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(1) Burlamaqui, in his principles of Politic Law, describes *natural liberty* to be the right which nature gives to all mankind, of disposing of their persons and property after the manner they judge most convenient to their happiness, on condition of their acting within the limits of the law of nature, and of their not abusing it to the prejudice of other men. To this right of liberty, there is a reciprocal obligation corresponding, by which the law of nature binds all mankind to respect the liberty of other men, and not to disturb them in the use they make of it, so long as they do not abuse it. (*Part* 1, *chap.* 3, *sect.* 15).

Each of these rights, say again the English lawyers, is inherent in the person of every Englishman; they are to him as an inheritance, and he cannot be deprived of them but by virtue of a sentence passed according to the laws of the land. And, indeed, as this right of in- 101
heritance is expressed in English by one word, (birth-right), the same as that which expresses the king's title to the crown, it has, in times of oppression, been often opposed to him as a right, doubtless of less extent, but of a sanction equal to that of his own.

One of the principal effects of the right of property is, that the king can take from his subjects no part of what they possess; he must wait till they themselves grant it him; and this right, which, as we have seen

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Civil liberty is the impartial administration of equal and expedient laws; and the restraints introduced should be equal to all, or as much so as the nature of things will admit. (*See Paley*, 136, *c.* 5; also *Tacit. De Mor. Germ. c.* 43).

Political liberty is defined by Professor Christian, in his Notes to 1 Blackst. Comm. 127, to be the security with which, from the constitution, form, and nature of the established government, the subjects enjoy civil liberty. He says, that no ideas or definitions are more distinguishable than those of civil and political liberty, yet they are generally confounded, and the latter cannot yet claim an appropriate name. But some, who are zealous to perpetuate the inestimable blessings of civil liberty enjoyed by the people of England, fancy that our political liberty may be augmented by reforms, or what they deem improvements, in the constitution of the government. Men of such opinions and dispositions there will be, and perhaps it is to be wished that there should be, in all times. But before any serious experiment is made, we ought to be convinced by little less than mathematical demonstration, that we shall not sacrifice substance to form, the end to the means, or exchange present possession for future prospects.

Political liberty is the direct end of the English constitution; and if we inquire into the principles in which it is founded, we shall find liberty appear in its highest perfection.—EDITOR.

before, is, by its consequences, the bulwark that protects all the others, has moreover the immediate effect of preventing one of the chief causes of oppression.

In regard to the attempts to which the right of property might be exposed from one individual to another, I believe I shall have said every thing, when I have observed, that there is no man in England, who can oppose the irresistible power of the laws; that, as the judges cannot be deprived of their employments but on an accusation by parliament, the effect of interest with the sovereign, or with those who approach his person, can scarcely influence their decisions: that, as the judges themselves have no power to pass sen-
102 tence, till the matter of fact has been settled by men nominated, we may almost say at the common choice of the parties (*a*), all private views, and consequently all respect of persons, are banished from the courts of justice. However, that nothing may be wanting which may help to throw light on the subject I have undertaken to treat, I shall relate, in general, what is the law in civil matters, that has taken place in England.

When the Pandects were found at Amalphi, the clergy, who were then the only men that were able to understand them, did not neglect that opportunity of increasing the influence they had already obtained, and caused them to be received in the greater part of Europe. England, which was destined to have a constitution so different from that of other states, was to be farther distinguished by its rejecting the Roman laws.

(*a*) Owing to the extensive right of challenging jurymen, which will be explained in the editor's observations upon the new Legal Constitution of England.

Under William the Conqueror, and his immediate successors, a multitude of foreign ecclesiastics flocked to the court of England. Their influence over the mind of the sovereign, which, in the other states of Europe, as they were then constituted, might be con- 103
sidered as matter of no great importance, was not so in a country, where, the sovereign being all-powerful, to obtain influence over him was to obtain power itself. The English nobility saw, with the greatest jealousy, men of a condition so different from their own vested with a power, to the attacks of which they were immediately exposed; and thought that they would carry that power to the height, if they were ever to adopt a system of laws which those same men sought to introduce, and of which they would necessarily become both the depositories and the interpreters.

It happened, therefore, by a somewhat singular conjunction of circumstances, that, to the Roman laws, brought over to England by monks, the idea of ecclesiastical power became associated, in the same manner as the idea of regal despotism was afterwards annexed to the religion of the same monks, when favoured by kings who endeavoured to establish an arbitrary government. The nobility at all times rejected these laws, even with a degree of ill humour (*b*): and the usurper

(*b*) The nobility, under the reign of Richard II., declared in the French language of those times, "Purce que le roialme d'Engleterre n'etoit devant ces heures, ne a l'entent du roy notre seignior, et seigniors du parlement, unques ne sera, rulé ne governé par la ley civil;" viz.—Inasmuch as the kingdom of England was not before this time, nor, according to the intent of the king our lord, and lords of parliament, ever shall be, ruled or governed by the civil law. (*In Rich. Parlamento Westmonasterii, Feb.* 3, *anno* 2, (1379)).

104 Stephen, whose interest it was to conciliate their affections, went so far as to prohibit the study of them.

As the general disposition of things brought about, as hath been above observed, a sufficient degree of intercourse between the nobility or gentry and the people, the aversion to the Roman laws gradually spread itself far and wide; and those laws, to which their wisdom in many cases, and particularly their extensiveness, ought naturally to have procured admittance, when the English laws themselves were as yet but in their infancy, experienced the most steady opposition from the lawyers; and as those persons, who sought to introduce them, frequently renewed their attempts, there at length arose a kind of general combination among the laity, to confine them to universities and monasteries (*c*).

105 This opposition was carried so far, that Fortescue, chief justice of the King's Bench, and afterwards chancellor, under Henry VI., wrote a book, entitled *De*

(*c*) It might perhaps be shewn, if it belonged to the subject, that the liberty of thinking in religious matters, which has at all times remarkably prevailed in England, is owing to much the same causes as its political liberty; both, perhaps, are owing to this, that the same men, whose interest it is in other countries that the people should be influenced by prejudices of a political or religious kind, have been in England forced to inform and unite with them. I shall here take occasion to observe, in answer to the reproach made to the English by President Henault, in his much esteemed Chronological History of France, that the frequent changes of religion, which have taken place in England, do not argue any servile disposition in the people; they only prove the equilibrium between the then existing sects; there was none but what might become the prevailing one, whenever the sovereign thought proper to declare for it; and it was not England, as people may think at first sight, it was only its government, which changed its religion.

Laudibus Legum Angliæ, in which he proposes to demonstrate the superiority of the English laws over the civil; and, that nothing might be wanting in his arguments on that subject, he gives them the advantage of superior antiquity, and traces their origin to a period much anterior to the foundation of Rome.

This spirit has been preserved even to much more modern times; and when we peruse the many paragraphs which Judge Hale has written in his History of 106
the Common Law, to prove that, in the few cases in which the civil law is admitted in England, it can have no power, by virtue of any deference due to the orders of Justinian, (a truth which certainly had no need of proof), we plainly see that this chief justice, who was also a very great lawyer, had, in this respect, retained somewhat of the heat of party.

Even at present, the English lawyers attribute the liberty they enjoy, and of which other nations are deprived, to their having rejected, while those nations have admitted, the Roman law; which is mistaking the effect for the cause. It is not because the English have rejected the Roman laws that they are free, but it is because they were free (or at least because there existed among them causes which were, in process of time, to make them so), that they have been able to reject the Roman laws. But even though they had admitted those laws, the same circumstances that have enabled them to reject the whole, would have likewise enabled them to reject those parts which might not have suited them; and they would have seen that it is very possible to receive the decisions of the civil law, on the subject of the *servitutes urbanæ et rusticæ*, without 107

adopting its principles with respect to the power of the emperors (*d*) (2).

The laws, therefore, that have taken place in England, are what they call the unwritten law (also termed the *common law*) (3), and the *statute law*.

(*d*) What particularly frightens the English lawyers, is L. 1, lib. 1, tit. 4, Dig.—*Quod principi placuerit legis habet vigorem.*

(2) Magna Charta declares (c. 29) that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land; and by the Habeas Corpus Act (31 Car. II. c. 2), it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas, (where they cannot have the full benefit and protection of the common law), but that all such imprisonments shall be illegal; that the person who shall dare to commit another, contrary to this law, shall be disabled from bearing any office, shall incur the penalty of *præmunire*, and be incapable of receiving the king's pardon; and the party suffering shall also have his private action against the person committing, and all his aiders, advisers, and abettors, and shall recover treble costs, besides his damages, which no jury shall assess at less than 500*l*.

Transportation, according to Sir W. Blackstone, (in his 1 Comm. 137), is unknown to the common law, and wherever it is inflicted, it is either by the choice of the criminal himself, or by the express direction of some modern act of parliament. (See *Newsome* v. *Bowyer*, 3 P. Wms. 38; but see Fleta, c. 29; Bract. lib. iii. c. 16, particularly s. 4). Mr. Barrington, in his Anc. Stat. 445, n., says, that transportation was first inflicted as a punishment by stat. 39 Eliz. c. 4. The two Despencers were, however, banished by a special law, near two centuries before. (See 9 Ruff. Stat. App. 16, and Co. Litt. 133. a.) The first mention of transportation is in the stat. 18 Car. II. c. 3, s. 2. (See 2 Woodd. 498).—EDITOR.

(3) The term *common law* is at times contrasted with that of *statute law*. Sometimes it is opposed to particular and local customs, sometimes to the rules prevailing in courts of equity, and sometimes it stands in contradistinction to the civil laws of Rome. The origin of the appellation seems to be a translation of the *jus commune* or *folcright*, mentioned in the laws of King Edward the

for salaries for the several departments of the royal household, and superannuations and retired allowances; 172,500*l.* for expenses of the household; 13,200*l.* for royal bounty, alms, and special services; 8,040*l.* for unappropriated monies; and her majesty is empowered to grant pensions in every year to the extent of 1,200*l.* The pension list of 75,000*l.* granted in the late reign is not included in her majesty's annuity, but is made a subject for investigation by the parliament.

The revenue of Queen Elizabeth was 600,000*l.*; that of King Charles I. was 800,000*l.*; and 1,200,000*l.* was granted by parliament to Charles II.; while that of the Commonwealth was 1,500,000*l.*: a further convincing proof, if any were wanted, that *the people* are never gainers by violent revolutions. The civil list revenue granted to King William, after the Revolution, including the hereditary duties, amounted to 700,000*l.*, which was continued to Queen Ann and George I., and in the reign of George II. was nominally augmented to 800,000*l.*; but in fact was considerably more.

Factious persons are continually making complaints against the revenue so granted by parliament; yet looking at the sums formerly granted, (to say nothing of that granted to Oliver Cromwell), the private revenues and prerogatives given up to the public, and the diminution in the value of money, compared with what it was worth in the last two centuries, every

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half a century. During the late reign, there being a queen consort, a further sum of 50,000*l.* was allotted, making for *their* Majesties' privy purse, 110,000*l.* a year.

impartial person must admit these complaints to be void of any rational foundation; and that it is impossible to support that dignity which the sovereign of this mighty empire should maintain, with an income in any degree less than what has been established by parliament.

Among the rights of an inferior nature are those of possession belonging to the sovereign; as such, may be reckoned the ancient jewels of the crown, which, being heir-looms, cannot be disposed of by will.

CHAPTER VII.

The Boundaries set to the Royal Prerogative—continued.

THE force of the prerogative of the Commons, as 78
shewn in the first section of the last chapter, and the facility with which it may be exerted, however necessary for the first establishment of the Constitution, may nevertheless prove too considerable at present, when it is requisite only to support it. There might be the danger, that, if the parliament should ever exert their privilege to its full extent, the prince, reduced to despair, might resort to fatal extremities; or, that the Constitution, which subsists only by virtue of its equilibrium, might in the end be subverted.

Indeed this is a case which the prudence of parliament has foreseen. They have, in this respect, imposed laws upon themselves; and without touching the prerogative itself, they have moderated the exercise of it.

This conduct of the parliament provides an admir- 79
able remedy for the accidental disorders of the state. For though, by the wise distribution of the powers of 80
government, great usurpations are become in a manner impracticable, nevertheless it is impossible but that, in consequence of the continual, though silent, efforts of the executive power to extend itself, abuses will at length slide in. But here the powers, wisely kept in reserve by the parliament, afford the means of remedying them. At the end of each reign, the civil list, and consequently that kind of independence which

it procured, are at an end. The successor finds a throne, a sceptre, and a crown; but he finds neither power, nor even dignity; and before a real possession of all these things is given him, the parliament have it in their power to take a thorough review of the state, as well as correct the several abuses that may have crept in during the preceding reign; and thus the Constitution may be brought back to its first principles.

England, therefore, by this means, enjoys one very great advantage, one that all free states have sought to procure for themselves: I mean that of a periodical reformation. But the expedients which legislators have contrived for this purpose in other countries, have always, when attempted to be carried into practice, been found to be productive of very disadvantageous
81 consequences. Those laws which were made in Rome, to restore that equality which is the essence of a democratical government, were always found impracticable; the attempt alone endangered the overthrow of the republic; and the expedient which the Florentines called *ripigliar il stato*, proved nowise happier in its consequences. This was because all those different remedies were destroyed beforehand, by the very evils they were meant to cure; and the greater the abuses were, the more impossible it was to correct them.

But the means of reformation which the parliament of England has taken care to reserve to itself, is the more effectual, as it goes less directly to its end. It does not oppose the usurpations of prerogative, as it were, in front—it does not encounter it in the middle of its career, and in the fullest flight of its exertion; but it goes in search of it to its source, and to the principle of its action. It does not endeavour forcibly to overthrow it; it only enervates its springs.

What increases still more the mildness of the operation, is, that it is only to be applied to the usurpations themselves, and passes by what would be far more formidable to encounter, the obstinacy and pride of the usurpers.

Every thing is transacted with a new sovereign, who, 82
till then, has had no share in public affairs, and has taken no step which he may conceive himself bound in honour to support. In fine, they do not wrest from him what the good of the state requires that he should give up: he himself makes the sacrifice.

The truth of all these observations is remarkably confirmed by the events that followed the reign of the two last Henries. Every barrier that protected the people against the incursions of power had been broken through. The parliament, in their terror, had even enacted that proclamations, that is, the will of the king, should have the force of laws (*a*): the Constitution seemed really undone. Yet, on the first opportunity afforded by a new reign, liberty began again to make its appearance (*b*). And when the nation, at length recovered from its long supineness, had, at the accession of Charles I., another opportunity of a change of sovereign, that enormous mass of abuses, which 83
had been accumulating, or gaining strength, during five successive reigns, was removed, and the ancient laws were restored.

(*a*) Stat. 31 Hen. VIII. cap. 8.

(*b*) The laws concerning treason, passed under Henry VIII., which *Judge Blackstone* calls, "an amazing heap of wild and new fangled treasons," were, together with the statute just mentioned, repealed in the beginning of Edward VI.

To which add, that this second reformation, which was so extensive in its effects, and might be called a new creation of the Constitution, was accomplished without producing the least convulsion. Charles I. in the same manner as Edward VI., (or his uncle, the Regent, Duke of Somerset), had done in former times, assented to every regulation that was passed; and whatever reluctance he might at first manifest, yet the Act, called *the Petition of Right*, (as well as the bill which afterwards completed the work), received the royal sanction without bloodshed (1).

It is true, great misfortunes followed; but they were the effects of particular circumstances. During the time which preceded the reigns of the Tudors, the nature and extent of regal authority having never been accurately defined, the exorbitant power of the princes of
84 that house had gradually introduced political prejudices of even an extravagant kind: those prejudices, having had a hundred and fifty years to take root, could not be shaken off but by a general convulsion; the agitation continued after the action, and was carried to excess by the religious quarrels which arose at that time.

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(1) This was a parliamentary declaration of the liberties of the people, followed by more ample concessions, and by many salutary laws, particularly the Habeas Corpus Act, passed by Charles II. To these succeeded the Bill of Rights, delivered by parliament to the Prince and Princess of Orange and afterwards executed in parliament, (1 William & Mary, stat. 2, c. 2); which rights were again asserted in the act of settlement limiting the crown to her most gracious majesty's illustrious house, with some new provisions for *better securing our religion, laws, and liberties*, which it declares to be "the birthright of the people of England." 12 & 13 Will. III. c. 2.—EDITOR.

CHAPTER VIII.

SECTION I.—*The Boundaries set to the Royal Prerogative—continued.*

THE Commons, however, have not entirely relied on the advantages of the great prerogative with which the Constitution has intrusted them.

Though this prerogative is, in a manner, out of danger of an immediate attack, they have, nevertheless, at all times shewn the greatest jealousy on its account. They never suffer, as we have observed before (1), a money-bill to begin any where but with themselves; and any alteration that may be made in it in the other House is sure to be rejected (2). If the Commons had not most strictly reserved to themselves the exercise of a prerogative, on which their very existence depends, 85
the whole might at length have slidden into that other body, which they might have suffered to share in it equally with themselves. If any other persons besides the representatives of the people had a right to make an offer of the produce of the labour of the people, the executive power would soon have forgotten that it only exists for the advantage of the public (*a*).

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(1) *Supra*, 82.

(2) But see Sir Matthew Hale on Parliaments, 65, 66, where an alteration is made by the Lords consistent with the grant; and Sir Heneage Finch in reply, Comm. Journ. 22 April, 1761. See also Hatsell, vol. 3, appendix.—EDITOR.

(*a*) As the Crown has the undisputed prerogative of assenting to

Besides, though this prerogative has of itself, we may say, an irresistible efficiency, the parliament has neglected nothing that may increase it, or at least the facility of its exercise: and though they have allowed the general prerogatives of the sovereign to remain undisputed, they have in several cases endeavoured to restrain the use he might make of them, by entering with him into divers express and solemn conventions for that purpose (*b*).

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and dissenting from what bills it thinks proper, as well as of convening, proroguing, and dissolving the parliament whenever it pleases; the latter have no assurance of having a regard paid to their bills, or even of being allowed to assemble, but what may result from the need the Crown stands in of their assistance; the danger, in that respect, is even greater for the Commons than for the Lords, who enjoy a dignity which is hereditary, as well as inherent to their persons, and form a permanent body in the state; whereas the Commons completely vanish, whenever a dissolution takes place: there is, therefore, no exaggeration in what has been said above, that their very being depends on their power of granting subsidies to the Crown.

Moved by these considerations, and, no doubt, by a sense of their duty towards their constituents, to whom this right of taxation originally belongs, the House of Commons have at all times been very careful, lest precedents should be established, which might, in the most distant manner, tend to weaken their right. Hence the warmth, I might say the resentment, with which they have always rejected even the amendments proposed by the Lords in their money-bills. The Lords, however, have not given up their pretensions to make such amendments; and it is only by the vigilance and constant predetermination of the Commons, to reject all alteration whatever made in their money-bills, without even examining them, that this pretension of the Lords is reduced to be a useless and only dormant claim. [See *post*, 396.—Ed.]

(*b*) Laws made to bind such powers in a state as have no superior power, by which they may be legally compelled to the execution of them, (for instance, the Crown, as circumstanced in England), are nothing more than general conventions or treaties made with the body of the people.

Thus the king is indisputably invested with the exclusive right of assembling parliaments; yet, he must assemble one at least once in three years; and this obligation on the king, which was insisted on by the people in very early times, has been since confirmed by an act passed in the 6th William & Mary, c. 2, by which it is enacted, that a new parliament shall be convoked within three years after the determination of any parliament, and that no parliament shall last longer than three years; but, by statute 1 Geo. I. c. 38, this period is enlarged to seven years. The Mutiny Act is passed only for one year, consequently parliament must necessarily be summoned once in every year: the precise time and place of meeting is at the king's disposal.

Moreover, as the most fatal consequences might ensue, 87
if laws which might most materially affect public liberty could be enacted in parliaments abruptly and imperfectly summoned, it has been established, that the writs for assembling a parliament must be issued forty days at least before the first meeting of it. Upon the same principle, it has also been enacted, that the king cannot abridge the term he has once fixed for a prorogation, except by a proclamation, in which not less than fourteen days' notice must be given from its date, when the two Houses of Parliament stand adjourned to the day and place declared in such proclamation (1); so a parliament may be dissolved by proclamation, as it was during the recess of 1806.

Again, the king is the head of the church; but he can neither alter the established religion, nor call indi-

(1) 39 & 40 Geo. III. c. 14.—Editor.

viduals to an account for their religious opinions (*c*).
88 He cannot even profess the religion which the legislature has strictly forbidden; and the prince who should profess it is declared incapable of *inheriting, possessing,* or *enjoying the crown of these kingdoms* (*d*).

The king is the first magistrate; but he can make no change in the maxims and forms consecrated by law or custom; he cannot even influence, in any case whatever, the decision of causes between subject and subject; and James I., assisting at the trial of a cause, was reminded by the judge that he could give no opinion (*e*). Lastly, though crimes are prosecuted in the king's name, he cannot refuse to lend it to any particular persons who have complaints to prefer.

(*c*) The Convocation, or assembly of the clergy, of which the king is the head, can only regulate such affairs as are merely ecclesiastical; they cannot touch the laws, customs, and statutes of the kingdom. Stat. 25 Hen. VIII. c. 19, which is declaratory of the common law. And this convocation cannot meet, except by virtue of the king's writ, which is essential to the ratification of their canons. See also 8 Hen. VI. c. 1, as to the privileges of the members, which are unnoticed in the stat 10 Geo. III. c. 50. It is summoned with every new parliament, but only assembles *pro formâ*.—EDITOR.

(*d*) 1 William & Mary, stat. 2, c. 2; see also the Act of Settlement, 12 & 13 Will. III. c. 2.—EDITOR.

(*e*) These principles have since been made an express article of an act of parliament; the same which abolished the Star Chamber. "Be it likewise declared and enacted by the authority of this present parliament, that neither his majesty nor his privy council have or ought to have any jurisdiction, power, or authority to examine or draw into question, determine, or dispose of the lands, tenements, goods, or chattels of any of the subjects of this kingdom." Stat. A. 16 Hen. I. cap. 10, s. 10. [This produced a material, but salutary change in the Constitution. In judicial magistracy the king's power is as nothing, though, formerly, he exercised all the judicial functions. It is now a separate political power, vested in and distributed over a variety of jurisdictions.—EDITOR].

The king has the privilege of coining money; but he 89
cannot alter the standard.

The king has the power of pardoning offenders; but he cannot exempt them from making a compensation to the parties injured. It is even established by law, that, in a case of murder, the widow, or next heir, shall have a right to prosecute the murderer; and the king's pardon, whether it preceded the sentence passed in consequence of such prosecution, or whether it be granted after it, cannot have any effect (*f*).

The king has the military power; but still, with respect to this, he is not absolute. It is true, in regard to the sea-forces, as there is in them this very great advantage, that they cannot be turned against the liberty of the nation, at the same time that they are the surest bulwark of the island, the king may keep them as he thinks proper; and in this respect he lies only under the general restraint of applying to parliament for obtaining the means of doing it. But in regard to land-forces, as they might become an immediate weapon in the hands of power, for throwing down all the barriers of public liberty, the king cannot raise them without the consent of parliament. The guards of Charles II. (4000 men) were declared anticonstitutional; and James's army was one of the causes of his being dethroned (*g*).

(*f*) The method of prosecution here mentioned is called an *appeal;* it must be sued within a year and a day after the commission of the crime.

(*g*) A new sanction was given to the above restriction in the 6th article of the Bill of Rights: "A standing army without the consent of parliament is against the law."

In these times, however, when it is become a custom with princes to keep those numerous armies which serve as a pretext and means of oppressing the people, a state that would maintain its independence is obliged, in a great measure, to do the same. The parliament has therefore thought proper to establish a standing body of troops, of which the king has the command.

SECTION II.

The Army.—Impeachments.

STANDING armies were first introduced by Charles VII. in France in 1445 (1), and have of late years universally prevailed over all Europe. It is observed by Montesquieu (2), that to prevent the executive power from being able to oppress, it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit as the people, as was the case in *Rome* until the time of *Marius*. To obtain this end, there are only two ways; either that the persons employed in the army should have sufficient property to answer for their conduct to their fellow subjects, and be enlisted only for a year, as was customary at *Rome;* or, if there should be a standing army composed chiefly of the most despicable part of the nation, the legislative

(1) Robertson, Chas. V., Vol. 1, p. 94.
(2) Sp. Laws, B. xi. Ch. 7.

power should have a right to disband them as soon as it pleased.

The most formidable enemy which the people of England have to dread, is their own lawless mobs. When once an army is established, it ought not to depend immediately upon the legislative, but upon the executive power; and this from the very nature of the thing, its business consisting more in action than deliberation. When troops depend entirely upon the legislative body, it becomes at once a military government.

The army is established only for one year; at the end of that term, it is (unless re-established) to be *ipso facto* disbanded; and as the question which then lies before parliament, is not, whether the army shall be dissolved, but whether it shall be established anew, as if it had never existed, any one of the three branches of the legislature may, by its dissent, hinder its continuance.

The parliament every year passes an act for punishing mutiny and desertion, and for the better payment of the army and their quarters, which authorizes the enlisting of recruits, and empowers courts-martial to award punishment for military offences: without this act the king has not even the necessary power of military discipline. The number of military forces established by parliament (3) at the time of passing the last mutiny act was 81,319.

This instrument of defence, which the circumstances of modern times have caused to be judged necessary, as it is capable, on the other hand, of being applied to the most dangerous purposes, has been joined to the

(3) 6 & 7 Will. IV. c. 8.

state by only a slender thread, the knot of which may be slipped on the first appearance of danger.

The army and navy are now paid from the consolidated fund, and an appropriation act is annually passed for this and other purposes.

The sum appropriated by the parliament (4) for army services to the 31st March, 1837, was 6,328,710*l.*, and for naval services 4,533,543*l.*

92 But these laws which limit the king's authority would not, of themselves, have been sufficient. As they are, after all, only intellectual barriers, which the king might not at all times respect; as the check which the Commons have on his proceedings, by a refusal of subsidies, affects too much the whole state to be exerted on every particular abuse of his power; and lastly, as even this check might in some degree be eluded, either by breaking the promises which have procured subsidies, or by applying them to uses different from those for which they were appointed, the constitution has besides supplied the Commons with the means of immediate opposition to the misconduct of government, by giving them a right to impeach the ministers.

It is true the king himself cannot be arraigned before judges; because, if there were any that could pass sentence upon him, it would be they, and not he, who must finally possess the executive power; but on the other hand, the king cannot act without ministers; it is therefore those ministers, that is, those indispensable instruments, who are responsible to the people.

If, for example, the public money has been employed in a manner contrary to the declared intention of those who granted it, an impeachment may be brought against

(4) 6 & 7 Will. IV. c. 98.

those who had the management of it. If any abuse of power is committed, or in general any thing done contrary to the public weal, they prosecute those who have been either the instruments or the advisers of the measure.

There are many instances upon record of such impeachments: as, where a Lord Chancellor had been guilty of bribery; (*Bacon's case,* 2 How. State Trials, 897; *Macclesfield's case,* 16 Id. 768); or where he had been thought to put the great seal to an ignominious treaty; (*Clarendon's case,* 6 Id. 334; *Somers's case,* 14 Id. 250); or to have placed it to a blank instrument, 4 Burn. Own Times, 475). Where a judge has misled the king by unconstitutional opinions, (*Tresilian's case,* 1 How. Sta. Tri. 119). Where a magistrate has attempted to subvert the fundamental laws, or introduce arbitrary power, (*Strafford's case,* 3 Id. 1385; *Clarendon's case*). Where a Lord Admiral has neglected the safeguard of the sea, (*Buckingham's case,* 2 Id. 1326; *Orford's case,* 14 Id. 242). Where an ambassador has betrayed his trust, (*Wolsey's case,* 4 Inst. 89; *Suffolk's case,* 3 Seld. Works, 1597; 1 How. S. Tri. 273; *Bristol's case,* 2 Id. 1282; 1 Rushw. 250). Where a privy councillor has propounded or supported pernicious and dishonourable measures, (*Suffolk's case; Bristol's case; Strafford's case*). Where a confidential adviser of the king has obtained exorbitant grants or incompatible employments, (*Clarendon's case; Halifax's case,* 14 How. St. Trials, 295; *Orford's case; Somers's case*). All such high misdeeds as peculiarly injure the commonwealth, by the abuse of great offices of trust, have been the usual grounds for impeachment.

But who shall be the judges to decide in such a case?

What tribunal will flatter itself that it can give an impartial decision, when it shall see, appearing at its bar, the government itself as the accused, and the representatives of the people as the accusers?

It is before the House of Peers that the law has directed the Commons to carry their accusation; that is, before judges, whose dignity on the one hand renders them independent, and who, on the other, have a great honour to support in that awful function, where they have all the nation as spectators of their conduct.

The accusation of the Commons is substituted in the place of an indictment, which cannot be supplied by articles exhibited by any peer or other person; on which account the charge brought by the Earl of Bristol against the Duke of Buckingham, (2 How. Sta. Tri., 1282), before he was formally impeached, and the counter-charge, (2 Id. 1287; 1 Rushw. 254), seem irregular and illegal. The stat. 1 Henry IV. abrogated appeals by any subject of whatever dignity, and was relied on by the judges, who unanimously denied the legality of the Earl of Bristol's articles exhibited against the Lord Chancellor Clarendon. (6 How. Sta. Tri., 312, 314, 315). So, when Henry VII. required a supposed delinquent to be attainted and lose his land, the judges determined the proceeding to be void. (Year Book, 4 Hen. VII. 18, pl. 11). The judges held that, as the attainder was by the House of Lords only, without the concurrence of the Commons, no forfeiture was incurred; and by the case before cited, of Lords Bristol and Clarendon, it is settled, that no charge of high treason can be originally brought in the House of Lords, by one peer against another.

Impeachments are not restrained by the stat. of

The *unwritten law* is thus called, not because it is only transmitted by tradition, from generation to generation, but because it is not founded on any known act of the legislature. It receives its force from immemorial custom, and for the most part derives its origin from acts of parliament, enacted in the times 108
which immediately followed the Conquest, (particularly those anterior to the time of Richard I.), the originals of which are lost.

The principal objects settled by the *common law*, are the rules of *descent* (3), the different methods of acquiring property, the various forms required for rendering contracts valid, in all which points it differs more or less from the *civil law*. Thus, by the common law, lands (4) descend to the eldest son, to the exclusion of all his brothers and sisters; whereas, by the civil law, they are equally divided between all the children: by the common law, property is transferred by writing; but by the civil law, tradition (or actual delivery) is moreover requisite.

The source from which the decisions of the common law are drawn, is what is called *præteritorum memoria eventorum*, and is found in the collection of judgments

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elder, expressing the same equal right, law, or justice, due to persons of all degrees. It was afterwards given to the laws contained in the code of King Edward the Confessor, which were common or general to the whole realm, and, in that respect, distinguished from the Northumbrian and other laws and usages of less extensive territorial authority.—EDITOR.

(3) The rules which now govern the descent of freehold estates of inheritance are settled by the statute 3 & 4 Will. IV. c. 106. See *Appendix*.—EDITOR.

(4) Except those affected by particular customs.—EDITOR.

that have been passed from time immemorial, and which, as well as the proceedings relative to them, are carefully preserved under the title of records. In order that the principles established by such a series of judgments may be known, extracts from them are from time to time published, under the name of reports; and these re-
109 ports reach, by a regular series, so far back as the reign of Edward II. inclusive.

The common law moreover comprehends some particular customs, which are fragments of the ancient Saxon laws escaped from the disaster of the Conquest; such as that called gavel-kind in the county of Kent, by which lands are divided equally between the sons, and that called Borough English, by which, in some particular districts, lands descend to the youngest son (5).

The *civil law*, in the few instances where it is admitted, is likewise comprehended under the unwritten law, because it is of force only so far as it has been authorized by immemorial custom. Some of its principles
110 are followed in the ecclesiastical courts, in the courts of Admiralty, and in the courts of the two universities; but it is there nothing more than *lex sub lege graviori*, and these different courts must conform to acts of parliament, and to the sense given to them by the courts of common law, being moreover subjected to the control of the latter.

Lastly, the *written law* is the collection of the various acts of parliament, the originals of which are

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(5) These customs, the commissioners appointed to inquire into the law of real property, by their Third Report, (pp. 8, 12), propose entirely to abolish; but they have not proposed to make any alteration in the tenure of *petit serjeanty* or of tenure in *burgage*.—EDITOR.

carefully preserved, especially since the reign of Edward III. Without entering into the distinctions made by lawyers with respect to them, such as public and private acts, declaratory acts, or such as are made to extend or restrain the common law, &c., it will be sufficient to observe, that, being the result of the united wills of the three constituent parts of the legislature, they, in all cases, supersede both the common law and all former statutes, and the judges must take cognizance of them, and decide in conformity to them, even though they had not been alleged by the parties (6).

SECTION II.

OF PRIVATE LIBERTY—*continued.*

The Courts for the Administration of Justice.

THE different courts for the administration of justice in England are—

1. The Court of *Common Pleas* (1). It formerly made 111
a part of the *aula regis* (the king's hall or court); but as the latter was bound by its institution always to follow the person of the king, and private individuals experienced great difficulties in obtaining relief from a

(6) Unless they be private acts.

(1) *Common Pleas* means all civil actions between man and man, as distinct from the *pleas of the crown*, which means all crimes and misdemeanours.—EDITOR.

court that was ambulatory, and always in motion, it was made one of the articles of the Great Charter, that the Court of Common Pleas should thenceforward be held in a fixed place (*a*); and since that time, it has been seated at Westminster. It is composed of a lord chief justice, and four other judges.

II. The *Court of Exchequer* was originally established to determine those causes in which the king or his servants or accountants were concerned, in respect of his debts and duties. It was set up by William the Conqueror (2) as part of the *Aula Regis* (3), and is called the *Exchequer scaccarium*, from the checquered cloth, resembling a chess-board, which covers the table there, and upon which certain of the king's accounts are made up. The sums are marked and scored with counters. This court is, by the Uniformity of Process Act, 2 Will. IV. c. 39, (shewn in the next chapter), thrown open and placed upon the same footing as the other courts at Westminster: Attornies of the other courts may now practise in it. All civil actions may now be brought there, real, personal, and mixed, without using the fiction formerly resorted to, by which a plaintiff was obliged to set forth in his declaration, that he was a debtor to the king. An outlawry may now also issue from this court, but it cannot enquire of felony or treason (4). It consists of two divisions, the receipt of the exchequer, which manages the royal revenue, and the court, or judicial part of it, which is again subdivided into a court of equity and a court of common law.

(*a*) "Communia placita non sequantur curiam nostram, sed teneantur in aliquo loco certo." *Magna Charta*, cap. 11.

(2) Lamb. Archeion, 24. (3) Mad. Hist. Exc. 109.

(4) 2 Hawk. P. C. 2.

This court is composed of the Chief Baron of the Exchequer, and four other judges. When it sits as a court of equity, the Chancellor of the Exchequer may preside, which is of rare occurrence: the last case in which the chancellor sat in judgment was that of *Naish* v. *The East India Company*, Mich. T. 1735, when Sir Robert Walpole pronounced the decree (5).

III. The Court of *King's Bench* (*b*) forms that part of the *Aula Regis* which continued to subsist after the dismembering of the Common Pleas. This court enjoys the most extensive authority of all other courts; it has the superintendence over all corporations, and keeps the various jurisdictions in the kingdom within their respective bounds. It takes cognizance, according to the end of its original institution, of all criminal causes, and even of many causes merely civil. It is composed of the Lord Chief Justice and four other judges.

IV. The Court of *the Exchequer Chamber*. There are now only two courts of the Exchequer Chamber.

When any of the other courts is equally divided in opinion, or the matter is of great weight and difficulty, the cause before judgment may be adjourned into the Exchequer Chamber, before the whole of the fifteen judges, who hear and determine upon it, sometimes with the aid of the Lord Chancellor.

This great court also meets to determine upon the effect of a special verdict in criminal cases, as whether the facts found by the jury make the prisoner guilty of murder or manslaughter.

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(5) 1 Fowl. Exch. Prac. 8.

(6) Called the *Queen's* Bench when a Queen reigns in her own right, as is now the case.

It has been held to be holden by the authority of the ancient common law (6); but this is considered to be erroneous (7). And it has been doubted, whether this court did not come into the place of parliamentary corrections of erroneous judgments (8); but it is now clearly settled and agreed to be, if resorted to, an intermediate tribunal (9).

The *Second Court* of *Exchequer Chamber* is constituted by stat. 31 Edw. III. c. 12 (10), and has been determined to be a necessary stage between the law side of the Exchequer and the House of Lords, as a court of appeal from the errors of other jurisdictions. It consists now of the judges and barons of all the courts.

Writs of error from all the courts are now returnable only in the Court of Exchequer Chamber, in which all the judges, except those of the court from which the writ is brought, preside, and from their judgment no writ of error lies except in parliament (11).

Writs of error *coram nobis* in the King's Bench, and *coram vobis* in the Common Pleas, and the proceedings thereon to reverse judgment *in the same court*, are not affected by this statute (12).

The writ of error acts as a supersedeas from the time it is allowed; but if obtained upon frivolous grounds, as was before the common practice, to create delay, the judge

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(6) Stat. 14 Edw. III. c. 5.

(7) Com. Dig. Courts, D. 5.

(8) *Ellison* v. *Warren*, 2 Kib. 97; Show. P. C. 110, cit.

(9) Woodd. Lect. 8, 229.

(10) See also 31 Eliz. c. 1, s. 2.

(11) 11 Geo. IV. & 1 Will. IV. c. 70, s. 8.

(12) *Gurney* v. *Gordon*, 2 Tyr. 15; 2 Crompt. & J. 11: *Castledine* v. *Munday*, 4 B. & Adol. 90: *Binns* v. *Pratt*, 1 Chitt. Rep. 369.

may order execution, and if the defendant in error obtains a judgment, he is entitled to interest for the time execution has been delayed (13). The only tenable objections are such *substantial defects* in the *pleadings* of the party in whose favour the judgment below has been given, as are not aided after verdict or judgment by default, or for want of a special demurrer, as required by 4 Ann. c. 16, or in respect of defects in *legal merits* on the case itself, as disclosed by a *demurrer to the evidence, bill of exceptions,* or *special verdict,* (and not upon a mere especial case or matter disclosed upon some *collateral* motion, rule *nisi* or rule absolute).

The Court of Exchequer Chamber is not a *court of appeal* by this statute, so as to re-investigate the *merits* upon any matter of *fact,* as the *Judicial Committee* of the *Privy Council* is; and it has therefore no power to convene a jury, or to institute any collateral inquiry. As constituted of the judges of the two courts instead of the four judges of the court below, it is supposed that this court will arrive at a more certainly correct and satisfactory decision than such court below.

The judges of the King's Bench, and the barons of the Exchequer of Pleas, therefore, constitute the only court of error upon a judgment of the Common Pleas. The judges of the Common Pleas and the same barons constitute the court of error upon a judgment of the King's Bench; and the judges of the King's Bench and Common Pleas constitute the court of error upon a judgment of the Exchequer of Pleas (14); and from all judgments in error of the Court of Exchequer Cham-

(13) 3 & 4 Will. IV. c. 42.

(14) See Chitty's Practice of the Law.

ber, the writ of error lies only to the House of Lords. The attendance of the chancellor and the lord treasurer is not now required.

There were formerly only twelve judges of the Courts of King's Bench, Common Pleas, and Exchequer; but now, by the stat 11 Geo. 4 & 1 Will. IV. c. 70, intituled " An Act for the more effectual administration of justice in England and Wales," which is fully noticed in the next chapter, the number was increased from twelve to fifteen. This statute fixed the salaries of the judges—The puisne judges at 5,000*l.* a year each, and a retiring annuity of 3,500*l.* for life. The Chief Justice of the Court of King's Bench, at 10,000*l.* The Chief Justice of the Court of Common Pleas, at 8,000*l.* The Chief Baron of the Court of Exchequer, at 7,000*l.* These salaries are payable out of the consolidated fund (15)—formerly, the judges were paid out of the civil list,—and all fees and pecuniary profits, formerly received by these judges, are now to be paid into the Exchequer, and to form part of the consolidated fund.

The commissions of these judges, which in former days were often given them *durante bene placito,* now must always be made *quamdiu se bene gesserint,* (on which good behaviour it seems the parliament only can determine), and they continue in force, notwithstanding the demise of the king (16), which renders them quite independent of the heir apparent.

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(15) 2 & 3 Will. IV. c. 116.
(16) 1 Geo. III. c. 23.

CHAPTER X.

Section I.

ON THE LAW THAT IS OBSERVED IN ENGLAND, IN REGARD TO CIVIL MATTERS.

The Administration of Justice.

It is a leading maxim of the laws of England, (and without it all laws are nugatory), that there is no right without a remedy, nor any legal power without a legal course to carry it into effect.

Justice is administered in England in civil matters under more defined principles than heretofore; its administration is, in a great measure, now governed by the *Statute Law*, which has recently effected very great improvements for the benefit of the people. Justice well administered, justice speedy, and justice cheap, appears to have been the object of the legislature; but the great changes that have been made are, as yet, but imperfectly understood by the people at large, although their liberties and rights are so much involved in them.

It becomes, therefore, of the first importance here to shew what is the *Legal Constitution of the Country* at this day. "It must needs be that offences will come." There will always be the offenders and the offended; but it is the voice of reason, that no man ought to

decide on his own cause; and it is the language of the holy scriptures, that "if one man sin against another, the judge shall judge him." Every well-regulated government, therefore, has its courts of justice, in which persons duly qualified and authorized preside for the administration of justice. The institution is of DIVINE appointment, and its end is, that the people may be judged with just judgment (1).

In every court there must be at least three parties: the plaintiff, who complains of an injury done; the defendant, who is called upon to make satisfaction or reparation for the injury; and the judicial power, which is to examine into the fact, to determine the law arising upon it, to ascertain whether any and what injury has been done to the complainer, and, by its officers, to apply the remedy for obtaining the satisfaction or reparation awarded.

Previous to the Conquest, the administration of justice was characteristically *local.* The court of tithing, for the decision of petty suits between neighbours; the *hundred* or *wapentake courts; the courts of the whole county,* and the *king's court,* succeeded each other in regular gradation.

In the reign of Edward I., and probably before, the local jurisdiction was limited to demands below 40*s.*; the statute of Gloucester, (6 Edw. I.), enacts, that none shall have suits of trespass before justices, unless he swear that the goods taken were worth 40*s.* at least. This established a permanent limit between the superior and inferior jurisdiction.

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(1) Deut. ch. 16, v. 13.

The change in the value of money, and the gradual depreciation of the coin, has greatly abridged the ancient local jurisdiction. Forty shillings of the reign of Edward I. would amount at the present day to at least 25*l.*; and to the same extent has the jurisdiction of the superior courts, in amount, been extended.

Sir Matthew Hale considered that the limit to the jurisdiction of the inferior courts should be extended to 10*l.* He observes upon the statute of Gloucester, and says, "At that time 40*s.* was a considerable sum:—first, in respect of the intrinsical value of the coin; for then 20 pence made an ounce of silver, and at this day it is 5*s.*, viz. 60 pence, and upon that single account, 40*s.* then, ariseth now to 6*l.*; but, second, that was not all; for, as I may say, money was at that time dearer than it is now, because there was not so much; and hence it is that the prices of all things at this day are much dearer now than they were then, because money is much more plentiful now than it was then, as it will appear to any that look into the proclamations of prices and commodities, both in the beginning of iters and parliaments in the times of Edward I. and Edward II. *Vide* Rot. Parl. 8 Edw. II. n. 29, in *schedula*, a proclamation for the price of victuals, viz., a fat ox, fatted with corn, 24*s.*; a fat cow, 12*s.*; a fat hog, 40*d.*; a fat mutton unshorn, 20*d.*; a fat mutton shorn, 14*d.*; a fat hen, 1*d.*; 24 eggs, 1*d.*; which evidences a great advance of the price of things at this day, besides the advance of the extrinsical denomination of money."

The inconvenience has been since attempted to be obviated by the establishment of *courts* of *conscience*, (justly so called); the first of which appears to have

been established by the stat. 3 Jas. I. c. 15, recently repealed by stat. 5 & 6 Will. IV. c. 94, loc.

In the reign of King George I. a statute was passed to prohibit the practice of previous personal arrest in cases of demands under *two pounds;* since which time *courts of conscience* have greatly increased, in which such demands are summarily decided, and where a simple summons without arrest can only be made use of. There are now several courts open for the recovery of small debts, and very many salutary changes have been made for the purpose of dealing out speedy and cheap justice. Besides the court of conscience or county court, which is confined to three divisions of the hundred of *Ossulston in Middlesex,* and has a *branch court* at *Brentford,* extending through the *hundreds* of *Gore, Elthorne, Spelthorne,* and *Isleworth,* in Middlesex, and another *branch court* at *Enfield,* for the *hundred of Edmonton,* there is now the *court of requests* for the *city of London,* for demands under 10*l.* (5 & 6 Will. IV. c. 94); the court of the sheriff of *London;* the court of the *sheriff* of *Middlesex;* and the *Lord Mayor's court:* in the three latter courts, if the demands exceed 5*l.,* the action may be removed into a superior court. The *court* of *record* for the *town* and *borough* of *Southwark,* for demands above forty shillings, and when the demand is under 20*l.* the action cannot be removed into a superior court without bail. There is also in the same borough a court of record for the *Clink liberty,* and a court of requests for the *town* and *borough* and *eastern* half of the hundred of Brixton, for demands under 5*l.* (4 Geo. IV. c. 123). There is also the *ancient court* of the *Marshalsea,* the jurisdiction of which extends 12 miles round Whitehall, but

not entering the city of London. Actions for demands above 5*l.* may be removed into a superior court. There is also the *court* of *requests* for the *Tower Hamlets*, for demands under 5*l.*; also a *court* of *requests* for *Westminster*, and that part of the *Duchy of Lancaster* adjoining, for demands under 5*l.*; governed by stat. 6 & 7 Will. IV. c. 137. This statute repealed the acts of 23 Geo. II. c. 27, and 24 Geo. II. c. 42, which formerly governed this court, and granted more effectual powers for the recovery of small debts in the city and liberty of Westminster. There is also the *Greenwich court of requests*, for demands under 5*l.* extending over the *hundreds* of *Blackheath*, *Bromley*, *Beckenham*, *Ruxley*, and *Little Lessness*, in *Kent*, and *Wallington*, in *Surrey;* governed by stat. 6 & 7 Will. IV. c. 120. *This court* has a branch at *Bromley*, and another at *Woolwich*, extending over *Woolwich*, *Charlton*, *Eltham*, *Bexley*, *Erith*, and *Crayford;* also a *court of requests* at *Croydon*, for demands under 5*l.*, extending over *Croydon*, *Beddington*, *Carshalton*, *Sutton*, *Mitcham*, *Morden*, *Cheam*, *Addington*, *Sanderstead*, *Colsdon*, and *Cattering;* also another *court of requests* at *Wandsworth*, for demands under 5*l.*, extending over *Wandsworth*, *Lower Tooting*, *Merton*, *Wimbledon*, *Putney*, *Barnes*, *Mortlake*, *East Shean*, and *Battersea*, *all in the western Division* of the *hundred of Brixton*, in *Surrey;* governed by stat. 46 Geo. III. c. 88.

In 1779 an act was passed to abolish imprisonment for debt in all cases of debt under 10*l.*; this sum was extended, by the statute 7 & 8 Geo. IV. c. 71, to 20*l.*, over and above and exclusive of any costs, charges, or expenses.

On the 16th August, 1838, an act was passed (1

& 2 Vict. cap. 110), for abolishing arrest on mesne process, in civil actions except in certain cases (1); which came into operation on the 1st October, 1838.

It is, however, worthy of inquiry, even at this day where the law is written specifically authorizing arrest for debt, except accompanied with fraud or violence. It is certainly not to be found in the Statute Book, nor is it authorized by Magna Charta, which protects every individual in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land.

Magna Charta is but declaratory of the ancient common law (2), and was founded upon the laws of Edward the Confessor. This charter every sovereign at his coronation is sworn to maintain.

The statute called *Confirmatio Cartarum* (25 Edw. I.) directs the Great Charter to be allowed as the common law: all judgments contrary to it are declared void.

The statute of Marlbridge (52 Henry III. c. 23) operates only upon frauds, and not upon civil contracts.

In the reign of Edward III. arrest for debt was very common, under pretence of the statutes of 11 & 13 Edw. I. called the Statute Merchant, and the 25 Edw. III. c. 17. This king, being informed of such an abuse of Magna Charta, published in the 42nd year of his reign his *Charta Confirmationis*, by which he abrogated all statutes and enactments contrary to or inconsistent with Magna Charta. "Let (said he) the great charter be holden in all points, and if any statute be made to the contrary *that* shall be holden as none."

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(1) See post, 145, 153. (2) 2 Inst. pröem.

From this period to the reign of Henry IV., these liberties were repeatedly confirmed; a long interval succeeded, and the Petition of Right, which was a parliamentary declaration of the liberties of the people, assented to by Charles I., followed. The Habeas Corpus Act succeeded in the reign of Charles II., and then came the Bill of Rights, or declaration delivered to the Prince and Princess of Orange, and afterwards enacted in parliament (1 W. & M. st. 2, c. 2); which statute recognizes all and singular the rights and liberties asserted and claimed in such declaration to be the true, ancient, and indubitable rights of the people. These liberties were again asserted in the Act of Settlement (12 & 13 Will. III. c. 2); and some new provisions were added for better securing our religion, laws, and liberties, which this statute declares to be the birthright of the people of England, according to the ancient doctrine of the common law (3). The question, therefore, arises, whether, looking at the 28th and 29th articles of Magna Charta, any person can be imprisoned for debt before judgment.

To meet this question, the reader is referred to the *Charta Confirmationis* of 9 Hen. III., and among the liberties there confirmed to the people will be found the following: "Ne aliquis *ballivus* (4) possit ponere aliquem ad legem simplici loquelâ suâ sine testibus fidelibus."

Here we find that no man can bring another under the ban of the law by his own unsupported declaration. How, then, without violence to the charters, can a man by his unsupported affidavit imprison another without

(3) Plowd. 55.

(4) Justice or bailiff.

the judgment of his peers (5). Sir Edward Coke, in his explanation of the 29th article, which will be found at length in another part of this book (6), says, "No man shall be taken, that is, restrained of liberty, by petition or suggestion to the king, or to the council, unless it be by indictment or presentment of good and lawful men where such deeds be done." There are those who apply the last words of this article, "*per legem terræ*," as intending to leave the matter open for future legislation. Now, as Magna Charta is declaratory of the ancient common law, the application cannot be admitted. The Saxon monarchs did not *even imprison their bondsmen for debt;* and it was not till the statute of Marlbridge, that stewards to the barons, intrusted with money, and absconding, could be imprisoned for fraud. Again, the 28th article declares "*simplici loquela sua sine testibus fidelibus* (7)." The 29th article is further interpreted by the statute 42 Edw. III., which sets at rest any question upon the true meaning of the words "*per legem terræ*." This statute declares (as before is shewn) Magna Charta to be the common law of the land, and that all enactments contrary to it were null and void. The statute 3 Cha. I. declares that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. The remedies given for private wrongs were then *summons* and *distringas*. Civil discords produced law fictions, which were in those

(5) Upon the *principle* that no man shall be the accuser and judge in his own cause.

(6) *Supra*, p. 20.

(7) On the *principle* that a simple account between man and man was not a crime, it allowed of neither arrest nor imprisonment.

times easily invented; and every person against whom an affirmation of debt was made, might be readily found guilty of a trespass *vi et armis*. The distinctions between *criminal acts* and *civil wrongs*, between *special contract* and *simple contract* debts, became afterwards the subject of contention.

In process of time the summons fell into disuse, and arrest for debt arose by means of an invention or fiction; this was, a plea of trespass, and trespass *vi et armis;* thus giving to an action of debt the semblance of crime, so as to incarcerate the debtor: then followed the *capias*, and many other writs of a similar nature and tendency.

Custom established the practice; and even now, upon affidavit being made of a debt exceeding 20*l*., and that a defendant is about to quit England, a judge may order an arrest, upon which a *capias* may issue, and any person may be arrested, and deprived of his liberty, until he can find sufficient securities for his appearance.

The statute 1 & 2 Vict. c. 110, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions except in certain cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England," sec. 1, enacts that no person shall be arrested upon mesne process in any civil action in any inferior court whatsoever, or (except in the cases and in the manner thereinafter provided for) in any superior court.

Sec. 2 enacts, that all personal actions in her Majesty's superior courts of law at Westminster shall be commenced by *writ of summons*. That if a plaintiff in any action in any of her Majesty's superior courts of law at

Westminster, in which the defendant was heretofore liable to arrest, whether upon the order of a judge, or without such order, shall, by the affidavit of himself or of some other person, show, to the satisfaction of a judge of one of such superior courts, that such plaintiff has a cause of action against the defendant to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to the act annexed, and shall bear date on the day on which the same shall be issued: Provided always, that the said writ of *capias*, and all writs of execution to be issued out of the superior courts of law at Westminster into the counties palatine of Lancaster and Durham, shall be directed to the Chancellor of the county palatine of Lancaster, or his deputy there, or to the Chancellor of the county palatine of Durham, or his deputy there.

This statute has been amended by statute 2 & 3 Vict. c. 39, but not to affect its object.

The Uniformity of Process Act, by which the writs

of summons and distringas were again introduced into practice (8), restored the old law to all its purity; all actions for simple debt can now only be commenced by writ of summons, and this act *imperatively* prescribes the form of it; and any material variation from it will not only make it *irregular*, but in some cases absolutely void (9). The writ may be issued into any county in England or Wales; but it must be served in the same manner as formerly adopted in the county in which the defendant is described in the writ as residing, or within 200 yards of the borders of it, and not elsewhere. Also places parcel of one county and situate in another, may be deemed as part of each county, but this does not apply to a county of a borough or city (10).

The fictions heretofore resorted to, by which a person was imprisoned for debt under the pretence of having committed a crime, are removed, and the old constitutional law between debtor and creditor stands as declared by Magna Charta, which admits of no imprisonment of the person but on the verdict of a jury. That charter is the basis of the *settled laws* of this kingdom, without which we have none: "It is the solemn contract between king and people, upon the conditions whereof the former is invested with the regal dignity; and, until a new Bill of Rights shall be assented to by the nation at large, it cannot be altered or violated."

By stat. 29 Car. II. c. 7, s. 6, no arrest can be made or process served upon a Sunday, except for treason, felony, or breach of the peace.

(8) *Post*, 152.

(9) See *Smith* v. *Crump*, 1 Dowl. 519: *Davies* v. *Porter*, 2 Id. 538: *Richards* v. *Stuart*, 10 Bing. 319: *Englehart* v. *Eyre*, 2 Dowl. 145: *Wilson* v. *Joy*, 2 Id. 182.

(10) *Davies* v. *Sherlock*, 7 Dowl. 530.

Section II.

The Subject continued.

THE NEW LEGAL CONSTITUTION.

The administration of justice to individuals in the superior courts in England and Wales is now regulated by statute 11 Geo. IV. & 1 Will. IV. c. 70 (1), and 1 & 2 Vict. c. 110 (2), which, with other recent statutes hereafter noticed, have established a *new legal constitution.*

By the statute first named, all the puisne judges are to sit by rotation in each term, or otherwise as they may agree, so that not more than three shall sit at the same time in banc, for the transaction of business in term, unless in the absence of the Lord Chief Justice or Lord Chief Baron.

Any judge, when occasion shall require, while the other judges of the same court are sitting in banc, is to sit apart from them for the purpose of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding motions, and making rules and orders in causes and business depending in the court to which such judge shall belong.

Every judge is authorized to sit in London or Middlesex to try issues arising in any court, and to transact any business in chambers or elsewhere depending in any court over which the superior courts have a common jurisdiction.

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(1) Amended by 1 Will. IV. c. 3, further amended by 1 Will. IV. c. 7. See also 2 & 3 Vict. c. 82.

(2) Amended by 2 & 3 Vict, c. 39.

The ancient law terms are abolished, and new terms fixed: Hilary term is always to begin on the 11th and end on the 31st January; Easter term to begin on the 15th April and end on the 8th May; Trinity term to begin on the 22nd May and end on the 12th June, and Michaelmas term to begin on the 2nd, and end on the 25th, November in every year.—See also 1 Will. IV. c. 3, which relates to essoign or general return days, and explains the duration of the terms intended by the statute.

The time for sittings in London and Middlesex, for the trial of issues of fact arising in any of the courts, is limited.

In all trials for felonies or misdemeanors upon any record of the King's Bench, judgment may be pronounced during the sittings by the judge presiding at the trial, as well upon the person who may have suffered judgment by default or confession, as upon those who shall be tried and convicted, and whether they shall be present or not, except in cases of information by the Attorney-General; such judgment to be final, unless within six days of the next term the court should see cause for a new trial being granted or for the judgment being amended.

The *Court of Exchequer* is thrown open, and attornies of the other superior courts are allowed to practise there.

A common jurisdiction is given to the judges of all the courts jointly, or any eight of them, to make rules and orders for regulating the proceedings of all the courts. The liberty of the subject was still further promoted by bail being allowed to be taken by any judge in chambers, in term as well as vacation. The

jurisdictions of the court of Westminster is also extended to the counties palatine of Chester and the principality of Wales, whose original jurisdictions are abolished, and assizes are directed to be held in those places in the same manner as in the other counties of England.

The rights of the corporation of Chester are saved, except that writs of error are to be made returnable in the Court of King's Bench.

All the judges are now judges of the Court of Common Pleas at Lancaster, the practice and proceedings in which court are regulated by the stat. 4 & 5 Will. IV. c. 62.

Attornies of any of the courts of Great Sessions may be admitted as attornies of the courts of Westminster.

Any person may now render in discharge of his bail upon merely obtaining the order of a judge, and whether in custody or not as to more actions than one. The order to be lodged with the gaoler, and notice to be given to the plaintiff's attorney and the sheriff.

In all actions of ejectment between landlord and tenant, a declaration may be served upon the tenant at any time within ten days after the expiration of the tenancy, and a writ of possession may issue immediately upon the certificate of a judge being obtained, after verdict for the plaintiff, or nonsuit.

It has been determined, that this clause does not extend to property situate in London or Middlesex, but to those places only for which assizes are held (2); and the judge has no discretion as to the time within which the

(2) See 1 Dowl. P. C. 547.

writ of possession shall be executed; he must either direct it to be immediate, or allow the matter to take its due course (3): but it seems that if the judge considers that some time ought to elapse before possession is taken, he will grant the certificate, upon the lessor undertaking not to enforce the execution before a certain time (4).

This *statute* was followed by another passed 1 Will. IV. c. 7, *for the more speedy judgment and execution in actions, and for amending the law as to a judgment on a* cognovit actionem, *in cases of bankruptcy.*

Judgment and execution on actions were heretofore much delayed by reason of the interval between the terms: this statute therefore declares that all *writs* of *inquiry* of damages may be made returnable on any day certain in term or vacation, and after the return judgment may be had, and execution issue forthwith. In all actions brought in any superior court, the judge before whom any such action may be tried is to certify, before the end of the sittings or assizes, that execution ought to issue forthwith, or at some specific day in vacation or term, in which case judgment may be signed, and execution issued.

The object of this act is to prevent vexatious delays to a plaintiff's just claim, and to grant him speedy execution.

It also provides, that no execution issued upon a *cognovit actionem*, signed after declaration or *judgment* by *default*, *confession*, or *nihil dicit*, shall be taken to be within the provision of the Bankrupt Act, 6 Geo.

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(3) 4 Carr. & Payne, 389. (4) 5 Id. 132.

IV. c. 16, which avoids such an execution as against the other creditors.

Writs of *inquiry* of damages, in the Court of *Common Pleas at Lancaster*, are to be made returnable on the first Wednesday in every month, in addition to the first and last days of the assizes; and all writs for removing suits from the *inferior courts* in *Lancaster* to the *Court of Common Pleas* there are to be made returnable on the first Wednesday in the month next after the issue, unless the assizes be held in the mean time, and then on the first or last day of such assizes.

The next important feature of this *new legal constitution*, is the statute 2 Will. IV. c. 39, called "*The uniformity of process act in personal actions*," mentioned in the last section. This statute abolished the variety and multiplicity of writs and fictions which formerly existed for commencing personal actions in the superior courts, and established a uniform mode of proceeding in all the courts.

Where *it is not intended to hold* a person (whether having any privilege or not) *to bail*, the process is commenced by a *writ of summons*, according to the form prescribed by the act; and the *appearance* to such writ is also directed, according to another form there shewn. If a defendant cannot be served with this summons, his appearance may be enforced by a *writ of distringas*, directed to the sheriff, to levy upon the goods of the defendant 40*s*. This writ is to be made returnable on some day in term not being less than fifteen days after its teste, (the day of the issuing, whether in term or vacation); and if within eight days after the return of the *distringas* the defendant does not appear, the plaintiff may appear for him, and proceed to judgment and execution.

When it is still intended to hold a person to bail, an order may be obtained at any time after the commencement of the suit, and before final judgment, in all actions in which the defendant was previously liable to arrest, on satisfying a judge by affidavit that the cause of action amounts to 20*l.* or upwards, and that the debtor is about to quit England, unless forthwith apprehended. On this the defendant may be arrested and held to bail in nearly the same way as under the writ of *capias*, provided by the Uniformity of Process Act (1).

Except, therefore, in replevin and other actions removed from inferior courts, and cases under the 85th section of 1 & 2 Vict. c. 110 (2), the writ of summons is now the only process by which a personal action can be commenced in any of the superior courts of law (3). That act has made no change in the form or mode of proceeding under the writ of summons (4).

If the writ be against *husband and wife*, service on the husband will be sufficient (5).

If against a *corporation aggregate*, it must be served on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation.

If it be against a *hundred*, or other like district, it must be served on the high constable, or any of the high constables thereof. And if against the *inhabitants*

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(1) *A member of parliament*, being a trader, after being served with a summons, not paying or compounding with his creditors to their satisfaction, or not appearing to any action within one month after service, commits an act of bankruptcy, upon which a fiat may issue against him.

(2) *Turnor* v. *Darnell*, 7 Dowl. 346.

(3) 1 & 2 Vict., c. 110, ss. 1 & 2.

(4) See Archbold's Practice, Q. B., by Chitty.

(5) *Buncombe* v. *Love*, Barnes, 406: *Collins* v. *Shapland*, Id. 412.

of a county, of a *city* or *town*, or the inhabitants of a *franchise*, liberty, city, town, or place not being part of a hundred or other like district, it should be served on some peace-officer thereof (6).

In an action against a *printer*, *publisher*, or *proprietor* of a *newspaper*, service may be at the place mentioned in the declaration of the proprietorship (7).

If against a *trading* or other *company* or *body*, within the meaning of the 7 Will. 4 & 1 Vict. c. 73, the service must be on the clerk of the company or body, or left at the head office, for the time-being, of the company or body; or if such clerk shall not be found or known, then service thereof on any agent or officer employed by the company or body, or by leaving the same at the usual places of abode of such agent or officer, will be good service (8).

The person who serves the writ must, within three days at least after such service, indorse on it the day of the month and week of the service (9), otherwise the plaintiff cannot enter an appearance for the defendant according to the statute, and the affidavit upon which such appearance is to be entered, must state the day when such indorsement was made (10).

The Uniformity of Process Act was amended by stat. 3 & 4 Will. IV. c. 67, which directs all writs issued into Middlesex, from the *King's Bench*, to be signed and sealed by the same persons, in like manner as all other writs issued into other counties from that court;

(6) 2 Will. 4, c. 39, s. 13.
(7) 6 & 7 Will. 4, c. 76, s. 9.
(8) 7 Will. 4 & 1 Vict. c. 73, s. 16.
(9) 2 Will. 4, c. 39, s. 1.
(10) R. M., 3 Will. 4, c. 3.

and that the writ of *venire facias juratores* may be tested on the day of issue, and be made returnable forthwith; and that the writ of *distringas juratores*, or *habeas corpora juratorum*, may be tested in term or vacation on a day subsequent to the teste of the *venire facias juratores;* and that all writs of execution may be tested on the day of issue, and be made returnable immediately; provided that in any trial at bar the *venire facias juratores* be made returnable as heretofore.

By this statute, therefore, the *writ of summons* or *capias* is the legal commencement of the suit, and contains a statement of the form of action in which the plaintiff is to proceed with his action.

The ancient writ of *latitat*, now abolished, was merely a process to bring a defendant into court, and the declaration was the legal commencement of the action.

One great advantage derived from these statutes is, that it has *put an end to all* the *fictions* that were formerly considered essential to give some of the courts jurisdiction. A complete jurisdiction is now given to all the courts by the *writ of summons for the commencement of actions.*

The legislature having thus defined the mode of obtaining *speedy justice*, its next care was to adopt another mode for the people getting *cheap justice;* and by statute 3 & 4 Will. IV. c. 42, being "*An Act for the further amendment of the law, and the better advancement of justice,*" most of the ancient artificial means, by which a defendant might harass his plaintiff by the refined trickery of sham and special pleading, are abolished; and the judges, or any eight or more of them, of whom the chief of each of the courts must be three, are empowered to make, by rule or order, such alterations in the mode of pleadings and proceedings in actions at law as to

them may seem expedient; such rules and orders to be laid before parliament, and not to have effect till six weeks thereafter. Various rules and orders have been accordingly made, which have had the effect of rendering pleadings more concise and intelligible, and, what is of great importance, of giving the suitor cheap with speedy justice.

But these rules and orders are not to deprive any person of the power of pleading the *general issue*, and offering special matter in evidence.

Heretofore there was no remedy for injury to the *real estate* of any deceased person, committed in his lifetime, nor for certain wrongs done by a person deceased, in his lifetime, to another, in respect of his real or personal property: by this statute actions may be brought by and against executors, in regard to such wrongs, within stated periods.

All *actions* of *debt* upon *specialties* are *limited* to twenty years from the cause of action, and all actions for *penalties* or *damages* to six years, and for monies given to a party, aggrieved by any statute, to two years, except where otherwise provided for by statute; and also except in cases of disability, by reason of infancy, being out of the country, beyond the seas, or being a feme covert. Where a specialty debt has been acknowledged in writing by a person liable, or by part payment, the time begins to run from either of those events. After judgment or outlawry reversed, no new action can be brought but within a year after the reversal. No *plea in abatement for nonjoinder* of a co-defendant is allowed in any court of common law, unless the plea shall state that such person is resident within the jurisdiction, and his place of residence be stated in an affidavit verifying the plea; and a provision is made in the

case of subsequent proceedings against the persons named in a plea in abatement. Nor can a *misnomer* now be pleaded in abatement.

In actions upon written instruments, where any party is designated by the initial letter or some contraction of the christian name, such initial or contraction may be used in the proceedings.

Wager of law is abolished.

Simple-contract debts may be maintained against an executor or administrator.

The judges are empowered to make regulations as to the admission of written documents to be offered in evidence.

The expense and delay attending trials upon *writs of inquiry*, under 8 & 9 Will. III. c. 11, is much lessened: they may now be executed before the sheriff, unless otherwise ordered by the court where the action is pending, or by any judge of the superior courts.

One of the greatest improvements in the *administration of justice* is the power given by this statute to the court, to direct, in all cases where any action is pending for debt not exceeding 20*l.*, and the matter at issue does not involve any difficult question of *fact* or *law*, and the court or any judge shall think fit that the issue be tried before the sheriff, or before any judge of the court of record, the return to be made at a day certain in term or vacation, after which execution may issue forthwith; except upon certificate of the judge, that the defendant has grounds for a new trial. The provisions of the statute 1 Will. IV. c. 7, before noticed (9), extend to such issues, as far as they are applicable.

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(9) *Supra*, 151.

A defendant is allowed to pay money into court, in certain personal actions, by a judge's order; and the delay and expense which formerly attended the trial of *local actions* in the county where the cause of action has arisen is put an end to: such *local actions* may now be tried in any county.

Amendments may also now be made on the record, in certain cases, on the trial of the cause, and in all cases of variance between the proof and the record.

The court or judge has power to direct the facts to be found specially.

Parties in any action may also state a *special case* for the opinion of the court without proceeding to trial, and witnesses interested solely on account of the verdict may be examined, but their evidence is of no value to themselves. The jury is also empowered to allow *interest upon debts* or sums certain, payable at a given time or otherwise, and to give damages in the nature of interest in all actions of *trover* or *trespass de bonis asportatis*, and on *policies of insurance*. Interest is also allowed upon *writs of error* for delay of execution after judgment for the defendant.

Executors suing in right of their testator, and a verdict passing against them, are now liable to costs.

Where several persons are made defendants in any action, and any one or more shall have a *nolle prosequi* entered as to him or them, or shall have a verdict, he shall have costs, unless the judge shall certify that there is a reasonable cause for making him a defendant; and a plaintiff in *scire facias*, and a plaintiff or defendant upon *demurrer*, is also entitled to his costs.

The costs of a *special jury* are, by the statute

6 Geo. IV. c. 50, directed to be paid by the party applying for it, unless the judge certifies that the cause was proper to be tried by a special jury, but it does not extend to cases in which the plaintiff has been nonsuited. This is remedied by the present statute, and the provision is made to extend to cases as well where the plaintiff is nonsuited, as where a verdict goes against him.

Executors are empowered to distrain for arrears of rent accrued in the lifetime of their testator; and such arrears may be distrained for within six months after the determination of the tenancy, and during the continuance of the possession of the tenant.

References to *arbitration* are also rendered more effectual: such references, where made a rule of court, cannot be revoked, without leave of the court or of a judge, by any party to such reference; and the court or any judge may enlarge the time for making the award; and the attendance of witnesses can be compelled, as well as the production of any documents.

This statute also gives power to the *Lord Chancellor* and *the judges* to grant *commissions* to take affidavits in *Scotland* and in *Ireland* to be used and read in the courts.

All the holidays to be kept in the courts enumerated in the statute 5 & 6 Edw. VI. c. 3, are abolished, except Sundays, Christmas-day and three following days, and Monday and Tuesday in Easter week.

A complete change has also been effected in the administration of the law in cases where persons have *adverse claims* made upon them to the same property, and have no interest in the subject to such claims. Persons so situated formerly could only seek

relief in a *court of equity* by a *bill of interpleader;* but the statute 1 & 2 Will. IV. c. 58, has provided a definite remedy at law: it is one of the most important acts for reform of the law.

The court, or any judge, upon the application of a defendant in an action of *debt, assumpsit, detinue,* or *trover,* after declaration and before plea, by affidavit or otherwise shewing that he has no interest, but that the right is claimed or supposed to belong to some third party, who has sued or he expects will sue him, denying collusion with the latter, and offering to bring the matter in dispute into court, may order such third party to appear, and state and maintain or relinquish his claim, and upon such order, to have the allegations of such third party and the plaintiff, and in the meantime to stay proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issues; and also direct who shall be plaintiff and defendant on such trial, or, with the consent of the plaintiff and such third party, to dispose of the merits of their claims in a summary manner. The judgment is final.

If the third party shall not appear, or after appearance shall refuse to comply with any order, he is barred from prosecuting his claim against the original defendant, but his right or claim against the plaintiff is saved.

All orders under this act made by a single judge, must be made by one of the judges of the superior courts of Westminster, who is at liberty, if he should so think fit, to refer the matter to the Court, who may dispose of it as if the proceeding had originally been commenced by rule of court.

The benefit of this statute is extended to sheriffs and other officers, who were formerly exposed to the hazard and expense of actions by assignees of bankrupts and others making claims to chattels taken in execution under the authority of the courts, and not being parties to the process. Any such claim now being made, *the court from which the execution issued* is authorized to call before them the party making the claim, and to exercise, for its adjustment and the relief and protection of the sheriff or other officer, any of the before-mentioned powers, and to make such rules and decisions as shall appear to be just; and all such rules and orders may be entered of record and made evidence. This effectually relieves the sheriff and his officers.

The powers and authorities given by this statute are also extended to all applications under the statute 1 Will. IV. c. 21, "*An Act to improve the proceedings on prohibition, and on writs of mandamus,*" by which *a writ of prohibition* may be now had by affidavit only. There is no longer a necessity for *a suggestion* as heretofore, and so much of the act of 2 & 3 Edw. VI. c. 13, intitled "*An Act for the payment of tithes,*" as relates to *prohibition,* is repealed; and the provisions in the statute of 9 Anne, c. 20, for proceedings on writs of *mandamus* and *informations in the nature of a quo warranto,* granted for trying the rights of offices and franchises in corporations and boroughs, are extended to all other writs of *mandamus,* and the proceedings thereon (10).

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(10) See the following decisions upon this statute:—*Parker* v. *Booth,* 8 Bing. 85 : *Ford* v. *Baynton,* 1 Dowl. P. C. 357 : *Anderson* v. *Calloway,* 1 Cromp. & M. 182 : *Bowdler* v. *Smith,* 1 Dowl. P. C.

Much difficulty and delay were formerly sustained, and sometimes a failure of justice took place, in actions by reason of the want of a competent power in the courts to order and enforce the examination of *witnesses.* This is now remedied by the statute 1 Will. IV. c. 22, by which the powers of the statute 13 Geo. III. c. 63, intituled "*An Act for the establishing certain regulations for the better management of the affairs of the East India Company, as well in India as in Europe,*" that made provisions for the examination of witnesses in *India,* are extended to the *colonies,* and to all actions in the courts of *Westminster,* in what country soever the cause of action may have arisen, without reference to jurisdiction, and the judges are empowered to enforce the attendance of witnesses.

This statute, however, does not apply to *indictments* (8).

Section III.

The Subject continued.

It becomes necessary now to shew what *limit* there is to *personal actions,* and to *actions on simple contract.*

By the statute 21 Jas. I. c. 16, called *the Statute of Limitations,* all such actions are required to be commenced within *six years* after the cause of action arose; but a loose verbal promise to pay within that period was

417: and *Bryant* v. *Ikey,* Id. 428: also *Barker* v. *Dynes,* Id. 169: and *Field* v. *Cope,* 2 Tyrr. 458; and 2 Crompt. & J. 480.

(8) *Rex* v. *Briscoe,* 1 Dowl. P. C. 520.

held sufficient to take any case out of the statute: this gave rise to many questions, and was an encouragement, in fact, to *perjury*. The late able chief justice of the King's Bench, *Lord Tenterden*, saw the inconvenience, and provided a remedy, by the statute 9 Geo. IV. c. 14, by which, in all such actions, no verbal promise is to be received as evidence of a new or continuing contract to take any case out of the statute; but such promise must be made in writing (1). This provision does not take away the effect of any payment made of principal or interest (2).

The limitation to actions on specialties, and upon *prescriptive claims*, is shewn in the *Appendix*.

These are the principal features of the *new Legal Constitution*, under which justice is administered to individuals in the superior courts of common law (3).

France has not been backward in reforming her *jurisprudence*, and reducing her code to a compact and definite form. It is not necessary to study law in a never-ending accumulation of decisions. Nothing could be more irregular than the *administration of justice in France before the Revolution*. The first stage of a process took place before judges appointed, not by *the king*, but by the *seigneur* or *lord* of the district. These judges had power to impose a fine, to decree a short imprisonment or other correctional punishment, and to

(1) See *Dickinson* v. *Hatfield*, 5 Carr. & P. 46.

(2) See *Beasley* v. *Greenslade*, 2 Tyr. Rep. 121: *Wyatt* v. *Hodson*, 1 Maule & Selw. 442.

(3) An able summary of the practice of the courts, as assimilated and established by the rules made by the judges, will be found in *Petersdorff's "Alphabetical Summary."*

give in a *civil suit* a decision subject to appeal. The *seneschals* and *baillis* ranked a degree higher, and were entitled to give a verdict in cases of importance, subject, however, to an appeal to one or other of the *parliaments*, of which there were in all *thirteen*, all composed of judges and public officers of rank. The whole of this system was reduced by the *National Assembly*, in 1791; the *seignoral judges* were replaced by *justices of the peace*, and every *arrondissement* (or district) was allowed its court or *tribunal de première instance*. The higher courts were not established till afterwards, but the judges of every description were elected by the people of the province until the time of *Napoleon;* still much was wanted to be done, and from *such an assembly* little could be expected that would work well for the good of the people; and what was done was only done to strengthen the arms of those who had usurped the power of the state. Each province had its peculiar code, some founded on the Roman law, others on tradition and local custom, but the whole were replete with ambiguity and discrepancy. It was left for the Emperor *Napoleon* to complete this great work: he established a *code of laws* at the beginning of the present century for the benefit of the country at large, which superseded the provincial codes. This was the labour of many years, and of many very eminent lawyers; and gave to the jurisprudence and judicial constitution of *France* nearly the form which they at present bear. This body of laws consists of *five codes*:—1, *Civil code;* 2, *Code de procédure civile;* 3, *Code de commerce;* 4, *Code d' instruction criminelle;* 5, *Code pénal;* and the whole is comprised in one volume, and so arranged as to be intelligible to every person without the aid of a lawyer. This code has had

the test, not only of considerable experience, but has been subject to a change of dynasty, and remains nearly unchanged. It has been found to protect both the government and the governed.

The great changes recently made in the law of *England*, as here shewn, have not yet had the experience of time to prove their worth; all defects or blemishes in the law should be removed by a cautious hand, and a philosophical spirit, disciplined by the closest studies. Rapid changes, made with little consideration or soundness of principle, generally produce mischief. *Savigny*, in the preface to his *History of the Roman Law in the Middle Ages*, observes, "Of the genius, perseverance, wisdom, and skill of the ancients, as legislators and lawyers, the splendid remains of the Roman law,—the institutes, the code, and the digest, are magnificent and lasting monuments; a convincing proof, if proof were wanting, of the degree of excellence to which the law, as a science, may be carried by the efforts of human reason."

CHAPTER XI.

SECTION I.—*The same Subject continued.*

THE COURTS OF EQUITY.

ARISTOTLE defines equity thus, "The nature of equity is the correction of the law, where it is defective by reason of its universality" (1). This definition is approved by *Puffendorff*, Jur. Nat. & G. lib. 5, c. 12, sec. 21. *Grotius* (2) defines *equity* as being "the correction of that wherein the law (by reason of its universality) is deficient;" for since, in laws, all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*" *Sir William Blackstone* (3) observes, it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge (4), founded on the circumstance of every particular case—whereas the *sys-*

(1) Arist. Eth. Nicom. lib. 5, c. 10.
(2) De Equitate, c. 1, sec. 3; République de Bodin, tom. 2, fo. 12.
(3) 3 Bl. Comm. 431.
(4) Selden's Tab. Talk, tit. Equity.

tem of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them (5) may perhaps be liable to objection.

That able lawyer, *Sir Edward Sugden*, late *Lord High Chancellor of Ireland*, in his admirable *Series of Letters to a Man of Property* (6), thus clearly explains the *difference between law and equity*. "It is peculiar to the Constitution of the country, that the law on the same case is frequently administered differently by different courts, and that not from a contrary exposition of the *same* rules. It must sound oddly to a foreigner, that on one side of Westminster Hall a man shall recover an estate, without argument, on account of the clearness of his title, and that, on the other side of the Hall, his adversary shall with equal facility recover back the estate. In all other countries the law is tempered with equity, and the same grounds rule the same case in all the courts of justice. The division of our law into what is termed legal and equitable arose partly from necessity, and partly from the desire of the ecclesiastics of former times to usurp a control over the common law courts. Our legal judges heretofore adhered so strictly to technical rules, although frequently subversive of substantial justice, that the chancellors interfered and moderated the rigour of the law, according, as it is termed, to equity and good conscience. The judges in equity soon found it necessary, like the com-

(5) Salk. 134; 2 Bl. Comm. 341, n.; 2 Vern. 289, 316; 3 Atk. 520; 1 Vern. 473.

(6) Letter 2.

mon law judges, to adhere to the decisions of their predecessors, whence it has inevitably happened that there are settled inviolable rules of equity, which require to be moderated, by the rules of good conscience, as much as ever the most rigorous and inflexible rule of law did before the chancellors interposed on equitable grounds. However, as the *law of property* is now administered in the different forums, allowing for the imperfection of all human laws, it *exhibits a most splendid and comprehensive code of jurisprudence;* and the man will deserve ill of his country who shall ever attempt to confound the rules by which the courts of law and equity are severally guided."

Sir Joseph Jekyll, in *Cowper* v. *Cowper,* (2 P. Wms. 753), in expressing his opinion upon proceedings in courts of equity, observes, that "though proceedings in equity were said to be *secundum discretionem boni viri,* yet, when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat.* As it is said in *Rooke's case* (5 Rep. 99, b), that discretion is a science not to act arbitrarily, according to men's will and private affection, so the discretion which is to be executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases, follows the law implicitly, in others assists, and advances the remedy, in others again it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as has been sometimes ignorantly imputed to this court. This is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the Constitution entrusted with."

The principles of decision adopted by *courts of equity*, when fully established, and made the grounds of successive decisions, are considered by those courts as rules to be observed with as much strictness as positive law.

The *prerogative* of the *courts of equity* is to judge, without the intervention of a jury, where the nature of the evidence requires it; nevertheless, upon any question of fact, the parties are at liberty to apply for an *issue* to decide upon it, which is always granted if the judge sees sufficient reasons for it. (See *Short* v. *Lee*, 2 Jac. & Walk. 496; 4 Dow. P. C. 318).

One material difference between a court of equity and a court of law is, as to the mode of proof. A defendant in a court of equity has the protection arising from his own conscience, in a degree in which the law does not affect to give him protection. If he positively, plainly, and precisely denies the assertion, and *one* witness only proves it as positively, clearly, and precisely as it is denied, and there is no circumstance attaching credit to the assertion overbalancing the credit due to the denial as a positive denial, a court of equity will not act upon the testimony of that witness. Not so at law: there the defendant is not heard. *One* witness *proves the case*, and however strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him. (*Per Lord Eldon*, 6 Ves. 184).

Witnesses in courts of equity are examined upon *interrogatories*, upon which their depositions are taken in writing.

To establish the *origin* of any branch of *legal or equitable jurisdiction* is always difficult, and seldom necessary, provided the exercise of such jurisdiction is found to be conducive to the ends of substantial jus-

tice. The jurisdiction (7) exercised by courts of equity may be considered in some cases as assistant to, in some concurrent with, and in others exclusive of the jurisdiction of courts of common law.

It is assistant to the jurisdiction of courts of law—1st, By removing legal impediments to the fair decision of a question depending in courts of law: thus, if an ejectment be brought to try a right to land in a court of common law, a court of equity will restrain the party in possession (unless he has an equal claim to the protection of a court of equity) from setting up any title which may prevent the fair trial of the right as *a term for years outstanding* in a trustee, lessee, or mortgagee. (*Harrison* v. *Southcote*, 1 Atk. 540). So also equity will, under certain circumstances, restrain a party from insisting upon the *invalidity of a devise*. (Anon. 1 Cha. Ca. 267). 2ndly, By compelling a *discovery* which may enable them to decide. 3rdly, By *perpetuating testimony* when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. (*The Earl of Suffolk* v. *Green*, 1 Atk. 451; *Duke of Dorset* v. *Serjt. Girdler*, Pre. Ch. 531; *Cressett* v. *Mytton*, 3 Bro. Ch. Rep. 481). It is, however, material to observe, that a bill to perpetuate testimony will lie, though the plaintiff might proceed at law, if he alleged by his bill, and by an affidavit annexed to the bill, any circumstances by means of which the testimony may probably be lost, (*Philips* v. *Carew*, 1 P. Wms. 117), as that the witness to be examined is the only witness to a material fact. (*Shirley* v. *Ferrers*, 3 P. Wms. 77; *Hankin* v. *Middleditch*, 2 Bro. Ch. R. 641).

(7) Fonblanque, Treat. Eq. Vol. 1, p. 10.

It may also be said to be *assistant*, by rendering the judgments of courts of law effective; as, 1st, By providing for the safety of *property in dispute* pending a litigation, in some cases by ordering the property to be brought into court, or to be collected by a receiver, in other cases, by restraining the party in whose hands it is from exercising any power over it, or parting with it until further order; 2ndly, By counteracting *fraudulent judgments*, &c.; and, 3rdly, By putting a bound to vexatious and oppressive litigation.

It exercises a *concurrent jurisdiction* with courts of law in most cases of fraud, accident (8), mistake (9), account, partition (10), and dower.

It claims *an exclusive jurisdiction* in most matters of trust and confidence, and "wherever, upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent."

It grants a prohibitory writ, called an injunction, in mixed as well as personal actions, and in waste (11), ejectment (12), and *quare impedit* (13), to stay proceedings in another court of equity (14), or in the Admiralty (15), or in the ecclesiastical courts (16), and in the courts of common law.

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(8) *Hatchett* v. *Pattle*, 6 Madd. 4.

(9) *Henkle* v. *Royal Exchange Assurance Office*, 1 Ves. 317, by Lord Hardwicke; *Taylor* v. *Radd*, 5 Ves. 595, cited by Lord Thurlow.

(10) See Hargrave's Co. Litt. 169, b. n. 2.

(11) See *Field* v. *Beaumont*, 1 Swanst. 209.

(12) *Lowe* v. *Jolliffe*, 1 Dick. 390.

(13) *Amhurst* v. *Dawling*, 2 Vern. 401.

(14) 4 Madd. 362.

(15) 3 Swanst. 605.

(16) 1 Atk. 628; 3 Swanst. 418, n.

An *injunction* in the Court of Exchequer stays all further proceedings, in whatever stage the cause may be; but in Chancery, if a declaration be delivered, the party may proceed to judgment, notwithstanding an injunction and execution is only stayed: but if no declaration has been delivered, all proceedings at law are restrained (17).

The courts of equity have no restraining power over *criminal prosecutions* (18), nor will they stay proceedings on a *mandamus* (19), or interfere where redress may be had by *certiorari* (20).

An *injunction* may be had at various stages of the cause. It is in some cases issued of course, and when the answer comes in, the injunction can only be continued upon good grounds. Where it is applied for to stay injuries of an unjust nature, then, upon filing the bill, and its contents being well supported by affidavits, it will be granted immediately, and continue until the defendant has put in his answer, and till the court shall make further order; and after answer, the court will determine whether it shall be dissolved or continued.

A *temporary injunction* will be made perpetual, when the same reasons continue which prevailed at its being granted (21).

A *dissolved injunction* may be revived if there be ground for it (22).

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(17) 3 Wood. 411; see *Bullen* v. *Ovey*, 16 Ves. 141; and *Mills* v. *Cobby*, 1 Mer. 3.

(18) *Attorney-General* v. *Cleaver*, 18 Ves. 220.

(19) *Montague* v. *Dudman*, 2 Ves. 398.

(20) *Kerrison* v. *Sparrow*, 19 Ves. 449.

(21) *Askew* v. *Townsend*, 2 Dick. 471.

(22) *Penfold* v. *Stoveld*, 3 Mad. 472.

Amending a bill dissolves an injunction (23).

The reader, who may be inclined to inform himself as to grounds taken by the friends and opponents of the jurisdiction of equity, may consult Hargrave's Law Tracts, p. 344.

SECTION II.

The Subject continued.

THE common *proceedings in the courts of equity* are commenced by bill, as it is termed, or rather a petition to the Lord High Chancellor, in which the complainant states his injury, and prays relief according to the circumstances of his case.

This bill is filed with the proper officer, (one of the six clerks in chancery), who issues a writ of *subpœna*, commanding the appearance of the defendant; and by the statute 11 Geo. IV. & 1 Will. IV. c. 36, intituled "An Act for altering and amending the law regarding commitments by courts of equity for contempts, and the taking bills *pro confesso*," certain rules and regulations are provided for the adoption of the court, greatly to the benefit of the suitor, and the advantage of the defendant.

If a defendant refuses to appear, or to put in his answer after he has appeared, an *attachment* goes against him for contempt. This is a writ in the nature of a *capias*

(23) *Bliss* v. *Boscawen*, 2 Ves. & B. 102.

directed to the sheriff of the county, and commanding him to attach or arrest the defendant, and bring him into court; if he refuses to appear, or absconds to avoid appearing, the court may order his appearance at a day certain; and if he does not then appear, the complainant's bill may be taken against him *pro confesso*, and such decree made thereon as shall be thought just; and to compel the performance of such decree, either an immediate *sequestration* may be had of the real and personal estate of the defendant, or possession of the estate and effects demanded by the bill will be delivered to the plaintiff, or otherwise as the nature of the case may require; and the plaintiff may be paid his demands from the sequestered estate of the defendant, the plaintiff first giving security to abide the order of the court touching the restitution of such estate upon the defendant's appearance, and paying the plaintiff's costs; and if he refuses such security, the estate sequestered, or whereof possession is given, is to remain under the direction of the court, either by the court appointing a receiver, or otherwise, until the appearance of the defendant, and payment of costs; and after any such decree shall be pronounced against any person out of the realm, or absconding, if the defendant shall return within seven years, or become publicly visible, he is to be served with a copy of the decree; and if he shall not within six months after such service appear and petition to have the cause reheard, the decree is to stand absolutely confirmed against him, and all persons claiming under him; but if he does appear, and petition for a rehearing, and shall pay or give security for costs, he will be admitted to answer the bill, and the cause proceeded with in the usual manner to a rehearing.

If a defendant be taken to prison under an attachment for contempt in not appearing, and, after fourteen days' notice in writing, requiring him to enter an appearance, he shall refuse to do so, the court may order an appearance to be entered for him, and proceedings may be had thereon as if he had appeared.

If an attachment has issued against a defendant for not putting in his answer, and the sheriff of the county shall make a return of *non est inventus*, the serjeant-at-arms attending the court will be ordered to apprehend and bring him to the bar of the court to answer his contempt; if the serjeant-at-arms cannot find him, then a sequestration issues of his real and personal estate, to be seized and detained, subject to the order of the court.

The plaintiff's bill will then be taken *pro confesso*, and a decree made accordingly.

If the defendant, being in such contempt, shall be brought to the bar of the court, and shall have been committed or remanded to the Fleet Prison, the plaintiff may have the writ of *habeas corpus* returnable within twenty-eight days after such committal; and after that return, if the defendant shall not have put in his answer, the bill will be taken *pro confesso* against him.

If the defendant be a *peer of the realm*, a *letter missive* is directed to him by the Lord Chancellor, requesting him to appear and answer: if he makes default, then the writ of *subpœna* is issued; and should he then continue in default, a *sequestration* may be had against his lands and goods, but his person cannot be affected. This is not a privilege of parliament, but of the peerage.

If the defendant be a *member of parliament*, the

same proceedings are adopted as against a peer of parliament, except that no letter missive is sent to him. And by the statute last mentioned (1), if any person having privilege of parliament shall, after the return of sequestration, neglect to appear, the court may appoint a clerk in court to enter an appearance for him, and proceedings may be had thereon; and if he shall then neglect or refuse to put in his answer within due time, the complainant's bill may be taken *pro confesso* against him, and may be read in evidence, as an answer, admitting the facts in the bill stated; and in like manner every other bill of discovery, taken *pro confesso*, may be taken and read as evidence.

If the *Attorney-General* be made a defendant in regard to any rights of the crown, the bill prays that he, being attended with a copy of the bill, may appear and put in his answer.

If a *body corporate* be proceeded against, the process is, by *distringas*, to distrain their corporate property, until they shall obey the summons or order of the court.

The *jurisdiction of this court* is extended by the statute 2 Will. IV. c. 33, intituled "An Act to effectuate the service of process issuing from the Courts of Chancery and Exchequer in *England* and *Ireland* respectively," by which the process of this court, concerning any lands in *England* or *Wales*, may be served in any part of the United Kingdom of *Great Britain* and *Ireland*, and in the *Isle of Man;* and the court is empowered to proceed upon such service as effectually as if made within its jurisdiction.

This statute is amended by the 4 & 5 Will. IV. c. 82, which extends its application to all suits in the same

(1) Sect. 12 & 13.

court concerning any charge, lien, judgment, or incumbrance upon lands in *England, Ireland, and Wales,* or concerning monies invested in the funds, or public shares in public companies or concerns, or the dividends thereof.

It may, however, be observed, that previous to these last-mentioned statutes, the Court of Chancery, since the union of *England and Scotland,* hath a *general jurisdiction* throughout the *United Kingdom of Great Britain;* before that union, the judge was styled Lord High Chancellor of England, but since Lord High Chancellor of Great Britain.

The Great Seal is the seal of Great Britain, from which all the powers of this Court flow; but, previous to these statutes, the legislature had not extended its jurisdiction into *Scotland.*

The *practice* and *proceedings* of the *High Court of Chancery* being now regulated by the statute 3 & 4 Will. IV. c. 94, it is unnecessary here to enter into any long detail upon that subject. This statute was preceded by that of the 2 & 3 Will. IV. c. 111, intituled "An Act to abolish certain sinecure offices connected with the Court of Chancery, and to make provision for the Lord High Chancellor on his retirement from office."

By these statutes great reforms were effected in the Court of Chancery. Many useless offices were abolished, and the suitors were relieved of many heavy charges to which they had been formerly subject.

Masters in Ordinary of the High Court of Chancery are now appointed by the king's letters patent; and each of them must make a yearly report to the Lord Chancellor, stating the days he has attended, the

number of hours in each day, in the performance of his duty; and he is to annex to such report a list of the causes pending in his office, shewing their different stages, the names of the parties, and the solicitors. The Masters hold their offices only during good behaviour, and are allowed a salary of 2,500*l.* a year each.

They have no retiring pension for length of service; but, for permanent infirmity and disability, such an annuity, not exceeding 1500*l.*, is provided by statute 46 Geo. III., as the Lord Chancellor may order, subject now to the approbation of the House of Commons.

These salaries are paid from the unclaimed suitors' fund in the Court of Chancery, which is of very great amount.

The Act further empowers the Lord Chancellor, with the advice of the Master of the Rolls and Vice-Chancellor, or one of them, to make General Rules and Orders, not being inconsistent with the enactments and provisions of the Act, for simplifying, establishing, and settling the course of practice, which they may always annul, and make new orders.

The Master of the Rolls is empowered to determine motions arising in causes in the High Court of Chancery; and to hear and determine all pleas and demurrers filed in causes depending in that court, subject to appeal to the Lord Chancellor.

This statute by a schedule fixes the salaries of many other officers of the Court of Chancery.

These salaries are paid from a newly-established fund, called "The Suitors' Fee-fund Account," and not by the nation. This fund is supplied by the fees paid by the suitors, which formerly were taken by the different officers who had no fixed salaries, and they are now

paid over to the Accountant-general of the Court of Chancery. The amount of these fees is settled by the Lord Chancellor, with the concurrence of the Master of the Rolls and the Vice-Chancellor, after they shall have been submitted to the House of Commons.

Various other officers of the court are also paid by fixed salaries, settled by stat. 3 & 4 Will. IV. c. 84, and 5 & 6 Will. IV. c. 47, intituled "An Act to provide for the performance of the duties of certain offices connected with the Court of Chancery which have been abolished." These salaries are payable out of the Consolidated Fund, and the fees heretofore paid to these officers are now paid into the Exchequer, and made part of that fund.

The Lord Chancellor, with the Master of the Rolls and the Vice-Chancellor, have, from time to time since the passing of this act, made General Orders for the regulation of the proceedings and practice of certain offices of the High Court of Chancery in England, under which that court is now governed.

Section III.

The Subject continued.

The *presiding judges* of the *High Court of Chancery* are the *Lord High Chancellor*, the *Vice-Chancellor*, and the *Master of the Rolls*. It has its name of Chancery, *Cancellaria*, from that of the chief judge, *Lord Chancellor*, or *Cancellarius*. This latter term had originally no connexion with courts of justice, or the cancelling of

instruments, and was in the early ages of very humble import, signifying those ushers who had the care of the *cancelli*, or latticed doors, leading to the presence-chamber of the Roman emperors and other great men, and were to admit or repel all comers, and to prevent riot and disorder. It first occurs in *Vopiscus* (1), but it is considered to have been in use at a much earlier period, with a different meaning. From their original situation the *cancellarii* became secretaries or chief scribes to the emperors, and were, in progress of time, invested with judicial powers, and a general superintendence over all other judicial officers (2).

Sir Edward Coke says (3), that Chancellor is so termed *a cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction.

The name and office were copied from the *Cæsarian* palace into most of the states of Europe. From the Roman empire it passed to the Roman church, and to the present time every bishop has his chancellor, the principal judge of his consistory. After the fall of the Roman empire, all the modern kingdoms of Europe preserved the office of chancellor, with different jurisdictions and dignities, according to their different constitutions; and when seals came into use, he had always the custody of the king's great seal.

Domat describes the *Chancellor of France* as the first of all the magistrates, the head of justice presiding in the king's council, and in all the sovereign courts where

(1) Hist. Aug. Scrip. vol. 2, p. 300.
(2) Spelm. Gloss. CANCELLARIUS.
(3) 4 Inst. 88.

he sits, giving the form and putting the seal to all edicts, declarations, and ordinances, issuing patents and commissions, and exercising all other functions of the first and most important offices (4).

The office of *Lord High Chancellor*, or Lord Keeper of the Great Seal, (whose authority is the same) (5), is created by the mere delivery in council of the great seal into his custody (6), and without writ or patent. The *statute of precedence* (7) gives him rank above all dukes, except those of the royal family; he is a privy councillor by his office (8), and prolocutor of the House of Lords by prescription. He has the appointment of all justices of the peace: he had anciently (being then an ecclesiastic) the superintendence of the royal chapel, and hence may be derived his style of *keeper of the king's conscience:* he has visitatorial authority over all eleemosynary corporations founded by the crown, and the right of presenting to certain of the king's ecclesiastical benefices; he is the general guardian of all infants, idiots, and lunatics, and superintends all the charitable uses in the kingdom; he is superior in dignity to all the other judges in the kingdom (9); and by the *Statute of Treasons*, he is first named of the great magistrates, to slay whom, in their places, during their offices, is declared to amount to high treason against the state (10): his office is not for life, but during the

(4) Pub. Law, b. II. t. 1, § 2.
(5) 5 Eliz. c. 18.
(6) 1 Roll. Ab. 88.
(7) 31 Hen. VIII. c. 10.
(8) Seld. Office of Lord Chancellor.
(9) 1 Chanc. Rep. App. 7.
(10) 25 Edw. III. stat. 5, c. 2; 14 Id. c. 5; 37 Id. c. 18; 17 Rich. II. c. 6.

pleasure of the king. Upon his creation as Lord High Chancellor he takes the following oath: "That he shall well and truly serve the king and his people in the office of Chancellor; that he shall do right to all people, poor and rich, after the law and usages of the realm; that he shall truly counsel the king, and his counsel *laine* (11) and keep; that he shall not know nor suffer the hurt or disheriting of the king; or that the rights of the crown be decreased by any means, so far as he may let it; and if he may not let it, he shall make it clearly and expressly to be known to the king, with his true advice and counsel; and that he shall do and purchase the king's profit in all he reasonably may."

The Master of the Rolls is an office of high judicial importance, and of great antiquity. In Dugdale's Original Jurisdictions (12) it is related, that it was conferred on Adam de Osgodby, in the 23 Edw. I., by the then chancellor, and that the next grant of it, transmitted to us, is expressed to be with the chancellor's assent. His authority, however, was formerly very much doubted, and occasioned many disputes, which compelled the legislature to interfere; and a statute was passed (3 Geo. II. c. 30) which declared that all orders and decrees made by him, except such as by the course of the court are appropriated to the great seal alone, should be deemed valid—subject, nevertheless, to be discharged or altered by the Lord Chancellor, and so as they shall not be enrolled till signed by him.

The *authority* of the *Master of the Rolls* was also extended by the statute 3 & 4 Will. IV. c. 94; but all his decisions are liable to be discharged, altered, or re-

(11) Hide or conceal, 4 Inst. 88, margin.
(12) P. 33.

versed by the Lord Chancellor upon appeal; his court being a branch of the Chancery, over which the Lord Chancellor has supreme jurisdiction.

The Vice-Chancellor is an office of modern creation, whose duty is to assist the Lord Chancellor in dispatching the business of his court. All the decisions of the Vice-Chancellor are subject to appeal to the Lord Chancellor, in the same manner as those of the Master of the Rolls.

The judgment of the Lord Chancellor is, however, not final: should either party be dissatisfied with it, he has the right to an *appeal* to the *House of Lords*, which is his last resort. This is the supreme court of judicature in the kingdom, having no original jurisdiction over causes, but only upon *appeals* and *writs of error*, and as regards the latter only, according to the directions of the statute 11 Geo. IV. & 1 Will. IV. c. 70.

An *appeal* is effected by a petition. *Chief Baron Gilbert* gives the following account of the commencement of these appeals:—"Towards the latter end of Cha. I.'s reign, the House of Lords asserted their jurisdiction of hearing appeals from the Chancery, which they do upon a paper petition, without any writ directed from the king; and for this their foundation is, that they are the great court of the king, and that, therefore, the Chancery is derived out of it, and, by consequence, that a petition will bring the cause and record before the court."

No appeal operates as a stay of proceedings, unless the court below, or the House of Lords, in special cases order a suspension (13).

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(13) See *Huguenin* v. *Baseley*, 15 Ves. 182.

An appeal from the Court of Exchequer, sitting as a court of equity, is immediately to the House of Lords.

Appeals from the *Court of Session* in *Scotland* are adjudged by the rules of the Scotch law, although any rule of law laid down by the House of Lords cannot be contradicted by any inferior tribunal (14).

Sentences by the *High Court of Delegates*, both in *ecclesiastical* and *maritime* causes, are no longer final; the statute 2 & 3 Will. IV. c. 92, repealed the act of 25 Hen. VIII. c. 19, so far as relates to the power of appeal and to the appointment of delegates, and also repealed the act of 8 Eliz. c. 5, and transferred the powers of that court to his majesty in council. All appeals, therefore, made formerly to the court of delegates, are now to be made to the privy council.

The statute 2 & 3 Will. IV. c. 93, gives powers to the ecclesiastical courts in England and Ireland to enforce process upon contempts against all classes of persons, whether having privilege of parliament or not, and residing beyond the limits of the jurisdiction of the court, nearly similar to those passed by the Court of Chancery.

The *councils of the king* are—first, the House of Commons, or High Court of Parliament; second, the peers of the realm; third, the judges; but the principal is the *privy council.* The king's will is the sole constituent of a privy councillor. Their number is indefinite; they hold their office during the life of the king that chooses them, but are subject to removal at his pleasure. The *Lord President* is appointed by patent; no person born out of the dominions of the crown of England, un-

(14) *Percy* v. *Whitehead*, 6 Ves. 517.

less of English parents, even though naturalized by parliament, can be a privy councillor (15).

The *duty* of a privy councillor may be collected from his oath (16): to advise the king according to the best of his cunning and discretion; to advise for the king's honour and good of the public, without partiality through affection, love, need, doubt, or dread; to keep the king's council secret; to avoid corruption; to help and strengthen the execution of what shall be there resolved; to withstand all persons who would attempt the contrary, and to observe, keep, and do all that a good and true councillor ought to do to his sovereign.

The *power of the privy council* and its *jurisdiction* has greatly increased, since it has become a court of appeal in ecclesiastical and maritime causes.

The council may inquire into all offences against the government, and commit the offenders to safe custody, in order to take their trial in a court of law; but this power can only be exercised in council (17).

It has power in all cases of *lunacy* and *idiotcy*, and *is a court of appeal from decrees of the Court of Chancery* (18), and in all causes arising within the colonies.

Its proceedings are now regulated by the stat. 3 & 4 Will. IV. c. 41, intituled "An Act for the better administration of justice in his majesty's privy council." This statute directs that the President of the Council, the Lord Chancellor, the Lord Chief Justice or

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(15) 12 & 13 Will. III. c. 2.
(16) 4 Inst. 54.
(17) *Entinck* v. *Carrington*, 2 Wils. 289.
(18) *Oxendon* v. *Compton*, 2 Ves. 72.

judge of the Court of King's Bench, Master of the Rolls, Vice-Chancellor, Lord Chief Justice or judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, judge of the Prerogative Court of the Lord Archbishop of Canterbury, judge of the High Court of Admiralty, and chief judge of the Court in Bankruptcy, and also all persons, members of the council, who shall have been President thereof, or held the office of Lord Chancellor of Great Britain, or shall have held any of the other offices before mentioned, shall form a committee, and shall be styled "*The Judicial Committee of the Privy Council*," with power for the king to appoint any two other privy councillors members of the committee.

All appeals or applications in prize suits and from Vice-admiralty Courts abroad (19), are to be made to the king in council, and not, as heretofore, to the High Court of Admiralty.

All appeals from the sentence of any judge are to be heard by the Judicial Committee, consisting of at least four members, who are to report thereon to the king in council for decision; the nature of such report or recommendation being always stated in open court, and agreed upon by a majority of the Committee who heard the case.

The king may require the attendance of any judge, being a privy councillor, at the Committee, and witnesses may be examined *vivâ voce*, or upon written depositions, and as to such facts as the Committee may

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(19) The practice of these courts is regulated, and their jurisdiction given, by 2 Will. IV. c. 51.

think fit; and new evidence may also be admitted, which before was not allowed; and causes may be remitted for rehearing, either generally or upon points only, as the Committee may order, and upon such rehearing take additional evidence, though before rejected, or may reject evidence before admitted.

The Council may direct a *feigned issue* to be tried in any court, abroad or at home, to try any fact, and order what evidence may be read at the trial, in the same manner as is adopted upon the trial of an issue from the Court of Chancery.

The Committee may also direct new trials of issues.

The powers of the statute 13 Geo. III. c. 62, and also of the 1 Will. IV. c. 22 (20), as relate to the examination of witnesses, are vested in the Committee; and for contempt of the order of the President requiring their attendance, they are liable to the same penalties as are inflicted by the Court of King's Bench for contempt of a *subpœna*.

The king may appoint a registrar, and the Committee may refer matters to him, in the same manner as matters are, by the Court of Chancery, referred to a master.

The time for appeals to be made is also regulated by the latter statute, which at present does not interfere with the standing order of the House of Lords of the 24th March, 1725, directing all appeals to be presented within five years from the time of signing and enrolling the decree; but the Council may alter the usage at its pleasure.

A decree of the King in Council, on any appeal

(20) *Supra*, p. 162.

from that of any court abroad, is to be carried into effect as the King in Council shall direct.

The King in Council may direct the East India Company and other persons to bring on appeals from the *Sudder Dewanny Adawlut Courts*, in the *East Indies*, to a hearing, and may appoint agents and counsel in all cases where no *proceedings* have been taken on either side for two years subsequent to the admission of the appeal by the Sudder Dewanny Adawlut Courts; and the order upon any such appeal is to be effectual notwithstanding the death of either party.

The King in Council may also make orders for regulating the mode, form, and time of such appeals, or of those from any other court in India, or elsewhere, to the *eastward of the Cape of Good Hope*, to prevent delay in the hearing of them.

The Committee are invested with the same powers (21) of punishing contempts, compelling appearances, and of enforcing decrees, as are possessed by the Court of Chancery or Court of King's Bench, or the ecclesiastical courts, and both *in personam* and *in rem:* heretofore the privy council could not decree *in personam* in England, unless in certain criminal matters (22).

Power is also given to the king to appoint any two of the council, who have been judges abroad, to attend the Committee, with a salary of 400*l.* a year each.

The latter statute does not abridge the powers, jurisdiction, or authority of the council, as heretofore exer-

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(21) 2 & 3 Will. IV. c. 93.

(22) See *Penn* v. *Baltimore*, 1 Ves. 444.

cised; nor does it alter the constitution or duties of the council, save as thereby expressly altered; nor does it prevent the king's acceding to treaties with foreign powers, by which any other person may be appointed to hear, and finally adjudicate, appeals from the Admiralty in prize causes.

By the statute 6 Ann. c. 7, the privy council continues for six months after the demise of the crown, unless sooner determined by the successor.

CHAPTER XII.

Of Criminal Justice.

154 We are now to treat of an article, which, though it does not in England, and indeed should not in any state, make part of the powers which are properly constitutional, that is, of the reciprocal rights by means of which the powers that concur to form the government constantly balance each other, yet essentially interests the security of individuals, and, in the issue, the constitution itself; I mean to speak of criminal justice. But, previous to an exposition of the laws of England on this head, it is necessary to desire the reader's attention to certain considerations.

When a nation entrusts the power of the state to a certain number of persons, or to one, it is with a view to two points: the one, to repel more effectually foreign attacks; the other, to maintain domestic tranquillity.

To accomplish the former point, each individual surrenders a share of his property, and sometimes, to a certain degree, even of his liberty. But though the power of those who are the heads of the state may thereby be rendered very considerable, yet it cannot be said that liberty is, after all, in any high degree, endangered; because, should ever the executive power turn against the nation a strength which ought to be employed solely for its defence, this nation, if it were

really free, (by which I mean, unrestrained by political prejudices), would be at no loss for providing the means of its security.

In regard to the latter object, that is, the maintenance of domestic tranquillity, every individual must, exclusive of new renunciations of his natural liberty, moreover surrender (which is a matter of far more dangerous consequence) a part of his personal security. 156

The legislative power being, from the nature of human affairs, placed in the alternative, either of exposing individuals to dangers which it is at the same time able extremely to diminish, or of delivering up the state to the boundless calamities of violence and anarchy, finds itself compelled to reduce all its members within reach of the arm of the public power, and, by withdrawing in such cases the benefit of the social strength, to leave them exposed, bare, and defenceless, to the exertions of the comparatively immense power of the executors of the laws.

Nor is this all; for, instead of that powerful reaction which the public authority ought in the former case to experience, here it must find none: and the law is obliged to proscribe even the attempt of resistance. It is therefore in regulating so dangerous a power, and in guarding lest it should deviate from the real end of its institution, that legislation ought to exhaust all its efforts.

But here it is of great importance to observe, that the more powers a nation has reserved to itself, and the more it limits the authority of the executors of the laws, the more industriously ought its precautions to be multiplied. 157

In a state where, from a series of events, the will of the prince has at length attained to hold the place of

law, he spreads an universal oppression, arbitrary and unresisted; even complaint is dumb: and the individual undistinguishable by him finds a kind of safety in his own insignificance. With respect to the few who surround him, as they are at the same time the instruments of his greatness, they have nothing to dread but momentary caprices; a danger, against which, if there prevails a certain general mildness of manners, they are in a great measure secured.

But in a state where the ministers of the laws meet with obstacles at every step, even their strongest passions are continually put in motion; and that portion of public authority, deposited with them to be the instrument of national tranquillity, easily becomes a most formidable weapon.

Let us begin with the most favourable supposition, and imagine a prince whose intentions are in every case thoroughly upright; let us even suppose that he
158 never lends an ear to the suggestions of those whose interest it is to deceive him: nevertheless, he will be subject to error; and this error, which, I will farther allow, solely proceeds from his attachment to the public welfare, yet may very possibly happen to prompt him to act as if his views were directly opposite.

When opportunities shall offer (and many such will occur) of procuring a public advantage by overleaping restraints, confident in the uprightness of his intentions, and being naturally not very earnest to discover the distant evil consequences of actions in which, from his very virtue, he feels a kind of complacency, he will not perceive, that, in aiming at a momentary advantage, he strikes at the laws themselves on which the safety of the nation rests, and that those acts, so laudable when

when we only consider the motive of them, make a breach at which tyranny will one day enter.

Yet farther, he will not even understand the complaints that will be made against him. To insist upon them will appear to him to the last degree injurious: pride, when perhaps he is least aware of it, will enter the lists; what he began with calmness, he will prosecute with warmth; and if the laws shall not have taken every possible precaution, he may think he is acting a very honest part, while he treats as enemies 159
of the state men whose only crime will be that of being more sagacious than himself, or of being in a better situation for judging of the results of measures.

But it were mightily to exalt human nature, to think that this case of a prince, who never aims at augmenting his power, may, in any shape, be expected frequently to occur. Experience, on the contrary, evinces that the happiest dispositions are not proof against the allurements of power, which has no charms but as it leads on to new advances; authority endures not the very idea of restraint; nor does it cease to struggle till it has beaten down every boundary.

Openly to level every barrier, at once to assume the absolute master, are, as we said before, fruitless tasks. But it is here to be remembered, that those powers of the people which are reserved as a check upon the sovereign, can only be effectual so far as they are brought into action by private individuals. Sometimes a citizen, by the force and perseverance of his complaints, opens the eyes of the nation; at other times, some member of the legislature proposes a law for the removal of some public abuse: these,

therefore, will be the persons against whom the prince will direct all his efforts (*a*).

160 And he will the more assuredly do so, as, from the error so usual among men in power, he will think that the opposition he meets with, however general, wholly depends on the activity of but one or two leaders; and amidst the calculations he will make, both of the supposed smallness of the obstacle which offers to his view, and of the decisive consequence of the single blow he thinks he needs to strike, he will be urged on by the despair of ambition on the point of being baffled, and by the most violent of all hatreds, that which was preceded by contempt.

In that case which I am still considering, of a really free nation, the sovereign must be very careful that military violence do not make the smallest part of his plan: a breach of the social compact like this, added to the horror of the expedient, would infallibly endanger his whole authority. But, on the other hand, as he has resolved to succeed, he will, in defect of other resources, try the utmost extent of the legal powers which the constitution has intrusted with him; and if the laws have not in a manner provided for every possible case, he will avail himself of the imperfect precautions themselves that have been taken, as a cover

161 to his tyrannical proceedings: he will pursue steadily his particular object, while his professions breathe nothing but the general welfare, and destroy the as-

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(*a*) By the word *prince*, I mean those who, under whatever appellation, and in whatever government it may be, are at the head of public affairs.

sertors of the laws, under the very shelter of the forms contrived for their security (*b*).

This is not all: independently of the immediate mischief he may do, if the legislature do not interpose in time, the blows will reach the constitution itself; and, the consternation becoming general among the people, each individual will find himself enslaved, in a state which yet may still exhibit all the common appearances of liberty.

Not only, therefore, the safety of the individual, but that of the nation itself, requires the utmost precautions in the establishment of that necessary but formidable prerogative of dispensing punishments. The first to be taken, even without which it is impossible to avoid the dangers above suggested, is, that it never be left at the disposal, nor, if it be possible, exposed to the influence, of the man who is the depositary of the public power.

The next indispensable precaution is, that this power 162
shall not be vested in the legislative body; and this precaution, so necessary alike under every mode of government, becomes doubly so, when only a small part of the nation has a share in the legislative power.

If the judicial authority were lodged in the legislative part of the people, not only the great incon-

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(*b*) If any person should charge me with calumniating human nature, (for it is her alone I am accusing here), I would desire him to cast his eyes on the history of Louis XI.—of a *Richelieu*, and, above all, on that of England before the Revolution: he would see the arts and activity of government increase, in proportion as it gradually lost its means of oppression.

venience must ensue of its thus becoming independent, but also that worst of evils, the suppression of the sole circumstance that can well identify this part of the nation with the whole, which is, a common subjection to the rules which they themselves prescribe. The legislative body, which could not, without ruin to itself, establish, openly and by direct laws, distinctions in favour of its members, would introduce them by its judgments: and the people, in electing representatives, would give themselves masters.

The judicial power ought therefore absolutely to reside in a subordinate and dependent body,—dependent, not in its particular acts, with regard to which it ought to be a sanctuary, but in its rules and in its forms, which the legislative authority must prescribe. How is this body to be composed? In this respect farther precautions must be taken.

163 In a state where the prince is absolute master, numerous bodies of judges are most convenient; inasmuch as they restrain, in a considerable degree, that respect of persons which is one inevitable attendant on that mode of government. Besides, those bodies, whatever their outward privileges may be, being at bottom in a state of great weakness, have no other means of acquiring the respect of the people than their integrity, and their constancy in observing certain rules and forms: nay, these circumstances united, in some degree overawe the sovereign himself, and discourage the thoughts he might entertain of making them the tools of his caprices (*c*).

(*c*) The above observations are in a great measure meant to allude to the *old* French *Parlemens*, and particularly that of Paris,

But in an effectually limited monarchy, that is, where the prince is understood to be, and in fact is, subject to the laws, numerous bodies of judicature would be repugnant to the spirit of the constitution, which requires that all powers in the state should be as much confined as the end of their institution can allow; not to add, that, in the vicissitudes incident to such a state, they might exert a very dangerous influence. 164

Besides, that awe which is naturally inspired by such bodies, and is so useful when it is necessary to strengthen the feebleness of the laws, would not only be superfluous in a state where the whole power of the nation is on their side, but would moreover have the mischievous tendency to introduce another sort of fear than that which men must be taught to entertain. Those mighty tribunals, I am willing to suppose, would preserve, in all situations of affairs, that integrity which distinguishes them in states of a different constitution; they would

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which formed such a considerable body as to have been once summoned as a fourth order to the general estates of the kingdom. The weight of that body, increased by the circumstance of the members holding their places for life, was in general attended with the advantage of placing them above being overawed by private individuals in the administration either of civil or criminal justice; it even rendered them so difficult to be managed by the court, that the ministers were at times obliged to appoint particular judges, or *commissaries*, to try such men as they resolved to ruin.

These, however, were only local advantages, connected with the nature of the French government *in those times*, which was an uncontrolled monarchy, with considerable remains of aristocracy. But, in a free state, such a powerful body of men, invested with the power of deciding on the life, honour, and property of the citizens, would be productive of very dangerous political consequences; and the more so, if such judges had the power of deciding upon the matter of law and the matter of fact.

never inquire after the influence, still less the political
165 sentiments, of those whose fate they were called to decide; but these advantages not being founded in the necessity of things, and the power of such judges seeming to exempt them from being so very virtuous, men would be in danger of taking up the fatal opinion, that the simple exact observance of the laws is not the only task of prudence: the citizen called upon to defend, in the sphere where fortune has placed him, his own rights, and those of the nation itself, would dread the consequence of even a lawful conduct, and, though encouraged by the law, might desert himself when he came to behold its ministers.

In the assembly of those who sit as his judges, the citizen might possibly descry no enemies; but neither would he see any man whom a similarity of circumstances might engage to take a concern in his fate: and their rank, especially when joined with their numbers, would appear to him to lift them above that which overawes injustice, where the law has been unable to secure any other check,—I mean, the reproaches of the public.

The security of the individual, and the consciousness of that security, being then equally essential to the enjoyment of liberty, and necessary for the preservation of it, these two points must never be left out of sight in the establishment of a judicial power; and I conceive that they necessarily lead to the following maxims.

168 In the first place, I shall remind the reader of what has been laid down above (1), that the judicial authority ought never to reside in an independent body; still less

(1) See p. 196.

in him who is already the trustee of the executive power.

Secondly, the party accused ought to be provided with every possible means of defence. Above all things, the whole proceedings ought to be public. The courts, and their different forms, must be such as to inspire respect, but never terror; and the cases ought to be so accurately ascertained, the limits so clearly marked, as that neither the executive power, nor the judges, may ever hope to transgress them with impunity.

In fine, since we must absolutely pay a price for the advantage of living in society, not only by relinquishing some share of our natural liberty, (a surrender which, in a wisely-framed government, a wise man will make without reluctance), but also by resigning part of even our personal security: in a word, since all judicial power is an evil, though a necessary one, no care should be omitted to reduce, as far as possible, the dangers of it.

As there is, however, a period at which the prudence of man must stop, at which the safety of the individual must be given up, and the law is to resign him to the judgment of a few persons, that is, (to speak plainly), to 169
a decision in some sense arbitrary, it is necessary that this law should narrow, as far as possible, this sphere of peril, and so order matters, that when the subject shall happen to be summoned to the decision of his fate by the fallible conscience of a few of his fellow-creatures, he may always find in them advocates, and never adversaries.

CHAPTER XIII.

The Subject continued.

EVERY one *now* will admit that our criminal law has been administered with unnecessary severity, and that society may be equally well protected under its present more merciful administration. Eight new acts of the legislature have recently come into operation. The punishment of death has been abolished in all cases, except murder; treason; piracy, when murder is attempted; setting fire to a dwelling-house, any person being therein; destroying ships, with intent to murder, or whereby life may be endangered; exhibiting false lights to bring ships into danger; robbery, attended with cutting and wounding; burglary, attended with violence; rape; administering poison; or stabbing, cutting, or wounding, with intent to murder.

The end of punishment is to deter men from offending (1). This was practically illustrated by the late Mr. Justice Buller, who, on sentencing a man to death for horse-stealing, and the criminal complained of the severity of the law, observed to him—"You are to be hanged, not because you have stolen a horse, but that horses may not be stolen." The punishment was too severe for the purpose to be attained. Mankind, says

(1) Blackstone.

Montesquieu, must not be governed with too much severity: we ought to make a prudent use of the means which nature has given us to conduct them. If we inquire into the cause of all human corruptions, we shall find that they proceed from the impunity of criminals, and not from the moderation of punishments. Let us follow nature, who has given shame to man for his scourge, and let the heaviest part of the punishment be the infamy attending it.

Moses considered *restitution* the fit punishment for violation of the laws of property: this may not always be possible; all admit that the murderer should suffer death. Punishment is everywhere an evil, but everywhere a necessary one: punishment, that is to say, suffering, applied purposely by public functionaries. No punishment no government; no government no political society (2).

When a person is charged with a crime, the magistrate, who is called in England *a justice of the peace*, issues a warrant to apprehend him; but this warrant can be no more than an order for bringing the party before him: he must then hear him, and take down in 170
writing his answers, together with the different informations. If it appears, on this examination, either that the crime laid to the charge of the person who is brought before the justice was not committed, or that there is no just ground to suspect him of it, he must be set absolutely at liberty; if the contrary results from the examination, the party accused must give bail for his appearance to answer to the charge, unless in capital cases; for then he must, for safer custody, be really

(2) Bentham on Death—Punishment.

committed to prison, in order to take his trial at the next sessions.

But this precaution of requiring the examination of an accused person, previous to his imprisonment, is not the only care which the law has taken in his behalf; it has further ordained, that the accusation against him should be again discussed, before he can be exposed to the danger of a trial. At every session the sheriff appoints what is called the *grand jury*. This assembly must be composed of more than twelve men, and less than twenty-four; and it is their duty to examine the evidence that has been given in support of every charge:
171 if twelve of those persons do not concur in the opinion that an accusation is well grounded, the party is immediately discharged; if, on the contrary, twelve of the grand jury find the proofs sufficient, the prisoner is said to be indicted, and is detained, in order to go through the remaining proceedings.

On the day appointed for his trial, the prisoner is brought to the bar of the court, where the judge, after causing the bill of indictment to be read in his presence, must ask him how he would be tried; to which the prisoner answers, *By God and my country;* by which he is understood to claim to be tried by a jury, and to have all the judicial means of defence to which the law entitles him. The sheriff then appoints what is called the petit jury: this must be composed of twelve men chosen out of the county where the crime was committed; their declaration finally decides on the truth or falsehood of the accusation.

As the fate of the prisoner thus entirely depends on the men who compose this jury, justice requires that he should have a share in the choice of them; and this he

has through the extensive right which the law has granted him, of challenging, or objecting to, such of them as he may think exceptionable.

These challenges are of two kinds. One, which is 172
called the challenge to the *array*, has for its object to have the whole panel set aside; it is proposed by the prisoner when he thinks that the sheriff who formed the panel is not indifferent in the cause; for instance, if he thinks he has an interest in the prosecution, that he is related to the prosecutor, or in general to the party who pretends to be injured.

The other challenges are called, to the polls—(*in capita*): they are exceptions proposed against the jurors, severally, and are reduced to four heads by Sir Edward Coke.—That which he calls *propter honoris respectum*, may be proposed against a lord empannelled on a jury; or he might challenge himself. That *propter defectum* takes place when a juror is legally incapable of serving that office, as if he is an alien, or if he has not an estate sufficient to qualify him (3). That *propter delictum* has for its object to set aside any juror convicted of such crime or misdemeanor as renders him infamous, as felony, perjury, &c. That *propter affectum* is proposed against a juror who has an interest in the conviction of the prisoner: one, for instance, who has an action depending between him and the prisoner; one

(3) If he be qualified in all respects, except the want of freehold, it is not a good cause of challenge, either in civil or criminal cases, provided in the former case the cause does not extend to a special juror. (6 Geo. IV. c. 50). This statute, which regulates the whole subject of juries, will be found more particularly noticed in the second section of the next chapter, by the *Editor*.

who is of kin to the prosecutor, or his counsel, attorney,
173 or of the same society or corporation with him (*a*). The minuteness of such an interest will not destroy the force of the objection (4).

In fine, in order to relieve even the imagination of the prisoner, the law allows him, independently of the several challenges above mentioned, to challenge peremptorily, that is to say, without shewing any cause, twenty jurors successively (*b*).

In cases of high and petit treason, the prisoner has thirty-five peremptory challenges; in murder, and in all other felonies twenty; and in misprision of treason the point seems to be unsettled. The right of peremptorily challenging is never allowed to a defendant accused of a mere misdemeanor (5); and by the statute 7 & 8 Geo. IV. c. 28, in cases of any treason, felony, or piracy, every peremptory challenge beyond the legal number is declared void, and the trial may proceed as if no trial had been made.

When, at length, the jury is formed, and they have taken their oath, the indictment is opened, and the prosecutor produces the proofs of his accusation. But, unlike to the rules of the civil law, the witnesses deliver their evidence in the presence of the prisoner: the latter may put questions to them; he may also produce

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(*a*) When a prisoner is an alien, one half of the jurors must also be aliens; a jury thus formed is called a jury *de medietate linguæ*.

(4) *Water Bailiff's case*, 1 Vern. 254; *Barton* v. *Hinde*, 5 Term Rep. 175; *Doe* v. *Tooth*, 2 Younge & Jer. 137.—EDITOR.

(*b*) When these several challenges reduce too much the number of the jurors on the panel, which is forty-eight, new ones are named on a writ of the judge, who are named the *tales*, from those words of the writ, *decem* or *octo tales*.

(5) Chitty's Crim. Law, 535.—EDITOR.

witnesses in his behalf, and have them examined upon oath. Lastly, he is allowed to have a counsel to assist him, not only in the discussion of any point of law which may be complicated with the fact, but also in the investigation of the fact itself, and who points out to 174
him the questions he ought to ask, or even asks them for him.

This was not formerly the established law, except in cases of treason; but now, by stat. 6 & 7 Will. IV. c. 114, it is enacted, that, in *all* cases of felony, after the close of the case for the prosecution, prisoners shall be admitted to make full answer and defence by counsel or by attornies, where they practise as counsel; and that, in all cases of summary conviction, prisoners may make their answer and defence by counsel or attorney, and that all prisoners, *for any offence*, shall be allowed copies of the examinations of the witnesses, and that *all persons* under trial at the time of trial shall be entitled to inspect the depositions, free of expense (6).

Such are the precautions which the law has devised for cases of common prosecutions; but in those for high treason and for misprision of treason, that is to say, for a conspiracy against the life of the king, or against the state, and for a concealment of it (7),—accusations which suppose a heat of party, and powerful accusers,—the law has provided for the accused further safeguards.

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(6) 7 Will. III. c. 3. See all the cases collected, 6 How. State Trials, 797. The Statute of Treasons, 25 Edw. III. stat. 5, c. 2, is explained and enlarged by stat. 36 Geo. III. c. 7, a temporary act, made perpetual by stat. 57 Geo. III. c. 6.—EDITOR.

(7) The punishment for misprision of treason is, loss of the profits of lands during life, total forfeiture of goods, and imprisonment for life. (1 Hal. P. C. 374).—EDITOR.

First, no person can be questioned for any treason, except a direct attempt on the life of the king, after three years elapsed since the offence (8). 2. The accused party may, independently of his other legal grounds of challenging *peremptorily*, challenge thirty-five jurors. 3. He may have two counsel to assist him through the whole course of the proceedings (9). 4. That his witnesses may not be kept away, the judges must grant him the same compulsive process to bring them in, which they issue to compel the evidences against
175 him. 5. A copy of his indictment must be delivered to him ten days at least before the trial, in presence of two witnesses (10), which copy must contain all the facts laid to his charge, the names, professions, and abodes of the jurors who are to be on the panel, and of all the witnesses who are intended to be produced against him (11).

When, either in cases of high treason, or of inferior crimes, the prosecutor and the prisoner have closed their evidence, and the witnesses have answered to the respective questions both of the bench and of the jurors, one of the judges sums up the facts which have been advanced on both sides. He points out to the jury what more precisely constitutes the hinge of the question before them; and he gives them his opinion both with regard to the evidences that have been given, and to the point of law which is to guide them in their de-

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(8) 7 Will. III. c. 3. The punishment for High Treason was formerly of revolting barbarity; it was altered by stat. 54 Geo. III. c. 146; see also 39 Geo. III. c. 93; and 7 & 8 Geo. IV. c. 28.—EDITOR.

(9) 20 Geo. II. c. 30; and see 6 How. St. Tri. 797.

(10) 7 Will. III. c. 3; see stat. 6 Geo. III. c. 53, s. 3.—EDITOR.

(11) See stat. 7 & 8 Geo. 4, c. 28.—EDITOR.

cision. This done, the jury withdraw into an adjoining room, where they must remain without eating and drinking, and without fire, till they have agreed unanimously among themselves, unless the court give a permission to the contrary. Their declaration or verdict 176
(*veredictum*) must (unless they choose to give a special verdict) pronounce expressly, either that the prisoner is guilty, or that he is not guilty, of the fact laid to his charge. Lastly, the fundamental maxim of this mode of proceeding is, that the jury must be unanimous.

And, as the main object of the institution of the trial by jury is to guard accused persons against all decisions whatsoever by men invested with any permanent official authority (*d*), it is not only a settled principle, that the opinion which the judge delivers has no weight but such as the jury choose to give it, but their verdict must, besides, comprehend the whole matter in trial, and decide as well upon the fact, as upon the point of law that may arise out of it (12): in other words, they

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(*d*) "Laws," as *Junius* says extremely well, "are intended, not to trust to what men will do, but to guard against what they may do."

(12) By the stat. 32 Geo. III. c. 60, (passed to *remove doubts respecting the functions of juries*), it is enacted, that, on every trial for *libel*, the jury may give a general verdict of guilty or not guilty upon the whole matter at issue; and shall not be required or directed by the judge to find the defendant guilty merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to it on the record. But this statute provides that the judge may give his opinion to the jury respecting the matter at issue; and the jury may at their discretion, as in other cases, find a special verdict; and the defendant, if convicted, may move the court as before in arrest of judgment. It has also had the effect of overruling the decisions which had previously held libel or no libel a question of law; but it only applies to criminal cases. (See

must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law (*e*).

177 This is even so essential a point, that a bill of indictment must expressly be grounded upon those two objects. Thus, an indictment for treason must charge, that the alleged facts were committed with a treasonable intent (*proditorie*). An indictment for murder must express that the fact has been committed with *malice prepense*, or aforethought. An indictment for robbery must charge, that the things were taken with an intention to rob (*animo furandi*), &c. (13).

Juries are even so uncontrollable in their verdict,—

Levi v. *Milne*, 4 Bing. 199). The popular notion, "the greater the truth, the greater the libel," is solely applicable to criminal cases, such charges having a greater tendency to provoke a breach of the peace. (4 Bac. Ab. 445).—EDITOR.

(*e*) Unless they choose to give a *special* verdict.—"When the jury," says Coke, "doubt of the law, and intend to do that which is just, they find the *special* matter; and the entry is, *Et super tota materia petunt discretionem justiciariorum.*" (Inst. iv. p. 41). These words of Coke, we may observe, confirm beyond a doubt the power of the jury to determine on the whole matter in trial: a power which in all constitutional views is necessary; and the more so, since a prisoner cannot in England challenge the judge, as he can under the civil law, and for the same causes as he can a witness.

(13) The civil law makes the *lucri causa*, or the intention of the thief to derive a profit from his crime, an essential part of the offence of theft. See *The King* v. *Morfit*, Russell & Ryan, Ca. Crim. Law, 307, where it was held to be larceny in a servant clandestinely to take his master's corn to give to his master's horses; and in which some of the judges stated it to be the ground of their opinion, that the additional quantity of corn would diminish the work of the men who had to look after the horses, so that the *lucri causa*, viz. *to give themselves ease*, was an ingredient in the case. (See First Rep. Crim. Law Comm. See also Sec. II. of the next chapter by the EDITOR).

so apprehensive has the constitution been lest precautions to restrain them in the exercise of their functions, however specious in the beginning, might in the issue 178
be converted to the very destruction of the ends of that institution,—that it is a repeated principle for a juror, in delivering his opinion, that he is to have no other rule than his opinion itself,—that is to say, no other rule than the belief which results to his mind from the facts alleged on both sides, from their probability, from the credibility of the witnesses, and even from all such circumstances as he may have a private knowledge of. Lord Chief Justice Hale expresses himself on this subject in the following terms (10):—

"In this recess of the jury, they are to consider the evidence, to weigh the credibility of the witnesses, and the force and efficacy of their testimonies; wherein (as I have before said) they are not precisely bound by the rules of the civil law, viz. to have two witnesses to prove every fact, unless it be in cases of treason, nor to reject one witness because he is single, or always to believe two witnesses, if the probability of the fact does upon other circumstances reasonably encounter them; for, the trial is not here simply by witnesses, but *by jury:* nay, it may so fall out, that a jury, upon their own knowledge, may know a thing to be false, 179
that a witness swore to be true, or may know a witness to be incompetent or incredible, though nothing be objected against him—and may give their verdict accordingly (*g*).

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(10) Hist. Com. Law, c. 12, sec. 11.

(*g*) The same principles and forms are observed in civil matters, only peremptory challenges are not allowed.

If the verdict pronounces *not guilty*, the prisoner is set at liberty, and cannot, on any pretence, be tried again for the same offence. If the verdict declares him *guilty*, then, and not till then, the judge enters upon his function as a judge, and pronounces the punishment which the law appoints (*h*). But, even in this case, he
180 is not to judge according to his own discretion only; he must strictly adhere to the letter of the law; no constructive extension can be admitted; and, however criminal a fact might in itself be, it would pass unpunished, if it were found not to be positively comprehended in some one of the cases provided for by the law. The evil that may arise from the impunity of a crime,—that is, an evil which a new law may instantly stop, has not by the English laws been considered as of magnitude sufficient to be put in comparison with the danger of breaking through a barrier on which so materially depends the safety of the individual (*i*).

(*h*) When the party accused is one of the lords temporal, he likewise enjoys the universal privilege of being judged by his peers; though the trial then differs in several respects. In the first place, as to the number of the jurors: all the peers are to perform the function of such, and they must be summoned at least twenty days beforehand. 2. When the trial takes place during the session, it is said to be in the *high court of parliament;* and the peers officiate at once as jurors and judges: when the parliament is not sitting, the trial is said to be in the court of the *high steward of England;* an office which is not usually in being, but is revived on those occasions; and the high steward performs the office of judge. 3. In either of these cases, unanimity is not required: and the majority, which must consist of twelve persons at least, is to decide.

(*i*) I shall here give an instance of the scruple with which the English judges proceed upon occasions of this kind. Sir *Henry Ferrers* having been arrested by virtue of a warrant, in which he was termed a *knight*, though he was a baronet, Nightingale, his ser-

To all these precautions taken by the law for the safety of the subject, one circumstance must be added, which indeed would alone justify the partiality of the English lawyers to their laws in preference to the civil law; I mean the absolute rejection they have made of torture (*k*). Without repeating here what has been 181
said on the subject by the admirable author of the treatise on *Crimes* and *Punishments* (*l*), I shall only observe, that the torture, in itself so horrible an expedient, would, more especially in a free state, be attended with the most fatal consequences. It was absolutely necessary to preclude, by rejecting it, all attempts to make the pursuit of guilt an instrument of vengeance against the innocent. Even the convicted criminal must be spared, and a practice at all rates exploded, which might so easily be made an instrument of endless vexation and persecution (*m*).

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vant, took his part, and killed the officer; but it was decided, that, as the warrant "was an ill warrant, the killing of an officer in executing that warrant cannot be murder, because no good warrant: wherefore he was found not guilty of the murder and manslaughter." —(See Croke's Rep. P. III. p. 371; also Dyer, 88 a, p. 107.—Ed.)

(*k*) Coke says (Inst. III. p. 35.), that when John Holland, duke of Exeter, and William de la Pole, duke of Suffolk, renewed under Henry VI. the attempts made to introduce the civil law, they exhibited the torture as a *beginning thereof.* The instrument was called the duke of Exeter's daughter.

(*l*) Beccaria.—Ed.

(*m*) Judge Foster relates, from Whitelocke, that the bishop of London having said to Felton, who had assassinated the duke of Buckingham, "If you will not confess, you *must go to the rack;*" the man replied, "If it must be so, I know not whom I may accuse in the extremity of the torture; bishop Laud, perhaps, or any lord at this board." "Sound sense (adds Foster) in the mouth of an enthusiast and a ruffian." Laud having proposed the rack, the matter

182 For the farther prevention of abuses, it is an invariable usage that the trial be public. The prisoner neither makes his appearance, nor pleads, but in places where everybody may have free entrance; and the witnesses when they give their evidence, the judge when he delivers his opinion, the jury when they give their verdict, are all under the public eye. Lastly, the judge cannot change either the place, or the kind of punishment ordered by the law; and a sheriff who should take away the life of a man in a manner different from that which the law prescribes, would be prosecuted as guilty of murder (*n*).

In a word, the Constitution of England, being a free constitution, demanded from that circumstance alone (as I should already have but too often repeated, if so fundamental a truth could be too often urged,) extraordinary precautions to guard against the dangers which unavoidably attend the power of inflicting punishments; and it is particularly, when considered in this light, that the trial by jury proves an admirable institution.

183 By means of it, the judicial authority is not only placed out of the hands of the man who is invested with the executive authority—it is even out of the hands of the judge himself. Not only the person who is trusted with the public power cannot exert it, till he has, as it were, received the permission to that purpose,

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was shortly debated at the board, and it ended in a reference to the judges, who unanimously resolved that the rack could not be legally used.

(*n*) And if any other person but the sheriff, even the judge himself, were to cause death to be inflicted upon a man, though convicted, it would be deemed homicide. (See Black. Com., b. iv. c. 14).

of those who are set apart to administer the laws; but these latter are also restrained in a manner exactly alike, and cannot make the law speak, but when, in their turn, they have likewise received permission.

And those persons to whom the law has thus exclusively delegated the prerogative of deciding that a punishment is to be inflicted,—those men, without whose declaration the executive and the judicial powers are both thus bound down to inaction, do not form among themselves a permanent body, who may have had time to study how their power can serve to promote their private views or interest: they are men selected at once from among the people, who perhaps never were before called to the exercise of such a function, nor foresee that they ever shall be called to it again.

As the extensive right of challenging effectually baffles, on the one hand, the secret practices of such as, in 184
the face of so many discouragements, might still endeavour to make the judicial power subservient to their own views, and on the other excludes all personal resentments, the sole affection which remains to influence the integrity of those who alone are entitled to put the public power into action, during the short period of their authority, is, that their own fate as subjects is essentially connected with that of the man whose doom they are going to decide.

In fine, such is the happy nature of this institution, that the judicial power, a power so formidable in itself, which is to dispose, without finding any resistance, of the property, honour, and life of individuals, and which, whatever precautions may be taken to restrain it, must in a great degree remain arbitrary, may be said, in

England, to exist,— to accomplish every intended end,— and to be in the hands of nobody (*o*).

In all these observations on the advantages of the
185 English criminal law, I have only considered it as connected with the constitution, which is a free one; and it is in this view alone that I have compared it with the jurisprudence received in other states. Yet, abstractedly from the weighty constitutional considerations which I have suggested, I think there are still other interesting grounds of pre-eminence on the side of the laws of England.

In the first place, they do not permit that a man should be made to run the risk of a trial, but upon the declaration of twelve persons at least (*the grand jury*). Whether he be in prison, or on his trial, they never for an instant refuse free access to those who have either advice or comfort to give him; they even allow him to summon all who may have any thing to say in his favour. And lastly, what is of very great importance, the witnesses against him must deliver their testimony in his presence; he may cross-examine them, and, by one unexpected question, confound a whole system of calumny: indulgences these, all denied by the laws of other countries.

Hence, though an accused person may be exposed to have his fate decided by persons (*the petty jury*) who

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(*o*) The consequence of this institution is, that no man in England ever meets the man of whom he may say, "That man has a power to decide on my death or life." If we could for a moment forget the advantages of that institution, we ought at least to admire the ingenuity of it.

possess not, perhaps, all that sagacity which in some 186
delicate cases it is particularly advantageous to meet with in a judge, yet this inconvenience is amply compensated by the extensive means of defence with which the law, as we have seen, has provided him. If a juryman does not possess that expertness which is the result of long practice, yet neither does he bring to judgment that hardness of heart which is, more or less, also the consequence of it: and bearing about him the principles (let me say, the unimpaired instinct) of humanity, he trembles while he exercises the awful office to which he finds himself called, and in doubtful cases always decides for mercy.

It is to be farther observed, that, in the usual course of things, juries pay great regard to the opinions delivered by the judges; that, in those cases where they are clear as to the fact, yet find themselves perplexed with regard to the degree of guilt connected with it, they leave it, as has been said before, to be ascertained by the discretion of the judge, by returning what is called a *special verdict;* that, whenever circumstances seem to alleviate the guilt of a person, against whom, nevertheless, the proof has been positive, they temper their verdict by recommending him to the mercy of the 187
king (which seldom fails to produce at least a mitigation of the punishment): that, though a man once acquitted can never, under any pretence whatsoever, be again brought into peril for the same offence, yet a new trial would be granted if he had been found guilty upon evidence strongly suspected of being false (11). Lastly, what distinguishes the laws of England from those of

(11) Black. Com., b. iv. c. 27.

other countries in a very honourable manner, is, that as the torture is unkown to them, so neither do they know any more grievous punishment than the simple deprivation of life.

All these circumstances have combined to introduce such a mildness into the exercise of criminal justice, that the trial by jury is that point of their liberty to which the people of England are most thoroughly and universally wedded; and the only complaint I have ever heard uttered against it, has been by men who, more sensible of the necessity of public order, than alive to the feelings of humanity, think that too many offenders escape with impunity.

CHAPTER XIV.

The Subject continued.

Section I.—*Laws relative to Imprisonment.*

But what completes that sense of independence which 188
the laws of England procure to every individual (a sense which is the noblest advantage attending liberty), is the greatness of their precautions upon the delicate point of imprisonment.

In the first place, by allowing, in most cases, enlargement upon bail, and by prescribing, on that article, express rules for the judges to follow, they have removed all pretexts, which circumstances might afford, for depriving a man of his liberty.

But it is against the executive power that the legislature has, above all, directed its efforts: nor has it been but by slow degrees that it has been able to wrest from it a branch of power which enabled it to deprive the people of their leaders, as well as to intimidate those who might be tempted to assume the function; 189
and which, having thus all the efficacy of more odious means without the dangers of them, was perhaps the most formidable weapon with which it might attack public liberty.

The methods originally pointed out by the laws of England for the enlargement of a person unjustly imprisoned, were the writs of *mainprize*, *de odio et atia*,

and *de homine replegiando.* Those writs, which could not be denied, were an order to the sheriff of the county in which a person was confined, to inquire into the causes of his confinement; and, according to the circumstances of his case, either to discharge him completely, or upon bail.

But the most useful method, and which, even by being most general and certain, has tacitly abolished all the others, is the writ of *Habeas Corpus,* so called, because it begins with the words *Habeas Corpus ad subjiciendum.* This writ being a writ of high prerogative, must issue from the Court of King's Bench: its effects extend equally to every county; and the king by it requires, or is understood to require, the person who holds one of his subjects in custody, to carry him before
190 the judge, with the date of the confinement, and the cause of it, in order to discharge him, or continue to detain him, according as the judge shall decree.

But this writ, which might be a resource in cases of violent imprisonment effected by individuals, or granted at their request, was but a feeble one, or rather was no resource at all against the prerogative of the prince, especially under the sway of the Tudors, and in the beginning of that of the Stuarts. And even in the first years of Charles I. the judges of the King's Bench, who, in consequence of the spirit of the times, and of their holding their places *durante bene placito,* were constantly devoted to the court, declared, "that they could not, upon a *Habeas Corpus,* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council."

Those principles, and the mode of procedure which resulted from them, drew the attention of parliament;

and in the bill called the Petition of Right, passed in the third year of the reign of Charles I. it was enacted, that no person should be kept in custody, in conse- 191
quence of such imprisonments.

But the judges knew how to evade the intention of this act: they indeed did not refuse to discharge a man imprisoned without a cause; but they used so much delay in the examination of the causes, that they obtained the full effect of an open denial of justice.

The legislature again interposed, and in the act passed in the sixteenth year of the reign of Charles I., the same in which the Star-chamber was suppressed, it was enacted, that "if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without delay, upon any pretence whatsoever, a writ of *Habeas Corpus;* and that the judge shall thereupon, within three court-days after the return is made, examine and determine the legality of such imprisonment."

This act seemed to preclude every possibility of future evasion: yet it was evaded still; and, by the connivance of the judges, the person who detained the prisoner could, without danger, wait for a second, and a third writ, called an *alias* and a *pluries,* before he produced him.

All these different artifices gave at length birth 192
to the famous act of *Habeas Corpus,* which is considered in England as a second great charter, and has extinguished all the resources of oppression (*a*).

(*a*) 31 Car. II. c. 2, intituled "An Act for better securing the liberty of the subject, and for prevention of imprisonment beyond the seas."

The principal articles of this act are,—

1. To fix the different terms allowed for bringing a prisoner: those terms are proportioned to the distance; and none can in any case exceed twenty days.

2. That the officer and keeper neglecting to make due returns (1), or not delivering to the prisoner, or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority (specified in the act); shall for the first offence forfeit one hundred pounds, and for the second two hundred, to the party aggrieved, and be disabled to hold his office.

193 3. No person, once delivered by *Habeas Corpus*, shall be re-committed for the same offence, on penalty of five hundred pounds.

4. Every person committed for treason or felony shall, if he require it, in the first week of the next term, or the first day of the next session, be indicted in that term or session, or else admitted to bail, unless it should be proved upon oath, that the king's witnesses cannot be produced at that time: and if not indicted and tried in the second term or session, he shall be discharged of his imprisonment for such imputed offence.

5. Any of the twelve judges, or the lord-chancellor, who shall deny a writ of *Habeas Corpus*, on sight of the warrant, or on oath that the same is refused, shall forfeit severally to the party aggrieved 500*l.*

6. No inhabitant of England (except persons contracting, or convicts praying to be transported) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey,

(1) If an equivocal return be made, an attachment may be had immediately. (5 Term Rep. 89.—EDITOR.)

or any place beyond the seas, within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved, a sum not less than 500*l.*, to be recovered with treble costs, shall be disabled to bear any office of 194
trust or profit, shall incur the penalties of a *præmunire* (2), and be incapable of the king's pardon (3).

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(2) The statutes of *Præmunire*, (see 4 Black. Com. 103), thus called from the writ for their execution, which begins with the words *præmunire* (for *præmonere*) *facias*, were originally designed to oppose the usurpations of the popes. The first was passed under the reign of Edward I., and was followed by 16 Rich. II. c. 5, and several others, which, even before the Reformation, established such effectual provisions as to draw upon one of them the epithet of *execrabile statutum*. The offences against which those statutes were framed were likewise distinguished by the appellation of *præmunire;* and under that word were included all attempts to increase the power of the pope at the expense of the royal authority. The punishment decreed for such cases was also called a *præmunire;* it has since been extended to several other kinds of offences, and amounts to imprisonment at the king's pleasure or for life, and total forfeiture of all goods and of rents of lands during life; (*Miles* v. *Williams*, 1 P. Wms. 249); but it is a prosecution now rarely heard of. *Præmunire* is defined by Sir William Blackstone, the introducing a foreign power into the kingdom; and yet the stat. 13 Eliz. c. 8, declares *usury* a *præmunire*, and that of 16 Car. I. c. 21, declares the monopoly of gunpowder a *præmunire*.—EDITOR.

(3) The writ of *habeas corpus* also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father; but when women or infants are brought before the court by this writ, it will only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to a guardianship, but will leave them at liberty to choose where they will go: and if there be any reason to apprehend that they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parent, or

Section II.

The Administration of Criminal Justice.

The whole system of the criminal law has of late years undergone great and important changes.

To Sir Robert Peel the public are indebted for the new criminal code, which he introduced in the year 1826, and completed in the year 1827.

This code is comprised in seven acts of parliament. He commenced with repealing, either wholly or in part, all the statutes relating to the criminal law.

His first act is the statute 7 Geo. IV. c. 64, intituled "An Act for improving the administration of criminal justice in England," in order, as the preamble states, to define under what circumstances persons may be admitted to bail in cases of felony, and to make better provisions for taking examinations, informations, bailments, and recognizances, and returning the same to the proper tribunals, and to prevent the technical strictness of criminal proceedings being relaxed, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence.

This act has been since partially altered by the statute 5 & 6 Will. IV. c. 76, s. 113, but only as regards the payment of expenses of prosecutions at the assizes: in all other respects it now remains in full force.

The second act is the 7 & 8 Geo. IV. c. 18, intituled

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the person who appears to be its legal guardian. (See 3 Burr. 1434, where all the prior cases are considered by Lord Mansfield).—Editor.

"An Act to prohibit the setting of spring guns, man-traps, and other engines calculated to destroy human life, or inflict grievous bodily harm (1)."

The third act is the 7 & 8 Geo. IV. c. 27, which is the repealing statute, and is intituled "An Act for repealing various statutes in England relative to the benefit of clergy, and to larceny, and other offences connected therewith, and to malicious injuries to property, and to remedies against the hundred."

The fourth act is the 7 & 8 Geo. IV. c. 28, intituled "An Act for further improving the administration of justice in criminal cases in England," with the view of abolishing forms used upon trials for criminal offences, which frequently impeded the due administration of justice, and also to abolish the benefit of clergy, and to make better provision for the punishment of offenders.

By this statute, any person (not being a peer of parliament) pleading "not guilty," is to be considered as having put himself upon the country for trial.

If a prisoner stands mute of malice, and will not answer, the court may order a plea of "not guilty" to be entered for him, and his trial may proceed accordingly.

Heretofore, when a prisoner stood mute, it was held equivalent to a conviction of guilty by confession, and execution might follow, as if convicted by verdict. This was the law under the statute 12 Geo. III. c. 20, and was substituted for the *peine forte et dure*, before then used to compel a prisoner to put in a plea of some kind. Two instances have occurred under this statute of persons, who, refusing to plead, were condemned and

(1) See *Ilott* v. *Wilkes*, 3 Barn. & Ald. 304.

executed; one for murder at the Old Bailey, in 1777, the other for burglary, at Wells, in 1792 (2).

By the recent statute, benefit of clergy is abolished; and it is declared, that *no person should suffer death* for felony, unless for some felony (3), excluded from the benefit of clergy, before the 8th February, 1827.

It is also declared, that the jury *shall not inquire concerning the property, real and personal, of persons convicted of treason or felony.*

The fifth act is the 7 & 8 Geo. IV. c. 29, intituled "An Act for consolidating and amending the laws of England relative to larceny and other offences connected therewith."

The punishment of death inflicted by this statute in certain cases was abolished by the statute 2 & 3 Will. IV. c. 62, and 3 & 4 Will. IV. c. 44, and other punishment substituted; and in some cases this punishment was again mitigated by the statute 1 Vict. c. 84, which abolishes the punishment of death in all cases of forgery, and inflicts other punishment in lieu.

This act is further amended by the statute 1 Vict. c. 87, intituled "An Act to amend the laws relating to robbery and stealing from the person." As the stat. 7 & 8 Geo. IV. c. 27, had previously repealed all the various statutes relative to larceny (4), and other

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(2) See Blacks. Comm. 329.

(3) Felony *originally* meant any offence punished with death, forfeiture of goods, and corruption of blood; *afterwards*, it was applied to the state of the offender's mind at the time of committing the offence, and called a *felonious intent.*

(4) *Larceny* was decided by the judges, in *Hammond's case*, Leach, 1089, to be a *felonious taking*, or *a taking with an intent to incur hanging, forfeiture of goods, and corruption of blood.*

offences of stealing, and to burglary, robbery, and threats for the purpose of robbery or of extortion, and to embezzlement, false pretences, and the receipt of stolen property, it became expedient that the provisions contained in those various statutes should be amended and consolidated, to take effect at the same time as the repealing act; and this statute ordains the punishment of offenders.

This statute did not extend to provide punishments for malicious injuries to property; and, as all the statutes relating to such crimes had been repealed with the other statutes relating to larceny, &c., it also became expedient that the provisions contained in those repealed statutes should be amended and consolidated into another act, to take effect from the same time as the repealing act; and, to accomplish this end, another statute was passed, 7 & 8 Geo. IV. c. 30, intituled "An Act for consolidating and amending the laws in England relating to *malicious injuries to property;*" which is the sixth act.

This statute has been since amended by the 1 Vict. c. 89, intituled "An Act to amend the laws relating to burning or destroying buildings or ships;" and the sections 2, 5, 9, 11, 17, and 26, are repealed; and other punishments are substituted for the crimes to which those sections relate.

The seventh act is the statute 7 & 8 Geo. IV. c. 31, and is intituled "An Act for consolidating and amending the laws in England relative to remedies against the hundred." The statutes of Hue and Cry, or the Black Act, being repealed, those remedies are afforded to persons injured only by this act. Its provisions are *extended* by the 2 & 3 Will. IV. c. 72, intituled "An

Act to extend the provisions of the act relative to remedies against the hundred," and relates solely to damages done to threshing machines.

These acts of Sir Robert Peel tended greatly to simplify the administration of criminal justice: still, the want of general principles and rules defining and limiting the nature of offences was a subject of great complaint.

In 1833 a commission was appointed by the crown to inquire into the state of the criminal law; and a report has been made upon it, in which the commissioners confined themselves to the following particulars embraced by the commission:

1. The digesting into one statute the statutes touching crimes, and the trial and punishment thereof.

2. The digesting into one other statute all the provisions of the common or unwritten law touching the same.

3. The expediency of combining both these statutes into one body of the criminal law, repealing all other statutory provisions, or of passing into a law the first-mentioned only of such statutes.

This report contains a digest of the law of theft. The commissioners made choice of this subject, because they considered that no other branch of the criminal law exhibited in so remarkable a degree the changes which the unwritten law had undergone, in consequence of its having been originally framed to meet less complicated circumstances, and having been afterwards adapted to the growing exigencies of society.

It is also in more common use than the other, not merely in the superior courts of criminal jurisdiction, but also by magistrates in the inferior courts, and upon

questions of commitment or bail. The commissioners therefore chose the subject, to shew the practical inconveniences arising from the want of certain, precise, and intelligible rules, accurately and distinctly defining the existing law; and they considered that this digest will in particular illustrate those difficulties which result from the mere *want of certain rules* for defining offences. The digest contains notes which refer to numerous definitions of the offence of theft or larceny, which not only contain various technical terms, the meaning of which is *no where accurately settled*, but differ in important respects from each other. It also illustrates the difficulties of the existing common law relating to crimes, which result from the *fluctuations of the common law, and the adoption of subtle distinctions;* as an instance of the latter, is the doctrine of the *asportavit;* for example, the lifting a bag from the bottom of the boot of a coach is an *asportavit*, though the thief is detected before he gets it out of the boot. But the setting a package on its end, in the place where it lay, for the purpose of cutting open the side, in order to steal the contents, is not an *asportavit* (5).

A recent case occurred at the sessions for a western county, where a prisoner was charged with stealing some *canary birds in a cage;* the facts were proved; an objection taken, that the birds, being *feræ naturæ*, could not, *although in a cage*, be the subject of *larceny*, it not being averred that they were reclaimed. Now, the birds are not wild in this country; and the charge for

(5) See Mr. Livingstone's Digest of Criminal Law, prepared for the State of Louisiana, where the offence of theft is made complete *by the taking only, without a carrying away.*

stealing the *birds being in a cage*, was disposed of. The second charge was for *stealing the cage:* here it was argued, that the *cage*, being *ancillary* to the *birds*, and only used for their sakes, the case was analogous to *title-deeds kept in a box;* and that, as both *deeds and box savour of the realty*, so here both *birds and cage savour of the feralty*. The objection was held to be fatal, and the prisoner was discharged.

This is a parallel case to that in which it was held, that a *horse tied to a gate* could not be the subject of *larceny*, as *attached to and savouring of the realty* (6).

The commissioners remark upon the second particular, that the common or unwritten law, as a system of penal law, is in various respects defective; and that, however convenient it may be in its quality of flexibility and easy adaptation to all the varying exigencies of justice, so far as concerns mere civil rights; yet, with respect to the criminal branch of the law, those very qualities constitute an objection to the system. So long as a large proportion of the penal law merely is oral, and dependent on the examination and construction of precedents, it must be, to the mass of society, inaccessible and unintelligible in its rules and boundaries; and this position is illustrated by the fact, that, in particular instances, the inconveniences arising from the administration of the oral law have prevailed to such an extent as to make recourse to legislative aid absolutely necessary; and thus considerable portions of the com-

(6) There are many ludicrous distinctions upon the *asportavit:* but, from all the cases, it appears that the slightest removal of a chattel, so that every part of it has quitted the site on which it rested, will satisfy it. (See *Coslet's case*, Leach, 236).

mon law have been *declared*, and the *doubts* occasioned by conflicting cases have been removed, by the statute law, through the means of what are called *declaratory acts.*

The Statutes 2 & 3 Will. IV. c. 62, and 4 Will. IV. c. 44 (7), were again amended by the statute 7 Will. IV. and 1 Vict. c. 90, and so much of the first mentioned act, as related to the punishment of persons convicted of offences, for which they were then liable to be transported *for life*, and so much of the last-mentioned act, as related to the punishment of persons convicted of breaking and entering a dwelling-house, and stealing therein, is repealed, and such persons are made liable to be transported for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for not exceeding three years. And the same statute, repealed ss. 14, 15, 16 and 17 of the 7 & 8 Geo. IV. c. 29, and also ss. 16 and 18 of the 7 & 8 Geo. IV. c. 30 (8), and new provisions were made in lieu, but so as not to affect the 5 & 6 Will. IV. c. 38, and 4 Geo. IV. c. 64. By this statute, *solitary confinement* was introduced, and made lawful for periods of not more than *one month* at a time, or than three months in one year.

The punishment of *death* was still further abolished by the statute 7 Will. IV. & 1 Vict. c. 91, for all offences mentioned in the statutes 1 Geo. I. c. 5; 25 Geo. II. c. 37, s. 9; 31 Geo. III. c. 17, s. 10; 37 Geo. III. c. 70, s. 1; Id. c. 40, s. 1; 52 Geo. III. c. 104, s. 1; 59 Geo. III. c. 136, s. 17; 5 Geo. IV. c. 113, s. 9; 3 & 4 Will. IV. c. 53, ss. 58, 59: and transportation for life, or not less than fifteen years, or

(7) Ante, p. 224. (8) Ante, p. 225.

imprisonment for not exceeding three years, was substituted, and with the latter punishment, hard labour and solitary confinement may be awarded; but this statute does not affect the power of the 5 & 6 Will. IV. c. 38, and 4 Geo. IV. c. 64; it also *repeals* the statute 2 Jac. I., c. 31.

Very great improvements have also been made in the police, as well in and near the metropolis as in large country towns, and in Dublin. The statute 10 Geo. IV. c. 44, intituled "An Act for improving the Police in and near the Metropolis" was passed for the purpose of establishing a new and more efficient system of police, in the room of the previous inadequate local establishments of nightly watch and police within the limits of what in the Act is called "The Metropolitan District," and which has proved to be very efficient for the protection of persons and property; and by the statute 2 & 3 Vict., c. 47, intituled "An Act for the further improving the Police in and near the Metropolis," very important regulations for the purpose were established: these local improvements in the police have been extended to *Birmingham* by the statute 2 & 3 Vict. c. 88, to *Bolton* by Id. c. 95, and to *Manchester* by Id. c. 87.

A great improvement has certainly been made in the administration of criminal justice in the city of London, by the establishment of a new court for the trial of offences committed in *the metropolis and parts adjacent*, called THE CENTRAL CRIMINAL COURT, established by the stat. 4 & 5 Will. IV. c. 36. The jurisdiction of this Court extends for several miles round the metropolis, into Essex, Kent, and Surry, set out in sect. 2 of the act, to which places there will be no winter circuit.

A further improvement, though less general in its

extent, yet of considerable *local* importance, was effected by the statute 4 & 5 Will. IV. c. 27, being "An Act for the better administration of justice in certain boroughs and franchises."

The statute 6 Geo. IV. c. 50, settled and regulated the law and practice relating to JURIES. It repeals all former statutes, and declares that all persons between the ages of twenty-one and sixty, who shall have 10*l.* a year, beyond reprises, in lands and tenements of freehold, copyhold or customary tenure, or in ancient demesne, or in rents issuing out of such tenements, in fee simple, fee tail, or for life, or 20*l.* a year in leaseholds, held for twenty-one years or any longer term, or any term determinable on a life or lives, or, being a householder, shall be rated to the poor-rate, or, in Middlesex, to the house duty, in a value of not less than 30*l.*, or who shall occupy a house containing not less than fifteen windows, shall be qualified and liable to serve on all juries for the trial of all issues joined in the superior courts of Westminster, and in all courts of *assize*, *nisi prius*, &c., such issues being triable in the county where he resides.

In Wales, the qualification required amounts to three-fifths of such properties.

In the CITY OF LONDON, a juror must be a resident within the city, and possess property to the value of 100*l.*

The various grounds of exemption from serving on juries are distinctly pointed out in the second section of the act.

A juror must be a natural-born subject, (except only when a foreigner is put on his trial), and not have been attainted of treason or felony, or convicted of an infa-

mous crime, and *not* pardoned, nor be under sentence of outlawry or excommunication.

The *jurors' book* is kept by the sheriff; it contains a list of all persons within his county duly qualified for the office, and from this he returns what is denominated the *common jury*. It also contains a list of what is termed the *special jury;* which consists of all persons described as of the degree of an esquire, or of any superior rank, or as a banker or merchant.

Having thus shewn the great and important changes that have been made in the administration of criminal justice, the reader is requested only to look back from these enlightened times to the dark ages, and even to the middle and end of only the last century, and he must be gratified in seeing the mildness with which criminal justice is now administered, compared with its sanguinary administration in those times.

When Solon abrogated *Draco's* statutes, (which inflicted the penalty of death for all offences), and decreed that no offence but murder should be punished capitally, crime greatly diminished. Let us quit Athens, and go to ancient Rome, and the same result will be found to attend the abrogation of the sanguinary punishments that were decreed by the laws of the Roman kings, and the twelve tables of the *Decemviri*. This was silently effected by the *Porcian* law, which exempted all citizens from the punishment of death (1). During the last century, important mitigations have been effected in the criminal laws of civilized nations; and in many, the punishment of death has been abolished, almost in all cases, without any increase of crime being the conse-

(1) See Livy, lib. 1.

quence; as, for instance, in Belgium and Tuscany, capital punishments have been practically abolished. In France, the Code Napoleon makes only six offences capital; and since 1830 further mitigation has taken place. In Austria, only traitors and murderers are punished with death. In Prussia and Holland, and in the United States of America, but few crimes are punished with death, and society suffers no injury.

The punishment of death is intended as an example to deter others from committing the same crime; whereas undetected criminals never apply the example to themselves. Sir W. Blackstone, in his work "On Crimes and Punishments," enforces the doctrines, that *unduly severe* punishments must always be *uncertain*, and therefore less fitted to deter men from the commission of offences, than milder but more certain penalties; and that the reformation of society will be much less effectually promoted by the enactment of such rigorous laws, as may inspire horror of the *punishment* of offences, than by educating the people in such a manner as to inspire them with horror of *the offences themselves*.

BOOK II.

CHAPTER I.

Advantages peculiar to the English Constitution.
1. *The Unity of the Executive Power.*

195 We have seen in former chapters the resources allotted to the different parts of the English government for balancing each other, and how their reciprocal actions and re-actions produce the freedom of the constitution, which is no more than an equilibrium between the ruling powers of the state. I now propose to show that the particular nature and functions of these same constituent parts of the government, which give it so different an appearance from that of other free states, are moreover attended with peculiar and very great advantages, which have not hitherto been sufficiently observed.

The first peculiarity of the English government, as a free government, is its having a king,—its having thrown into one place the whole mass, if I may use the expression, of the executive power, and having invariably and for ever fixed it there. By this very circum-

stance also has the *depositum* of it been rendered sacred and inexpugnable;—by making one great, very great man in the state, has an effectual check been put to the pretensions of those who otherwise would strive to become such; and disorders have been prevented, which, in all republics, ever brought on the ruin of liberty, and, before it was lost, obstructed the enjoyment of it.

If we cast our eyes on all the states that ever were free, we shall see that the people ever turning their jealousy, as it was natural, against the executive power, but never thinking of the means of limiting it that has so happily taken place in England (*a*), never employed any other expedients besides the obvious one of trusting that power to magistrates whom they appointed annually; which was in great measure the same as keeping 197
the management of it to themselves: whence it resulted, that the people, who, whatever may be the frame of the government, always possess, after all, the reality of power, thus uniting in themselves with this reality of power the actual exercise of it, in form as well as in fact, constituted the whole state. In order, therefore, legally to disturb the whole state, nothing more was requisite than to put in motion a certain number of individuals.

In a state which is small and poor, an arrangement of this kind is not attended with any great inconveniences, as every individual is taken up with the care of providing for his subsistence, as great objects of am-

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(*a*) The rendering that power dependent on the people for its supplies. (See book i. c. 6).

bition are wanting, and as evils cannot, in such a state, ever become much complicated. In a state that strives for aggrandisement, the difficulties and danger attending the pursuit of such a plan inspire a general spirit of caution, and every individual makes a sober use of his rights as a citizen.

But when, at length, those exterior motives come to cease, and the passions, and even the virtues, which they
198 excited, thus become reduced to a state of inaction, the people turn their eyes back towards the interior of the republic; and every individual, in seeking then to concern himself in all affairs, seeks for new objects that may restore him to that state of exertion which habit, he finds, has rendered necessary to him, and to exercise a share of power which, small as it is, yet flatters his vanity.

As the preceding events must needs have given an influence to a certain number of citizens, they avail themselves of the general disposition of the people, to promote their private views: the legislative power is thenceforth continually in motion; and, as it is badly informed and falsely directed, almost every exertion of it is attended with some injury either to the laws, or the state.

This is not all; as those who compose the general assemblies cannot, in consequence of their numbers, entertain any hopes of gratifying their own private ambition, or, in general, their own private passions, they at least seek to gratify their political caprices, and they accumulate the honours and dignities of the state on some favourite whom the public voice happens to raise at that time.

But, as in such a state there can be, from the irregularity of the determinations of the people, no such thing 199
as a settled course of measures, it happens that men never can exactly tell the present state of public affairs. The power thus given away is already grown very great before those for whom it was given so much as suspect it; and he himself who enjoys that power does not know its full extent: but then, on the first opportunity that offers, he suddenly pierces through the cloud which hid the summit from him, and at once seats himself upon it. The people, on the other hand, no sooner recover sight of him, than they see their favourite now become their master, and discover the evil only to find that it is past remedy.

As this power, thus surreptitiously acquired, is destitute of the support both of the law and of the ancient course of things, and is even but indifferently respected by those who have subjected themselves to it, it cannot be maintained but by abusing it. The people at length succeed in forming somewhere a centre of union; they agree in the choice of a leader: this leader in his turn rises; in his turn also he betrays his engagements; power produces its wonted effects; and the protector becomes a tyrant.

This is not all: the same causes which have given 200
one master to the state, give it two, give it three. All those rival powers endeavour to swallow up each other; the state becomes a scene of endless quarrels and broils, and is in a continual convulsion.

If amidst such disorders the people retained their freedom, the evil must indeed be very great to take away all the advantages of it; but they are slaves, and

yet have not what in other countries makes amends for political servitude; I mean tranquillity.

In order to prove all these things, if proofs were deemed necessary, I would only refer the reader to what every one knows of Pisistratus and Megacles, of Marius and Sylla, of Cæsar and Pompey. However, I cannot avoid translating a part of the speech which a citizen of Florence addressed once to the senate: the reader will find in it a kind of abridged story of all republics; at least of those which, by the share allowed to the people in the government, deserved that name, and which, besides, have attained a certain degree of extent and power.

"That nothing human may be perpetual and stable,
201 it is the will of Heaven, that, in all states whatsoever, there should arise certain destructive families, who are the bane and ruin of them. Of this our own republic affords as many and more deplorable examples than any other, as it owes its misfortunes not only to one, but to several such families. We had at first the *Buondelmonti* and the *Huberti*. We had afterwards the *Donati* and the *Cerchi:* and at present (shameful and ridiculous conduct!) we are waging war among ourselves for the *Ricci* and the *Albizzi*.

"When in former times the Ghibelins were suppressed, every one expected that the Guelfs, being then satisfied, would have chosen to live in tranquillity; yet, but a little time had elapsed when they again divided themselves into the factions of the *whites* and the *blacks*. When the whites were suppressed, new parties arose, and new troubles followed. Sometimes battles were fought in favour of the exiles; and, at other times, quarrels broke out between the nobility

and the people. And, as if resolved to give away to others what we ourselves neither could, nor would, peaceably enjoy, we committed the care of our liberty 202
sometimes to king Robert, and at other times to his brother, and at length to the duke of Athens; never settling or resting in any kind of government, as not knowing either how to enjoy liberty or support servitude." (*b*)

The *English constitution* has prevented the possibility of misfortunes of this kind. By diminishing the power, or rather *actual exercise* of *the power, of the people* (*c*), and making them share in the legislature only by their representatives, the irresistible violence has been avoided of those numerous and general assemblies, which, on whatever side they throw their weight, bear down every thing. Besides, as *the power of the people*, when they have any kind of power, and know how to use it, is at all times really formidable, the constitution has set a counterpoise to it; and the royal authority is this counterpoise.

In order to render it equal to such a task, the con- 203
stitution has, in the first place, conferred on the king, as we have seen before, the exclusive prerogative of calling and dismissing the legislative bodies, and of putting a negative on their resolutions.

Secondly, it has also placed on the side of the king the whole executive power in the nation.

Lastly, in order to effect still nearer an equilibrium,

(*b*) See the History of Florence, by Machiavel, lib. iii.

(*c*) We shall see in the sequel, that this diminution of the *exercise* of the *power* of the people has been attended with a great increase of their *liberty*.

the constitution has invested the man whom it has made the sole head of the state, with all the personal privileges, all the pomp, all the majesty, of which human dignities are capable. In the language of the law, the king is sovereign lord, and the people are his subjects;—he is universal proprietor of the kingdom;—he bestows all the dignities and places; and he is not to be addressed but with the expressions and outward ceremony of almost eastern humility. Besides, his person is sacred and inviolable; and any attempt whatsoever against it is, in the eye of the law, a crime equal to that of an attack upon the whole state.

In a word, since, to have too exactly completed the
204 equilibrium between the power of the people and that of the crown, would have been to sacrifice the end to the means, that is, to have endangered liberty with a view to strengthen the government, the deficiency which ought to remain on the side of the crown, has at least been, in appearance, made up, by conferring on the king all that sort of strength that may result from the opinion and reverence of the people; and, amidst the agitations which are the unavoidable attendants of liberty, the royal power, like an anchor that resists both by its weight and the depth of its hold, ensures a salutary steadiness to the vessel of the state.

The greatness of the prerogative of the king, by its thus procuring a great degree of stability to the state in general, has much lessened the possibility of the evils we have above described; it has even, we may say, totally prevented them, by rendering it impossible for any citizen to rise to any dangerous greatness.

And to begin with an advantage by which the people easily suffer themselves to be influenced, I mean that

of birth, it is impossible for it to produce in England effects in any degree dangerous; for, though there are 205
lords who, besides their wealth, may also boast of an illustrious descent, yet that advantage, being exposed to a continual comparison with the splendour of the throne, dwindles almost to nothing; and, in the gradation universally received of dignities and titles, that of sovereign prince and king, places him who is invested with it out of all degree of proportion.

The ceremonial of the court of England is even formed upon that principle. Those persons who are related to the king have the title of princes of the blood, and, in that quality, an undisputed pre-eminence over all other persons (*d*). Nay, the first men in the nation think it an honourable distinction to themselves, to hold the different menial offices, or titles, in his household. If we, therefore, were to set aside the extensive and real power of the king, as well as the numerous means he possesses of gratifying the ambition and hopes of individuals, and were to consider only the majesty of his title, and that kind of strength founded on public opinion which results from it, we should find 206
that advantage so considerable, that to attempt to enter into a competition with it, with the bare advantage of high birth, which itself has no other foundation than public opinion, and that too in a very subordinate degree, would be an attempt completely extravagant.

If this difference is so great as to be thoroughly submitted to, even by those persons whose situation might incline them to disown it, much more does it influence

(*d*) This by stat. 31st of Hen. VIII., extends to the sons, grandsons, brothers, uncles, and nephews of the reigning king.

the minds of the people. And if, notwithstanding the value which every Englishman ought to set upon himself as a man, and a free man, there were any whose eyes were so very tender as to be dazzled by the appearance and the arms of a lord, they would be totally blinded when they came to turn them towards the royal majesty.

The only man, therefore, who, to persons unacquainted with the constitution of England, might at first sight appear in a condition to put the government in danger, would be one who, by the greatness of his abilities and public services, might have acquired in a high degree the love of the people, and obtained a great influence in the House of Commons.

But how great soever this enthusiasm of the public
207 may be, barren applause is the only fruit which the man whom they favour can expect from it. He can hope neither for a dictatorship, nor a consulship, nor in general for any power under the shelter of which he may at once safely unmask that ambition with which we might suppose him to be actuated, or, if we suppose him to have been hitherto free from any, grow insensibly corrupt. The only door which the constitution leaves open to his ambition, of whatever kind it may be, is a place in the administration during the pleasure of the king. If, by the continuance of his services, and the preservation of his influence, he becomes able to aim still higher, the only door which again opens to him is that of the House of Lords.

But this advance of the favourite of the people towards the establishment of his greatness, is, at the same time, a great step towards the loss of that power which might render him formidable.

In the first place, the people, seeing that he is become much less dependent on their favour, begin, from that very moment, to lessen their attachment to him. Seeing him, moreover, distinguished by privileges which are the objects of their jealousy, I mean their political jealousy, and member of a body whose interests are 208
frequently opposite to theirs, they immediately conclude that this great and new dignity cannot have been acquired but through a secret agreement to betray them. Their favourite, thus suddenly transformed, is going, they make no doubt, to adopt a conduct entirely opposite to that which has till then been the cause of his advancement and high reputation, and, in the compass of a few hours, completely to renounce those principles which he has so long and so loudly professed. In this, certainly, the people are mistaken; but yet, neither would they be wrong, if they feared that a zeal, hitherto so warm, so constant, I will even add, so sincere, when it concurred with their favourite's private interest, would, by being thenceforth often in opposition to it, become gradually much abated.

Nor is this all: the favourite of the people does not even find in his new dignity all the increase of greatness and *éclat* that might at first be imagined.

Hitherto he was, it is true, only a private individual; but then he was the object in which the whole nation interested themselves; his actions and words were set forth in the public prints; and he everywhere met with applause and acclamation.

All these tokens of public favour are, I know, some- 209
times acquired very lightly; but they never last long, whatever people may say, unless real services are performed: now, the title of benefactor to the nation, when

deserved, and universally bestowed, is certainly a very handsome title, and which does nowise require the assistance of outward pomp to set it off. Besides, though he was only a member of the inferior body of the legislature, we must observe, he was the first: and the word *first* is always a word of very great moment.

But, now that he is made a lord, all his greatness, which hitherto was indeterminate, becomes defined. By granting him privileges established and fixed by known laws, that uncertainty is taken from his lustre which is of so much importance in those things which depend on imagination; and his value is lowered, just because it is ascertained.

Besides, he is a lord; but then there are several men who possess but small abilities, and few estimable qualifications, who also are lords; his lot is, nevertheless, to be seated among them; the law places him exactly on the same level with them; and all that is real in his greatness is thus lost in a crowd of dignities, hereditary and conventional.

210 Nor are these the only losses which the favourite of the people is to suffer. Independently of those great changes which he descries at a distance, he feels around him alterations no less visible, and still more painful.

Seated formerly in the assembly of the representatives of the people, his talents and continual success had soon raised him above the level of his fellow-members; and, being carried on by the vivacity and warmth of the public favour, those who might have been tempted to set up as his competitors were reduced to silence, or even became his supporters.

Admitted now into an assembly of persons invested with a perpetual and hereditary title, he finds men

hitherto his superiors,—men who see with a jealous eye the shining talents of the *homo novus*, and who are firmly resolved, that, after having been the leading man in the House of Commons, he shall not be the first in theirs.

In a word, the success of the favourite of the people was brilliant, and even formidable; but the constitution, in the very reward it prepares for him, makes him find a kind of ostracism. His advances were sudden, and his course rapid; he was, if you please, like a torrent, ready to bear down every thing before it; but this torrent is 211
compelled, by the general arrangement of things, finally to throw itself into a vast reservoir, where it mingles and loses its force and direction.

I know it may be said, that, in order to avoid the fatal step which is to deprive him of so many advantages, the favourite of the people ought to refuse the new dignity which is offered to him, and wait for more important successes, from his eloquence in the House of Commons, and his influence over the people.

But those who give him this counsel have not sufficiently examined it. Without doubt, there are men in England, who, in their present pursuit of a project which they think essential to the public good, would be capable of refusing for a while a dignity which would deprive their virtue of opportunities of exerting itself, or might more or less endanger it; but woe to him who should persist in such a refusal, with any pernicious design! and who, in a government where liberty is established on so solid and extensive a basis, should endeavour to make the people believe that their fate depends on the persevering virtue of a single citizen. His ambitious views being at last discovered, (nor could

212 it be long before they were so), his obstinate resolution to move out of the ordinary course of things would indicate aims, on his part, of such an extraordinary nature, that all men whatever, who have any regard for their country, would instantly rise up from all parts to oppose him, and he must fall overwhelmed with so much ridicule, that it would be better for him to fall from the Tarpeian rock (*e*).

In fine, even though we were to suppose that the new lord might, after his exaltation, have preserved all his interest with the people, or, what would be no less difficult, that any lord whatever could, by dint of his wealth and high birth, rival the splendour of the crown itself, all these advantages, how great soever we may
213 suppose them, as they would not of themselves be able to confer on him the least executive authority, must for ever remain mere showy unsubstantial advantages. Finding all the active powers of the state concentred in that very seat of power which we suppose him inclined to attack, and there secured by formidable provisions, his influence must always evaporate in ineffectual words; and after having advanced himself, as we sup-

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(*e*) The reader will, perhaps, object, that no man in England can entertain such views as those I have suggested here: this is precisely what I intended to prove. The essential advantage of the English government above all those that have been called *free*, and which in many respects were but apparently so, is, that no person in England can entertain so much as a thought of ever rising to the level of the power charged with the execution of the laws. All men in the state, whatever may be their rank, wealth, or influence, are thoroughly convinced that they must, in reality as well as in name, continue to be *subjects;* and are thus compelled really to love, defend, and promote, those laws which secure liberty to the subject. This latter observation will be again introduced in the sequel.

pose, to the very foot of the throne, finding no branch of independent power which he might so far appropriate to himself, as at last to give a reality to a political importance, he would soon see it, however great it might have at first appeared, decline and die away.

God forbid, however, that I should mean that the people of England are so fatally tied down to inaction, by the nature of their government, that they cannot, in times of oppression, find means of appointing a leader! No; I only meant to say, that the laws of England open no door to those accumulations of power, which have been the ruin of so many republics; that they offer to the ambitious no possible means of taking advantage of the inadvertence or even the gratitude of the people, to make themselves their tyrants; and that the public power, of which the king has been made the exclusive 214
depository, must remain unshaken in his hands, so long as things continue to keep in the legal order; which, it may be observed, is a strong inducement to him constantly to endeavour to maintain them in it (*f*).

(*f*) Several events, in the English history, put in a very strong light this idea of the stability which the power of the crown gives to the state.

One is, the facility with which the great Duke of Marlborough, and his party at home, were removed from their employments. Hannibal, in circumstances nearly similar, had continued war against the will of the senate of Carthage: Cæsar had done the same in Gaul: and when, at last, he was expressly required to deliver up his commission, he marched his army to Rome, and established a military despotism. But the Duke of Marlborough, though surrounded, as well as the above-named generals, by a victorious army, and by allies, in conjunction with whom he had carried on such a successful war, did not even hesitate to surrender his commission. He knew that all his soldiers were inflexibly prepossessed in favour of that power against which he must have revolted; he knew that the same pre-

possessions were deeply rooted in the minds of the whole nation, and that every thing among them concurred to support the same power; he knew that the very nature of the claims he must have set up would instantly have made all his officers and captains turn themselves against him; and, in short, that, in an enterprise of this nature, the arm of the sea he had to repass was the smallest of the obstacles he would have to encounter.

The other event I shall mention here, is that of the revolution of 1689. If the long-established power of the crown had not beforehand prevented the people from accustoming themselves to fix their eyes on some particular citizens, and in general had not prevented all men in the state from attaining too considerable a degree of power and greatness, the expulsion of James II. might have been followed by events similar to those which took place at Rome after the death of Cæsar.

CHAPTER II.

The Executive Power is more easily confined when it is One.

ANOTHER great advantage, and which one would not at 215
first expect, in this *unity* of the public power in England,—in this union, and, if I may so express myself, in this coacervation, of all the branches of the executive authority,—is the greater facility it affords of restraining it.

In those states where the execution of the laws is intrusted to several hands, and to each with different titles and prerogatives, such division, and the changeableness of measures which must be the consequence of it, constantly hide the true cause of the evils of the state: in the endless fluctuation of things, no political principles have time to fix among the people; and public misfortunes happen, without ever leaving behind them 216
any useful lesson.

At some times military tribunes, and at others consuls, bear an absolute sway; sometimes patricians usurp every thing, and at other times those who are called nobles (*a*); at one time the people are oppressed by decemvirs, and at another by dictators.

(*a*) The capacity of the Romans being admitted to all places of public trust (at length gained by the plebeians) having rendered use-

Tyranny, in such states, does not always beat down the fences that are set around it; but it leaps over them. When men think it confined to one place, it starts up again in another;—it mocks the efforts of the people, not because it is invincible, but because it is unknown;—seized by the arm of a Hercules, it escapes with the changes of a Proteus.

But the indivisibility of the public power in England
217 has constantly kept the views and efforts of the people directed to one and the same object; and the permanence of that power has also given a permanence and a regularity to the precautions they have taken to restrain it.

Constantly turned towards that ancient fortress, the royal power, they have made it for seven centuries the object of their fear; with a watchful jealousy they have considered all its parts; they have observed all its outlets; they have even pierced the earth to explore its secret avenues and subterraneous works.

United in their views by the greatness of the danger, they regularly formed their attacks. They established their works, first at a distance; then brought them successively nearer; and, in short, raised none but what served afterwards as a foundation or defence to others.

After the Great Charter was established, forty successive confirmations strengthened it. The act called the *Petition of Right*, and that passed in the sixteenth

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less the old distinction between them and the patricians, a coalition was then effected between the great plebeians, or commoners who got into these places, and the ancient patricians. Hence a new class of men arose, who were called *nobiles* and *nobilitas*. These are the words by which Livy, after that period, constantly distinguishes those men and families who were at the head of the state.

year of Charles I., then followed: some years after, the *Habeas Corpus Act* was established; and the Bill of Rights at length made its appearance (1). In fine, whatever the circumstances may have been, the people always had, in their efforts, that inestimable advantage of knowing with certainty the general seat of the evils they had to defend themselves against; and each calamity, each particular eruption, by pointing out some weak place, 218
served to procure a new bulwark for public liberty.

To conclude in a few words:—the executive power in England is formidable, but then it is for ever the same; its resources are vast, but their nature is at length known; it has been made the indivisible and inalienable attribute of one person alone, but then all other persons, of whatever rank or degree, become really interested to restrain it within its proper bounds (*b*).

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(1) And, in our days, the Reform Bill.—EDITOR.

(*b*) This last advantage of the greatness and indivisibility of the executive power, viz. the obligation it lays upon the greatest men in the state, sincerely to unite in a common cause with the people, will be more amply discussed hereafter, when a more particular comparison between the English government and the republican form shall be offered to the reader.

CHAPTER III.

A second Peculiarity. The Division of the Legislative Power.

THE second peculiarity which England, as an individual state and a free state, exhibits in its constitution, is the division of its legislature. But in order to make the
219 reader more sensible of the advantages of this division, it is necessary to desire him to attend to the following considerations.

It is, without doubt, absolutely necessary, for securing the constitution of a state, to restrain the executive power: but it is still more necessary to restrain the legislative. What the former can only do by successive steps, (I mean subvert the laws), and through a longer or shorter train of enterprises, the latter can do in a moment. As its bare will can give being to the laws, so its bare will can also annihilate them; and, if I may be permitted the expression, the legislative power can change the constitution, as God created the light.

In order, therefore, to ensure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But here we must observe a difference between the legislative and the executive powers. The latter may be confined, and even is the more easily so, when undivided: the legislative, on the contrary, in order to its being restrained, should abso-

lutely be divided. For, whatever laws it may make to restrain itself, they never can be, relatively to it, any thing more than simple resolutions: as those bars which it might erect to stop its own motions must then be 220
within it, and rest upon it, they can be no bars. In a word, the same kind of impossibility is found, to fix the legislative power when it is *one*, which Archimedes objected against his moving the earth (*a*).

Nor does such a division of the legislature only render it possible for it to be restrained, since each of those parts into which it is divided can then serve as a bar to the motions of the others, but it even makes it to be actually so restrained. If it has been divided into only two parts, it is probable that they will not in all cases unite, either for *doing* or *undoing*:—if it has been divided into three parts, the chance that no changes will be made is greatly increased. Nay more; as a kind of point of honour will naturally take place between these different parts of the legislature, they will therefore be led to offer to each other only such propositions as will at least be plausible; and all very prejudicial changes will thus be prevented, as it were, before their birth.

If the legislative and executive powers differ so greatly with regard to the necessity of their being divided, in order to their being restrained, they differ no less with regard to the other consequences arising from such division.

The division of the executive power necessarily intro- 221
duces actual oppositions, even violent ones, between the different parts into which it has been divided; and that

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(*a*) He wanted a spot whereupon to fix his instruments.

part which in the issue succeeds so far as to absorb, and unite in itself, all the others, immediately sets itself above the laws. But those oppositions which take place, and which the public good requires should take place, between the different parts of the legislature, are never any thing more than oppositions between contrary opinions and intentions; all is transacted in the regions of the understanding; and the only contention that arises is wholly carried on with those inoffensive weapons, assents and dissents, *ayes* and *noes*.

Besides, when one of these parts of the legislature is so successful as to engage the others to adopt its proposition, the result is, that a law takes place which has in it a great probability of being good: when it happens to be defeated, and sees its propositions rejected, the worst that can result from it is, that a law is not made at that time; and the loss which the state suffers thereby, reaches no farther than the temporary setting-aside of some more or less useful speculation.

222 In a word, the result of a division of the executive power is either a more or less speedy establishment of *the right of the strongest*, or a continued state of war (*b*):—that of a division of the legislative power, is either truth, or general tranquillity.

The following maxims will therefore be admitted. That the laws of a state may be permanent, it is requisite that the legislative power should be divided;—that they may have weight, and continue in force, it is necessary that the executive power should be *one*.

(*b*) In England, when the executive power became double, by the king allowing the parliament to have a perpetual and independent existence, a civil war almost immediately followed.

The division of the English legislature is not accompanied (which is indeed a very fortunate circumstance) 224
by any actual division of the nation; each constituent part of it possesses strength sufficient to ensure respect to its resolutions; yet no real division has been made of the forces of the state. Only a greater proportional share of all those distinctions which are calculated to gain the reverence of the people, has been allotted to those parts of the legislature which could not possess their confidence in so high a degree as the others; and 225
the inequalities in point of real strength between them have been made up by the magic of dignity.

Thus, the king, who alone forms one part of the legislature, has on his side the majesty of the kingly title: the two houses are, in appearance, no more than councils entirely dependent on him; they are bound to follow his person; they only meet, as it seems, to advise him; and never address him but in the most solemn and respectful manner.

As the nobles, who form the second order of the legislature, bear, in point both of real weight and numbers, no proportion to the body of the people, they have received, as a compensation, the advantage of per- 226
sonal honours, and of an hereditary title.

Besides, the established ceremonial gives to their assembly a great pre-eminence over that of the representatives of the people. They are the *upper* house, and the others are the *lower* house. They are in a more special manner considered as the king's council; and it is in the place where they assemble that his throne is placed.

Besides, the lords are members of the legislature by virtue of a right inherent in their persons; and they are

supposed to sit in parliament on their own account, and for the support of their own interest. In consequence of this, they have the privilege of giving their votes by *proxy* (*c*); and, when any of them dissent from the resolutions of their house, they may enter a protest against them, containing the reasons of their particular opinion. In a word, as this part of the legislature is destined frequently to balance the power of the people, what it could not receive in real strength it has received
228 in outward splendour and greatness; so that, when it cannot resist by its weight, it overawes by its apparent magnitude.

In fine, as these various prerogatives, by which the component parts of the legislature are thus made to balance each other, are all intimately connected with the fortune of the state, and flourish and decay according to the vicissitudes of public prosperity or adversity; it thence follows, that, though differences of opinion may sometimes take place between those parts, there can scarcely arise any when the general welfare is really in question. And when, to resolve the doubts that may arise on political speculations of this kind, we cast our eyes on the debates of the two houses for a long succession of years, and see the nature of the laws which have been proposed, of those which have passed, and of those which have been rejected, as well as of the arguments that have been urged on both sides, we shall remain convinced of the goodness of the principles on which the English legislature is formed.

(*c*) The commons have not that privilege, because they are themselves *proxies* for the people. (See Coke's Inst. 4, p. 41).

CHAPTER IV.

A third Advantage peculiar to the English Government.— The Business of proposing Laws, lodged in the Hands of the People.

A THIRD circumstance, which I propose to show to be 229
peculiar to the English government, is the manner in which the respective offices of the three component parts of the legislature have been divided, and allotted to each of them.

In most of the ancient free states, the share of the people in the business of legislation was to approve or reject the propositions which were made to them, and to give the final sanction to the laws. The function of those persons (or in general those bodies), who were intrusted with the executive power, was to prepare and frame the laws, and then to propose them to the people: and, in a word, they possessed that branch of the legislative power which may be called the *initiative*, that is, the prerogative of putting that power in action (*a*).

(*a*) This power of previously considering and approving such laws as were afterwards to be propounded to the people, was, in the first times of the Roman republic, constantly exercised by the senate: laws were made, *populi jussu, ex auctoritate senatus.* Even in cases of elections, the previous approbation and *auctoritas* of the senate,

230 This *initiative* or exclusive right of proposing in legislative assemblies, attributed to the magistrates, is indeed very useful, and perhaps even necessary, in states of a republican form, for giving a permanence to the laws, as well as for preventing the disorders and struggles for power which have been mentioned before; but, upon examination, we shall find that this expedient is attended with inconveniences of little less magnitude than the evils it is meant to remedy.

231 These magistrates, or bodies, at first indeed apply frequently to the legislature for a grant of such branches of power as they dare not of themselves assume, or for the removal of such obstacles to their growing authority as they do not yet think it safe for them peremptorily to set aside. But when their authority has at length gained a sufficient degree of extent and stability, as farther manifestations of the will of the legislature could then only create obstructions to the exercise of their power, they begin to consider the legislature as an enemy whom they must take great care never to rouse. They consequently convene the assembly of the people as seldom as they can. When they do it, they carefully avoid proposing any thing favourable to public liberty. They soon even entirely cease to convene the assembly at all; and the people, after thus losing the power of legally asserting their rights, are exposed to that which is the highest degree of political ruin, the loss of even the remembrance of them, unless some indirect means are found, by which they may from time

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with regard to those persons who were offered to the suffrages of the people, were required. *Tum enim non gerebat is magistratum qui ceperat, si patres auctores non erant facti.* (Cic. pro Plancio, 3.)

to time give life to their dormant privileges; means which may be found, and succeed pretty well in small states, where provisions can more easily be made to answer their intended ends; but, in states of consider- 232
able extent, have always been found, in the event, to give rise to disorders of the same kind with those which were at first intended to be prevented.

But as the capital principle of the English constitution totally differs from that which forms the basis of republican governments, so it is capable of procuring to the people advantages that are to be found unattainable in the latter. It is the people in England, or at least those who represent them, who possess the *initiative* in legislation, that is to say, who perform the office of framing laws, and proposing them. And among the many circumstances in the English government, which would appear entirely new to the politicians of antiquity, that of seeing the person intrusted with the executive power bear that share in legislation which they looked upon as being necessarily the lot of the people, and the people enjoy that which they thought the indispensable office of its magistrates, would not certainly be the least occasion of their surprise.

I foresee that it will be objected, that, as the king of England has the power of dissolving, and even of not calling parliaments, he is hereby possessed of a prero- 233
gative which, in fact, is the same with that which I have just now represented as being so dangerous.

To this I answer, that all circumstances ought to be combined. Doubtless, if the crown had been under no kind of dependence whatever on the people, it would long since have freed itself from the obligation of calling their representatives together; and the British parlia-

ment would most likely have no existence now, except in history.

But, as we have above seen, the necessities of the state, and the wants of the sovereign himself, put him under a necessity of having frequent recourse to his parliament; and then the difference may be seen between the prerogative of not calling an assembly, when powerful causes nevertheless render such a measure necessary, and the exclusive right, when an assembly is convened, of *proposing* laws to it.

In the latter case, though a prince, (let us even suppose), in order to save appearances, might condescend to mention any thing besides his own wants, it would be at most to propose the giving up of some branch of his prerogative upon which he set no value, or to reform such abuses as his inclination does not lead him to imi-
234 tate; but he would be very careful not to touch any points which might materially affect his authority.

Besides, as all his concessions would be made, or appear to be made, of his own motion, and would in some measure seem to spring from the activity of his zeal for the public welfare, all that he might offer, though in fact ever so inconsiderable, would be represented by him as grants of the most important nature, and for which he expects the highest gratitude. Lastly, it would also be his province to make restrictions and exceptions to laws thus proposed by himself; he would also be the person who would choose the words to express them, and it would not be reasonable to expect that he would give himself any great trouble to avoid all ambiguity.

235 But the parliament of England is not, as we said before, bound down to wait passively and in silence for

such laws as the executive power may condescend to propose to them. At the opening of every session, they of themselves take into their hands the great book of the state; they open all the pages, and examine every article.

When they have discovered abuses, they proceed to inquire into their causes:—when these abuses arise from an open disregard of the laws, they endeavour to strengthen them; when they proceed from their insufficiency, they remedy the evil by additional provisions (*b*).

Nor do they proceed with less regularity and free- 236
dom, in regard to that important object, subsidies. They are to be the sole judges of the quantity of them, as well as of the ways and means of raising them; and they need not come to any resolution with regard to them till they see the safety of the subject completely provided for. In a word, the making of laws is not, in such an arrangement of things, a *gratuitous* contract, in which the people are to take just what is given them, and as it is given them:—it is a contract, in which they *buy* and *pay*, and in which they themselves settle the different conditions, and furnish the words to express them.

The English parliament have given a still greater extent to their advantages on so important a subject. They have not only secured to themselves a right of proposing laws and remedies, but they have also pre-
vailed on the executive power to renounce all claim to 237

(*b*) No popular assembly ever enjoyed the privilege of starting, canvassing, and proposing new matter, to such a degree as the English parliament.

do the same. It is even a constant rule, that neither the king nor his privy council can make any amendments in the bills preferred by the two houses; but the king is merely to accept or reject them; a provision, this, which, if we pay a little attention to the subject, we shall find to have been also necessary for completely securing the freedom and regularity of the parliamentary deliberations (*c*).

I indeed confess, that it seems very natural, in the modelling of a state, to intrust this very important office
238 of framing laws to those persons who may be supposed to have before acquired experience and wisdom in the management of public affairs. But events have unfortunately demonstrated, that public employments and power improve the understanding of men in a less degree than they pervert their views; and it has been found in the issue, that the effect of a regulation which, at first sight, seems so perfectly consonant with prudence, is to confine the people to a mere passive and defensive share in the legislation, and to deliver them

(*c*) The king, indeed, at times, sends messages to either house; and nobody, I think, can wish that no means of intercourse should exist between him and his parliament. But these messages are always expressed in very general words: they are only made to desire the house to take certain subjects into their consideration: no particular articles or clauses are expressed; the commons are not to declare, at any settled time, a solemn acceptance or rejection of the proposition made by the king; and, in short, the house follow the same mode of proceeding, with respect to such messages, as they usually do in regard to petitions presented by private individuals. Some member makes a motion upon the subject expressed in the king's message: a bill is framed in the usual way: it may be dropped at every stage of it; and it is never the proposal of the crown, but the motions of some of their own members, which the house discuss, and finally accept or reject.

up to the continual enterprises of those who, at the same time that they are under the greatest temptations to deceive them, possess the most powerful means of effecting it.

If we cast our eyes on the history of the ancient governments, in those times when the persons intrusted with the executive power were still in a state of dependence on the legislature, and consequently were frequently obliged to have recourse to it, we shall see almost continual instances of selfish and insidious laws proposed by them to the assemblies of the people.

And those men, in whose wisdom the law had at first placed so much confidence, became, in the issue, so lost to all sense of shame and duty, that when arguments were found to be no longer sufficient, they had recourse to force; the legislative assemblies 239
became so many fields of battle, and their power a real calamity.

I know very well, however, that there are other important circumstances besides those I have just mentioned, which would prevent disorders of this kind from taking place in England (*d*). But, on the other hand, let us call to mind that the person who, in England, is invested with the executive authority, unites in himself the whole public power and majesty. Let us represent to ourselves the great and sole magistrate of the nation pressing the acceptance of those laws which he had proposed, with a vehemence suited to the usual importance of his designs, with the warmth of monarchical pride,

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(*d*) I particularly mean here the circumstance of the people having entirely delegated their power to their representatives; the consequences of which institution will be discussed in the next chapter.

which must meet with no refusal, and exerting for that purpose all his immense resources.

It was therefore a matter of indispensable necessity, that things should be settled in England in the manner they are. As the moving springs of the executive power are, in the hands of the king, a kind of sacred *depositum*, so are those of the legislative power in the hands of the two houses. The king must abstain from touching them, in the same manner as all the subjects of the kingdom are bound to submit to his prerogatives. When he sits in parliament, he has left, we may say, his executive power without doors, and can only assent or dissent. If the crown had been allowed to take an active part in the business of making laws, it would soon have rendered useless the other branches of the legislature.

CHAPTER V.

SECTION I.—*As to whether it would be an Advantage to public Liberty, that the Laws should be enacted by the Votes of the People at large.*

BUT it will be said, whatever may be the wisdom of the English laws, how great soever their precautions may be with regard to the safety of the individual, the people, as they do not themselves expressly enact them, cannot be looked upon as a free people. The author of the *Social Contract* carries this opinion even farther; he says, that, "though the people of England think 241
they are free, they are much mistaken; they are so only during the election of members for parliament: as soon as these are elected, the people are slaves—they are nothing (*a*)."

Before I answer this objection, I shall observe that the word *liberty* is one of those which has been most misunderstood or misapplied.

Thus, at Rome, where that class of citizens who were really masters of the state, were sensible that a lawful regular authority, once trusted to a single ruler, would put an end to their tyranny, they taught the people to believe, that, provided those who exercised a military

(*a*) See M. Rousseau's Social Contract, chap. xv.

power over them, and overwhelmed them with insults, went by the names of *consules, dictatores, partricii, nobiles,* or by any other appellation than that horrid one of *rex,* they were free; and that such a valuable situation must be preferred at the price of every calamity.

In the same manner, certain writers, misled by their inconsiderate admiration of the governments of an-
242 cient times, and perhaps also by a desire of presenting lively contrasts to what they call the degenerate manners of our modern times, have cried up the governments of Sparta and Rome as the only ones fit for us to imitate. In their opinions, the only proper employment of a free citizen is, *to be either incessantly assembled in the forum, or preparing for war. Being valiant, inured to hardships, inflamed with an ardent love of one's country,* which is, after all, nothing more than an ardent desire of injuring all mankind for the sake of that society of which we are members,—*and with an ardent love of glory,* which is likewise nothing more than an ardent desire of committing slaughter, in order to make afterwards a boast of it,—have appeared to these writers to be the only social qualifications worthy of our esteem, and of the encouragement of lawgivers (*b*). And while, in order to support such opinions, they have used a profusion of exaggerated expressions without any distinct meaning, and perpetually repeated, though without defining them, the words *dastardliness, corruption, greatness of soul,* and *virtue,*
243 they have not once thought of telling us the only thing

(*b*) I have used all the above expressions in the same sense in which they were used in the ancient commonwealths, and still are, by most of the writers who describe their governments.

that was worth our knowing, which is, whether men were happy under those governments which they have so much exhorted us to imitate.

Nor, while they have thus misapprehended the only rational design of civil societies, have they better understood the true end of the particular institutions by which they were to be regulated. They were satisfied when they saw the few who really governed every thing in the state, at times perform the illusory ceremony of assembling the body of the people, that they might appear to consult them; and the mere giving of votes, under any disadvantage in the manner of giving them, and how much soever the law might afterwards be neglected that was thus pretended to have been made in common, has appeared to them to be liberty.

But those writers are in the right: a man who contributes by his vote to the passing of a law, has himself made the law; in obeying it, he obeys himself; he therefore is free. A play on words, and nothing more. The individual who has voted in a popular legislative assembly has not made the law that has passed in it; he has only contributed, or seemed to contribute, 244
towards enacting it, for his thousandth, or even ten thousandth, share; he has had no opportunity of making his objections to the proposed law, or of canvassing it, or of proposing restrictions to it; and he has only been allowed to express his assent or dissent. When a law has passed agreeably to his vote, it is not as a consequence of this his vote that his will happens to take place; it is because a number of other men have accidentally thrown themselves on the same side with him:—when a law contrary to his intentions is enacted, he must nevertheless submit to it.

This is not all: for though we should suppose that to give a vote is the essential constituent of liberty; yet such liberty could only be said to last for a single moment, after which it becomes necessary to trust entirely to the discretion of other persons, that is, according to this doctrine, to be no longer free. It becomes necessary, for instance, for the citizen who has given his vote, to rely on the honesty of those who collect the suffrages; and more than once have false declarations been made of them.

245 The citizen must also trust to other persons for the execution of those things which have been resolved upon in common: and when the assembly shall have separated, and he shall find himself alone, in the presence of the men who are invested with the public power, of the consuls, for instance, or of the dictator, he will have but little security for the continuance of his liberty, if he has only that of having contributed by his suffrage towards enacting a law which they are determined to neglect.

What then is liberty (1)?—Liberty, I would answer,

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(1) There is no word that admits of more various significations than that of *liberty*. Some have taken it for a facility of deposing a person on whom they had conferred a tyrannical authority. Others, for the power of choosing a superior, whom they are obliged to obey. Others, for the right of bearing arms, and of being thereby enabled to use violence. Others, in fine, for the privilege of being governed by a native of their own country, or by their own laws. A certain nation (Russia) for a long time thought liberty consisted in the privilege of wearing a long beard. Some have annexed this name to one form of government, exclusive of others: those who had a republican taste applied it to this species of polity; those who liked a monarchical state gave it to monarchy. Thus they have all applied the name of *liberty* to the government most suitable to their own cus-

so far as it is possible for it to exist in a society of beings whose interests are almost perpetually opposed to each other, consists in this, that *every man, while he respects the persons of others, and allows them quietly to enjoy the produce of their industry, be certain himself likewise*

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toms and inclinations; and, as in republics, the people have not so constant and so present a view of the causes of their misery; and as the magistrates seem to act only in conformity to the laws; hence *liberty* is generally said to reside in republics, and to be banished from monarchies. In fine, as in democracies the people seem to act almost as they please, this sort of government has been deemed the most free; and the *power* of the people has been confounded with their *liberty*.—The *political liberty of the subject* is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is necessary the government be so constituted as that one man be not afraid of another. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. (See *Montesq. Sp. Laws*, b. ii. c. 2. Even *Mirabeau*, the idol of all who aim at *natural liberty*, distinguished from civil and political liberty, in his System of Nature, observes, that the laws, in order that they may be just, ought invariably to have for their end the general interest of society; that is to say, to assure to the greatest number of citizens those advantages for which they have associated themselves. These advantages are, Liberty, Property, Security. Liberty is the faculty of doing for his own peculiar happiness every thing that does not injure or diminish the happiness of his associates. In associating themselves, each individual has *renounced* the exercise of that portion of his *natural liberty* which could be able to prejudice or injure the liberty of others. The exercise of that liberty which is prejudicial to society is called licentiousness. Property is the faculty of enjoying those advantages which labour and industry have procured to each member of the society. Security is the certitude and assurance that each member ought to have of enjoying in his person and in his property the protection of the laws, so long as he shall faithfully observe his engagements with society.—Editor.

to enjoy the produce of his own industry, and that his person be also secure. But to contribute by one's suffrage to procure these advantages to the community,—to have a share in establishing that order, that general arrangement of things by means of which an individual, lost as it were in the crowd, is effectually protected;—to lay down the rules to be observed by those who, being
246 invested with a considerable power, are charged with the defence of individuals, and provide that they should never transgress them;—these are functions, are acts of government, but not constituent parts of liberty.

In few words: to concur by one's suffrage in enacting laws, is to enjoy a share, whatever it may be, of power; to live in a state where the laws are equal for all, and sure to be executed, (whatever may be the means by which these advantages are attained), is to be free.

Be it so: we grant that to give one's suffrage is not liberty itself, but only a mean of procuring it, and a mean too which may degenerate to mere form; we grant also, that other expedients might be found for that purpose; and that for a man to decide, that a state with whose government and interior administration he is unacquainted, is a state in which the people *are slaves, are nothing*, merely because the *comitia* of ancient Rome are no longer to be met with in it, is a somewhat precipitate decision. Yet many, perhaps, will continue to think, that liberty would be much more complete, if the
247 people at large were expressly called upon to give their opinion concerning the particular provisions by which it is to be secured, and that the English laws, for instance, if they were made by *the suffrages of all*, would be wiser, more equitable, and, above all, more likely to be

executed. To this objection, which is certainly specious, I shall endeavour to give an answer.

If, in the first formation of a civil society, the only care to be taken was that of establishing, once for all, the several duties which every individual owes to others and to the state;—if those who are intrusted with the care of procuring the performance of these duties, had neither any ambition, nor any other private passions, which such employment might put in motion, and furnish the means of gratifying:—if, looking upon their functions as a mere task of duty, they were never tempted to deviate from the intentions of those who had appointed them:—in such a case, there might be no inconvenience in allowing every individual to have a share in the government of the community of which he is a member; or rather, in such a society, and among such beings, there would be no occasion for any government.

But experience teaches us that many more precau- 248
tions, indeed, are necessary to oblige men to be just towards each other; nay, the very first expedients that may be expected to conduce to such an end, supply the most fruitful source of the evils which are proposed to be prevented. Those laws, which were intended to be equal for all, are soon warped to the private convenience of those who have been made the administrators of them: instituted at first for the protection of all, they soon are made only to defend the usurpations of a few; and, as the people continue to respect them, while those to whose guardianship they were intrusted make little account of them, they at length have no other effect than that of supplying the want of real strength in those

few who have contrived to place themselves at the head of the community, and of rendering regular and free from danger the tyranny of the smaller number over the greater.

To remedy, therefore, evils which thus have a tendency to result from the very nature of things,—to oblige those who are in a manner masters of the law to conform themselves to it,—to render ineffectual the silent, powerful, and ever-active conspiracy of those who govern, requires a degree of knowledge, and a
249 spirit of perseverance, which are not to be expected from the multitude.

The greater part of those who compose this multitude, taken up with the care of providing for their subsistence, have neither sufficient leisure, nor even, in consequence of their more imperfect education, the degree of information requisite for functions of this kind. Nature, besides, who is sparing of her gifts, has bestowed upon only a few men an understanding capable of the complicated researches of legislation; and, as a sick man trusts to his physician, a client to his lawyer, so the greater number of the citizens must trust to those who have more abilities than themselves for the execution of things, which, at the same time that they so materially concern them, require so many qualifications to perform them with any degree of sufficiency.

To these considerations, of themselves so material, another must be added, which is, if possible, of still greater weight. This is, that the multitude, in consequence of their being a multitude, are incapable of coming to any mature resolution.

Those who compose a popular assembly are not ac-
250 tuated, in the course of their deliberations, by any clear

and precise views of present or positive personal interest. As they see themselves lost, as it were, in the crowd of those who are called upon to exercise the same function with themselves—as they know that their individual votes will make no change in the public resolutions, and that, to whatever side they may incline, the general result will nevertheless be the same;—they do not undertake to inquire how far the things proposed to them agree with the whole of the laws already in being, or with the present circumstances of the state, because men will not enter upon a laborious task, when they know that it can scarcely answer any purpose.

It is, however, with dispositions of this kind, and each relying on all, that the assembly of the people meet. But, as very few among them have previously considered the subjects on which they are called upon to determine, very few carry along with them any opinion or inclination, or at least any inclination of their own, and to which they are resolved to adhere. As, however, it is necessary, at last, to come to some resolution, the major part of them are determined by reasons which they would blush to pay any regard to on much less serious occasions. An unusual sight, a change 251
of the ordinary place of the assembly, a sudden disturbance, a rumour, are, amidst the general want of a spirit of decision, the *sufficiens ratio* of the determination of the greatest part (*c*); and from this assemblage of separate wills, thus formed hastily, and without re-

(*c*) Every one knows of how much importance it was, in the Roman commonwealth, to assemble the people in one place rather than another. In order to change entirely the nature of their resolutions, it was often sufficient to hide from them, or let them see, the Capitol.

flection, a general will results, which is also void of reflection.

If, amidst these disadvantages, the assembly were left to themselves, and nobody had an interest to lead them into error, the evil, though very great, would not, however, be extreme; because such an assembly never being called upon but to determine upon an affirmative or negative (that is, only having two cases to choose between), there would be an equal chance of their choosing either; and it might be hoped that at every other turn they would take the right side.

But the combination of those who share either in the
252 actual exercise of the public power, or in its advantages, do not thus allow themselves to sit down in inaction. They wake while the people sleep. Entirely taken up with the thoughts of their own power, they live but to increase it. Deeply versed in the management of public business, they see at once all the possible consequences of measures. And, as they have the exclusive direction of the springs of government, they give rise, at their pleasure, to every incident that may influence the minds of a multitude who are not on their guard, and who wait for some event or other that may finally determine them.

It is they who convene the assembly, and dissolve it; it is they who offer propositions, and make speeches to it. Ever active in turning to their advantage every circumstance that happens, they equally avail themselves of the tractableness of the people during public calamities, and its heedlessness in times of prosperity. When things take a different turn from what they expected, they dismiss the assembly. By presenting to it

many propositions at once, and which are to be voted upon in the lump, they hide what is destined to promote their own private views, or give a colour to it, by joining it with things which they know will take hold of the mind of the people (*d*). By presenting, in their 253
speeches, arguments and facts which men have no time to examine, they lead the people into gross and yet decisive errors; and the common-places of rhetoric, supported by their personal influence, ever enabled them to draw to their side the majority of votes.

On the other hand, the few (for there are, after all, some) who, having meditated on the proposed question, see the consequences of the decisive step which is just going to be taken, being lost in the crowd, cannot make their feeble voices to be heard amidst the universal noise and confusion. They have it no more in their power to stop the general motion, than a man in the midst of an army on a march, has it in his power to avoid marching. In the mean time, the people are giving the suffrages; a majority appears in favour of the proposal; it is finally proclaimed as the general will of all; and it is at bottom nothing more than the effect

(*d*) It was thus the senate at Rome assumed to itself the power of imposing taxes. They promised, in the time of the war against the Veientes, to give pay to such citizens as would enlist; and to that end they established a tribute. The people, solely taken up with the idea of not going to war at their own expense, were transported with so much joy, that they crowded at the door of the senate, and laying hold of the hands of the senators, called them their fathers—*Nihil unquam, acceptum à plebe tanto gaudio traditur: concursum itaque ad curiam esse, prehensatasque exeuntium manus, patres vere appellatos, &c.* (See Tit. Liv. book iv.)

of the artifices of a few designing men, who are exulting among themselves (*e*).

255 In a word, those who are acquainted with republican governments, and in general know the manner in which business is transacted in numerous assemblies, will not scruple to affirm that the few who are united, who take an active part in public affairs, and whose
256 station makes them conspicuous, have such an advantage over the many who turn their eyes towards them, and are without union among themselves, that, even with a middling degree of skill, they can at all times direct at their pleasure, the general resolutions; that,

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(*e*) In Geneva, in the year 1707, a law was enacted, that a general assembly of the people should be held, every five years, to treat of the affairs of the republic; but the magistrates, who dreaded those assemblies, soon obtained from the citizens themselves the repeal of the law; and the first resolution of the people, in the first of those periodical assemblies (in the year 1712), was to abolish them for ever. The profound secrecy with which the magistrates prepared their proposal to the citizens on that subject, and the sudden manner in which the latter, when assembled, were acquainted with it, and made to give their votes upon it, have indeed accounted but imperfectly for this strange determination of the people; and the consternation which seized the whole assembly when the result of the suffrages was proclaimed, has confirmed many in the opinion that some unfair means had been used. The whole transaction has been kept secret to this day; but the common opinion on this subject, which has been adopted by M. Rousseau, in his *Lettres de la Montagne*, is this: The magistrates, it is said, had privately instructed the secretaries in whose *ears* the citizens were to *whisper* the suffrages: when a citizen said *approbation*, he was understood to approve the proposal of the magistrates; when he said *rejection*, he was understood to reject the *periodical assemblies;* and numberless instances might be drawn from ancient history, in confirmation of the above observations.

as a consequence of the very nature of things, there is no proposal however absurd, to which a numerous assembly of men may not, at one time or other, be brought to assent; and that laws would be wiser, and more likely to procure the advantage of all, if they were to be made by drawing lots, or casting dice, than by the suffrages of a multitude.

Section II.

The Subject continued.

The first part of this chapter enters upon an enquiry of considerable importance at the present day; and as much is said that the Constitution is not only strengthened by the Reform Act, (as it is familiarly called), but that reform has not proceeded far enough without universal suffrage and vote by ballot, it becomes necessary to extend this enquiry still further—as to the advantages to be gained by the people in the establishment of *such* a constitutional suffrage.

In making *that* enquiry, it is not within the nature of this work, which is intended more as an illustration of the *science of politics*, considered as an *exact science*, to enter further upon the stability afforded to the constitution by the Reform Act, than is practically consistent with the well-being of the institutions of the country.

It is a well admitted axiom, that there must always be a counterbalancing power to support in proper health

the entire constitution; without this equilibrium it must fall.

Ancient institutions generally tend to reform the people's manners, and those of modern date to corrupt them. In the course of a long administration the descent to vice is insensible, but there is no re-ascending to virtue without making the most generous efforts. *Burlamaqui*, in his *Principles of Natural and Political Law* (1), collects the principal views which the sovereign ought to have in the enacting of laws. Among others he observes, that the laws ought to be such, that the subjects may be inclined to observe them rather of their own accord than through necessity, and that the sovereign ought not to be easily persuaded to change the established laws, and that frequent changes in laws certainly lessen their authority, as well as that of the sovereign.

The opinions expressed in the preceding section of this chapter, are in themselves conclusive, that universal suffrage and vote by ballot is impracticable in our constitution. Enough has also been said in this volume, shewing the effect of *giving power to the people.* We are at first to look at our great population, and secondly, to look at property as the standard of representation. What is the intent of the constitution? to promote civilization, and to protect our liberties, our religion, and our property. For these essential purposes the constitution has been established. It is said that the constitution has gained strength by the Reform Act. For it to gain strength, I apprehend that the balance of power, or, as Montesquieu terms it, the

(1) Part 3, ch. 1.

equilibrium must be maintained in all its due proportions: if this equilibrium be destroyed, so also is the whole constitution.

The establishment of universal suffrage and vote by ballot would destroy that equilibrium, by the return to parliament of that portion of the commons *without property*, to the exclusion of the other portion who have property, and the consequent government by the multitude, and the establishment of a tyrannical despotism, the destruction of property, and the subversion of the constitution. The very *principle* of *universal suffrage* is characteristic of democracy, and the *principles* of *vote* by *ballot* are irresponsibility and secresy. *These* principles are in direct opposition to the constitution, which is open and free. The Roman republic was destroyed through making the suffrage secret, for it was then no longer possible to direct a populace that sought its own destruction (2). It is well and justly observed by a noble writer and statesman of the present time (3), that "the government of the states of modern Europe rests upon property. The love of enjoying and the fear of losing an estate is the main principle of action with all who have an estate to keep or to lose. A democratic revolution cuts across the grain of this pervading principle; the well-known instability of a *single popular assembly* makes every man tremble for his fortune, and the welfare of his family. Hence all the *old nobility*, and *all proprietors of every degree*, are the enemies of a democratic form of government;

(2) See upon this subject Montesq. Sp. Laws, b. ii. c. ii.

(3) Lord John Russell. See his introduction to the Memoirs of the Affairs of Europe from the Treaty of Utrecht.

hence they join in the intrigues of displaced courtiers, and even in the aggressions of a foreign army; there remains no way of averting or blunting the edge of their hostility, but death, confiscation, the scaffold, and the almshouse. But *what means* are these for *philanthropic reformers* to employ!—to slay thousands, to beggar millions; not merely to take political power, and the means of advancement, from the hands of one set of men to put them into those of another, but to tear up society by the roots."

These are fearful consequences, and must, in every reasonable and unprejudiced mind, establish the principle so forcibly before laid down, that the multitude, in consequence of their being a multitude, are incapable of coming to a mature resolution (4).

The same noble writer thus most expressively inquires into the consequences attending such an evil state of society:—"Is it nothing (he says) to banish the most civilized of a civilized community, and to *raise the dregs of society to a place which they can only trouble by their impurity?* Is it nothing to tear apart all the endearing dependencies, the grateful bonds that unite the highest with the lowest, and to strike a blow, that, in throwing down the palace, equally robs of subsistence the prince in the hall, and the poor at the gate? Is it a trifling matter to ruin the happiness of one whole generation? to set tenant against landlord—servant against master—spread the havoc of war, not only over the fields and the houses, but in the thoughts and the hearts of every family of a great community;" and proceeds to shew, that nothing can be gained by the experiment of a de-

(4) See also b. 2, c. 5.

mocratic revolution. Entertaining such opinions, this noble statesman, in framing the Reform Act, could have no intention of doing so upon democratic principles: however, if the principles of the Reform Act are democratic, then it is inconsistent with the constitution. It has opened, certainly, a wide field for many changes, that, without great care, may at last destroy the constitution, if the natural love of the English for monarchy does not operate as a sort of counterpoise, and check all rising democratic principles.

Experience shews, that it is only by applying to the people a *diminishing power*, that they, as a body, can be well and constitutionally governed. Let that power be increased by universal suffrage and vote by ballot, the people will know *how* to use it; a few designing men will take advantage of them for their own exclusive benefit, and the people will become the slaves of their tyrants.

FRANCE and AMERICA are held up as examples to the contrary of the doctrine here maintained; but I will hold them up as confirmatory of that doctrine. What is the *franchise* in *France?* people are led, by democrats, to believe that it is universal and uncircumscribed; but let the people inquire into the fact, and they will find much *higher qualifications* (in relation to the two countries) required, than, by the Reform Act, is now required in this country to be an elector and a representative.

By *the New Constitutional Charter*, signed by the present King of the French in 1830, the deputies are elected for five years (5); no deputy can be admitted

(5) Art. 31.

into the Chamber, if he be not *thirty years of age*, and if he do not pay direct taxes to the amount of a thousand francs a year (6). The Charter of 1814 (7) required the deputy to be forty years of age.

No man is an elector under twenty-five years of age, nor without the *other* qualifications prescribed by law (8); nor can he have any right of suffrage, if he does not pay direct taxes to the amount of 300 francs, as ordained by the Charter of 1814 (9). Compare these qualifications with those required in this country, and the example of France is disposed of.

We will turn to the *United States of America.*

The *Southern States* have abolished the vote by ballot, and in its place have established open elections like our own.

The *Northern* and *Eastern States* retain it; but look at its extent there. The amount polled is one in nine or thereabouts, and many of the polled are corrupted by the influence of the government; and what is this legislature, but a many headed tyrant that keeps the tyranny of each other in countenance, that they may the more readily exact arbitrary power. The UNITED STATES are only *in form* subject to a republican government; they are in fact governed by laws modelled after those of the mother country.

Every unprejudiced mind must admit that it is an idle fallacy to hold up to the nations of Europe this republican *form* of government, as a model for them to work upon, on account of *the liberty* which it gives to the citizen, and that *to acquire that same liberty* the governments of Europe require reform or change.

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(6) Art. 32. (7) Id. 38. (8) Id. 34. (9) Id. 40.

It is a republic only in name. Its laws are monarchical, and its president has such extreme powers of control, (*far beyond those of our sovereign*), that it is in effect a monarchy without its attributes. This accounts for the want of those refined and social feelings which exists in America, and which will not be attained until those attributes appear. The mind must be expanded, animated, and exalted. The store, or the warehouse, only narrows the mind and makes it worldly and selfish; but the precedence of nobility open to all, its decorations, its honour, and its passage through the world, brings forth the highest spirit of emulation, and opens the loftiest powers of the mind. Civilization follows in its train with all the blessings of refinement and social intercourse. It is a moral improvement in the course of civilization.

The government of the United States is, in fact, the government of England exercised in another manner, and wanting only the maturity of the English government to make it one and the same; and as that may require reform, so will the government of the United States. The laws of both countries having the same origin, are equally subject to the same defects or inconveniencies arising from the same causes; and it is a remarkable fact, that the two nations should at the same time be engaged upon commissions of enquiry into the evils which have sprung out of existing laws, with the view to their reformation: the same laws therefore governing both nations, no greater liberty can exist in one nation than in the other.

True *practical liberty*, pure and unmixed with ungovernable licentiousness, can never attain to that perfection under an *elective presidency*, at which it has arrived

under our hereditary and limited monarchy. It is not within the common order of things that a monarchical form of government should long exist under an elective presidency, when the people shall have divided themselves into distinct classes, as in the mother country, and have buried their bantling called *equality:* that babe has never yet reached maturity; riches and distinctions have always killed it, and its tomb now lies mouldering in America. *Equality* being thus destroyed, *inequality* rises upon its ashes—ranks or grades succeed; but how do they exist? in *mere wealth:* There is no emulation beyond this distinction. To this the vast powers of the mind are limited, and when attained, the chasm between him who obtains it, and his citizen *brother* who is in want of it, is so great that it cannot be fathomed; hence civilization and refinement drag on at a slow pace. Can this state of things from all past experience last long — wealth the only distinction? Will not *ambition* at length shew itself, and open the eyes of the people to their true state of political government compared with their false one? The comparison therefore between liberty and independence in the United States, where even slavery still exists, and in Great Britain where slavery is abolished, becomes odious. There is more true liberty in the principles of the English Constitution, than in that of any other known nation.

These opinions may not be pleasing to some American readers; to satisfy such, we will, as an illustration, refer to the writings of one of their own statesmen (10), who, in an able work upon the sub-

(10) Mr. Everett, Charge d'Affaires of the United States at the court of the Netherlands, "On the Situation of the Principal Powers of Europe," chap. vii.

ject, observes, while treating of Great Britain:—"The country which first gave the example of a free and well regulated government, is naturally an object of curiosity and interest to the friends of liberty; and to this distinction Great Britain seems to be fairly entitled. We find, in the fierce democracies of Greece and Rome, and in the modern Italian republics, many traces of high spirit and independent feeling, many exhibitions of the loftiest qualities that belong to our nature—characters perhaps that have never been excelled or equalled in England; but the political institutions of these states were all irregular and vicious; and some of the most celebrated of them, as Athens, were also deficient in the necessary resources for embodying the principle of liberty in a powerful and imposing form. The illustrious characters that adorned all these republics, and the charm of poetry and eloquence that has been thrown about them in description, have given a sort of conventional celebrity to their political institutions, which vanishes at the slightest touch of critical examination. Holland is perhaps the country which has the best right to contest with England the glory of giving the world the first example of a liberal and well regulated constitution; but although the republic of the Seven United Provinces made a nearer approach to the attainment of this object than its predecessors, it was far from reaching it. It was reserved therefore for England to solve this great problem; and to exhibit for the first time, the phenomena of a vigorous and permanent political system, founded on the basis of liberty and equality. All the new representative governments on the continent of Europe are avowedly imitations of this, although they have not copied the British Constitution in every part;

and where they intended to copy, have often failed to do it from not understanding the model. In the UNITED STATES we have brought, *as we suppose*, the forms of government to still greater perfection; have cleared away many abuses, avoided many errors, and introduced great improvements in the details of administration; but we are still proud and happy to look to GREAT BRITAIN as the source from which we derive the spirit and the love of liberty; and from which we have drawn all our political institutions with the alterations necessary to accommodate them to our situation and habits. The British islands, therefore, whatever may be the future fate of their inhabitants, will always be reckoned as classical and sacred ground by the friends of liberty; and their history and constitution will ever be studied with singular attention, by all who wish to attain correct notions of political science (11)."

Shall we look to *Switzerland* for an example of the advantages to be derived from a republic; if we do, we shall find a despotic government under the supreme control of the burgher. It is true, the nobility are destroyed, and, as a consequence, the peasant and the labourer have become slaves without any possible chance of their condition being bettered. The state of society is all rich and all poor, the mighty and the weak. In fine, it is an aggregation of petty despotisms, and the governing power is attained only by riches.

It is impossible to establish in this country the government of ancient Athens. *Democracy* has never

(11) See also De Torqueville's View of the Political Institutions of America.

been allowed to exist for any time in any of the principal countries of Europe; the influence of property has always overturned it.

The small republics of modern Italy are wholly dependent upon the government of the capital, though frequently opposed to it. The Wat Tylers and Jack Cades of England, the Stephen Marcels and the Jacquerie of France, the Cola Rienzie's and Massaniello's of Italy, were all eminently unsuccessful and short-lived; and although large towns and even cities have set up a democracy, the weight of property has never allowed it to be established. All the revolutions that have originated with the Jack Cades, or the dregs of the people, have proved abortions; while all such as have originated with the higher classes, (as in the cases of the Rebellion in 1640, and the Revolution of 1688), have maintained their ground.

In all popular states, certain qualifications have been necessarily imposed upon electors, by which the independence of the members may be established; persons without any property, it is not unrighteous to suppose, may be very easily brought under the influence and control of persons having property, and, consequently, to have no will of their own. The principle upon which the constitution of suffrage is framed, is to combine as much as possible both numbers and property: every individual now being a ten pound householder has a vote in some part of the kingdom. The richest man has but one vote in one place, though, in right of his property being situate in different places returning members, he has also a vote in those places.

Whether or not this new constitution of suffrage is for the benefit *of the people at large*, or whether or not

it has placed too much power in the hands of the people, is not a matter for inquiry in this work: they are practical questions, which the people can themselves resolve. It is beyond doubt, that the interest of property, and the necessity of giving a place to the aristocracy to vindicate the rights of the people equally with their own, will overthrow every constitution which pretends to act by the mere unbalanced will of the people.

It was the opinion of the Emperor Napoleon, upon the necessity of giving a place to the aristocracy in every constitution, that, to make a constitution in a country which should have no kind of aristocracy, would be attempting to navigate in a single element; and that the French Revolution undertook a problem as insoluble as that of giving a direction to balloons (12).

Every lover of *real liberty*, who possesses any property in the country, who has any intelligence, and who wishes the government to be so constituted that one man be not afraid of another, which, in few words, is the *true political liberty of the subject*, must see, that any further reform, beyond what has been obtained, must end in the establishment of democracy, and the destruction of our institutions. Any attempt, beyond *wholesome improvements* in the established laws, such as have followed the passing of the Reform Act, will be subversive of the constitution, and end in anarchy.

Absolute stability is not to be expected in anything human; for that which exists immortally exists alone necessarily; and this attribute of the SUPREME

(12) Mémoires pour servir à l'Histoire de France sous Napoleon, écrits à St. Helena sous la dicter de l'Empereur.—Lib. i. p. 145.

BEING can neither belong to man nor to the works of man. The best instituted governments, like the best constituted animal bodies, carry in them the seeds of their destruction; and though they grow and improve for a time, they will soon tend visibly to their dissolution. Every hour they live is an hour the less they have to live. All that can be done, therefore, to prolong the duration of a good government, is to *draw it back* on every favourable occasion to the *first good principles on which it was founded.* When those occasions happen *often,* and are well improved, such governments are prosperous and durable. When they happen *seldom,* or are *ill improved,* then political bodies live in pain or in languor, and will die soon (13).

In conclusion, it may be held as an axiom, that democracy in England will become supreme, when the people shall refuse to support the constitution as by law established, in church and state, formed of the three estates of the kingdom. Sever but one of the links, and the whole is destroyed.

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(13) Lord Bolingbroke's Patriot King.

CHAPTER VI.

The Advantages that accrue to the People from appointing Representatives, and entrusting them with their Legislative Authority.

How then shall the people remedy the disadvantages that necessarily attend their situation? How shall they resist the phalanx of those who have engrossed to themselves all the honours, dignities, and power in the state?

It will be by employing for their defence the same means by which their adversaries carry on their attack: it will be by using the same weapons as they do,—the same order,—the same kind of discipline.

257 They are a small number, and consequently easily united;—a small number must therefore be opposed to them, that a like union may also be obtained. It is because they are a small number, that they can deliberate on every occurrence, and never come to any resolutions but such as are maturely weighed;—it is because they are few, that they can have forms which continually serve them for general standards to resort to, approved maxims, to which they invariably adhere, and plans which they never lose sight of:—here, therefore, oppose to them a small number, and you will obtain the like advantages.

Besides, those who govern, as a farther consequence of their being few, have a more considerable share, and

therefore feel a deeper concern in the success, whatever it may be, of their enterprises. As they usually profess a contempt for their adversaries, and are at all times acting an offensive part against them, they impose on themselves an obligation of conquering. They, in short, who are all alive from the most powerful incentives, and aim at gaining new advantages, have to do with a multitude, who, wanting only to preserve what they already possess, are unavoidably liable to long intervals of inactivity and supineness. But the people, by appointing 258
representatives, immediately gain to their cause that advantageous activity which they before stood in need of, to put them on a par with their adversaries; and those passions become excited in their defenders, by which they themselves cannot be actuated.

Exclusively charged with the care of public liberty, the representatives of the people will be animated by a sense of the greatness of the concerns with which they are intrusted. Distinguished from the bulk of the nation, and forming among themselves a separate assembly, they will assert the rights of which they have been made the guardians, with all that warmth which the *esprit de corps* is used to inspire (*a*). Placed on an elevated theatre, they will endeavour to render themselves still more conspicuous; and the arts and ambitious activity of those who govern will now be encountered by the vivacity and perseverance of opponents actuated by the love of glory.

(*a*) If it had not been for an incentive of this kind, the English Commons would not have vindicated their right of taxation with so much vigilance as they have done, against all enterprises (often perhaps involuntary) of the Lords.

259 Lastly, as the representatives of the people will naturally be selected from among those citizens who are most favoured by fortune (1), and will have consequently much to preserve, they will, even in the midst of quiet times, keep a watchful eye on the motions of power. As the advantages they possess will naturally create a kind of rivalship between them and those who govern, the jealousy which they will conceive against the latter will give them an exquisite degree of sensibility on every increase of their authority. Like those delicate instruments which discover the operations of nature, while they are yet imperceptible to our senses, they will warn the people of those things which of themselves they never see but when it is too late; and their greater proportional share, whether of real riches, or of those which lie in the opinions of men, will make them the barometers that will discover, in its first beginning, every tendency to a change in the constitution (*b*).

260 These observations are so obvious, that the people themselves, in popular governments, have always been sensible of the truth of them, and never thought it possible to remedy, by themselves alone, the disadvantages necessarily attending their situation. Whenever the oppressions of their rulers have forced them to resort to some uncommon exertion of their legal powers, they have immediately put themselves under the direction of those few men who had been instrumental in informing

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(1) See the last chapter, section 2.—EDITOR.

(*b*) All the above reasoning essentially requires that the representatives of the people should be united in interest with the people. We shall soon see that this union really prevails in the English constitution, and may be called the masterpiece of it.

and encouraging them: and when the nature of the circumstances has required any degree of firmness and perseverance in their conduct, they have never been able to attain the ends they proposed to themselves, except by means of the most explicit deference to those leaders whom they had thus appointed.

But, as these leaders, thus hastily chosen, are easily 261
intimidated by the continual display which is made before them of the terrors of power;—as that unlimited confidence which the people now repose in them only takes place when public liberty is in the utmost danger, and cannot be kept up otherwise than by an extraordinary conjunction of circumstances, in which those who govern seldom suffer themselves to be caught more than once;—the people have constantly sought to avail themselves of the short intervals of superiority which the chance of events had given them, for rendering durable those advantages which they knew would, of themselves, be but transitory, and for getting some persons appointed, whose peculiar office it may be to protect them, and whom the constitution shall thenceforward recognise. Thus it was that the people of Lacedæmon obtained their ephori, and the people of Rome their tribunes.

We grant this, will it be said; but the Roman people never allowed their tribunes to *conclude any thing definitely;* they, on the contrary, reserved to themselves the right of *ratifying* (c) any resolutions the latter should take. This, I answer, was the very circumstance that rendered the institution of tribunes totally 262
ineffectual in the event. The people thus wanting to

(c) See Rosseau's Social Contract.

interfere, with their own opinions, in the resolutions of those on whom they had, in their wisdom, determined entirely to rely—and endeavouring to settle with a hundred thousand votes things which would have been settled equally well by the votes of their advisers,—defeated in the issue every beneficial end of their former provisions: and while they meant to preserve an appearance of their sovereignty (a chimerical appearance, since it was under the direction of others that they intended to vote), they fell back into all those inconveniencies which we have before mentioned.

The senators, the consuls, the dictators, and the other great men of the republic, whom the people were prudent enough to fear, and simple enough to believe, continued still to mix with them, and play off their political artifices. They continued to make speeches to
263 them (*d*), and still availed themselves of their privilege of changing at their pleasure the place and form of the public meetings. When they did not find it possible by such means to direct the resolutions of the assemblies, they pretended that the omens were not favourable, and under this pretext, or others of the same kind,

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(*d*) Valerius Maximus relates, that the tribunes of the people having offered to propose some regulations in regard to the price of corn in a time of great scarcity, Scipio Nasica overruled the assembly merely by saying, "Silence, Romans! I know better than you what is expedient for the republic.—Which words were no sooner heard by the people, than they showed by a silence full of veneration, that they were more affected by his authority, than by the necessity of providing for their own subsistence." *Tacete, quæso, Quirites! Plus enim ego quam vos quid reipublicæ expediat intelligo.—Quâ voce auditâ, omnes, pleno venerationis silentio, majorem ejus auctoritatis quam alimentorum suorum curam egerunt.*

they dissolved them (*e*). And the tribunes, when they had succeeded so far as to effect an union among themselves, thus were obliged to submit to the pungent mortification of seeing those projects which they had pursued with infinite labour, and even through the greatest dangers, irrecoverably defeated by the most despicable artifices.

When, at other times, they saw that a confederacy 264
was carrying on with uncommon warmth against them, and despaired of succeeding by employing expedients of the above kind, or were afraid of diminishing their efficacy by a too frequent use of them, they betook themselves to other stratagems. They then conferred on the consuls, by the means of a short form of words for the occasion (*f*), an absolute power over the lives of the citizens, or even appointed a dictator. The people, at the sight of the state masquerade which was displayed before them, were sure to sink into a state of consternation: and the tribunes, however clearly they might see through the artifice, also trembled in their turn, when they thus beheld themselves left without defenders (*g*).

(*e*) *Quid enim majus est, si de jure augurum quærimus,* (says Tully, who was himself an augur, and a senator), *quam posse a summis imperiis et summis potestatibus comitiatus et concilia, vel instituta dimittere, vel habita rescindere? Quid gravius, quam rem susceptam dirimi, si unus augur* ALIUM (id est, alium diem) *dixerit?* See de Legib. lib. ii. § 12.

(*f*) Videat Consul ne quid detrimenti Respublica capiat.

(*g*) "The tribunes of the people," says Livy, who was a great admirer of the aristocratical power, "and the people themselves, durst neither lift up their eyes, nor even mutter, in the presence of the dictator." *Nec adversus dictatoriam vim, aut tribuni plebis, aut ipsa plebs, attollere oculos, aut hiscere, audebant.* See Tit. Liv. lib. vi. § 16.

At other times, they brought false accusations against the tribunes before the assembly itself; or, by privately slandering them with the people, totally deprived them of their confidence. It was through artifices of this kind, that the people were brought to behold, without
265 concern, the murder of Tiberius Gracchus, the only Roman that was really virtuous—the only one who truly loved the people. It was also in the same manner that Caius, who was not deterred by his brother's fate from pursuing the same plan of conduct, was in the end so entirely forsaken by the people, that nobody could be found among them who would even lend him a horse to fly from the fury of the nobles; and he was at last compelled to lay violent hands upon himself, while he invoked the wrath of the gods on his inconstant fellow-citizens.

At other times they raised divisions among the people. Formidable combinations broke out suddenly on the eve of important transactions; and all moderate men avoided attending assemblies, where they saw that all was to be tumult and confusion.

In fine, that nothing might be wanting to the insolence with which they treated the assemblies of the people, they sometimes falsified the declarations of the number of the votes; and once they even went so far as to carry off the urns into which the citizens were to throw their suffrages (*h*).

(*h*) With respect to all the above observations, see Plutarch's Lives, particularly the Lives of the two Gracchi. No instance is here drawn from those assemblies in which one-half of the people were made to arm themselves against the other. Allusion is only made to those times which immediately either preceded or followed

But when the people have entirely trusted their 266
power to a moderate number of persons, affairs immediately take a widely different turn. Those who govern are from that moment obliged to leave off all those stratagems which had hitherto ensured their success. Instead of those assemblies which they affected to despise, and were perpetually comparing to storms, or to the current of the *Euripus* (*i*), and in regard to 267
which they accordingly thought themselves at liberty to pass over the rules of justice, they now find that they have to deal with men who are their equals in point of education and knowledge, and their inferiors only in point of rank and form. They, in consequence, soon find it necessary to adopt quite different methods; and, above all, become very careful not to talk to them any more about the sacred chickens, the *white* or *black* days, and the Sibylline books.—As they see their new adversaries expect to have a proper regard paid to them, that single circumstance inspires them with it:—as they see them act in a regular manner, observe constant rules, in a word, proceed with *form*, they come to look upon them with respect, for the very same reason which makes themselves be reverenced by the people.

The representatives of the people, on the other hand, do not fail soon to procure for themselves every advan-

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the third Punic war, as these are commonly called the *best periods* of the republic.

(*i*) Tully makes no end of his similes on this subject. *Quod enim fretum, quem Euripum, tot motus, tantas et tam varias habere putatis agitationes fluctuum, quantas perturbationes et quantos æstus habet ratio comitiorum?* See Orat. pro Murænâ.—*Concio*, says he in another place, *quæ ex imperitissimis constat, &c.* De Amicitiâ, § 25.

tage that may enable them effectually to use the powers with which they have been intrusted, and to adopt every rule of proceeding that may make their resolutions to be truly the result of reflection and deliberation.

Thus it was that the representatives of the English
268 nation, soon after their first establishment, became formed into a separate assembly: they afterwards obtained the liberty of appointing a president:—soon after, they insisted upon their being consulted on the last form of the acts to which they had given rise:—lastly, they insisted on thenceforth framing them themselves.

269 But that circumstance which, of all others, constitutes the superior excellence of a government in which the people act only through their representatives, that is, by means of an assembly formed of a moderate number of persons, and in which it is possible for every member to propose new subjects, and to argue and to
270 canvass the questions that arise,—is, that such a constitution is the only one capable of the immense advantage (1) of putting into the hands of the people the moving springs of the legislative authority.

In a constitution where the people at large exercise the function of enacting the laws, as it is only to those persons towards whom the citizens are accustomed to turn their eyes, (that is, to the very men who govern), that the assembly have either time or inclination to listen, they acquire, at length, as has constantly been the case in all republics, the exclusive right of proposing, if they please, when they please, in what manner they please: a prerogative this, of such extent,

(1) See b. ii. chap. iv.—EDITOR.

that it would suffice to put an assembly, formed of men of the greatest parts at the mercy of a few dunces, and renders completely illusory the boasted power of the people. Nay more, as this prerogative is thus placed in the very hands of the adversaries of the people, it forces the people to remain exposed to their attacks, in a condition perpetually passive, and takes from them 271
the only legal means by which they might effectually oppose their usurpations.

To express the whole in a few words—A *representative* constitution places the remedy in the hands of those who feel the disorder: but a *popular* constitution places the remedy in the hands of those who cause it: and it is necessarily productive, in the event, of the misfortune—of the political calamity, of trusting the care and the means of repressing the invasions of power, to the men who have the enjoyment of power.

CHAPTER VII.

A farther Disadvantage of Republican Governments (1). *The People are necessarily betrayed by those in whom they trust.*

HOWEVER those general assemblies of a people who were made to determine upon things which they neither understood nor examined,—that general confusion in which the ambitious could at all times hide their artifices, and carry on their schemes with safety,—were not the only evils attending the ancient commonwealths.
272 There was a more secret defect, and a defect that struck immediately at the very vitals of it, inherent in that kind of government.

It was impossible for the people ever to have faithful defenders. Neither those whom they had expressly chosen, nor those whom some personal advantages enabled to govern the assemblies (for the only use which the people ever make of their power, is either to give it away, or allow it to be taken from them), could possibly be united to them by any common feeling of the same concerns. As their influence put them, in a great measure, upon a level with those who were invested with the executive authority, they cared little to restrain oppressions out of the reach of which they

(1) See chap. v. of this book, sect. 2.—EDITOR.

saw themselves placed. Nay, they feared they should thereby lessen a power which they knew was one day to be their own; if they had not even already an actual share in it (*a*).

Thus, at Rome, the only end which the tribunes ever 273
pursued with any degree of sincerity and perseverance, was to procure to the people, that is, to themselves, an admission to all the different dignities in the republic. After having obtained that a law should be enacted for admitting plebeians to the consulship, they procured for them the liberty of intermarrying with the patricians. They afterwards rendered them admissible to the dictatorship, to the office of military tribune, to the censorship: in a word, the only use they made of the power of the people, was to increase privileges which they called the privileges of all, though they and their friends alone were ever likely to have the enjoyment of them.

But we do not find that they ever employed the power of the people in things really beneficial to the people. We do not find that they ever set bounds to the terrible power of its magistrates,—that they ever repressed that class of citizens who knew how to make their crimes pass uncensured,—in a word, that they ever endeavoured, on the one hand to regulate, and on the other to strengthen, the judicial power; precautions

(*a*) How could it be expected that men who entertained views of being prætors would endeavour to restrain the power of the prætors, —that men who aimed at being one day consuls, would wish to limit the power of the consuls,—that men whom their influence among the people made sure of getting into the senate, would seriously endeavour to confine the authority of the senate?

these, without which men might struggle to the end of time, and never attain true liberty (*b*).

274 And indeed the judicial power, that sure *criterion* of the goodness of a government, was always, at Rome, a mere instrument of tyranny. The consuls were at all times invested with an absolute power over the lives of the citizens. The dictators possessed the same right; so did the prætors, the tribunes of the people, the judicial commissioners named by the senate, and so, of course, did the senate itself: and the fact of the three hundred and seventy deserters whom it commanded to be thrown at one time, as Livy relates, from the Tarpeian rock, sufficiently shows that it well knew how to exert its power upon occasions.

It even may be said, that, at Rome, the power of life and death, or rather the right of killing (2), was annexed to every kind of authority whatever, even to that which results from mere influence or wealth; and the only consequence of the murder of the Gracchi, which was accompanied by the slaughter of three hundred, and afterwards of four thousand unarmed citizens, whom the nobles *knocked on the head*, was to engage the senate to erect a temple to *Concord* (*c*).

(*b*) Without such precautions, laws must always be, as *Pope* expresses it,

"Still for the strong too weak, the weak too strong."

(2) See end of chap. xiv. b. i.—EDITOR.

(*c*) If we turn our eyes to Lacedæmon, we shall see, from several instances of the justice of the *ephori*, that matters were little better ordered there, in regard to the adminstration of public jussice. And, in Athens itself, the only one of the ancient commonwealths in which the people seem to have enjoyed any degree of real liberty, we find a story of a barber in the Piræus, who, having spread about the town

Nothing can more completely show to what degree 275
the tribunes had forsaken the interests of the people, whom they were appointed to defend, than the fact of their having allowed the senate to invest itself with the power of taxation; they even suffered it to assume to itself the power, not only of dispensing with the laws, but also of abrogating them (*d*).

In fine, as the necessary consequence of the *com-* 276
municability of power, a circumstance essentially inherent in the republican form of government, it is impossible for it ever to be restrained within certain rules. Those who are in a condition to control it, from that very circumstance become its defenders. Though they may have risen, as we may suppose, from the humblest stations, and such as seemed totally to preclude them from all ambitious views, they have no sooner reached a certain degree of eminence, than they begin to aim

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the news of the overthrow of the Athenians in Sicily, which he had heard from a stranger who had stopped at his shop, was put to the torture, by the command of the archons, because he could not tell the name of his author. (See Plut. Life of Nicias).

(*d*) There are frequent instances of the consuls taking away from the capitol the tables of the laws passed under their predecessors. Nor was this, as we might at first be tempted to believe, an act of violence which success alone could justify; it was a consequence of the acknowledged power enjoyed by the senate, *cujus erat gravissimum judicium de jure legum*, as we may see in several places in Tully. Nay, the augurs themselves, as this author informs us, enjoyed the same privilege. "If laws had not been laid before the people in the legal form, they (the augurs) may set them aside; as was done with respect to the *Lex Tatia*, by the decree of the college, and to the *Leges Liviæ*, by the advice of Philip, who was consul and augur." *Legem, si non jure rogata est, tollere possunt; ut Tatiam decreto collegii, ut Livias, consilio Philippi, consulis et auguris.* (See De Legib. lib. ii. § 12.

higher. Their endeavours had at first no other object, as they professed, and perhaps with sincerity, than to see the laws impartially executed: their only view now is to set themselves above them: and seeing themselves raised to the level of a class of men who possess all the
277 power and enjoy all the advantages of the state, they make haste to associate themselves with them (*e*).

Personal power and independence on the laws being, in such states, the immediate consequence of the favour of the people, they are under an unavoidable necessity of being betrayed. Corrupting, as it were, every thing they touch, they cannot shew a preference to a man, but they thereby attack his virtue; they cannot raise him, without immediately losing him and weakening
278 their own cause; nay, they inspire him with views directly opposite to their own, and send him to join and increase the number of their enemies.

Thus, at Rome, after the feeble barrier which excluded the people from offices of power and dignity had

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(*e*) Which always proves an easy thing. It is, in commonwealths, the particular care of that class of men who are at the head of the state, to keep a watchful eye over the people, in order to draw over to their own party any man who happens to acquire a considerable influence among them; and this they are (and indeed must be) the more attentive to do, in proportion as the nature of the government is more democratical.

The constitution of Rome had even made express provisions on that subject. Not only the censors could at once remove any citizen into what tribe they pleased, and even into the senate (and we may easily believe that they made a political use of this privilege); but it was moreover a settled rule, that all persons who had been promoted to any public office by the people, such as the consulship, the ædileship, or tribuneship, became, *ipso facto*, members of the senate. (See Middleton's *Dissertation on the Roman Senate*).

been thrown down, the great plebeians, whom the votes of the people began to raise to those offices, were immediately received into the senate, as has been just now observed. From that period, their families began to form, in conjunction with the ancient patrician families, a new combination, or political association of persons (*f*); and as this combination was formed of no particular class of citizens, but of all those who had influence enough to gain admittance into it, a single overgrown head was now to be seen in the republic, which, consisting of all who had either wealth or power of any kind, and disposing at will of the laws and the power of the people (*g*), soon lost all regard to moderation and decency.

Every constitution, therefore, whatever may be its 279
form, which does not provide for inconveniences of the kind here mentioned, is a constitution essentially imperfect. It is in man himself that the source of the evils to be remedied lies; general precautions therefore can only prevent them. If it be a fatal error entirely to rely on the justice and equity of those who govern, it is an error no less dangerous to imagine, that, while virtue and moderation are the constant companions of those who oppose the abuses of power, all ambition, all thirst after dominion, have retired to the other party.

Though wise men, led astray by the power of names,

(*f*) Called *nobiles* and *nobilitas*.

(*g*) It was, in several respects, a misfortune for the people of Rome, whatever may have been said to the contrary by the writers on this subject, that the distinction between the patricians and the plebeians was ever abolished; though, to say the truth, this was an event which could not be prevented.

and the heat of political contentions, may sometimes lose sight of what ought to be their real aim, they nevertheless know that it is not against the *Appii*, the *Coruncanii*, the *Cethegi*, but against all those who can influence the execution of the laws, that precautions ought to be taken;—that it is not the consul, the prætor, the archon, the minister, the king, whom we ought to dread, nor the tribune, or the representative of the people, on whom we ought implicitly to rely: but that all those persons, without distinction, ought to
280 be the objects of our jealousy, who, by any methods, and under any names whatsoever, have acquired the means of turning against each individual the collective strength of all, and have so ordered things around themselves, that whoever attempts to resist them, is sure to find himself engaged alone against a thousand.

CHAPTER VIII.

Fundamental Difference between the English Government, and the Governments just described.—In England, all Executive Authority is placed out of the Hands of those in whom the People trust.—Usefulness of the Power of the Crown.—The Power which the People themselves exercise in the Election of Members of Parliament.

In what manner then has the English Constitution contrived to find a remedy for evils which, from the very nature of men and things, seem to be irremediable? How has it found means to oblige those persons to whom the people have given up their power, to make them effectual and lasting returns of gratitude?—those who enjoy an exclusive authority, to seek the advantage of all?—those who make the laws, to make only equitable ones?—It has been by subjecting themselves to those laws, and for that purpose excluding them from all share in the execution of them.

Thus, the parliament can establish as numerous a 281
standing army as it will; but immediately another power comes forward, which takes the absolute command of it, fills all the posts in it, and directs its motions at its pleasure. The parliament may lay new taxes; but immediately another power seizes the produce of them, and alone enjoys the advantages and glory arising

from the disposal of it. The parliament may even, if you please, repeal the laws on which the safety of the subject is grounded; but it is not their own caprices and arbitrary humours, it is the caprice and passions of other men which they will have gratified, when they shall thus have overthrown the columns of public liberty.

And the English Constitution has not only excluded from any share in the execution of the laws those in whom the people trust for the enacting of them, but it has also taken from them what would have had the same pernicious influence on their deliberations—the hope of ever invading that executive authority, and transferring it to themselves.

This authority has been made in England one single, indivisible prerogative: it has been made for ever the
282 unalienable attribute of one person, marked out and ascertained before-hand by solemn laws and long-established custom (1); and all the active forces in the state have been left at his disposal.

In order to secure this prerogative still farther against all possibility of invasions from individuals, it has been heightened and strengthened by every thing that can attract and fix the attention and reverence of the people. The power of conferring and withdrawing places and employments has also been added to it; and ambition itself has thus been interested in its defence and service.

A share in the legislative power has also been given to the man to whom this prerogative has been delegated; a passive share indeed, and the only one that can, with safety to the state, be trusted to him, but by

(1) See Hallam's Mid. Ages, 83, 115.—EDITOR.

means of which he is enabled to defeat every attempt against his constitutional authority.

Lastly, he is the only self-existing and permanent power in the state. The generals, the ministers of state, are so only by the continuance of his pleasure. He would even dismiss the parliament itself, if ever he saw it begin to entertain dangerous designs; and he needs only to say one word to disperse every power in 283
the state that may threaten his authority. Formidable prerogatives these; but with regard to which we shall be inclined to lay aside our apprehensions, if on one hand we consider the great privileges of the people by which they have been counterbalanced, and, on the other, the happy consequences that result from their being thus united.

From this unity, and this total sequestration of the executive authority, this advantageous consequence in the first place results—the attention of the whole nation is directed to one and the same object. The people, besides, enjoy this most essential advantage, which they would vainly endeavour to obtain under the government of many;—they can give their confidence, without giving power over themselves, and against themselves; they can appoint trustees, and yet not give themselves masters.

Those men to whom the people have delegated the power of framing the laws, are thereby made sure to feel the whole pressure of them. They can increase the prerogatives of the executive authority, but they can- 284
not invest themselves with it:—they have it not in their power to command its motions, they only can unbind its hands.

They are made to derive their importance from (nay,

they are indebted for their existence to) the need in which that power stands of their assistance; and they know that they would no sooner have abused the trust of the people, and completed the treacherous work, than they would see themselves dissolved, spurned, like instruments now spent and become useless.

This same disposition of things also prevents in England that essential defect, inherent in the government of many, which has been described in the preceding chapter.

In that sort of government, the cause of the people, as has been observed, is continually deserted and betrayed. The arbitrary prerogatives of the governing powers are at all times either openly or secretly favoured, not only by those in whose possession they are,—not only by those who have good reason to hope that they shall at some future time share in the exercise of them,—but also by the whole crowd of those men who, in consequence of the natural disposition of mankind to
285 over-rate their own advantages, fondly imagine, either that they shall one day enjoy some branch of this governing authority, or that they are even already, in some way or other, associated to it.

But as this authority has been made, in England, the indivisible, unalienable attribute of one alone, all other persons in the state are, *ipso facto*, interested to confine it within its due bounds. Liberty is thus made the common cause of all; the laws that secure it are supported by men of every rank and order; and the *Habeas Corpus Act*, for instance, is as zealously defended by the first noblemen in the kingdom as by the meanest subject.

Even the minister himself, in consequence of this

inalienability of the executive authority, is equally interested with his fellow-citizens to maintain the laws on which public liberty is founded. He knows, in the midst of his schemes for enjoying or retaining his authority, that a court-intrigue or a caprice may at every instant confound him with the multitude, and the rancour of a successor, long kept out, send him to linger in the same prison which his temporary passions might tempt him to prepare for others.

In consequence of this disposition of things, great 286
men are made to join in a common cause with the people for restraining the excesses of the governing power; and, which is no less essential to the public welfare, they are also, from this same cause, compelled to restrain the excess of their own private power or influence; and a general spirit of justice becomes thus diffused through all parts of the state.

The wealthy commoner, the representative of the people, the potent peer, always having before their eyes the view of a formidable power, — of a power, from the attempts of which they have only the shield of the laws to protect them, and which would, in the issue, retaliate a hundred-fold upon them their acts of violence,—are compelled, both to wish only for equitable laws, and to observe them with scrupulous exactness.

Let then the people dread, (it is necessary to the preservation of their liberty), but *let them never entirely cease to love the throne, that sole and indivisible seat of all the active powers in the state.*

Let them know it is that which, by lending an immense strength to the arm of justice, has enabled her to bring to account, as well the most powerful as the

287 meanest offender,—which has suppressed, and, if I may so express myself, weeded out all those tyrannies, sometimes confederated with, and sometimes adverse to each other, which incessantly tend to grow up in the middle of civil societies, and are the more terrible in proportion as they feel themselves to be less firmly established.

Let them know it is that which, by making all honours and places depend on the will of one man, has confined within private walls those projects, the pursuit of which, in former times, shook the foundations of whole states;—has changed into intrigues the conflicts, the outrages of ambition:—and that those contentions which, in the present times, afford them only matter of amusement, are the volcanoes which set in flames the ancient commonwealths.

It is that, which, leaving to the rich no other security for his palace than that which the peasant has for his cottage, has united his cause to that of the latter;—the cause of the powerful to that of the helpless;—the cause of the man of extensive influence and connexions to that of him who is without friends.

It is the throne above all, it is this jealous power,
288 which makes the people sure that its representatives never will be any thing more than its representatives: at the same time it is the ever-subsisting Carthage, which vouches to it for the duration of their virtue.

The English constitution having essentially connected the fate of the men to whom the people trust their power with that of the people themselves, really seems, by that caution alone, to have procured the latter a complete security.

However, as the vicissitude of human affairs may, in process of time, realize events which at first had ap-

peared most improbable, it might happen that the ministers of the executive power, notwithstanding the interest they themselves have in the preservation of public liberty, and in spite of the precautions expressly taken to prevent the effect of their influence, should at length employ such efficacious means of corruption as might bring about a surrender of some of the laws upon which this public liberty is founded. And though we 289
should suppose that such a danger would really be chimerical, it might at least happen, that, conniving at a vicious administration, and being over-liberal of the produce of general labour, the representatives of the people might make them suffer many of the evils which attend worse forms of government.

Lastly, as their duty does not consist only in preserving their constituents against the calamities of an arbitrary government, but, moreover, in procuring them the best administration possible, it might happen that they would manifest in this respect an indifference, which would, in its consequences, amount to a real calamity.

It was, therefore, necessary that the constitution should furnish a remedy for all the above cases: now, it is in the right of electing members of parliament that this remedy lies.

When the time is come at which the commission given by the people to their delegates expires, they again assemble in their several towns or counties: on these occasions, they have it in their power to elect again those of their representatives whose former con- 290
duct they approve, and to reject those who have contributed to give rise to their complaints: a simple remedy this, and which only requiring, in its application, a

knowledge of matters of fact, is entirely within the reach of the abilities of the people; but a remedy, at the same time, which is the most effectual that could be applied; for, as the evils complained of arise merely from the peculiar dispositions of a certain number of individuals, to set aside those individuals is to pluck up the evil by the roots.

But, in order to make the reader sensible of the advantages that may accrue to the people of England from their right of election, there is another of their rights, of which it is absolutely necessary that an account should first be given, which is, the liberty of the press.

CHAPTER IX.

SECTION I.—*The Liberty of the Press.*

As the evils that may be complained of in a state do 291
not always arise merely from the defect of the laws, but also from the non-execution of them; and this non-execution of such a kind, that it is often impossible to subject it to any express punishment, or even to ascertain it by any previous definition; men, in several states, have been led to seek for an expedient that might supply the unavoidable deficiency of legislative provisions, and begin to operate, as it were, from the point at which the latter begin to fail: we are speaking of the censorial power,—a power which may produce excellent effects, but the exercise of which (contrary to that of the legislative power) must be left to the people themselves.

As the proposed end of legislation is not, according to what has been above observed, to have the particular intentions of individuals upon every case known and complied with, but solely to have what is most conducive to the public good, on the occasions that arise, found out and established, it is not an essential re- 292
quisite in legislative operations, that every individual should be called upon to deliver his opinion; and since this expedient, which at first sight appears so natural, of seeking out by the advice of all that which concerns

all, is found liable, when carried into practice, to the greatest inconveniences, we must not hesitate to lay it aside entirely. But, as it is the *opinion of individuals* alone which constitutes the check of a censorial power, this power cannot produce its intended effect any farther than this *public opinion* is made known and declared: the sentiments of the people are the only thing in question here: it is therefore necessary that the people should speak for themselves, and manifest those sentiments. A particular *court of censure* would essentially frustrate its intended purpose; it is attended, besides, with very great inconveniences.

As the use of such a court is to determine upon those cases which lie out of the reach of the laws, it cannot be tied down to any precise regulations. As a farther consequence of the arbitrary nature of its functions, it cannot even be subjected to any constitutional check; and it continually presents to the eye the view of a *power* entirely *arbitrary*, and which in its different
293 exertions may affect, in the most cruel manner, the peace and happiness of individuals. It is attended, besides, with this very pernicious consequence, that, by dictating to the people their judgments of men or measures, it takes from them that freedom of thinking, which is the noblest privilege, as well as the firmest support of liberty (*a*).

(*a*) M. de Montesquieu, and M. Rousseau, and indeed all the writers on this subject, bestow vast encomiums on the censorial tribunal that had been instituted at Rome:—they have not been aware that this power of censure, lodged in the hands of peculiar magistrates, with other discretionary powers annexed to it, was no other than a piece of state-craft, like those described in the preceding chapters, and had been contrived by the senate as an additional

We may, therefore, look upon it as a farther proof of the soundness of the principles on which the English 294
constitution is founded, that it has allotted to the people themselves the province of openly canvassing and arraigning the conduct of those who are invested with any branch of public authority; and that it has thus delivered into the hands of the people at large the exercise of the censorial power. Every subject in England has not only a right to present petitions to the king, or to the houses of parliament, but he has a right also to lay his complaints and observations before the public by means of an open press: a formidable right this to those who rule mankind, and which, continually dispelling the cloud of majesty by which they are surrounded, brings them to a level with the rest of the people, and strikes at the very being of their authority.

And, indeed, this privilege is that which has been obtained by the English nation with the greatest difficulty, and latest in point of time, at the expense of the executive power. Freedom was in every other respect already established, when the English were still, with regard to the public expression of their sentiments, under restraints that may be called despotic. History abounds with instances of the severity of the Court of Star-chamber against those who presumed to write on 295
political subjects. It had fixed the number of printers and printing-presses, and appointed a *licenser*, without

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means of securing its authority. Sir Thomas More has also adopted similar opinions on the subject; and he is so far from allowing the people to canvass the actions of their rulers, that, in his System of Polity, which he calls *An Account of Utopia* (the happy region, ευ and τοπος, he makes it death for individuals to talk about the conduct of government.

whose approbation no book could be published. Besides, as this tribunal decided matters by its own single authority, without the intervention of a jury, it was always ready to find those persons guilty whom the court was pleased to look upon as such: nor was it indeed without ground that Chief Justice Coke, whose notions of liberty were somewhat tainted with the prejudices of the times in which he lived, concluded the eulogiums he has bestowed on this court, with saying, that "the right institution and orders thereof being observed, it doth keep all England in quiet."

After the Court of Star-chamber had been abolished, the Long Parliament, whose conduct and assumed power were little better qualified to bear a scrutiny, revived the regulations against the freedom of the press. Charles II., and after him James II., procured farther renewals of them. These latter acts having expired in the year 1692, were, at this æra, although posterior to
296 the Revolution, continued for two years longer; so that it was not till the year 1694, that, in consequence of the parliament's refusal to prolong the prohibitions, the freedom of the press (a privilege which the executive power could not, it seems, prevail upon itself to yield up to the people) was finally established.

In what, then, does this liberty of the press precisely consist? Is it a liberty left to every one to publish any thing that comes into his head? to calumniate, to blacken, whomsoever he pleases? No; the same laws that protect the person and the property of the individual, do also protect his reputation (1). The

(1) See sec. 2 of this chapter, by the EDITOR.

liberty of the press, as established in England, consists therefore (to define it more precisely) in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must, in these cases, proceed by the trial by jury (2). This latter circumstance more particularly constitutes the freedom of the press. 297

And indeed this extreme security with which every man in England is enabled to communicate his sentiments to the public, and the general concern which matters relative to the government are always sure to create, have wonderfully multiplied all kinds of public papers: many of them make their appearance every day, and communicate to the public the several measures taken by the government, as well as the different causes of any importance, whether civil or criminal, that occur in the courts of justice, and sketches from the speeches either of the advocates, or the judges, concerned in the management and decision of them. During the time the parliament continues sitting, the votes or resolutions of the house of commons are daily published by authority; and the most interesting speeches in both houses are taken down in short-hand, and communicated to the public in print (3). 300

Lastly, the private anecdotes in the metropolis, and the country, concur also towards filling the collection; and as the several public papers circulate, or are transcribed into others, in the different country towns, and even find their way into the villages, where every

(2) *Supra*, p. 124—207.

(3) See *Rex* v. *Wright*, 8 Term Rep. 293.—EDITOR.

man, down to the labourer, peruses them with a sort of eagerness, every individual thus becomes acquainted with the state of the nation, from one end to the other; and by these means the general intercourse is such, that the three kingdoms seem as if they were one single town.

And it is this public notoriety of all things that constitutes the supplemental power, or check, which, we have above said, is so useful to remedy the unavoidable
301 insufficiency of the laws, and keep within their respective bounds all those persons who enjoy any share of public authority.

As they are thereby made sensible that all their actions are exposed to public view, they dare not venture upon those acts of partiality, those secret connivances at the iniquities of particular persons, or those vexatious practices which the man in office is but too apt to be guilty of, when, exercising his office at a distance from the public eye, and as it were in a corner, he is satisfied, that provided he be cautious, he may dispense with being just. Whatever may be the kind of abuse in which persons in power may, in such a state of things, be tempted to indulge themselves, they are convinced that their irregularities will be immediately divulged. The juryman, for example, knows that his verdict—the judge, that his direction to the jury—will presently be laid before the public: and there is no man in office but who thus finds himself compelled, in almost every instance, to choose between his duty and the surrender of all his former reputation (*b*).

(*b*) The liberty of the press is so far from being injurious to the reputation of individuals (as some persons have complained), that

Even those persons whose greatness seems most to 303
set them above the reach of public censure, are not those who least feel its effects. They have need of the suffrages of that vulgar whom they affect to despise, and who are, after all, the dispensers of that glory which is the real object of their ambitious cares. Though all have not so much sincerity as Alexander, they have equal reason to exclaim, *O people! what toils do we not undergo, in order to gain your applause!*

I confess that, in a state where the people dare not speak their sentiments, but with a view to please the ears of their rulers, it is possible that either the prince, or those to whom he has trusted his authority, may sometimes mistake the nature of the public sentiments; or that, for want of that affection of which they are denied all possible marks, they may rest contented with inspiring terror, and make themselves amends in beholding the over-awed multitude smother their complaints.

But when the laws give a full scope to the people 304
for the expression of their sentiments, those who govern cannot conceal from themselves the disagreeable truths which resound from all sides. They are obliged to put up even with ridicule; and the coarsest jests are not always those which give them the least uneasiness.

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is, on the contrary, its surest guard. When there exists no means of communication with the public, every one is exposed, without defence, to the secret shafts of malignity and envy. The man in office loses his reputation, the merchant his credit, the private individual his character, without so much as knowing either who are his enemies, or which way they carry on their attacks. But when there exists a free press, an innocent man immediately brings the matter into open day, and crushes his adversaries, at once, by a public challenge to lay before the public the grounds of their several imputations.

Like the lion in the fable, they must bear the blows of those enemies whom they despise the most; and they are, at length, stopped short in their career, and compelled to give up those unjust pursuits which, they find, draw upon them, instead of that admiration which is the proposed end and reward of their labours, nothing but mortification and disgust.

In short, whoever considers what it is that constitutes the moving principle of what we call great affairs, and the invincible sensibility of man to the opinion of his fellow-creatures, will not hesitate to affirm, that if it were possible for the liberty of the press to exist in a despotic government, and (what is not less difficult) for it to exist without changing the constitution, this liberty would alone form a counterpoise to the power of the prince.

305 Another effect, and a very considerable one, of the liberty of the press, is, that it enables the people effectually to exert those means which the constitution has bestowed on them, of influencing the motions of the government.

It has been observed in a former place, how it came to be a matter of impossibility for any large number of men, when obliged to act in a body, and upon the spot, to take any well-weighed resolution. But this inconvenience, which is the inevitable consequence of their
306 situation, does in no wise argue a personal inferiority in them, with respect to the few who, from some accidental advantages, are enabled to influence their determinations. It is not fortune, it is nature, that has made the essential differences between men; and whatever appellation a small number of persons, who speak without sufficient reflection, may affix to the general

body of their fellow-creatures, the whole difference between the statesman, and many a man from among what they call the dregs of the people, often lies in the rough outside of the latter,—a disguise which may fall off on the first opportunity: and more than once has it happened, that from the middle of a multitude, in appearance contemptible, there have been seen to rise at once, Variatuses or Sparctacuses.

Time, and a more favourable situation, are therefore the only things wanting to the people; and the freedom of the press affords the remedy to these disadvantages. Through its assistance, every individual may, at his leisure and in retirement, inform himself of every thing that relates to the questions on which he is to take a resolution. Through its assistance, a whole nation, as it were, holds a council, and deliberates,—slowly indeed (for a nation cannot be informed like an assembly of judges), but after a regular manner, and with certainty. 307
Through its assistance, all matters of fact are at length made clear; and, through the conflict of the different answers and replies, nothing at last remains but the sound part of the arguments.

Hence, though all good men may not think them- 303
selves obliged to concur implicitly in the tumultuary resolutions of a people whom their orators take pains to agitate, yet, on the other hand, when this same people, left to itself, perseveres in opinions which have for a long time been discussed in public writings, and from which (it is essential to add) all errors concerning facts have been removed, such perseverance is certainly a very respectable decision; and then it is, though only then, that we may with safety say,—"the voice of the people is the voice of God."

How therefore can the people of England *act*, when, having formed opinions which may really be called their own, they think they have just cause to complain of the administration? It is, as has been said above, by means of the right they have of electing their representatives; and the same method of general intercourse that has informed them with regard to the objects of their complaints, will likewise enable them to apply the remedy to them.

Through this medium they are acquainted with the nature of the subjects that have been deliberated upon
309 in the assembly of their representatives;—they are informed by whom the different motions were made,—by whom they were supported;—and the manner in which the suffrages are delivered, is such, that they always can know the names of those who have voted constantly for the advancement of pernicious measures.

And the people not only know the particular dispositions of every member of the House of Commons, but, from the general notoriety of affairs, have also a knowledge of the political sentiments of a great number of those whom their situation in life renders fit to fill a place in that house. And availing themselves of the several vacancies that happen, and still more of the opportunity of a general election, they purify, either successively or at once, the legislative assembly; and thus, without any commotion or danger to the state, they effect a material reformation in the views of the government.

Some persons may doubt these patriotic and systematic views, here attributed to the people of England, and may object to the disorders that sometimes happen at
310 elections. But this reproach, (which, by the way, will

come with little propriety from writers who *would have the people transact every thing in their own persons*), though true to a certain degree, is not, however, so much so as it is thought by certain persons who have taken only a superficial survey of the state of things.

Without doubt, in a constitution in which all important causes of uneasiness are so effectually prevented, it is impossible but that the people will have long intervals of inattention. Being then suddenly called from this state of inactivity to elect representatives, they have not examined beforehand the merits of those who solicit their votes; and the latter have not had, amidst the general tranquillity, any opportunity of making themselves known to them (4).

The elector, persuaded, at the same time, that the person whom he will elect will be equally interested with himself in the support of public liberty, does not enter into laborious disquisitions, and from which he sees he may exempt himself. Obliged, however, to give the preference to somebody, he forms his choice on motives which would not be excusable, if it were not that some motives are necessary to make a choice, and that, 311
at this instant, he is not influenced by any other.

But if the measures of government, and the reception of those measures in parliament, by means of a too complying house of commons, should ever be such as to spread a serious alarm among the people, the same causes which have concurred to establish public liberty would, no doubt, operate again, and likewise concur in

(4) The independence of a member of parliament is demanded by the constitution. He is a representative not only of any particular constituency, but of the whole empire.—EDITOR.

its support. A general combination would then be formed, both of those members of parliament who have remained true to the public cause, and of persons of every order among the people. Public meetings, in such circumstances, would be appointed; general subscriptions would be entered into, to support the expenses, whatever they might be, of such a necessary opposition; and all private and unworthy purposes being suppressed by the sense of the national danger, the choice of the electors would then be wholly determined by the con-
312 sideration of the public spirit of the candidates, and the tokens given by them of such spirit.

Thus were those parliaments formed, which suppressed arbitrary taxes and imprisonments. Thus was it that, under Charles the Second, the people, when recovered from that enthusiasm of affection with which they received a king so long persecuted, at last returned to him no parliaments but such as were composed of a majority of men attached to public liberty. Thus it was that, persevering in a conduct which the circumstances of the times rendered necessary, the people baffled the arts of the government: and Charles dissolved three successive parliaments, without any other effect than that of having those same men re-chosen, and set again in opposition to him, of whom he hoped he had rid himself for ever.

Nor was James the Second happier in his attempts than Charles had been. This prince soon experienced that his parliament was actuated by the same spirit as those which had opposed the designs of his late brother; and having suffered himself to be led into measures of violence, instead of being better taught by the discovery he made of the real sentiments of the people, his reign

was terminated by that catastrophe with which every 313
one is acquainted.

Indeed, if we combine the right enjoyed by the people of England of electing their representatives, with the whole of the English government, we shall become continually more and more sensible of the excellent effects that may result from that right. All men in the state are, as has been before observed, really interested in the support of public liberty. Nothing but temporary motives, and such as are quite peculiar to themselves, can induce the members of any house of commons to connive at measures destructive of this liberty. The people, therefore, under such circumstances, need only change these members, in order effectually to reform the conduct of that house; and it may fairly be pronounced beforehand, that a House of Commons composed of a new set of members, will, from this bare circumstance, be in the interest of the people.

Hence, though the complaints of the people do not always meet with the speedy and immediate redress, (a celerity which would be the symptom of a fatal unsteadiness in the constitution, and would sooner or later bring on its ruin), yet, when we attentively consider the 314
nature and the resources of this constitution, we shall not think it too bold an assertion to say, that it is impossible but that complaints in which the people persevere (that is, *well-grounded complaints*), will sooner or later be redressed.

SECTION II.—*The Liberty of the Press—concluded.*

"THE liberty of the press is a privilege that cannot be too highly prized by every Englishman, as he enjoys that which no other government in Europe tolerates. No tyrannical government could possibly long continue with a free press; hence the very existence of this privilege is a proof of the strength and stability of the executive of Great Britain, which is found to admit of that extensive freedom of writing and speaking on political and all other subjects, which Englishmen enjoy, and at the same time punishes all those who shall be *convicted* of libelling any part of the constitution. This privilege is not the effect of any statute enacting it, but arises rather from the absence of all law prohibiting it; and may, in fact, be very fitly considered as a part of the common law of the land. Blackstone (1) observes that every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid that, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."

Much, however, may be said, for and against this liberty as it is now exerted. That it has become more licentious even than in the days of that great statesman Mr. Pitt, cannot be denied. *Lord Chatham* called the press "a chartered libertine;" and in his time it was, compared with what it is,—a young libertine, which has increased with its growth, and become so great, as to be, in fact, the sovereign power.

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(1) Comm. vol. 4, p. 151.

How to control it, so that it shall not overturn, in its wild torrent, public liberty, is a question that no person has yet ventured upon.

The law is strong enough to stop this licentiousness; but dare we, at this day, exert the law, after the examples we have had of *ex-officio informations* and the issuing of *general warrants*, which were by the legislature (2), as well as by the Court of King's Bench (3), declared illegal? To establish a censorship as in other countries, would, as observed in the first section of this chapter, not only be attended with great inconveniences, but would be a direct interference with the liberty of the press; at the same time, to censure its licentiousness is to maintain that liberty. Before the statute 32 Geo. III. c. 60, even the jury had no power to declare what was, or what was not a libel; they could only give a verdict upon the mere fact of publication (4). This statute (introduced by Mr. Fox), gave them the power both on *indictments* and *informations*, where the general issue is pleaded, of giving a general verdict upon the whole matter in issue; and they are not to be required or directed by the judge to find the defendant guilty, merely on the proof of publication, and of the sense ascribed to the alleged libel on the record; but power is reserved to the judge, to give his opinion to the jury respecting the matter in issue, and the jury may find a special verdict; and the defendant, if convicted, may move the court, as before this statute, in arrest of judgment. So that now the jury, and not the judges, have to determine

(2) Comm. Jour. 22 Ap. 1766.

(3) 3 Burr. 1742. See also *Wilkes's case*, 1 Belsh. Geo. III. p. 94; and Junius's Letters.

(4) See *Woodfall's case*; also *Dean of St. Asaph's case*, 3 T. R. 428.

upon the intention of the writer (5). This statute is considered a declaratory law, overruling all the decisions which held libel or no libel a question of law (6); but it does not extend to *actions*, it is confined to criminal cases (7).

The liberty of the press is essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published; and hence the justice of punishing the publisher, or vendor, as well as the writer; because, if a person knowingly publishes, or vends, what is improper, mischievous, or illegal, he does so at his own peril, and must submit to the consequences. Thus, the will of individuals is still left free; the abuse only of that free will is the object of legal punishment.

To send an abusive private letter is as much a libel as if it were openly printed; and in all *criminal* prosecutions for libel, it is of no importance whether the matter of them be true or false, since the guilt of the libeller consists in the provoking of another to a breach of the peace. Lord Mansfield ruled upon this principle, that in all *criminal* cases, "the greater the truth, the greater the libel." Whereas, in all *civil actions*, this principle is reversed. It is no libel if the truth be proved, or the defendant justifies by his plea. So also in all *civil* actions, the alleged libel must appear to be false, as well as scandalous;

(5) The theory of the law of libel will be found explained in 1 Coleridge's Friend, 150.

(6) *Rex* v. *Withers*, 3 Term Rep. 428; *Rex* v. *Dean of St. Asaph*, n. Id.

(7) *Levi* v. *Milne*, 4 Bing. 199. From the circumstances that the act is silent as to *actions*, and the different scope and object of an indictment and an action, the one forbidding, the other admitting a justification. See also Starkie on Libel.

as, if the charge be *true*, then the complainer has received no private injury, and has consequently no ground to seek compensation, whatever the offence may be as affects the public peace. This was not formerly the doctrine held in the courts of law when it was held that the *truth* might be pleaded in *mitigation of damages*, but it is now the prevailing doctrine (8).

The publication of any matter tending to disturb the public peace, is a criminal offence, even should the matter relate to foreign governments and magistrates; because, nations at peace with each other may be provoked to actual hostilities by the conduct of a subject of one nation, who, by his publications, defames another nation, or its government or magistrates. This was determined by Lord Ellenborough, in the case of Peltier, for a libel upon Napoleon Buonaparte, in which his lordship held, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and be treated as a libel; and particularly where it has a tendency to interrupt the amity and peace between the two countries. An action was recently brought against the printers of the reports of the House of Commons, for an alleged libel, (contained in a Report of one of the Committees of the House, which the printers had published and sold under its authority,) and the Court of Queen's Bench determined, that no man is privileged to publish, and offer for general sale, matter which is libellous, notwithstanding such matter be printed for a report to the House of Com-

(8) *Edwards* v. *Bell*, 1 Bing. 403; and see 11 Price, 257, 752; and 1 Taunt. 235.

(9) The first section of this statute is repealed by 4 & 5 Will. IV, c. 71.

mons(10). To this solemn decision of THE COURT, the House of Commons on the 30th of May, 1837, resolved—

"1. That the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially of this House, as the representative portion of it.

"2. That, by the law and privilege of Parliament, this House has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges; and that the institution or prosecution of any action, suit, or other proceeding, for the purpose of bringing them into discussion or decision before any court or tribunal elsewhere than in Parliament, is a high breach of such privilege, and renders all parties concerned therein amenable to its just displeasure, and to the punishment consequent thereon."

The plaintiff in the action obtained heavy damages against the printers, and he levied an execution upon their goods for the amount. The House then ordered the Sheriffs to refund the amount forthwith to the printers, which they declined doing. The House then resolved that the Sheriffs, having been guilty of a contempt and breach of its privileges, they should be committed to the custody of the Sergeant-at-Arms, and that the Speaker should issue his warrant accordingly. The Sheriffs were thereupon imprisoned. Hence a collision (greatly to be lamented in times like the present,) has arisen between the House of Commons and the Judges of the Court of Queen's Bench.

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(10) See a Report of the judgment upon demurrer in this case in THE LEGAL GUIDE, Vol. 2, *p.* 136.

CHAPTER X.

Right of Resistance.

But all those privileges of the people, considered in 314
themselves, are but feeble defences against the real strength of those who govern. All those provisions, all those reciprocal rights, necessarily suppose that things remain in their legal and settled course: what would then be the resource of the people, if ever the prince, suddenly freeing himself from all restraint, and throwing himself, as it were, out of the constitution, should no longer respect either the person or the property of the subject, and either should make no account of his conventions with the parliament, or attempt to force it implicitly to submit to his will?—It would be resistance.

Without entering here into the discussion of a doc- 315
trine, which would lead us to inquire into the *first principles of civil government*, and consequently engage us in a long disquisition, and with regard to which, besides, persons free from prejudices agree pretty much in their opinions, it is only necessary to observe here, that the question has been decided in favour of this doctrine by the laws of England, and that resistance is looked upon by them as the ultimate and lawful resource against the violence of power.

It was resistance that gave birth to the Great Char-

ter, that lasting foundation of English liberty, and the excesses of a power established by force were also re-
316 strained by force (*a*). It has been by the same means that, at different times, the people have procured the confirmation of the same charter. Lastly, it has also been the resistance to a king who made no account of his own engagements, that has, in the issue, placed on the throne the illustrious family which is now in possession of it. This resource, which, till then, had only been an act of force opposed to other acts of force, was, at that æra, expressly recognized by the law itself. The Lords and Commons, solemnly assembled, declared, that "King James the Second, having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people, having violated the fundamental laws, and withdrawn himself, had abdicated the government; and that the throne was thereby vacant (*b*)."

And lest those principles, to which the revolution thus gave a sanction, should, in process of time, become mere *arcana* of state, exclusively appropriated, and only known to a certain class of subjects, the same act we
317 have just mentioned, expressly insured to individuals the right of publicly preferring complaints against the

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(*a*) Lord Lyttelton says extremely well, in his Persian Letters—"If the privileges of the people of England be concessions from the crown, is not the power of the crown itself a concession from the people?" It might be said with equal truth, and somewhat more in point to the subject of this chapter,—If the privileges of the people be an encroachment on the power of kings, the power itself of kings was at first an encroachment (no matter whether effected by surprise) on the *natural liberty* of the people.

(*b*) The Bill of Rights has since given a new sanction to all these principles.

abuses of government, and, moreover, of being provided with arms for their own defence. Judge Blackstone expresses himself in the following terms, in his Commentaries on the Laws of England (1):—" To vindicate those rights when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence."

Lastly, this right of opposing violence, in whatever shape, and from whatever quarter it may come, is so generally acknowledged, that the courts of law have sometimes grounded their judgments upon it.

But it is with respect to this right of an ultimate re- 319
sistance, that the advantage of a free press appears in a most conspicuous light. As the most important rights of the people, without the prospect of a resistance which overawes those who should attempt to violate them, are little more than mere shadows,—so this right of *resisting* itself is but vain, when there exists no means of effecting a general union between the different parts of the people.

Private individuals, unknown to each other, are forced to bear, in silence, injuries in which they do not see other people take a concern. Left to their own individual strength, they tremble before the formidable and ever-ready power of those who govern; and as these latter well know (and are even apt to over-rate) the advantages of their own situation, they think that they may venture upon any thing.

(1) Book 1, Chap. 1.

But when they see that all their actions are exposed to public view,—that, in consequence of the celerity
320 with which all things become communicated, the whole nation forms, as it were, one continued *irritable* body, no part of which can be touched without exciting an universal *tremor*,—they become sensible that the cause of each individual is really the cause of all, and that to attack the lowest among the people is to attack the whole people.

Here, also, we must remark the error of those, who, as they make the liberty of the people consist in their power, so make their power consist in their action.

When the people are often called to act in their own persons, it is impossible for them to acquire any exact knowledge of the state of things. The event of one day effaces the notions which they had begun to adopt on the preceding day; and, amidst the continual change of things, no settled principle, and, above all, no plans of union, have time to be established among them.—You wish to have the people love and defend their laws and liberty; leave them, therefore, the necessary time to know what laws and liberty are, and to agree in their opinion concerning them. You wish an union, a *coalition*, which cannot be obtained but by a slow and peaceable *process;* forbear, therefore, continually to shake the vessel.

321 Nay, farther, it is a contradiction, that the people should *act*, and at the same time retain any real power. Have they, for instance, been forced by the weight of public oppression to throw off the restraints of the law, from which they no longer received protection?—they presently find themselves suddenly become subject to the command of a few leaders, who are the more abso-

lute in proportion as the nature of their power is less clearly ascertained; nay, perhaps they must even submit to the toils of war, and to military discipline (2).

If it be in the common and legal course of things that the people are called to move, each individual is obliged, for the success of the measures in which he is then made to take a concern, to join himself to some party; nor can this party be without a head. The citizens thus grow divided among themselves, and contract the pernicious habit of submitting to leaders. They are, at length, no more than the clients of a certain number of patrons; and the latter, soon becoming able to command the arms of the citizens, in the same manner as they at first governed their votes, make little account of a people, with one part of which they know how to curb the other.

But when the moving springs of government are 322
placed entirely out of the body of the people, their action is thereby disengaged from all that could render it complicated, or hide it from the eye. As the people thenceforward consider things speculatively, and are, if I may be allowed the expression, only spectators of the game, they acquire just notions of things; and as these

(2) Mr. Justice Blackstone, in his commentaries upon the conduct of *the people*, in their resistance to Charles I., observes:—"Flushed, therefore, with the success they had gained, fired with resentment for past oppressions, and dreading the consequences, if the king should regain his power, the *popular leaders* (*who in all ages have called themselves* THE PEOPLE) began to grow insolent and ungovernable, their insolence soon rendered them desperate, and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign." See also Chapter v. of this book.—EDITOR.

notions, amidst the general quiet, gain ground, and spread themselves far and wide, they at length entertain, on the subject of their liberty, but one opinion.

Forming thus, as it were, one body, the people, at every instant, have it in their power to strike the decisive blow, which is to level every thing. Like those mechanical powers, the greatest efficiency of which exists at the instant which precedes their entering into action, it has an immense force, just because it does not yet exert any; and in this state of stillness, but of attention, consists its true *momentum*.

With regard to those who (whether from personal privileges, or by virtue of a commission from the people) are intrusted with the active part of government, as they,
323 in the meanwhile, see themselves exposed to public view, and observed as from a distance by men free from the spirit of party, and who place in them but a conditional trust, they are afraid of exciting a commotion, which, though it might not prove the destruction of all power, yet would surely and immediately be the destruction of their own. And if we might suppose that, through an extraordinary conjunction of circumstances, they should resolve among themselves upon the sacrifice of those laws on which public liberty is founded, they would no sooner lift up their eyes towards that extensive assembly, which views them with a watchful attention, than they would find their public virtue return upon them, and would make haste to resume that plan of conduct, out of the limits of which they can expect nothing but ruin and perdition.

In short, as the body of the people cannot act without either subjecting themselves to some power, or effecting a general destruction, the only share they can have in a

government, with advantage to themselves, is not to interfere, but to influence — to be able to act, and not to act.

The power of the people is not when they strike, but when they keep in awe: it is when they can overthrow 324
every thing, that they never need to move; and Manlius included all in four words, when he said to the people of Rome—*Ostendite bellum, pacem habebitis.*

CHAPTER XI.

SECTION I.

Proofs drawn from Facts, of the Truth of the Principles laid down in the present Work.—First, the peculiar Manner in which Revolutions have always been concluded in England.

IT may not be sufficient to have proved by arguments the advantages of the English constitution; it will perhaps be asked, whether the effects correspond to the theory? To this very proper question an answer is ready: it is the same which was once made, by a Lacedæmonian—*Come and see.*

If we peruse the English history, we shall be particularly struck with one circumstance to be observed in it, and which distinguishes most advantageously the English government from all other free governments; that
325 is, the manner in which revolutions and public commotions have always been terminated in England.

If we read with some attention the history of other free states, we shall see that the public dissensions that have taken place in them have constantly been terminated by settlements in which the interests only of a *few* were really provided for, while the grievances of the *many* were hardly, if at all, attended to. In England

the very reverse has happened; and we find revolutions always to have been terminated by extensive and accurate provisions for securing the general liberty.

The histories of the ancient Grecian commonwealths, and, above all, of the Roman republic, of which more complete accounts have been left us, afford striking proof of the former part of this observation.

What was, for instance, the consequence of that great revolution by which the kings were driven from Rome, and in which the senate and patricians acted as the advisers and leaders of the people? The consequence was, as we find in Dionysius of Halicarnassus, and Livy, that the senators immediately assumed all those powers lately so much complained of by themselves, which the kings had exercised. The execution of their future 326
decrees were entrusted to two magistrates, taken from their own body, and entirely dependent on them, whom they called *consuls*, and who were made to bear about them all the ensigns of power which had formerly attended the kings. Only care was taken that the axes and *fasces*, the symbols of the power of life and death over the citizens, which the senate now claimed to itself, should not be carried before both consuls at once, but only before one at a time, for fear, says Livy, of doubling the terror of the people (*a*).

Nor was this all: the senators drew over to their party those men who had the most interest at that time among the people, and admitted them as members into

(*a*) "Omnia jura (*regum*), omnia insignia, primi consules tenuere; id modò cautum est, ne, si ambo fasces haberent, duplicatus terror videretur."—*Tit. Liv.* lib. ii. § 1.

their own body (*b*); which indeed was a precaution they could not prudently avoid taking. But the interests of the great men in the republic being thus provided for, the revolution ended. The new senators, as well as the old, took care not to lessen, by making provisions for
327 the liberty of the people, a power which was now become their own. Nay, they presently stretched this power beyond its former tone; and the punishments which the consul inflicted, in a military manner, on a number of those who still adhered to the former mode of government, and even upon his own children, taught the people what they had to expect for the future, if they presumed to oppose the power of those whom they had thus unwarily made their masters.

Among the oppressive laws or usages which the senate, after the expulsion of the kings, had permitted to continue, what were most complained of by the people, were those by which such citizens as could not pay their debts, with the interest (which at Rome was enormous), at the appointed time, became slaves to their creditors, and were delivered over to them, bound with cords; hence the word *nexi*, by which slaves of that kind were denominated (1). The cruelties exercised by creditors on those unfortunate men, whom the private calamities, caused by the frequent wars in which Rome was engaged, rendered very numerous, at last roused the body of the

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(*b*) These new senators were called *conscripti;* hence the name of *patres conscripti*, afterwards indiscriminately given to the whole senate.—*Tit. Liv.* lib. ii. § 1.

(1) The civil law empowered debtors when ill used by their creditors to sell themselves.—EDITOR.

people: they abandoned both the city and their inhuman fellow-citizens, and retreated to the other side of the river *Aniv.*

But this second revolution, like the former, only 328
procured the advancement of particular persons. A new office was created, called the tribuneship. Those whom the people had placed at their head when they left the city, were raised to it. Their duty, it was agreed, was, for the future, to protect the citizens: and they were invested with a certain number of prerogatives for that purpose. This institution, it must however be confessed, would have, in the issue, proved very beneficial to the people, at least for a long course of time, if certain precautions had been taken with respect to it, which would have much lessened the future personal importance of the new tribunes (*c*); but these precautions the latter did not think proper to suggest; and in regard to those abuses themselves, which had at first given rise to the complaints of the people, no father mention was made of them (2).

As the senate and patricians, in the early ages of the commonwealth, kept themselves closely united, the tribunes, for all their personal privileges, were not able, 329
during the first times after their creation, to gain an

(*c*) Their number, which was only ten, ought to have been much greater; and they never ought to have accepted the power left to each of them, of stopping, by his single opposition, the proceedings of all the rest.

(2) Cicero held, that the establishing of the tribunes preserved the republic; and observes, "A chief or head is sensible that the affair depends upon himself, and therefore, *he* thinks; but the people in their impetuosity, are ignorant of the danger into which they hurry themselves."—*Cic. de. Leg.* Lib. 3.—EDITOR.

admittance either to the consulship, or into the senate, and thereby to separate their condition any farther from that of the people. This situation of theirs, in which it was to be wished they might always have been kept, produced at first excellent effects, and caused their conduct to answer, in a great measure, the expectation of the people. The tribunes complained loudly of the exorbitancy of the powers possessed by the senate and consuls; and here we must observe that the power exercised by the latter over the lives of the citizens, had never been yet subjected (which will probably surprise the reader) to any known laws, though sixty years had already elapsed since the expulsion of the kings. The tribunes therefore insisted that laws should be made in that respect, which the consuls should thenceforward be bound to follow, and that they should no longer be left, in the exercise of their power over the lives of the citizens, to their own caprice and wantonness (*d*).

330 Equitable as these demands were, the senate and patricians opposed them with great warmth; and, either by naming dictators, or calling in the assistance of the priests, or other means, they defeated, for nine years together, all the endeavours of the tribunes. However, as the latter were at that time in earnest, the senate was at length obliged to comply: and the *Lex Terentilla* was passed, by which it was enacted, that a general code of laws should be made.

(*d*) "Quod populus in se jus dederit, eo consulem usurum; non ipsos libidinem ac licentiam suam pro lege habituros."—*Tit. Liv.* lib. iii. § 9.

These beginnings seemed to promise great success to the cause of the people. But, unfortunately for them, the senate found means to have it agreed, that the office of tribune should be set aside during the whole time that the code should be framing. They, moreover, obtained that the ten men, called decemvirs, to whom the charge of composing this code was to be given, should be taken from the body of the patricians. The same causes, therefore, produced again the same effects; and the power of the senate and consul was left in the new code, or laws of the Twelve Tables, as undefined as before. As to the laws above mentioned, concerning debtors, which never had ceased to be bitterly complained of by the people, and in regard to which some satisfaction ought, in common justice, to 331
have been given them, they were confirmed, and a new terror added to them from the manner in which they were expressed.

The true motive of the senate, when they thus trusted the framing of the new laws to a new kind of magistrates, called decemvirs, was, that, by suspending the ancient office of consul, they might have a fair pretence for suspending also the office of tribune, and thereby rid themselves of the people, during the time that the important business of framing the code should be carrying on: they even, in order the better to secure that point, placed the whole power of the republic in the hands of those new magistrates. But the senate and patricians experienced then, in their turn, the danger of intrusting men with an uncontrolled authority. As they themselves had formerly betrayed the trust which the people had placed in them, so did the decemvirs, on this occasion, likewise deceive them.

They retained by their own private authority the unlimited power that had been conferred on them, and at last exercised it on the patricians as well as the plebeians. Both parties therefore united against them, and the decemvirs were expelled from the city.

332 The former dignities of the republic were restored, and with them the office of tribune. Those from among the people who had been most instrumental in destroying the power of the decemvirs, were, as it was natural, raised to the tribuneship; and they entered upon their offices with a prodigious degree of popularity. The senate and the patricians were, at the same time, sunk extremely low in consequence of the long tyranny which had just expired; and those two circumstances united, afforded the tribunes but too easy an opportunity of making the present revolution end as the former ones had done, and converting it to the advancement of their own power. They got new personal privileges to be added to those which they already possessed; and moreover procured a law to be enacted, by which it was ordained, that the resolutions taken by the *comitia tributa* (an assembly in which the tribunes were admitted to propose new laws) should be binding upon the whole commonwealth; — by which they at once raised to themselves an *imperium in imperio*, and acquired, as Livy expresses it, a most active weapon (*e*).

333 From that time great commotions arose in the republic, which, like all those before them, ended in promoting the power of a *few*. Proposals for easing the people of their debts, for dividing with some

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(*e*) Acerrimum telum.

equality amongst the citizens, the lands which were taken from the enemy, and for lowering the rate of the interest of money, were frequently made by the tribunes. And indeed all these were excellent regulations to propose; but unfortunately for the people, the proposals of them were only pretences used by the tribunes for promoting schemes of a fatal, though somewhat remote, tendency to public liberty. Their real aims were at the consulship, the prætorship, the priesthood, and other offices of executive power, which they were intended to control, and not to share. To these views they constantly made the cause of the people subservient. Witness, among other instances, the manner in which they procured to themselves an admittance to the office of consul.

Having, during several years, seized every opportunity of making speeches to the people on that subject, and even excited seditions in order to overcome the opposition of the senate, they at last availed themselves of the circumstance of an *interregnum* (a time, 334
during which there happened to be no other magistrates in the republic beside themselves), and proposed to the tribes, whom they had assembled, to enact the three following laws:—the first, for settling the rate of interest of money; the second, for ordaining that no citizen should be possessed of more than five hundred acres of land; and the third for providing that one of the two consuls should be taken from the body of the plebeians. But on this occasion it evidently appeared, says Livy, which of the laws in agitation were most agreeable to the people, and which to those who proposed them; for the tribes accepted the laws concerning the interest of money, and the lands; but

as to that concerning the plebeian consulship, they rejected it; and both the former articles would from that moment have been settled, if the tribunes had not declared, that the tribes were called upon, either to accept, or reject, all their three proposals at once (*f*).
335 Great commotions ensued thereupon, for a whole year; but at last the tribunes, by their perseverance in insisting that the tribes should vote on their three *rogations* jointly, obtained their ends, and overcame both the opposition of the senate, and the reluctance of the people.

In the same manner did the tribunes get themselves made capable of filling all other places of executive power, and public trust, in the republic. But when all their views of that kind were accomplished, the republic did not for all this enjoy more quiet, nor was the interest of the people better attended to, than before. New struggles then arose for actual admission to those places,—for procuring them to relatives or friends,—for governments of provinces, and commands of armies. A few tribunes, indeed, did at times apply themselves seriously, out of real virtue and love of their duty, to remedy the grievances of the people; but their fellow tribunes, as we may see in history, and the whole body of those men upon whom the people had, at different times, bestowed consulships, ædileships, censorships, and other dignities without number,

(*f*) "Ab tribunis, velut per interregnum, concilio plebis habito, apparuit quæ ex promulgatis plebi, quæ latoribus, gratiora essent; nam de fœnore atque agro rogationes jubebant, de plebeio consulatu antiquabant (*antiquis stabant*); et perfecta utraque res esset, ni tribuni se in omnia simul consulere plebem dixissent."—*Tit. Liv.* lib. vi. § 39.

united together with the utmost vehemence against 336
them; and the real patriots, such as Tiberius Gracchus, Caius Gracchus, and Fulvius, constantly perished in the attempt.

I have been somewhat explicit on the effects produced by the different revolutions that happened in the Roman republic, because its history is much known to us, and we have either in Dionysius of Halicarnassus, or in Livy, considerable monuments of the more ancient part of it. But the history of the Grecian commonwealths would also have supplied us with a number of facts to the same purpose. That revolution, for nstance, by which the *Pisistratidæ* were driven out of Athens,—that by which the *Four Hundred*, and afterwards the *Thirty*, were established,—as well as that by which the latter were in their turn expelled,—all ended in securing the power of a *few*. The republic of Syracuse, that of Corcyra, of which Thucydides has left us a pretty full account, and that of Florence, of which Machiavel has written the history, also present to us a series of public commotions ended by treaties, in which, as in the Roman republic, the grievances of the people, though ever so loudly complained of in the beginning, by those who acted as their defenders, were, in the issue, most carelessly attended to, or even totally disregarded.

But, if we turn our eyes towards the English history, 337
scenes of a quite different kind will offer to our view; and we shall find, on the contrary, that revolutions in England have always been terminated by making such provisions, and only such, as all orders of the people were really and indiscriminately to enjoy.

Most extraordinary facts, these! and which, from all the other circumstances that accompanied them, we see, all along, to have been owing to the impossibility (a point that has been so much insisted upon in former chapters) in which those who possessed the confidence of the people, were, of transferring to themselves any branch of the executive authority, and thus separating their own condition from that of the rest of the people.

338 Without mentioning the compacts which were made with the first kings of the Norman line, let us only cast our eyes on *Magna Charta*, which is still the foundation of English liberty. A number of circumstances, which have been described in the former part of this work, concurred at that time to strengthen the regal power to such a degree that no men in the state could entertain a hope of succeeding in any other design than that of setting bounds to it. How great was the union which thence arose among all orders of the people!—what extent, what caution, do we see in the provisions made by the Great Charter! All the objects for which men naturally wish to live in a state of society, were settled in its various articles. It confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though *now, unless considered attentively,* and with this retrospect, they *seem* but of trifling concern. But besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses, or other process for debts or services due to the crown, and from the tyrannical abuse of the

prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony; prohibited the grants of exclusive fisheries, and the erection of new bridges, so as to oppress the neighbourhood. With respect to *private rights*, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, and prohibited the appeals of women, unless for the death of their husbands. In matters of *public police* and *national concern*, it enjoined an uniformity of weights and measures; gave new encouragements to commerce by the protection of merchant strangers; and forbade the alienation of lands in *mortmain*. With regard to the *administration* of *justice*, besides prohibiting all denials or delays of it, it fixed the court of *Common Pleas* at Westminster, that the suitors might no longer be harassed with following the king's person in all its progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and established annual circuits; it also corrected some abuses then incident to the trials by wager, of law, and of battle; directed the regular awarding of inquest for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the Exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, *lastly*, (which alone would have merited the title that

it bears, of *the Great Charter*,) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land (3).

339 Under Henry the Third great disturbances arose; and they were all terminated by solemn confirmations given to the Great Charter. Under Edward I., Edward II., Edward III., and Richard II., those who were intrusted with the care of the interests of the people, lost no opportunity that offered, of strengthening still farther that foundation of public liberty,—of taking all such precautions as might render the Great Charter still more effectual in the event. They had not ceased to be convinced that their cause was the same with that of all the rest of the people.

Henry of Lancaster having laid claim to the crown, the Commons received the law from the victorious party (4). They settled the crown upon Henry, by the name of Henry the Fourth; and added, to the act of settlement, provisions which the reader may see in the

340 second volume of the *Parliamentary History* of England. Struck with the wisdom of the conditions demanded by the Commons, the authors of the book just mentioned observe (perhaps with some simplicity) that the Commons of England *were no fools at that time*. They ought

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(3) B. 1, Cap. 2, p. 28.

(4) It was this king that first established the right of parliament to regulate the succession to the throne, which was an act of necessity in him, as he had come to it by a doubtful title, and therefore he appealed to the parliament, and a statute was ordained in the 7th year of his reign, limiting the crown to him by the name of Henry the Fourth, and the heirs of his body.—EDITOR.

rather to have said—The commons of England were happy enough to form among themselves an assembly in which every one could propose what matters he pleased, and freely discuss them;—they had no possibility left of converting either these advantages, or in general the confidence which the people had placed in them, to any private views of their own: they, therefore, without loss of time, endeavoured to stipulate useful conditions with that power by which they saw themselves at every instant exposed to be dissolved and dispersed, and applied their industry to insure the safety of the whole people, as it was the only means they had of procuring their own.

In the long contentions which took place between the houses of York and Lancaster, the commons remained spectators of disorders which in those times it was not in their power to prevent; they successively acknowledged the title of the victorious parties; but whether under 341
Edward the Fourth, under Richard the Third, or Henry the Seventh, by whom those quarrels were terminated, they continually availed themselves of the importance of the services which they were able to perform to the new-established sovereign, for obtaining effectual conditions in favour of the whole body of the people.

At the accession of James the First, which, as it placed a new family on the throne of England, may be considered as a kind of revolution, no demands were made by the men who were at the head of the nation, but in favour of general liberty.

After the accession of Charles the First, discontents of a very serious nature began to take place; and they were terminated, in the first instance, by the act called the *Petition of Right*, which is still looked upon as a

most precise and accurate delineation of the rights of the people (*g*).

342 At the restoration of Charles the Second, the constitution being re-established upon its former principles, the former consequences produced by it began again to take place; and we see at that æra, and indeed during the whole course of that reign, a continued series of precautions taken for securing the general liberty.

Lastly, the great event which took place in the year 1689, affords a striking confirmation of the truth of the observation made in this chapter. At this æra the political wonder again appeared—of a revolution terminated by a series of public acts, in which no interests but those of the people at large were considered and provided for:—no clause, even the most indirect, was inserted, either to gratify the present ambition, or favour the future views, of those who were personally concerned in bringing those acts to a conclusion. Indeed, if any thing is capable of conveying to us an adequate idea of the soundness, as well as peculiarity, of the principles
343 on which the English government is founded, it is the attentive perusal of the system of public compacts to which the revolution of the year 1689 gave rise,—of the

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(*g*) The disorders which took place in the latter part of the reign of that prince seem indeed to contain a complete contradiction to the assertion which is the subject of the present chapter; but they, at the same time, are a no less convincing confirmation of the truth of the principles laid down in the course of this whole work. The above-mentioned disorders took rise from that day in which Charles the First gave up the power of dissolving his parliament—that is, from the day in which the *members* of that assembly acquired *an independent, personal, permanent authority*, which they soon began to turn against the people who had raised them to it.

Bill of Rights with all its different clauses, and of the several acts, which, till the accession of the house of Hanover, were made in order to strengthen it.

Section II.

Secondly—*The Manner after which the Laws for the Liberty of the Subject are executed in England.*

The second difference between the English government and that of other free states, concerns the important object of the execution of the laws. On this article, also, we shall find the advantage to lie on the side of the English government; and, if we make a comparison between the history of those states and that of England, it will lead us to the following observation, viz. that though in other free states the laws 344
concerning the liberty of the citizens were imperfect, yet the execution of them was still more defective. In England, on the contrary, not only the laws for the security of the subject are very extensive in their provisions, but the manner in which they are executed carries these advantages still farther; and English subjects enjoy no less liberty from the spirit both of justice and mildness by which all branches of the government are influenced, than from the accuracy of the laws themselves.

The Roman commonwealth will here again supply us with examples to prove the former part of the above assertion. By what is said, in the foregoing chapter, that,

in times of public commotion, no provisions were made for the body of the people, it is meant, no provisions which were likely to prove effectual in the event. When the people were aroused to a certain degree, or when their concurrence was necessary to carry into effect certain resolutions or measures, that were particularly interesting to the men in power, the latter could not, with any
345 prudence, openly profess a contempt for the political wishes of the people; and some declarations, expressed in general words, in favour of public liberty, were indeed added to the laws that were enacted on those occasions. But these declarations, and the principles which they tended to establish, were afterwards even openly disregarded in practice.

Thus, when the people were made to vote, about a year after the expulsion of the kings, that the regal government never should be again established in Rome, and that those who should endeavour to restore it should be devoted to the gods, an article was added, which, in general terms, confirmed to the citizens the right they had before enjoyed under the king, of appealing to the people from the sentences of death passed upon them. No punishment (which will surprise the reader) was decreed against those who should violate this law; and indeed the consuls, as we may see in Dionysius of Halicarnassus and Livy, concerned themselves but little about the appeals of the citizens; and, in the more than military exercise of their functions, continued to sport with rights which they ought to have respected, however imperfectly and loosely they had been secured.

346 An article, to the same purport with the above, was afterwards also added to the laws of the Twelve

Tables (1); but the decemvirs, to whom the execution of those laws was at first committed, behaved exactly in the same manner, and even worse than the consuls had done before them: and after they were expelled (*a*), the magistrates who succeeded them appear to have been as little tender of the lives of the citizens. Out of many instances, the following may be selected, to show upon what slight grounds the citizens were exposed to have their lives taken away:—Spurius Mælius being accused of endeavouring to make himself king, was summoned by the master of the horse to appear before the dictator, in order to clear himself of this somewhat extraordinary imputation. Spurius took refuge among the people; the master of the horse pursued him, and killed him on the spot. The multitude having there- 347
upon expressed a great indignation, the dictator had them called to his tribunal, and declared that Spurius had been lawfully put to death, even though he might be innocent of the crime laid to his charge, for having refused to appear before the dictator, when desired to do so by the master of the horse (*b*).

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(1) These Tables were in great part brought from Greece; and it was an opinion commonly received in Rome, that the cruelties practised by the magistrates on the citizens were only imitations of the examples which the Greeks had given them.—EDITOR.

(*a*) At the time of the expulsion of the decemvirs, a law was also enacted that no magistrate should be created from whom no appeal could be made to the people (*magistratus sine provocatione.—Tit. Liv.* lib. iii. § 55); by which the people expressly meant to abolish the dictatorship; but, from the fact that will just now be related, and which happened about ten years afterwards, we shall see that this law was not better observed than the former ones had been.

(*b*) Tumultuantem deinde multitudinem, incertâ existimatione facti, ad concionem vocari jussit, et *Mælium jure cæsum* pronunciavit,

About one hundred and forty years after the times we mention, the law concerning the appeal to the people was enacted for the third time. But we do not see that it was better observed in the sequel than it had been before: we find it frequently violated, after that period, by the different magistrates of the republic; and the senate itself, notwithstanding this same law, at times made formidable examples of the citizens. Of this we have an instance in the three hundred soldiers who had pillaged the town of Rhegium. The senate, of its own authority, ordered them all to be put to death. In vain did the tribune Flaccus remonstrate
348 against so severe an exertion of public justice on Roman citizens; the senate, says Valerius Maximus, nevertheless persisted in its resolution (*c*).

All these laws for securing the lives of the citizens had hitherto been enacted without any mention of a punishment against those who should violate them. At last the celebrated *Lex Porcia* was passed, which subjected to banishment those who should cause a Roman citizen to be scourged and put to death. From a number of instances posterior to this law, it appears that it was not better observed than those before it had been; Caius Gracchus, therefore, caused the *Lex Sem-*

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etiamsi regni crimine insons fuerit, qui vocatus a magistro equitum, ad dictatorem non venisset.—Tit. Liv. lib. iv. § 15.

(*c*) Val. Max. book ii. ch. 7. This author does not mention the precise number of those who were put to death on this occasion; he only says that they were executed fifty at a time, on different successive days; but other authors make the number of them amount to four thousand. Livy speaks of a whole legion—*Legio Campana, quæ Rhegium occupaverat, obsessa, deditione factâ, securi percussa est.—Tit. Liv.* lib. xv. *Epit.—Polybius* says that only three hundred were taken and brought to Rome.

pronia to be enacted, by which a new sanction was given to it. But this second law did not secure his own life, and that of his friends, better than the *Lex Porcia* had done that of his brother, and those who had supported him; indeed all the events which took 349
place about those times rendered it manifest that the evil was such as was beyond the power of any laws to cure. I shall here mention a fact which affords a remarkable instance of the wantonness with which the Roman magistrates had accustomed themselves to take away the lives of the citizens. A citizen, named Memmius, having put up for the consulship, and publicly canvassing for the same, in opposition to a man whom the tribune Saturninus supported, the latter caused him to be apprehended, and made him expire under blows in the public forum. The tribune even carried his insolence so far (as Cicero informs us) as to give to this act of cruelty, transacted in the presence of the whole people assembled, the outward form of a lawful act of public justice (*d*).

Nor were the Roman magistrates satisfied with com- 350
mitting acts of injustice in their political capacity, and

(*d*) The fatal forms of words (*cruciatus carmina*) used by the Roman magistrates when they ordered a man to be put to death, resounded (says Tully, in his speech for *Rabirius*) in the assembly of the people, in which the censors had forbidden the common executioner even to appear, *I, lictor, colliga manus. Caput obnubito, Arbori infelici suspendito.*—Memmius being a considerable citizen, as we may conclude from his canvassing with success for the consulship, all the great men in the republic took the alarm at the atrocious action of the tribune: the senate, the next day, issued out its solemn mandate, or form of words, to the consuls, *to provide that the republic should receive no detriment;* and the tribune was killed in a pitched battle that was fought at the foot of the Capitol.

for the support of the power of that body of which they made a part. Avarice and private rapine were at last added to political ambition. The provinces were first oppressed and plundered. The calamity, in process of time, reached Italy itself, and the centre of the republic; till at last the *Lex Calpurnia de repetundis* was enacted to put a stop to it. By this law an action was given to the citizens and allies for the recovery of the money extorted from them by magistrates, or men in power: and the *Lex Junia* afterwards added the penalty of banishment to the obligation of making restitution.

But here another kind of disorder arose. The judges proved as corrupt as the magistrates had been oppressive. They equally betrayed, in their own province, the cause of the republic with which they had been entrusted; and rather chose to share in the plunder of
351 the consuls, the prætors, and the proconsuls, than put the laws in force against them.

New expedients were therefore resorted to, in order to remedy this new evil. Laws were made for judging and punishing the judges themselves; and, above all, continual changes were made in the manner of composing their assemblies. But the malady lay too deep for common legal provisions to remedy. The guilty judges employed the same resources, in order to avoid conviction, as the guilty magistrates had done; and those continual changes, at which we are amazed, that were made in the constitution of the judiciary bodies (*e*),

(*e*) The judges (over the assembly of whom the prætor usually presided) were taken from the body of the senate, till some years

instead of obviating the corruption of the judges, 352
only transferred to other men the profit arising from becoming guilty of it. It became a general complaint, so early as the times of the Gracchi, that no man, who had money to give, could be brought to punishment (*f*). Cicero says, that, in his time, the same opinion was universally received (*g*); and his speeches are full of his lamentations on what he calls the *levity*, and the *infamy*, of the public judgments.

Nor was the impunity of corrupt judges the only evil under which the republic laboured. Commotions of the whole empire at last took place. The horrid vexations, and afterwards, the acquittal, of Aquilius, proconsul of Syria, and of some others who had been guilty of the same crimes, drove the provinces of Asia to desperation: and then it was that the terrible war of Mithridates arose, which was ushered in by the death 353

after the last Punic war; when the *Lex Sempronia*, proposed by Caius S. Gracchus, enacted that they should in future be taken from the equestrian order. The consul Cæpio procured afterwards a law to be enacted, by which the judges were to be taken from both orders, equally. The *Lex Servilia* soon after put the equestrian order again in possession of the *judgments;* and, after some years, the *Lex Livia* restored them entirely to the senate. The *Lex Plautia* enacted afterwards, that the judges should be taken from the three orders, senatorian, equestrian, and plebeian. The *Lex Cornelia*, framed by the dictator Sylla, enacted again, that the judges should be entirely taken from the body of the senate. The *Lex Aurelia* ordered anew, that they should be taken from the three orders. Pompey made afterwards a change in their number (which he fixed at seventy-five,) and in the manner of electing them. And lastly, Cæsar restored the judgments to the order of the senate.

(*f*) App. de Bell. Civ.

(*g*) Act. in Verr. i. § 1.

of eighty thousand Romans, massacred in one day, in various cities of Asia (*h*).

The laws and public judgments not only thus failed of the end for which they had been established: they even became, at length, new means of oppression added to those which already existed. Citizens possessed of wealth, persons obnoxious to particular bodies, or the few magistrates who attempted to stem the torrent of the general corruption, were accused and condemned; while Piso, of whom Cicero, in his speech against him, relates facts which make the reader shudder with horror, and Verres, who had been guilty of enormities of the same kind, escaped unpunished.

Hence a war arose, still more formidable than the former, and the dangers of which we wonder that Rome was able to surmount. The greatest part of the Italians revolted at once, exasperated by the tyranny of the public judgments; and we find in Cicero, who informs us of the cause of this revolt, which was called the *Social War*, a very expressive account both of the
354 unfortunate condition of the republic, and of the perversion that had been made of the methods taken to remedy it. "A hundred and ten years have not yet elapsed (he says) since the law for the recovery of money extorted by magistrates was first propounded by the tribune Calpurnius Piso. A number of other laws to the same effect, continually more and more severe, have followed: but so many persons have been accused, so many condemned, so formidable a war has been excited in Italy by the terror of the public judgments, and, when the laws and judgments have been suspended, such an oppression and plunder of our allies

(*h*) Appian.

have prevailed, that we may truly say, it is not by our own strength, but by the weakness of others, that we continue to exist (*i*)."

I have entered into these particulars with regard to the Roman commonwealth, because the facts on which they are grounded are remarkable of themselves, and yet no just conclusion can be drawn from them, unless a series of them were presented to the reader. Nor are we to account for these facts by the luxury which prevailed in the latter ages of the republic, by the corruption of the manners of the citizens, their degeneracy 355
from their ancient principles, and such loose general phrases, which may perhaps be useful to express the manner itself in which the evil became manifested, but by no means set forth the causes of it.

The above disorders arose from the very nature of the government of the republic,—of a government in which the executive and supreme power being made to centre in the body of those in whom the people had once placed their confidence, there remained no other effectual power in the state that might render it necessary for them to keep within the bounds of justice and decency. And in the mean time, as the people, who were intended as a check over that body, continually gave a share in this executive authority to those whom they intrusted with the care of their interests, they increased the evils they complained of, as it were, at every attempt they made to remedy them; and instead of raising up opponents to those who were become the enemies of their liberty, as it was their intention to do, they continually supplied them with new associates.

(*i*) See Cic. de Off. lib. ii. § 75.

356 From this situation of affairs, flowed, as an unavoidable consequence, that continual desertion of the cause of the people, which, even in times of revolutions, when the passions of the people themselves were roused, and they were in a great degree united, manifested itself in so remarkable a manner. We may trace the symptoms of the great political defect here mentioned, in the earliest ages of the commonwealth, as well as in the last stage of its duration. In Rome, while small and poor, it rendered vain whatever rights or power the people possessed, and blasted all their endeavours to defend their liberty, in the same manner, as, in the more splendid ages of the commonwealth, it rendered the most salutary regulations utterly fruitless, and even instrumental to the ambition and avarice of a few. The prodigious fortune of the republic, in short, did not create the disorder; it only gave full scope to it.

But if we turn our view towards the history of the *English* nation, we shall see how, from a government in which the above defects did not exist, different consequences have followed;—how cordially all ranks of men have always united together, to lay under proper re-
357 straints this executive power, which they knew could never be their own. In times of public revolutions, the greatest care, as we have before observed, was taken to ascertain the limits of that power; and after peace had been restored to the state, those who remained at the head of the nation continued to manifest an unwearied jealousy in maintaining those advantages which the united efforts of all had obtained.

Thus it was made one of the articles of Magna Charta, that the executive power should not touch the person of the subject, but in consequence of a judgment passed

upon him by his peers; and so great was afterwards the general union in maintaining this law, that the *trial by jury*,—that admirable mode of proceeding, which so effectually secures the subject against all the attempts of power, even (which seemed so difficult to obtain) against such as might be made under the sanction of the judicial authority—hath been preserved to this day. It has even been preserved in all its original purity. Nay, though 358
this privilege of being tried by one's peers was at first a privilege of conquerors and masters, exclusively appropriated to those parts of nations which had originally invaded and reduced the rest by arms, it has in England been successively extended to every order of the people.

And not only the person, but also the property of the individual, has been secured against all arbitrary attempts from the executive power; and the latter has been successively restrained from touching any part of 359
the property of the subject, even under pretence of the necessities of the state, any otherwise than by the free grant of the representatives of the people. Nay, so true and persevering has been the zeal of these representatives, in asserting on that account the interests of the nation, from which they could not separate their own, that this privilege of taxing themselves, which was in the beginning grounded on a most precarious tenure, and only a mode of governing adopted by the sovereign for the sake of his own convenience, has become, in time, a settled right of the people, which the sovereign has found it necessary solemnly and repeatedly to acknowledge.

Nay more, the representatives of the people have applied this right of *taxation* to a still nobler use than the

mere preservation of property: they have, in process of time, succeeded in converting it into a regular and constitutional mean of influencing the motions of the executive power. By means of this right, they have gained the advantage of being constantly called to concur in the measures of the sovereign,—of having the greatest at-
360 tention shewn by him to their requests, as well as the highest regard paid to any engagements that he enters into with them. Thus has it become at last the peculiar happiness of English subjects, to whatever other people, either ancient or modern, we compare them, to enjoy a share in the government of their country, by electing representatives, who, by reason of the peculiar circumstances in which they are placed, and of the extensive rights they possess, are both *willing* faithfully to serve those who have appointed them, and *able* to do so.

And indeed the commons have not rested satisfied with establishing, once for all, the provisions for the liberty of the people which have been just mentioned; they have afterwards made the preservation of them the first object of their care (2), and taken every opportunity of giving them new vigour and life.

361 Thus, under Charles the First, when attacks of a most alarming nature were made on the privilege of the

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(2) The commons, at the beginning of a session, appoint standing committees for the whole session. They have usually been five in number, viz. of Religion, of Grievances, of Courts of Justice, of Trade, and of Privileges. Of these, the first four are general or grand committees: the last is composed of members specially nominated. All these committees are, however, only appointed at the beginning of a session *pro formâ*. (See Coke's 4 Inst. 11; and Com. Dig. Parl. E. 6).—EDITOR.

people to grant free supplies to the crown, the commons vindicated, without loss of time, that great right of the nation, which is the constitutional bulwark of all others, and hastened to oppugn, in the beginning, every precedent of a practice that must in the end have produced the ruin of public liberty.

They even extended their care to abuses of every kind. The judicial authority, for instance, which the executive power had imperceptibly assumed to itself, both with respect to the person and property of the individual, was abrogated by the act which abolished the court of Star-chamber: and the crown was thus brought back to its true constitutional office, viz. the countenancing, and supporting with its strength, the execution of the laws.

The subsequent endeavours of the legislature have carried to a still greater extent the above privileges of the people. They have, moreover, succeeded in restraining the crown from any attempt to seize and confine, even for the shortest time, the person of the subject, unless it be in the cases ascertained by the law, of which the judges of it are to decide.

Nor has this extensive unexampled freedom at the 362
expense of the executive power been made, as we might be inclinable to think, the exclusive appropriated privilege of the great and powerful. It is to be enjoyed alike by all ranks of subjects. Nay, it was the injury done to a common citizen that gave existence to the act which has completed the security of this interesting branch of public liberty. The *oppression of an obscure individual*, says Judge Blackstone, *gave rise to the famous Habeas Corpus Act.* Junius has quoted this observation of the judge; and the same is well worth re-

peating a third time, for the just idea it conveys of that readiness of all orders of men to unite in defence of common liberty, which is a characteristic circumstance in the English government (*k*).

And this general union in favour of public liberty has
363 not been confined to the framing of laws for its security: it has operated with no less vigour in bringing to punishment such as have ventured to infringe them; and the sovereign has constantly found it necessary to give up the violators of those laws, even when his own servants, to the justice of their country (3).

366 So much regularity has even been introduced into the operations of the executive power in England,—such an exact justice have the people been accustomed, as a consequence, to expect from that quarter, that even
367 the sovereign, for his having once suffered himself personally to violate the safety of the subject, did not escape severe censure. The attack made, by order of Charles the Second, on the person of Sir John Coventry, filled the nation with astonishment; and this violent gratification of private passion, on the part of the sovereign (a piece of self-indulgence with regard to inferiors, to which whole classes of individuals in certain countries almost think that they have a right), excited a general ferment. "This event," says Bishop Burnet,

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(*k*) The individual here alluded to was one Francis Jenks, who having made a motion at Guildhall, in the year 1676, to petition the king for a new parliament, was examined before the privy-council, and afterwards committed to the Gatehouse, where he was kept about two months, through the delays made by the several judges to whom he applied, in granting him a *Habeas Corpus*.—(See the *State Trials*, vol. vii. anno 1676.

(3) *Supra*, p. 114.

"put the House of Commons in a furious uproar. It gave great advantages to all those who opposed the court; and the names of the *court* and *country* party, which till now had seemed to be forgotten, were revived (*l*)."

These are the limitations that have been set, in the English government, on the operations of the executive power: limitations to which we find nothing comparable in any other free states, ancient or modern; and which are owing, as we have seen, to that very circumstance 368
which seemed at first sight to prevent the possibility of them, that is, the greatness and unity of that power; the effect of which has been, in the event, to unite, upon the same object, the views and efforts of all orders of the people.

From this circumstance,—the *unity* and peculiar stability of the executive power in England,—another most advantageous consequence has followed, that has been before noticed, and which it is not improper to mention again here, as this chapter is intended to confirm the principles laid down before—viz. the unremitted continuance of the same general union among all ranks of men, and the spirit of mutual justice which thereby continues to be diffused through all orders of subjects.

Though surrounded by the many boundaries that have just now been described, the crown, as we must observe, has preserved its prerogative undivided: it still

(*l*) See Burnet's History, vol. i. anno 1669.—An act of parliament was made on this occasion, for giving a farther extent to the provisions before made for the personal security of the subject; which is still called the *Coventry* Act.

possesses its whole effective strength, and is only tied by its own engagements, and the consideration of what it owes to its dearest interests.

The great, or wealthy men in the nation, who, assisted by the body of the people, have succeeded in reducing
369 the exercise of its authority within such well-defined limits, can have no expectation that it will continue to confine itself to them any longer than they themselves continue, by the justice of their own conduct, to deserve that support of the people which alone can make them appear of consequence in the eye of the sovereign,—no probable hopes that the crown will continue to observe those laws by which their wealth, dignity, and liberty, are protected, any longer than they themselves also continue to observe them.

Nay more, all those claims of their rights which they continue to make against the crown, are encouragements which they give to the rest of the people to assert their own rights against them. Their constant opposition to all arbitrary proceedings of that power is a continual declaration they make against any acts of oppression which the superior advantages they enjoy might entice them to commit on their inferior fellow-subjects. Nor was that severe censure, for instance, which they concurred in passing on an unguarded violent action of their sovereign only a restraint put upon the personal actions of future English kings; no, it was a much more extensive pro-
370 vision for the securing of public liberty;—it was a solemn engagement entered into by all the powerful men in the state to the whole body of the people, scrupulously to respect the person of the lowest among them.

And indeed the constant tenor of the conduct, even of the two houses of parliament, shows us that the above

observations are not matters of mere speculation. From the earliest times we see the members of the House of Commons to have been very cautious not to assume any distinction that might alienate from them the affections of the rest of the people (4). Whenever those privileges which were necessary to them for the discharge of their trust have proved burdensome to the community, they have retrenched them. And those of their members

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(4) In all cases of public offences, down to a simple breach of the peace, the members of the House of Commons have no privileges whatever above the rest of the people: they may be committed to prison by any justice of the peace; and are dealt with afterwards in the same manner as any other subjects. With regard to civil matters, their privilege is to be free from arrest. *Lord Camden* held, in Wilkes's case, that arrest for *libel* was a breach of privilege, which last could only be *forfeited* by *treason, felony,* or *breach of the peace,* and that *libel* had only a *tendency* to break the peace; (2 Wils. 251); but it was afterwards resolved, by both houses, that the case of writing and publishing seditious libels should not be entitled to privilege, and that the reasons upon which that case proceeded extended equally to every indictable offence; (Comm. Jour. 24th Nov. 1763; Lord's Jour. 29th Nov. 1763. See 1 Blackst. Com. 166); but notwithstanding the privilege of freedom from arrest, their lands and effects may be had and taken by their creditors, and such of them as are traders are as liable to the bankrupt laws as other persons. They have also the privilege of franking and receiving letters free of postage. In former times the members were paid by their constituents. It does not appear that the privilege from arrest is limited to any precise time after a dissolution; but it has been determined by all the judges that it extends to a convenient time. (See *Col. Pitt's case,* 2 Str. 988). The statute 10 Geo. 3, c. 50, settled the privileges of members of the House of Commons; and, upon the question raised as to the policy of their being free from arrest, by reason of the privilege being abused by some few, it is very plain that a constituency should not be deprived of its member's services; and, consequently, the privilege is for the public good, and should be maintained.—EDITOR.

who have applied either these privileges, or in general
371 that influence which they derived from their situation, to any oppressive purposes, they themselves have endeavoured to bring to punishment.

372 In fine, in order, as it were, to make it completely notorious, that neither the condition of representative of the people, nor even any degree of influence in their house, could excuse any one of them from strictly observing the rules of justice, the Commons did on one occasion pass the most severe censure they had power to inflict upon their speaker himself, for having, in a single instance, attempted to convert the discharge of his duty, as speaker, into the means of private emolument (5).

373 If we turn our view toward the House of Lords, we shall find that they have also constantly taken care that their peculiar privileges should not prove impediments to the common justice which is due to the rest of the people (*m*). They have constantly agreed to every just proposal that has been made to them on that subject by the Commons: and indeed, if we consider the numerous and oppressive privileges claimed by the *nobles* in most other countries, and the vehement spirit with which they are commonly asserted, we shall think it no small praise to the body of the nobility in England (and also to the nature of that government of which they make

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(5) Sir John Trevor, Case 6, Wm. 3.

(*m*) In case of a public offence, or even a simple breach of the peace, a peer may be committed, till he finds bail, by any justice of the peace: and peers are to be tried by the common course of law, for all offences under felony. With regard to civil matters, they are at all times free from *arrest;* but execution may be had against their effects, in the same manner as against those of other subjects.

a part), that it has been by their free consent that their 374
privileges have been confined to what they now are; that is to say, to no more, in general, than what is necessary to the accomplishment of the end and constitutional design of that house.

In the exercise of their judicial authority with regard to civil matters, the Lords have manifested a spirit of equity nowise inferior to that which they have shown in their legislative capacity. They have, in the discharge of that function (which of all others is so liable to create temptations), shown an incorruptness really superior to what any judicial assembly in any other nation can boast. Nor can it, with any good reason, be contradicted that the conduct of the House of Lords, in their civil judicial capacity, has constantly been such as has invariably kept them above the reach of even suspicion or slander.

Even that privilege which they enjoy, of exclusively trying their own members, in case of any accusation that may affect their lives (a privilege which we might at first sight think repugnant to the idea of a regular government, and even alarming to the rest of the people), has constantly been rendered, by the Lords, subservient to the purpose of doing justice to their 375
fellow-subjects; and if we cast our eyes either on the collection of the *State Trials*, or on the History of England, we shall find very few examples, if any, of a peer, really guilty of the offence laid to his charge, that has derived any advantage from his not being tried by a jury of *commoners*.

Nor has this just and moderate conduct of the two houses of parliament, in the exercise of their powers (a

moderation so unlike what has been related of the conduct of the powerful men in the Roman republic), been the only happy consequence of that salutary jealousy which those two bodies entertain of the power of the crown. The same motive has also engaged them to exert their utmost endeavours to put the courts of justice under proper restraints;—a point of the highest importance to public liberty.

They have, from the earliest times, preferred complaints against the influence of the crown over these courts, and at last procured laws to be enacted by which such influence has been entirely prevented; all which measures, we must observe, were at the same time strong declarations that no subjects, however exalted their rank might be, were to think themselves exempt from submitting to the uniform course of the
376 law, or hope to influence or over-awe it. The severe examples which they have united to make on those judges who have rendered themselves the instruments of the passions of the sovereign, or of the designs of the ministers of the crown, are also awful warnings to the judges who have succeeded them, never to attempt to deviate in favour of any, the most powerful individuals, from that straight line of justice which the joint wisdom of the legislature has once marked out to them.

This singular situation of the English judges, relatively to the three constituent powers of the state (and also the formidable support which they are certain to receive from them as long as they continue to be the faithful ministers of justice), has at last created such an impartiality in the distribution of public justice in England, has introduced into the courts of law the practice

of such a thorough disregard to either the influence or wealth of the contending parties, and procured to every individual, both such an easy access to these courts, and such a certainty of redress, as are not to be paralleled in any other government. Philip de Comines, so long as three hundred years ago, commended in strong terms the exactness with which justice was done in England to all ranks of subjects; and the impartiality with which 377
the same is administered in these days, will, with still more reason, excite the surprise of every stranger who has an opportunity of observing the customs of this country.

Indeed to such a degree of impartiality has the ad- 378
ministration of public justice been brought in England, that it is saying nothing beyond the exact truth, to affirm that any violation of the laws, though perpetrated by men of the most extensive influence—nay, though committed by the special direction of the very first servants of the crown—will be publicly and completely redressed. And the very lowest of subjects will obtain such redress, if he has but spirit enough to stand forth, and appeal to the laws of his country. Most extraordinary circumstances these! which those who know the difficulty of establishing just laws among mankind, and of providing afterwards for their due execution, only find credible because they are matters of fact, and can begin to account for only when they look up to the constitution of the government itself; that is to say, when they consider the circumstances in which the executive power, or the crown, is placed in relation to the two bodies that concur with it to form the legislature,—the circumstances in which those two assemblies are placed in relation

to the crown, and to each other,—and the situation in
379 which all the three find themselves with respect to the whole body of the people (*n*).

380 In fine, a very remarkable circumstance in the English government (and which alone evinces something peculiar and excellent in its nature), is that spirit of extreme mildness with which justice, in criminal cases, is administered in England.

385 Nay, so anxious has the English legislature been to establish mercy, even to convicted offenders, as a fundamental principle of the government of England, that
386 they made it an express article of that great public compact which was framed at the important æra of the Revolution, that "no cruel and unusual punishments" should be enforced.—They even endeavoured, by adding a clause for that purpose to the oath which kings

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(*n*) The following case affords a singular instance of the confidence with which all subjects in England claim what they think their just rights, and of the certainty with which the remedies of the law are in all cases open to them. The fact I mean, is the arrest executed in the reign of queen Anne, in the year 1708, on the person of the Russian ambassador, by taking him out of his coach, for the sum of fifty pounds. And the consequences that followed this fact are still more remarkable. The czar highly resented the affront, and demanded that the sheriff of Middlesex, and all others concerned in the arrest, should be punished with instant death. But the queen (to the amazement of that despotic court, says Judge Blackstone) "directed the secretary of state to inform him that she could inflict no punishment upon any, the meanest of her subjects, unless warranted by the law of the land." An act was afterwards passed to free from arrest the persons of foreign ministers, and such of their servants as they have delivered a list of to the secretary of state. A copy of this act, elegantly engrossed and illuminated, was sent to Moscow, and an ambassador extraordinary commissioned to deliver it.

were thenceforward to take at their coronation, as it were to render it an everlasting obligation of English kings, to make justice to be "executed with mercy."(6)

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(6) Human punishment may be considered with regard to its power, end, and measure.

With respect to the power or right of the legislature to enact punishment, any one must see the mischief that would arise, if men were allowed to redress their own grievances. But no man being a proper judge in his own case, the power of enacting punishment is, with the strictest justice, transferred from individuals to the sovereign authority, and thereby one of the evils which civil government was intended to remedy is prevented.

The justice of human punishment can originally be maintained on no other principles than those of the laws of nature, which authorise every man to secure himself against the assaults of others. But with regard to the particular mode of punishment which may be thought best calculated to defend every individual, in his civil capacity, from injury, that must be left to the wisdom and determination of the supreme legislative authority. And it is in vain for any criminal to say, that this or that penalty is too severe for his crime; for it is a maxim of the constitution, that every man is consenting expressly or impliedly to every act of the legislature. The criminal code, therefore, is a constituent part of that original contract into which every man enters when he first becomes a member of society; and was intended to contribute to his personal safety and happiness, till his own folly brought down its terrible vengeance upon his head.

As to the end of human punishment; it is not inflicted by way of revenge: for that would be to usurp the prerogative of God, to whom only vengeance belongeth. Neither is it awarded to make an atonement. For every wilful violation of human laws that are not contrary to revelation, is a breach of the moral law; and no human suffering can remove the guilt of the offender, or make whole the law which he has broken. Suffering is the effect of transgression. Now it is utterly impossible that an effect should destroy the cause which produced it. No length of confinement of a debtor, for instance, will discharge the debt which he owes. In short, it is from the Scriptures alone that we learn how sin can be pardoned consistently with the Divine attributes and government. (Rom. ch. 3,

v. 20, 26; 1 Pet. ch. 3, v. 18). The sole design of the legislature in enacting punishments is to prevent the commission of the same crime in future, so as to secure the public safety; therefore these punishments should be merciful in proportion to the crime committed, and not savour of revenge. Crimes are more effectually prevented by the *certainty* than by the *severity* of punishment. Great severity of the law has always been found to defeat its own end; for its execution is hindered by public humanity, and the criminal escapes punishment. The *certainty* of suffering a mild punishment will deter men from breaking the laws much more effectually than (as was very recently the case) the *uncertain* penalty of death.—EDITOR.

CHAPTER XII.

A more inward View of the English Government.—Very essential Differences between the English Monarchy, (as a Monarchy,) and all those with which we are acquainted.—The solidity of the executive authority of the English Crown.

THE doctrine constantly maintained in this work, and 387
which has been sufficiently supported by facts and comparisons drawn from the history of other countries, is, that the remarkable liberty enjoyed by the English nation is essentially owing to the impossibility under which their leaders, or in general all men of power among them, are placed, of invading and transferring to themselves any branch of the governing executive authority; which authority is exclusively vested, and firmly secured, in the crown. Hence the anxious care with which those men continue to watch the exercise of that authority. Hence their perseverance in observing every kind of engagement which themselves may have entered into with the rest of the people.

But here a consideration of a most important kind
presents itself: How comes the crown in England thus 388
constantly to preserve to itself (as we see it does) the executive authority in the state, and moreover to preserve it so completely as to inspire the great men in the

nation with that conduct so advantageous to public liberty, which has just been mentioned? These are effects which we do not find, upon examination, that the power of *crowns* has hitherto been able to produce in other countries.

In all states of a monarchical form, we indeed see that those men whom their rank and wealth, or their personal power of any kind, have raised above the rest of the people, have formed combinations among themselves to oppose the power of the monarch. But their views, we must observe, in forming these combinations, were not by any means to set general and impartial limitations on the sovereign authority. They endeavoured to render themselves entirely independent of that authority; or even utterly to annihilate it, according to circumstances.

Thus we see that in all the states of ancient Greece, the kings were at last destroyed and exterminated. The same event happened in Italy, where, in remote times, there existed for a while several kingdoms, as we learn
389 both from the ancient historians and poets. And in Rome, we even know the manner and circumstances in which such a revolution was brought about.

In more modern times, we see the numerous monarchical sovereignties (which had been raised in Italy on the ruins of the Roman empire) successively destroyed by powerful factions; and events of much the same nature have at different times taken place in the kingdoms established in the other parts of Europe. And it has only been by means of standing armed forces that the
390 sovereigns of most of the European kingdoms have been able, in a course of time, to assert the prerogatives of the crown, and support their authority.

How therefore can the crown of England, without the assistance of any armed force, maintain, as it does, its numerous prerogatives? How can it, under such circumstances, preserve to itself the whole executive power in the state? For here we must observe, the crown in England does not derive any support from what regular forces it has at its disposal; and if we doubted this fact we need only look to the astonishing subordination in which the military is kept to the civil power, to become convinced that an English king is not indebted to his army for the preservation of his authority (*a*).

If we could suppose that the armies of the Emperor of Russia, for instance, were, through some very extraordinary circumstance, all to vanish in one night, the power of that sovereign, we must not doubt, would, in six months, be reduced to a mere shadow. He would 391
immediately behold his prerogatives, however formidable they may be at present, invaded and dismembered (*b*); and supposing that regular government continued to exist, he would be reduced to have little more influence in them than the kings of Sweden were allowed to enjoy, before the revolution in 1772.

How therefore,—to repeat the question once more, (which is one of the most interesting that can occur in politics),—how can the crown in England, without the assistance of any armed force, avoid those dangers to which all other sovereigns are exposed?

(*a*) Henry VIII. the most absolute prince, perhaps, who ever sat upon a throne, kept no standing army.

(*b*) As was the case in the several kingdoms into which the Spanish monarchy was formerly divided; and, in no very remote times, in France itself.

How can it, without any such force, accomplish even incomparably greater works than those sovereigns, with their powerful armies, are, we find, in a condition to perform? How can it bear that universal effort, (unknown in other monarchies), which, we have seen, is continually and openly exerted against it? How can it even continue to resist this effort so powerfully as to preclude all individuals whatever from entertaining any
392 views besides those of setting just and *general* limitations to the exercise of its authority? How can it enforce the laws upon all subjects, indiscriminately, without injury or danger to itself? How can it, in fine, impress the minds of all the great men in the state with so lasting a jealousy of its power, as to necessitate them, even in the exercise of their undoubted rights and privileges, to continue to court and deserve the affection of the rest of the people?

Why, that those great men, who even in quiet times prove so formidable to other monarchs, are in England divided into two assemblies; and such, it is necessary to add, are the principles upon which this division is made, that from it result, as necessary consequences, the solidity and the indivisibility of the power of the crown.

To attempt to give a demonstration of this assertion otherwise than by facts would lead into difficulties which the reader is little aware of. In general, the science of politics, considered as an *exact science*,—that is to say, as a science capable of actual demonstration,—is infinitely deeper than the reader suspects. The knowledge of man, on which such a science, with its preliminary *axioms* and *definitions*, is to be grounded, has hitherto remained surprisingly imperfect: as one instance how little man is known to himself, it might be

mentioned that no tolerable explanation of that continual human phenomenon, laughter, has been yet given; and the powerful complicate sensation which each sex produces in the other, still remains an equally inexplicable mystery.

Those speculators who will amuse themselves in seeking for the *demonstration* of the political theorem above expressed, will thereby be led through a field of observations which they will at first little expect; and, in their way towards attaining such demonstration, will find the science, commonly called metaphysics, to be at best but a very superficial one; and that the mathematics, or at least the mathematical reasonings hitherto used by men, are not so completely free from error as has been thought. (Certain errors that are not discovered, are, in several cases, compensated by others, which are equally unperceived). As a farther explanation of the peculiarity in the English government, it may be considered as a great *ballet*, or dance, in which, as in other *ballets*, every thing depends on the disposition of the figures.

The reader has been led, in the course of this work, much beyond the line within which writers on the subject of government have confined themselves; or rather, a track has been followed entirely different from that which those writers have pursued. But as the observation here made, on the stability of the power of the crown in England, and the cause of it, is new in its kind, so do the principles from which its truth is to be 393
demonstrated totally differ from what is commonly looked upon as the foundation of the science of politics. To lay those principles here before the reader, in a manner completely satisfactory to him, would lead us

into philosophical discussions on what really constitutes the basis of governments and power amongst mankind, both extremely long, and in a great measure foreign to the subject of this work. The above observations therefore shall be proved by facts; which is more, after all, than political writers usually undertake to do with regard to their speculations.

As it is chiefly proposed to show that the extensive liberty the English enjoy is the result of the peculiar frame of their government, and occasionally to compare the same with the republican form, it was at first intended to confine these proofs to that circumstance, which both constitutes the essential difference between those two forms of government, and is the immediate cause of English liberty,—that is, the having placed all the executive authority in the state out of the hands of those in whom the people trust. With regard to the remote cause of that same liberty,—that is to say, the
394 *stability of the power of the crown*, the singular solidity, without the assistance of any armed force, by which this executive authority is so secured,—it is absolutely necessary to mention the fact in this place, in order to obviate the objections which the more reflecting part of our readers might otherwise have made, both to several of the observations before offered to them, and to a few others which are soon to follow, indicating that the power of the crown in England stands upon foundations entirely different from those on which the same power rests in other countries, and of engaging the reader to observe, that, as the English monarchy differs, in its nature and main foundations, from every other, so all that is said here of its advantages is peculiar and confined to it.

But to come to the proofs (derived from facts) of the

solidity accruing to the power of the crown in England, from the *co-existence* of the two assemblies which concur to form the English parliament, several open acts of these two houses, by which they have by turns effectually defeated the attacks of each other upon its prerogative, shall be first shewn.

Without looking farther back for examples than the reign of Charles the Second, we see that the House of Commons had, in that reign, begun to adopt the method of adding (or tacking, as it is commonly expressed) such 396
bills as they wanted more particularly to have passed, to their money bills. This forcible use of their undoubted privilege of granting money, if it had been suffered to grow into common practice, would have totally destroyed the equilibrium that ought to subsist between them and the crown. But the Lords took upon themselves the task of maintaining that equilibrium; they complained with great warmth of the several precedents that were made by the Commons, of the practice we mention: they insisted that bills should be framed "*in the old and decent way of parliament;*" and at last made it a standing order of their house, to reject, upon the sight of them, all bills that are tacked to money bills.

Again, about the thirty-first year of the same reign, a strong party prevailed in the House of Commons; and their efforts were not entirely confined, if we may credit the historians of those times, to serving their constituents faithfully, and providing for the welfare of the state. Among other bills which they proposed in their house, they carried one to exclude from the crown the immediate heir to it; an affair this, of a very high nature; and with regard to which it may well be ques-

397 tioned whether the legislative assemblies have a right to form a resolution, without the express and declared concurrence of the body of the people. But both the crown and the nation were delivered from the danger of establishing such a precedent, by the interposition of the Lords, who threw out the bill on the first reading.

In the reign of King William the Third, a few years after the Revolution, attacks were made upon the crown from another quarter. A strong party was formed in the House of Lords; and, as we may see in Bishop Burnet's History of his Own Times (*c*), they entertained very deep designs. One of their views, among others, was to abridge the royal prerogative of calling parliaments, and judging of the proper times of doing it. They, besides, proposed to have all money bills stopped in their house, till they had procured the right of taxing themselves, their own estates, and to have a committee of Lords, and a certain number of the Commons, appointed to confer together concerning the state of the nation: "which committee (says Bishop Burnet) would soon have grown to have been a council of state, that would have brought all affairs under their inspection, and never had been proposed but when the nation was ready to break into civil wars (*d*). They accordingly framed and carried in their house a bill for ascertaining
398 the sitting of parliament every year: but the bill, after it had passed their house, was rejected by the Commons (*b*).

Again, we find that, a little after the accession of King George the First, an attempt was made, by a party in the House of Lords, to wrest from the crown a pre-

(*c*) Anno 1693. (*d*) Nov. 28th, 1693.

rogative which is one of its finest flowers, and is, besides, the only check it has on the dangerous views which that house (which may stop both money bills and all other bills) might be brought to entertain; I mean the right of adding new members to it, and judging of the times when it may be necessary to do so. A bill was accordingly presented, and carried, in the House of Lords, for limiting the members of that house to a fixed number, beyond which it should not be increased; but after great pains taken to ensure the success of this bill, it was at last rejected by the Commons.

In fine, the several attempts which a majority in the House of Commons have in their turn made to restrain, farther than it now is, the influence of the crown, arising from the distribution of preferments and other advantages, have been checked by the House of Lords, and all 399
place-bills have, from the beginning of the eighteenth century, constantly miscarried in that house(1).

Nor have these two powerful assemblies only suc-

(1) By a statute passed 6 Ann, c. 7, any member who shall accept of any office of profit under the crown, his election or seat bebecomes void; he may, however, be re-elected. And by another statute, passed 22 Geo. 3, c. 45, no contractor with the government is eligible to a seat in parliament; but this statute does not extend to contracts with corporations, or with companies which then consisted of ten persons or partners, or to any person to whom the interest of such a contract shall accrue by marriage or operation of law for the first twelve months. These statutes are still in operation under the 75th section of the Reform Act; and as no member of parliament can resign his seat, the only way to vacate it is by accepting a situation of profit under the crown; and it is now usual, in such cases, for the crown to grant the office of the stewardship of the Chiltern Hundreds in Buckinghamshire, which, with the manor of East Hundred in Berkshire, are districts belonging to the crown. But it is remarkable, that although this custom has existed since

ceeded in thus warding off the open attacks of each other on the power of the crown. Their co-existence, and the principles upon which they are severally framed, have been productive of another effect much more extensive, though at first less attended to,—that is, the preventing even the making of such attacks; and in times too, when the crown was of itself incapable of defending its authority? the views of each house destroying, upon these occasions, the opposite views of the other, like those positive and negative equal quantities (if the comparison may be allowed), which destroy each other on the opposite sides of an equation.

Of this we have several remarkable examples: for instance, when the sovereign has been a minor. If we examine the history of other nations, especially before the invention of standing armies, we shall find that the event we mention never failed to be attended with open invasions of the royal authority, or even sometimes with complete and settled divisions of it. In England, on the contrary, whether we look at the reign of Richard II., or that of Henry VI., or of Edward VI., we shall
400 see that the royal authority was quietly exercised by the councils that were appointed to assist those princes; and when they came of age, it was delivered over to them undiminished.

Bnt nothing so remarkable can be alleged on this subject as the manner in which the two houses have acted upon those occasions, when, the crown being without any present possessor, they had it in their power both to settle it on what person they pleased,

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1750, according to Mr. Hatsell, (vol. 2, p. 41), yet it is an office from which no profit is derived.—EDITOR.

and to divide and distribute its effectual prerogatives in what manner, and to what set of men, they might think proper. Circumstances like these we mention have never failed, in other kingdoms, to bring on a division of the effectual authority of the crown, or even of the state itself. In Sweden, for instance, (to speak of a kingdom which has borne the greatest outward resemblance to that of England), when queen Christina was put under a necessity of abdicating the crown, and it was transferred to the prince who stood next to her in the line of succession, the executive authority in the state was immediately divided, and either distributed among the nobles, or assigned to the senate, into which the nobles alone could be admitted; and the new king was only to be a president over it.

After the death of Charles the Twelfth, who died 401
without male heirs, the disposal of the crown (the power of which Charles the Eleventh had found means to render again absolute) returned to the states, and was settled on the princess Ulrica, and the prince her husband. But the senate, at the same time it thus settled the possession of the crown, again assumed to itself the effectual authority which had formerly belonged to it. The privilege of assembling the states was vested in that body. They also secured to themselves the power of making war and peace, and treaties with foreign powers,—the disposal of places,—the command of the army and of the fleet,—and the administration of the public revenue. Their number was to consist of sixteen members. The majority of votes was to be decisive upon every occasion. The only privilege of the new king was to have his vote reckoned for two: and if at any time he should refuse to attend their

meetings, the business was nevertheless to be done as effectually and definitively without him (*c*).

402 Regulations of a similar nature were made in Denmark, and continued to subsist, with some variations, till the revolution which, in the seventeenth century, placed the whole power of the state in the hands of the crown without control. The different kingdoms into which Spain was formerly divided were governed in much the same manner. But in England, the revolution of the year 1689 was terminated in a manner to-
403 tally different. Those who at that interesting epoch had the guardianship of the crown,—those in whose hands it lay *vacant*—did not manifest so much as a thought to split and parcel out its prerogative (2). They tendered it to a single indivisible possessor, impel-

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(*c*) The senate had procured a seal to be made, to be affixed to their official resolutions, in case the king should refuse to lend his own.

(2) In order to preserve and secure the constitution, *both parties* (that is, *Whigs* and *Tories*, which were, at *this* memorable and eventful period, the only names party was designated by) *coalesced* in inviting the Prince of Orange to accept the crown. The *Whigs* were zealous to expel from the throne a prince whose conduct had fully justified all that their fears had predicted of his successor. The *Tories*, enraged at the preference shown to the Catholics, and the Church inflamed by recent injuries, resolved to pull down the idol that their own hands had made, and which they had blindly worshipped. Their eyes being now opened, they saw the necessity of restoring and securing the constitution. And the *Protestant nonconformists*, whom the king had gained by his indulgence, judged it more prudent to look forward for a *general toleration* to be established by law, than to rely any longer on the insidious caresses of their theological adversaries. By this extraordinary coalition *faction* was for a time silenced: all parties sacrificing their former animosities to the apprehension of a common danger, or to the sense of a common interest. See Bolingbroke's Dissertation on Parties.—EDITOR.

led as it were by some secret power operating upon them, without any salvo, without any article to establish the greatness of themselves or of their families. It is true, those prerogatives destructive of public liberty, which the late king had assumed, were retrenched from the crown; and thus far the two houses agreed. But as to any attempt to transfer to other hands any part of the authority of the crown, no proposal was even made about it. Those branches of prerogative which were taken from the kingly office were annihilated, and made to cease to exist in the state: and all the executive authority that was thought necessary to be continued in the government, was, as before, left undivided in the crown.

In the very same manner was the whole authority of 404
the crown transferred afterwards to the princess who succeeded King William the Third, and who had no other claim to it but what was conferred on her by the parliament. And in the same manner again it was settled, a long time beforehand, on the princes of Hanover who succeeded her (*d*).

Nay, there is one more extraordinary fact.—Not- 405

(*d*) It may not be improper to observe here, as a farther proof of the indivisibility of the power of the crown (which has been above said to result from the peculiar frame of the English government), that no part of the executive authority of the king is vested in his privy council: the whole centres in the sovereign; the votes of the members are not even counted; and in fact, the constant style of the law is, the king *in* council, and not the king *and* council. A proviso is indeed sometimes added to some bills, that certain acts mentioned in them are to be transacted by the king in council; but this is only a precaution taken in the view that the most important affairs of a great nation may be transacted with proper solemnity, and to prevent, for instance, all objections that might, in process of time, be drawn from

withstanding all the revolutions we mention, although parliament hath sat every year since the beginning of the last century, and though they have constantly enjoyed the most unlimited freedom, both as to the subjects and the manner of their deliberations, and numberless proposals have in consequence been made,—yet such has been the efficiency of each house, in destroying, preventing, or qualifying, the views of the other, that the crown has not been obliged during all that period to make use, even once, of its negative voice; and the last bill rejected by a king of England was that rejected by King William the Third in the year 1692, for triennial parliaments (3)

There is also another instance yet more remarkable of this forbearing conduct of the parliament in regard to the crown, to whatever open or latent cause it may be owing, and proves how little their *esprit de corps* in reality leads them, amidst the apparent heat sometimes of their struggles, to invade its governing executive authority: and that is the facility with which they have been prevailed upon to give up any essential branch of that
406 authority, even after a conjunction of preceding circumstances had caused them to be actually in possession of

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the uncertainty whether the king had assented, or not, to certain particular transactions. The king names the members of the privy council; or excludes them, by causing their names to be struck out of the book.

(3) This bill was introduced to stop the corruption of the House of Commons, which was then at its height, as far as it affected the representatives of the people. And William was afterwards obliged to assent to it, or lose the vote of supply which was tacked to it; indeed he was afraid to exert the influence of the crown in defeating a bill, at that time of so much consequence to the nation. (See Burnet, b. 5).—EDITOR.

it: a case this, however, that has not frequently happened in the English history. After the restoration of Charles II., for instance, the parliament, of their own accord, passed an act (in the first year that followed that event), by which they annihilated, at one stroke, both the independent legislative authority, and all claims to such authority, which they had assumed during the preceding disturbances: by the stat. 13 Car. II. c. 1. it was forbidden, under the penalty of a *præmunire*, to affirm that either of the two houses of parliament, or both jointly, possess, without the concurrence of the king, the legislative authority. In the fourth year after the Restoration, another capital branch of the governing authority of the crown was also restored to it, without any manner of struggle:—by the stat. 16 Car. II. c. 1. the act was repealed by which it had been enacted, that in case the king should neglect to call a parliament once at least in three years, the peers should issue the writs for an election: and that, should they neglect to issue the same, the constituents should of themselves assemble to elect a parliament.

It is here to be observed, that, in the same reign, the 407
parliament passed the *Habeas Corpus* Act, as well as the other acts that had prepared for it, and in general showed a jealousy in watching over the liberty of the subject, superior perhaps, to what has taken place at any other period of the English history. This is another striking confirmation of what has been remarked in a preceding chapter, concerning the manner in which public disturbances have been terminated in England. Here we find a series of parliaments to have been tenaciously and perseveringly jealous of those kinds of popular universal provisions, which great men

in other states ever disdained seriously to think of, or give a place to, in those treaties by which internal peace was restored to the nation; and at the same time these parliaments cordially and sincerely gave up those high and splendid branches of governing authority, which the senates, or assemblies of great men who surrounded the monarchs in other limited monarchies, never ceased anxiously to strive to assume to themselves,—and which the monarchs, after having lost them, never were able to recover but by military violence, aided by surprise,
408 or through national commotions. All these are political singularities, certainly remarkable enough. It is a circumstance in no small degree conducive to the solidity of the executive authority of the English crown (which is the subject of this chapter), that those persons who seem to have it in their power to wrest the same from it, are even prevented from entertaining thoughts of doing so (*d*).

There have been times of public disturbance, when the *Habeas Corpus* Act was indeed suspended (3), (which may serve as one proof, that, in proportion as a government is in danger, it becomes necessary to abridge the liberty of the subject); but the executive power did not thus of itself stretch its own authority; the pre-

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(*d*) Another instance of this real disinterestedness of the parliament in regard to the power of the crown;—nay, of the strong bent that prevails in that assembly to make the crown the general depository of the executive authority of the nation, is the manner in which they are accustomed to provide for the execution of such resolutions of an active kind as they may at times adopt: which is always by addressing the crown for the purpose, and desiring it to interfere with its own executive authority.

(3) See 57 Geo. 3, c. 3; 35 Belsham, vol. 2; anno 1777, p. 226; anno 1794—98; and 58 Geo. 3, c. 6.—EDITOR.

caution was deliberated upon and taken by the representatives of the people; and the detaining of individuals in consequence of the suspension of the act was limited to a certain fixed time. Notwithstanding the just fears of internal and hidden enemies which the circumstances of the times might raise, the deviation from the former course of the law was carried no farther than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals; the proceedings against them were to be carried on no otherwise than in a public place: they were to be tried by their peers, and have all the usual legal means of defence allowed to them.

As another proof of the peculiar solidity of the power 409
of the crown, in England, may be mentioned the facility, and safety to itself and to the state, with which it has at all times been able to deprive any particular subjects of their different offices, however overgrown and even dangerous their private power might seem to be. A very remarkable instance of this kind occurred when the great duke of Marlborough was suddenly removed from all his employments: the following is the account given by Dean Swift in his "History of the four last Years of the Reign of Queen Anne(4)."

"As the queen found herself under the necessity, 410
either, on the one side, to sacrifice those friends, who had ventured their lives in rescuing her out of the power of some, whose former treatment she had little reason to be fond of,—to put an end to the progress she had made towards a peace, and dissolve her parliament; or,

(4) In Book 1 most of these cases are shewn by the EDITOR.

on the other side, by removing one person from so great a trust, to get clear of all her difficulties at once; her majesty determined upon the latter expedient, as the shorter and safer course; and during the recess at Christmas, sent the duke a letter, to tell him she had no farther occasion for his service.

"There has not perhaps in the present age been a clearer instance to show the instability of greatness which is not founded on virtue: and it may be an instruction to princes who are well in the hearts of their people, that the overgrown power of any particular person, although supported by exorbitant wealth, can, by a little resolution, be reduced in a moment, without any dangerous consequences. This lord, who was, beyond all comparison, the greatest subject in Christendom, found his power, credit, and influence, crumble away on a sudden; and except a few friends and followers, the rest dropped of in course," &c. (B. I. near the end) (5).

The ease with with such a man as the duke was suddenly removed, Dean Swift has explained by the necessary advantages of princes who possess the affection of
411 their people, and the natural weakness of power which is not founded on virtue. However, these are very unsatisfactory explanations. The history of Europe, in former times, presents a continual series of examples to the contrary. We see in it numberless instances of princes incessantly engaged in resisting in the field the competition of the subjects invested with the eminent dignities of the realm, who were not by any means superior to them in point of virtue,—or, at other times,

(5) See Dr. Russell's History of Modern Europe, 317; and the *Stuart Papers*, 1713.—EDITOR.

living in a continual state of vassalage under some powerful man whom they durst not resist, and whose *power, credit,* and *influence,* they would have found it far from possible to *reduce in a moment, or crumble on a sudden,* by the sending of a single letter, even though assisted *by a little resolution,* to use Dean Swift's expressions, and without any dangerous consequences.

Nay, certain kings, such as Henry the Third of France, in regard to the Duke of Guise, and James the Second of Scotland, in regard to the two Earls of Douglas successively, had at last recourse to plot and assassination; and expedients of a similar violent kind are the settled methods adopted by the eastern monarchs; nor is it very sure that they can always easily do otherwise (*e*).

But a dissolution of the parliament, that is, the dis- 413
mission of the whole body of the great men in the nation, assembled in a legislative capacity, is a circumstance in the English government, in a much higher degree remarkable and deserving our notice than the depriving any single individual, however powerful, of his public employments. When we consider in what an easy and complete manner such a dissolution is effected

(*e*) We might also mention here the case of the Emperor Ferdinand II. and the Duke of Walstein, which seems to have at the time made a great noise in the world.—The Earls of Douglas were sometimes attended by a retinue of two thousand horse. *See Dr. Robertson's History of Scotland.*—The Duke of Guise was warned, some hours before his death, of the danger of trusting his person in the king's presence or house; he answered, *On n'oseroit,* They durst not.

If Mary, queen of Scots, had possessed a power analogous to that exerted by queen Anne, she might perhaps have avoided being driven into those instances of ill-conduct which were followed by such tragical consequences.

in England, we must become convinced that the power of the crown bears upon foundations of very uncommon, though perhaps hidden, strength.

414 The person who is invested with the kingly office in England, has need of no other weapon, no other artillery, than the civil *insignia* of his dignity to effect the dissolution. He steps into the midst of them, telling them that they are dissolved; and they are dissolved:—he tells them that they are no longer a parliament; and they are no longer so. Like the wand of Popilius (*f*), a dissolution instantly puts a stop to their warmest debates
415 and most violent proceedings. The peremptory words by which it is expressed have no sooner met their ears, than all their legislative faculties are benumbed; though they may still be sitting on the same benches, they look no longer on themselves as forming an assembly; they no longer consider each other in the light of associates or of colleagues. As if some strange kind of weapon, or a sudden magical effort, had been exerted in the midst of them, all the bonds of their union are cut off; and they hasten away, without having so much as the thought of continuing for a single minute the duration of their assembly.

416 To all these observations concerning the peculiar solidity of the authority of the crown in England, I shall add another that is supplied by the whole series of English history; which is, that though bloody broils and disturbances have often taken place in England, and war been often made against the king, yet it has scarcely ever been done, but by persons who positively

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(*f*) A Roman ambassador, who stopped the army of Antiochus, King of Syria.—*Livii Hist.* lib. xiv.

and expressly laid claim to the crown. Even while Cromwell contended with an armed force against Charles the First, it was in the king's own name that he waged war against him.

The same objection might be expressed in a more 417
general manner, and with strict truth, by saying that no war has been waged, in England, against the governing authority, except upon national grounds; that is to say, either when the title to the crown has been doubtful, or when general complaints, either of a political or religious kind, have arisen from every part of the nation. As instances of such complaints, may be mentioned those that gave rise to the war against King John, which ended in the passing of the Great Charter; the civil wars in the reign of Charles I.; and the Revolution of the year 1689. From the facts just mentioned it may also be observed, as a conclusion, that the crown cannot depend on the great security we have been describing any longer than it continues to fulfil its engagements to the nation, and to respect those laws which form the compact between it and the people. And the imminent dangers, or at least the alarms and perplexities, in which the kings of England have constantly involved themselves, whenever they have attempted to struggle against the general sense of the nation, manifestly show that all that has been above observed, concerning the security and the remarkable stability somehow annexed to their office, is to be understood, not of the capricious power 418
of the man, but of the lawful authority of the head of the state.

When the kingly dignity has happened in England to be wrested from the possessor, through some revolution, it has been recovered, or struggled for, with more

difficulty than in other countries: in all the other countries upon earth, a king *de jure* (by claim) possesses advantages in regard to the king in being, much superior to those of which the same circumstance may be productive of in England. The power of the other sovereigns in the world is not so securely established as that of an English king; but then their character is more indelible; that is to say,—till their antagonists have succeeded in cutting off them and their families, they possess, in a high degree, a power to renew those claims and disturb the state. Those family pleas or claims of priority, and, in general, those arguments to which the bulk of mankind have agreed to allow so much weight, cease almost entirely to be of any effect in England, against the person actually invested with the kingly office, as soon as the constitutional parts and springs have begun to move, and, in short, as soon as the machine of the government has once begun to be in full play. An universal general ferment, similar to that which produced the former disturbances, is the only time of real danger (6).

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(6) The remarkable degree of internal national quiet, which, for very near 150 years, (and through such an eventful period as the last 30 years), has followed the revolution of 1689, is a strong proof of the truth of the above observations; and, all circumstances being considered, no other country can produce the like instance.—EDITOR.

Section II.

The Subject continued.

There is certainly a very great degree of singularity in 419
all the circumstances we have been describing: those persons who are acquainted with the history of other countries cannot but remark with surprise that stability of the power of the English crown,—that mysterious solidity, that inward binding strength, with which it is able to carry on with certainty its legal operations, amidst the clamorous struggle and uproar with which it is commonly surrounded, and without the medium of any armed threatening force. To give a demonstration of the manner in which all these things are brought to bear and operate, is not intended to be attempted here; the principles from which such demonstration is to be derived, suppose an inquiry into the nature of man, and of human affairs, which rather belongs to philosophy (though to a branch hitherto unexplored) than to politics; at least such an inquiry certainly lies out of the sphere of the common science of politics (*a*). However, there is a very material reason 420
for introducing all the above-mentioned facts concerning the peculiar stability of the governing authority of England, inasmuch as they lead to an observation of a most important political nature; which is, that this

(*a*) It may, if the reader pleases, belong to the science of *meta-politics*, in the same sense as we say *metaphysics;* that is, the science of those things which lie beyond physical or substantial things. A few more words are bestowed upon the same subject at the end of this chapter.

stability allows several essential branches of English liberty to take place, which, without it, could not exist. For there is a very essential consideration to be made in every science, though speculators are sometimes apt to lose sight of it, which is this—in order that things may have existence, they must be possible; in order that political regulations of any kind may obtain their effect, they must imply no direct contradiction, either open or hidden, to the nature of things, or to the other circumstances of the government. In reasoning from this principle, we shall find that the stability of the governing executive authority in England, and the weight it gives to the whole machine of the state, has actually enabled the English nation (considered as a free nation), to enjoy several advantages which would really have been totally unattainable in other European states, whatever degree of public virtue we might even suppose to have belonged to the men who acted in those states as the advisers of the people, or, in
421 general, who were intrusted with the business of framing the laws.

One of these advantages, resulting from the solidity of the government, is, the extraordinary personal freedom which all ranks of individuals in England enjoy at the expense of the governing authority. In the Roman commonwealth, for instance, we behold the senate invested with a number of powers totally destructive of the liberty of the citizens: and the continuance of these powers was, no doubt, in a great measure, owing to the treacherous remissness of those men to whom the people trusted for repressing them, or even to their determined resolution not to abridge those prerogatives. Yet, if we attentively consider the constant situation of

affairs in that republic, we shall find, that though we should suppose those persons to have been ever so truly attached to the cause of the people, it would not really have been possible for them to procure to the people an entire security. The right enjoyed by the senate, of suddenly naming a dictator, with a power unrestrained by any law, or of investing the consuls with an authority of much the same kind, and the power it at times assumed of making formidable examples of arbitrary justice, were resources of which the republic could not, perhaps, 422
with safety have been totally deprived; and though these expedients frequently were used to destroy the just liberty of the people, yet they were also very often the means of preserving the commonwealth.

Upon the same principle we should possibly find that the *ostracism*, that arbitrary method of banishing citizens, was a necessary resource in the republic of Athens.

It is therefore a most advantageous circumstance in 423
the English government, that its security renders all such expedients unnecessary, and that the representatives of the people have not only been constantly willing to promote the public liberty, but that the general situation of affairs has also enabled them to carry their precautions so far as they have done. And, indeed, when we consider what prerogatives the crown, in England, has sincerely renounced; that,—in consequence of the independence conferred on the judges, and of the method of *trial by jury*, it is deprived of all means of influencing the settled course of the law, both in civil and criminal matters— that it has renounced all power of seizing the property of individuals, and even of restraining, in any manner whatsoever, and for the shortest time, the liberty of their persons— we do not know which we

ought most to admire, whether the public virtue of those who have deprived the supreme executive power of all those dangerous prerogatives, or the nature of that same power, which has enabled it to give them up without ruin to itself,—whether the happy frame of the English government, which makes those in whom the
424 people trust, continue so faithful to the discharge of their duty, or the solidity of that same government, which can afford to leave to the people so extensive a degree of freedom.

Again, the liberty of the press, that great advantage enjoyed by the English nation, does not exist in any of the other monarchies of Europe as it does in England, however well established their power may at first seem to be; and it might even be demonstrated that it cannot so exist in them. The most watchful eye, we see, is
425 constantly kept in those monarchies upon every kind of publication; and a jealous attention is paid even to the loose and idle speeches of individuals. Much unnecessary trouble (we may be apt at first to think) is taken upon this subject; but yet, if we consider how uniform is the conduct of all those governments, how constant and unremitted are their cares in those respects, we shall become convinced, without looking farther, that there must be some sort of necessity for their precautions.

In republican states, for reasons which are at bottom the same as in the before-mentioned governments, the people are always kept under the greatest restraints by those who are at the head of the state (1). In the Roman

(1) See De Tocqueville's view of the political institutions of America.—EDITOR.

commonwealth, for instance, the liberty of writing was curbed by the severest laws (*b*): with regard to the freedom of speech, things were but little better, as we may conclude from several facts; and many instances may even be produced of the dread with which the private citizens, upon certain occasions, communicated their 426
political opinions to the consuls, or to the senate.

With respect, therefore, to this point, it may again be 427
looked upon as a most advantageous circumstance in the English government, that those who have been at the head of the people have not only been constantly disposed to procure the public liberty, but also that they have found it possible for them to do so; and that the remarkable strength and steadiness of the government have admitted of that extensive freedom of speaking and writing which the people of England enjoy. A most advantageous privilege this! which, affording to every man a mean of laying his complaints before the public, procures him almost a certainty of redress against any act of oppression that he may have been exposed to; and which leaving, moreover, to every subject a right to give his opinion on all public matters, and, by thus influencing the sentiments of the nation, to influence those of the legislature itself (which is sooner or later obliged to pay a deference to them), procures to him a sort of legislative authority of a much more efficacious and beneficial nature than any formal right he might enjoy of 428

(*b*) The law of the Twelve Tables had established the punishment of death against the author of a libel: nor was it by a *trial by jury* that they determined what was to be called a libel. SI QUIS CARMEN OCCENTASSIT, ACTITASSIT, CONDIDISSIT, QUOD ALTERI FLAGITIUM FAXIT, CAPITAL ESTO.

voting by a mere *yea* or *nay*, upon general propositions suddenly offered to him, and which he could have neither a share in framing, nor any opportunity of objecting to and modifying.

Such a privilege, by supporting in the people a continual sense of their security, and affording them undoubted proofs that the government, whatever may be its form, is ultimately designed to ensure the happiness of those who live under it, is both one of the greatest advantages of freedom, and its surest characteristic. The kind of security, as to their persons and possessions, which subjects, who are totally deprived of that privilege, enjoy at particular times under other governments, perhaps may entitle them to look upon themselves as the well administered property of masters who rightly understand their own interests; but it is the right of canvassing without fear the conduct of those who are placed at their head, which constitutes a free nation (*c*).

429 The unbounded freedom of debate, possessed by the English parliament, is also a consequence of the peculiar stability of the government. All sovereigns have agreed in their jealousy of assemblies of this kind, in their dread of the privileges of assemblies who attract in so high a degree the attention of the rest of the people,—who in a course of time become connected by so many essential ties with the bulk of the nation, and ac-

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(*c*) If we consider the great advantages to public liberty which result from the institution of the trial by jury, and from the liberty of the press, we shall find England to be in reality a more democratical state than any other we are acquainted with. The judicial power, and the censorial power, are vested in the people.

quire so much real influence by the essential share they must needs have in the management of public affairs, and by the eminent services, in short, which they are able to perform to the community (*d*). Hence it has happened that monarchs, or single rulers, in all countries, have endeavoured to dispense with the assistance of assemblies like those we mention, notwithstanding the capital advantages they might have derived from 430
their services towards the good government of the state; or, if the circumstances of the times have rendered it expedient for them to call such assemblies together, they have used the utmost endeavours in abridging those privileges and legislative claims which they soon found to prove so hostile to their security: in short, they have ever found it impracticable to place an unreserved trust in public meetings of this kind.

We may here name *Cromwell*, as he was supported by a numerous army, and possessed more power than any foreign monarch who has not been secured by an armed force. Even after he had *purged*, by the agency of Colonel Pride and two regiments, the parliament that was sitting when his power became settled, thereby thrusting out all his opponents, to the amount of about two hundred, he soon found his whole authority endangered by the proceedings of those who remained, and was under a necessity of turning them out in the military manner with which every one is acquainted.

(*d*) And which they do actually perform, till they are able to throw off the restraints of impartiality and moderation,—a thing which, being men, they never fail to do when their influence is generally established, and proper opportunities offer. Sovereigns know these things, and dread them.

Finding still a meeting of this kind highly expedient to legalise his military authority, he called together that assembly which was called *Barebone's* parliament.
431 He had *himself chosen the members of this parliament*, to the number of about a hundered and twenty, and they had severally received the summons from him; yet notwithstanding this circumstance, and the total want of personal weight in most of the members, he began, in a very few months, and in the midst of his powerful victorious army, to feel a serious alarm at their proceedings; he soon heard them talk of their own divine commission, and of the authority they had received from the *Lord;* and, in short, finding he could not trust them, he employed the offices of a second colonel to effect their dismission. Being now dignified with the legal appellation of *Protector*, he ventured to call a parliament elected by considerable parts of the people; but though the existence of this parliament was grounded, we might say grafted, upon his own, and though bands of soldiers were even posted in the avenues to keep out all such members as refused to take certain personal engagements to him, he made such haste, in the issue, to rid himself of their presence, as to contrive a mean quibble or device to shorten the time of their sitting by ten or twelve days (*e*). To a fourth
432 assembly he again applied; but though the elections had been so managed as to procure him a formal tender

(*e*) They were to have sat five months; but Cromwell pretended that the months were to consist of only twenty-eight days, as this was the way of reckoning time used in paying the army and the fleet.

of the crown during the first sitting (2), he put an end to the second with resentment and precipitation (*f*).

The example of the Roman emperors, whose power was outwardly so prodigious, may also be introduced here. They used to shew the utmost jealousy in their conduct with respect to the Roman senate; and that assembly, which the prepossession of the people, who looked upon it as the ancient remains of the republic, had made it expedient to continue, were not suffered to assemble but under the drawn scymitars of the prætorian guards.

It may be objected that pride of kings or sin- 433
gle rulers makes them averse to the existence of assemblies like those we mention, and despise the capital services which they might derive from them for the good government of their kingdoms. Granted, it may in some measure be so. But if we inquire into the general situation of affairs in different states, and into the examples with which their history supplies us, we shall also find that the pride of those kings agrees in the main with the interest and quiet of their subjects, and that their preventing such assemblies from meeting, or, when met, from assuming too large a share in the 434
management of public affairs, is, in a great measure, matter of necessity.

We may therefore reckon it as a very great ad-

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(2) Supra, p. 51.

(*f*) The history of the conduct of the deliberating and debating assemblies we are alluding to, in regard to the monarchs, or single rulers of any denomination, who summon them together, may be expressed in very few words. If the monarch is unarmed, they over-rule him, so as almost entirely to set him aside; if his power is of a military kind, they form connexions with the army.

vantage, that, in England, no such necessity exists. Such is the frame of the government, that the supreme executive authority can both give leave to assemble, and shew the most unreserved trust, when assembled, to those two houses which concur together to form the legislature.

These two houses, we see, enjoy the most complete freedom in their debates, whether the subject be *grievances*, or regulations concerning government matters of any kind; no restriction whatever is laid upon them; they may start any subject they please. The crown is not to take any notice of their deliberations; its wishes, or even its name, are not to be introduced in the debates. And, in short, what makes the freedom of deliberating, exercised by the two houses, really unlimited, is the privilege, or sovereignty, we may say, enjoyed by each within its own walls, in consequence of which, nothing done or said in parliament is to be questioned in any place out of parliament. Nor will it be pretended by those persons who are acquainted with the English history, that these privileges of parliament we mention
435 are nominal privileges, only privileges upon paper, which the crown has disregarded whenever it has thought proper, and to the violations of which the parliament have used very tamely to submit. That these remarkable advantages,—this total freedom from any compulsion or even fear; and, in short, this unlimited liberty of debate, so strictly claimed by the parliament, and so scrupulously allowed by the crown,—should be exercised year after year, during a long course of time, without producing the least relaxation in the execution of the laws, the smallest degree of anarchy,—are certainly very singular political phænomena.

It may be said, that the remarkable solidity of the governing executive authority, in England, operates to the advantage of the people, with respect to the objects we mention, in a twofold manner. In the first place, it so far takes from the great men in the nation all serious ambition to invade this authority, that their debates do not produce such anarchical and more or less bloody struggles as have very frequently disturbed other countries. In the second place, it inspires those great men with that salutary jealousy of the same authority which leads them to frame such effectual provisions for laying it under proper restraints. This distinguished *stability* 436
of the executive authority of the English crown affords an explanation of the peculiar manner in which public commotions have constantly been terminated in England, compared with the manner in which the same events have been concluded in other kingdoms. In what is mentioned, in a former chapter (3), upon this peculiarity in the English government, that is, the accuracy, impartiality, and universality of the provisions by which peace, after internal disturbances, has been restored to the nation,—the comparisons are confined to instances drawn from republican governments, with the intention not to say any thing of governments of a monarchical form, till the very essential observations contained in this chapter were introduced, which are, that the power of *crowns*, in other monarchies, has not been able, by itself, to produce the same effects it has in England,—that is, has not been able to inspire the great men in the state with any thing like that salutary jealousy we mention, nor of course to induce them to unite in a real

(3) Chap. 15 of this book.—EDITOR.

437 common cause with the rest of the people. In other monarchies (*g*), those men who, during the continuance of the public disturbances, were at the head of the people, finding it in their power, in the issue, to parcel out, more or less, the supreme governing authority, (or even the state itself), and to transfer the same to themselves, constantly did so, in the same manner, and for the very same reasons, as it happened in the ancient commonwealths; those monarchical governments being in reality, so far as that, of a republican nature: and the governing authority was left, at the conclusion, in the same undefined extent it had before (*h*). But, in England, the great men in the nation finding themselves in a situation entirely different, lost no time in pursuits like those in which the great men of other countries used to indulge themselves on the occasion we mention. Every member of the legislature plainly perceived, from the general
438 aspect of affairs, and his feelings, that the supreme executive authority in the state must in the issue fall somewhere undivided, and continue so; and being moreover sensible, that neither personal advantages of any kind, nor the power of any faction, but the law alone, could afterwards be an effectual restraint upon its motions, they had no thought or aim left, except to frame with care those laws on which their own liberty was to continue to depend, and to restrain a power which they judged it so impracticable to transfer to themselves or their party, or to render themselves independent of.

(*g*) Before the introduction of those numerous standing armies which are now kept by all the crowns of Europe.

(*h*) As a remarkable instance of such a treaty, may be mentioned that by which the war *for the public good* was terminated in France. See the note in page 30 of this work.

Nor has the great freedom of canvassing political subjects we have described been limited to the members of the legislature, or confined to the walls of Westminster, that is, to the exclusive spot on which the two houses meet: the like privilege is allowed to the other orders of the people; and a full scope is given to that spirit of party, and a complete security ensured to those numerous and irregular meetings, which, especially when directed to matters of government, create so much uneasiness in the sovereigns of other countries. Individuals even may, in such meetings, take an active 439
part for procuring the success of those public steps which they wish to see pursued; they may frame petitions to be delivered to the crown (4), or to both houses, either to procure the repeal of measures already entered upon by government, or to prevent the passing of such as are under consideration, or to obtain the enacting of new regulations of any kind: they may severally subscribe their names to such petitions.

That mighty political engine, the press, is also at their service; they may avail themselves of it to advertise the time and place, as well as the intent, of the meetings, and moreover to set off and inculcate the advantages of those notions which they wish to see adopted.

Such meetings may be repeated; and every individual may deliver what opinion he pleases on the proposed subjects, though ever so directly opposite to the views or avowed designs of the government. The member of the legislature may, if he chooses, have admittance

(4) See stat. 1 Car. 2, c. 5, the only law now in operation sanctioning and restraining this privilege.—EDITOR.

among them, and again enforce those topics which have
440 not obtained the success he expected in that house to which he belongs. The disappointed statesman, the minister turned out, also find the door open to them: they may bring in the whole weight of their influence and of their connexions; they may exert every nerve to enlist the assembly in the number of their supporters; they are bidden to do their worst; they fly through the country from one place of meeting to another: the clamour increases; the constitution, one may think, is going to be shaken to its very foundations:—but these mighty struggles, by some means or other, always find a proportionate degree of re-action; new difficulties, and at last insuperable impediments, grow up in the way of those who would take advantage of the general ferment to raise themselves on the wreck of the governing authority; a secret force exerts itself, which gradually brings things back to a state of moderation and calm; and that sea so stormy, to appearance so deeply agitated, constantly stops at certain limits, which it seems as if it wanted the power to pass.

The impartiality with which justice is dealt to all orders of men in England, is also in great measure owing to the peculiar stability of the government: the very remarkable, high degree, to which this impartiality
441 is carried, is one of those things which, being impossible in other countries, are possible under the government of this country. In the ancient commonwealths, from the instances that have been introduced in a former place, and from others that might be quoted, it is evident that no redress was to be obtained, for the acts of injustice or oppression committed by the men possessed of influence or wealth upon the inferior

citizens. In the monarchies of Europe, in former times, abuses of a like kind prevailed to a most enormous degree. In our days, notwithstanding the great degrees of strength acquired by the different governments, it is matter of the utmost difficulty for subjects of the inferior classes to obtain the remedies of the law against certain individuals: in some countries it is impossible, let the abuse be ever so flagrant; an open attempt to pursue such remedies being moreover attended with danger. Even in those monarchies of Europe in which the government is supported both by real strength and by civil institutions of a very advantageous nature, great differences prevail between individuals in regard to the facility of obtaining the remedies of the law: and to seek for redress is, at best, in many cases, so arduous and precarious an attempt, as to take from injured individuals all thoughts of en- 442
countering the difficulty (5). Nor are these abuses we mention in the former or present governments of Europe, to be attributed only to the want of resolution in the heads of those governments. In some countries, the sovereign, by an open design to suppress these abuses, would have endangered at once his whole authority: and in others, he would find obstructions multiply so in his way as to compel him, perhaps very quickly, to drop the undertaking. How can a monarch, alone, make a

(5) *Mirabeau,* in his speech on the abuses of the law in *old* France, observed, "It was the iniquity of our courts of justice, the plunder of lawyers and *procureurs* (attorneys), which gave rise to the happy idea of the sculptor, who formed a group, consisting of a man in his shirt, who had gained his cause; a man naked, who had lost it; and an attorney well dressed and in good case, pointing and laughing at them."—EDITOR.

persevering stand against the avowed expectations of all the great men by whom he is surrounded, and against the loud claims of powerful classes of individuals? In a commonwealth, what can the senate do when they find that their refusing to protect a powerful offender of their own class, or to indulge some great citizen with the impunity of his friends, is likely to be productive of serious divisions among themselves, or perhaps of disturbances among the people?

If we cast our eyes on the strict and universal impartiality with which justice is administered in England, we shall soon become convinced that some inward essential difference exists between the English government and those of other countries, and that its power is
443 founded on causes of a distinct nature. Individuals of the most exalted rank do not entertain so much as the thought to raise the smallest direct opposition to the operation of the law. The complaint of the meanest subject, if preferred and supported in the usual way, immediately meets with a serious regard. The oppressor, of the most extensive influence, though in the midst of a train of retainers, nay, though in the fullest flight of his career and pride, and surrounded by thousands of applauders and partisans, is stopped short at the sight of the legal paper which is delivered into his hands; and a tipstaff is sufficient to bring him away, and produce him before the bench.

Such is the *greatness*, and such is the uninterrupted *prevalence* of the law (*i*); such is, in short, the continuity of omnipotence, of resistless superiority, it exhibits,

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(*i*) Lex magna est, et prævalebit.

that the extent of its effects at length ceases to be a subject of observation to the public.

Nor are great or wealthy men to seek for redress or satisfaction of any kind, by any other means than such as are open to all; even the sovereign has bound himself to resort to no other; and experience has shown that he may, without danger, trust the protection of his person, and of the places of his residence, to the slow 444
and litigious assistance of the law.

Another very great advantage attending the remarkable stability of the English government, is, that the same is effected without the assistance of an armed standing force: the constant expedient, this, of all other governments. Doctor Adam Smith (*j*) expresses an opinion certainly erroneous. "To a sovereign who feels himself supported, not only by the natural aristo- 445
cracy of the country, but by a *well-regulated standing army*, the rudest, the most groundless, and the most licentious remonstrances can give little disturbance. He can safely pardon or neglect them, and his consciousness of his superiority naturally disposes him to do so. *That degree of liberty which approaches to licentiousness, can be tolerated only in countries where the sovereign is secured by a well-regulated standing army*" (*k*).

(*j*) An *Inquiry into the Nature and Causes of the Wealth of Nations.* Book v. chap. i.

(*k*) Dr. Smith's design, in the whole passage, is to show that standing armies, under proper restrictions, cannot be hurtful to public liberty: and may in some cases be useful to it, by freeing the sovereign from any troublesome jealousy in regard to this liberty. In the beginning of the passage which is here examined, he says, "Where the sovereign is himself the general, and the principal nobility and gentry of the country are the chief officers of the army,—

The above positions are grounded on the notion, that an army places in the hands of the sovereign a united irresistible strength, a strength liable to no accidents, difficulties, or exceptions; *a supposition this*, which is not conformable to experience. If a sovereign was endued with a kind of extraordinary power attending on his person, at once to lay under water whole legions of insurgents, or to repulse and sweep them away by flashes and shocks of the electrical fluid, then indeed he might use the great forbearance above described:—though it is not,
446 perhaps, very likely he would put up with the *rude* and *groundless* remonstrances of his subjects, and with their *licentious* freedom; yet he might, with safety, do or not do so, at his own choice. But an army is not that simple weapon which is here supposed. It is formed of officers and soldiers who feel the same passions with the rest of the people,—the same disposition to promote their own interest and importance, when they find out their strength, and proper opportunities offer. What will therefore be the resource of the sovereign, if, into that army, on the assistance of which he relies, the same party spirit creeps, by which his other subjects are actuated? Where will he take refuge, if the same political caprices, abetted by the serious ambition of a few leading men,—the same restlessness, and at last, perhaps, the same disaffection,—begin to pervade the smaller kingdom of the army, by which the main kingdom or nation is agitated?

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where the military force is placed under the command of those who have the greatest interest in the support of the civil authority, because they have the greatest share of that authority,—a standing army can never be dangerous to liberty, On the contrary, it may in some cases be favourable to liberty."

The prevention of dangers like those just mentioned constitutes the most essential part of the precautions and state-craft of rulers, in those governments which are secured by standing armed forces. Mixing the troops formed of natives with foreign auxiliaries, dispersing them in numerous bodies over the country, and continually shifting their quarters, are among the me- 447
thods that are used; which it does not belong to our subject to enumerate, any more than the extraordinary expedients employed by the eastern monarchs for the same purposes. But one caution, very essential to be mentioned here, and which the governments we allude to never fail to take before every other, is to retrench from their unarmed subjects a freedom, which, transmitted to the soldiery, would be attended with such fatal consequences; hindering such bad examples from being communicated to those in whose hands their power and life are trusted, is what every notion of self-preservation suggests to them; every weapon is accordingly exerted to suppress the rising and spreading of so awful a contagion.

In general, it may be laid down as a maxim, that, where the sovereign looks to his army for the security of his person and authority, the same military laws by which this army is kept together must be extended over the whole nation; not in regard to military duties and exercises, but certainly in regard to all that relates to the respect due to the sovereign and to his orders. The martial law, concerning these tender points, must be universal. The jealous regulations concerning mutiny and contempt of orders cannot be severely enforced on that part of the nation which secures the subjection 448
of the rest; and enforced, too, through the whole scale

of military subordination, from the soldier to the officer, up to the very head of the military system,—while the more numerous and inferior part of the people are left to enjoy an unrestrained freedom:—that secret disposition which prompts mankind to resist and counteract their superiors cannot be surrounded by such formidable checks on one side, and be left to be indulged to a degree of licentiousness and wantonness on the other.

In a country where an army is kept, capable of commanding the obedience of the nation, this army will both imitate the licentiousness above-mentioned, and check it in the people. Every officer and soldier, in such a country, claims a superiority in regard to other individuals; and, in proportion as their assistance is relied upon by the government, expects a greater or less degree of submission from the rest of the people (6).

449 Dr. Smith concludes his above quoted observations concerning the security of the power of an armed
450 sovereign, by immediately adding: "It is in such countries only that it is unnecessary that the sovereign should be trusted with any discretionary power for suppressing even the wantonness of this licentious liberty (*l*)." This

(6) An English soldier, in fact, is but a free citizen, voluntarily engaging for a time to serve in the army of his country, and not a mere slave of power, overawing his fellow citizens into subjection to despotism. The constitution does not recognize a perpetual soldier; and it is only to prevent domestic insurrection and foreign invasion, that the legislature provides an army; indeed looking at the great standing armies upon the continent of Europe, England would be placed in a position of great danger, were it left at any time without an armed force, even in time of peace.—EDITOR.

(*l*) Dr. Smith deemed a government to be a more simple machine, and an army a more simple instrument, than they in reality are. Like many other persons of great abilities, while struck with a certain peculiar consideration, he has overlooked others no less important.

leads us to take notice of a remarkable circumstance in the English government. From the expression, *it is unnecessary that the sovereign should be trusted with any discretionary power*, Dr. Smith appears to think that a sovereign at the head of an army, and whose power is secured by this army, usually waits to set himself in motion, till he has received leave for that purpose; that is, till he has been trusted with a power for so doing. This notion is borrowed from the steady and thoroughly legal government of this country; but the like law-doctrine, or principle, exists under no other government. In all monarchies (and it is the same in republics), the executive power in the state 451
is supposed to possess, originally and by itself, all manner of lawful authority: every one of its exertions is deemed to be legal: and they do not cease to be so, till they are stopped by some express and positive regulation.—The sovereign, and also the civil magistrate, till so stopped by some positive law, may come upon the subject when they choose: they may question any of his actions; they may construe them into unlawful acts, and inflict a penalty, as they please: in these respects they may be thought to abuse, but not to exceed, their power. The authority of the government, in short, is supposed to be unlimited, so far as there are no visible boundaries set up against it; within which boundaries lies whatever degree of liberty the subject may possess.

In England, the very reverse exists. It is not the authority of the government, it is the liberty of the subject, which is supposed to be unbounded. All the actions of an individual are supposed to be lawful, till that law is pointed out which makes them to be otherwise. The

onus probandi is here transferred from the subject to the prince. The subject is not at any time to show the
452 ground of his conduct. When the sovereign or magistrate think proper to exert themselves, it is their business to find out and produce the law in their own favour, and the prohibition against the subject.

453 This kind of law principle, owing to the general spirit by which all parts of the government are influenced, is even carried so far, that any quibble, or trifling circumstance, by which an offender may be enabled to step aside and escape, though ever so narrowly, the reach of the law, will screen him from punishment, let the immorality or intrinsic guilt of his conduct be ever so openly admitted (7).

Such a narrow circumscription of the exertions of the government is very extraordinary: it does not exist
454 in any country but this; nor could it. The situation of other governments is such, that they cannot thus allow themselves to be shut out of the unbounded space unoccupied by any law, in order to have their motions confined to that spot which express and previously-declared provisions have chalked out. The power of these governments being constantly attended with more or less precariousness, there must be a degree of *discretion* answerable to it (*m*).

The foundation of the law-principle, or doctrine, which

(7) A number of instances, some even of a ludicrous kind, might be quoted in support of the above observation. (See B. i. cap. 12. —EDITOR).

(*m*) It might perhaps also be proved, that the great lenity used in England in the administration of criminal justice, both in regard to the mildness, and to the frequent remission of punishments, is essentially connected with the same circumstance of the *stability* of the government. Experience indicates that it is needless to use any

confines the exertion of the power of the government to such cases only as are expressed by a law in being, was laid when the Great Charter was passed: this restriction was implied in one of those general impartial articles which the barons united with the people to obtain from the sovereign. The crown, at that time, derived from its foreign dominions that stability and inward strength 455
(in regard to the English nation) which are now in a secret hidden manner annexed to the civil branch of its office, and which, though operating by different means, continue to maintain that kind of confederacy against it, and union between the different orders of the people. By the article in *Magna Charta* here alluded to (8), the sovereign bound himself neither to *go*, nor *send*, upon the subject, otherwise than by the trial of peers, and the law of the land. This article was, however, afterwards disregarded in practice, in consequence of the lawful efficiency which the king claimed for his *proclamations*, and especially by the institution of the court of *Star-chamber*, which grounded its proceedings not only upon these proclamations, but also upon the particular rules it chose to frame within itself. By the abolition of this court (and also of the Court of High Commission) in the reign of Charles the First, the above provision of the Great Charter was put in actual force; and it has appeared by the event, that the very extraor- 456
dinary restriction upon the governing authority we are alluding to, and its execution, are no more than what

great degree of harshness and severity in regard to offenders; and the supreme governing authority is under no necessity of showing the subordinate magistracies any bad example in that respect. (See Editor's observations, *supra*, 377).

(8) Cap. 29. See page 28.—Editor.

the intrinsic situation of things, and the strength of the constitution, can bear.

The law-doctrine we have above described, and its being strictly regarded by the high governing authority, I take to be the most characteristic circumstance in the English government, and the most pointed proof that can be given of the true freedom which is the consequence of its frame. The practice of the executive authority thus to square its motions upon such laws, and such only as are ascertained and declared before-hand, cannot be the result of that kind of stability which the
457 crown might derive from being supported by an armed force, or, as the above-mentioned author has expressed it, from the sovereign being the general of an army; such a rule of acting is even contradictory to the office of a general: the operations of a general eminently depend for their success on their being sudden, unforeseen, attended by surprise.

In general, the stability of the power of the English crown cannot be the result of that kind of strength which arises from an armed force: the kind of strength which is conferred by such a weapon as an army, is too uncertain, too complicated, too liable to accidents: in a word, it falls infinitely short of the degree of steadiness necessary to counterbalance, and at last quiet, those extensive agitations in the people which sometimes seem to threaten the destruction of order and government. An army, if its support be well directed, may be useful to prevent this restlessness in the people from beginning to exist: but it cannot keep it within bounds, when it has once taken place.

If, from general arguments and considerations, we pass to particular facts, we shall actually find that the

crown, in England, does not rely for its support, nor 458
ever has relied, upon the army of which it has the command. From the earliest times,—that is, long before the invention of standing armies among European princes,—the kings of England possessed an authority certainly as full and extensive as that which they now enjoy. After the weight they derived from their possessions beyond sea had been lost, a certain arrangement of things began to be formed at home, which supplied them with a strength of another kind, though not less solid; and they began to derive from the civil branch of their regal office that secure power which no other monarchs had ever possessed, except through the assistance of legions and prætorian guards, of armies of Janissaries, or of Sretlitzes.

The princes of the house of Tudor, to speak of a very remarkable period in the English history, though they had no other visible present force than inconsiderable retinues of servants, were able to exert a power equal to that of the most absolute monarchs that ever reigned, equal to that of a Domitian or a Commodus, an Amurath or a Bajazet; nay, it even was superior, if we consider the steadiness and outward show of legality with which it was attended throughout.

The stand which the kings of the house of Stuart 459
were able to make, though unarmed, and only supported by the civil authority of their office, during a long course of years, against the restless spirit which began to actuate the nation, and the vehement political and religious notions that broke out in their time, is still more remarkable than even the exorbitant power of the princes of the house of Tudor, during whose reign prepossessions of quite a contrary nature were universal.

The struggle opened with the reign of James the First; yet he peaceably weathered the beginning storm, and transmitted his authority undiminished to his son. Charles the First, indeed, was at last crushed under the ruins of the constitution: but if we consider that, after making the important national concessions contained in the *Petition of Right*, he was able, single and unarmed, to maintain his ground without loss or real danger, during the space of eleven years (that is, till the year 1640), we shall be inclined to think that, had he been better advised, he might have avoided the misfortunes that at length befel him.

Even the events of the reign of James the Second
460 afford a proof of that solidity which is annexed to the authority of the English crown. Although the whole nation, not excepting the army, were in a manner unanimous against him, he was able to reign four years, standing single against all, without meeting with any open resistance. Nor was such justifiable and necessary resistance easily brought about at length (*n*). Though it is not to be doubted that the dethroning of James the Second would have been effected in the issue, and perhaps

(*n*) Mr. Hume is rather too anxious in his wish to exculpate James the Second. He begins the conclusive character he gives of him, with representing him as a prince *whom we may safely pronounce more unfortunate than criminal.* If we consider the solemn engagements entered into, not by his predecessors only, but by himself, which this prince endeavoured to break, how cool and deliberate was his attack on the liberties and the religion of the people, how unprovoked the attempt, and, in short, how totally destitute he was of any plea of self-defence or necessity,—a plea to which most of the princes who have been at variance with their subjects have had a more or less distant claim,—we shall look upon him as being perhaps the most guilty monarch that ever existed.

in a very tragical manner; yet, if it had not been for the assistance of the Prince of Orange, the event would certainly have been postponed for a few years. That authority on which James relied with so much confidence, 461
was not annihilated at the time it was, otherwise than by a ready and considerable armed force being brought against it from the other side of the sea,—like a solid fortress, which, though without any visible outworks, requires, in order to be compelled to surrender, to be battered with cannon.

If we look into the manner in which this country has been governed since the Revolution, we shall evidently see that it has not been by means of the army that the crown has been able to preserve and exert its authority. It is not by means of their soldiers that the kings of Great Britain prevent the manner in which elections are carried on from being hurtful to them; for these soldiers must move from the places of election one day before such elections are begun, and not return till one day after they are finished. It is not by means of their military force that they prevent the several kinds of civil magistracies in the kingdom from invading and lessening their prerogative; for this military force is not to act till called for by these latter, and under their direction. It is not by means of their army that they lead the two branches of the legislature into that respect to their regal authority which we have before described; since each of these two branches, severally, is possessed 462
with an annual power of disbanding this army (*o*).

(*o*) The generality of the people have from early times been so little accustomed to see any display of force used to influence the debates of the parliament, that the attempt made by Charles the First

There is another circumstance, which, abstractedly from all others, makes it evident that the executive authority of the crown is not supported by the army: I mean the very singular subjection in which the military is kept in regard to the civil power in this country.

In a country where the governing authority in the state is supported by the army, the military profession, (who, in regard to the other professions, have on their side the advantage of present force, being now moreover countenanced by the law), immediately acquire, or rather assume, a general ascendancy; and the sovereign, far from wishing to discourage their claims, feels an inward happiness in seeing that instrument on which he rests his authority additionally strengthened by the
463 respect of the people, and receiving a kind of legal sanction from the general outward consent.

And not only the military profession at large, but the individuals belonging to it, also claim personally a pre-eminence; chief commanders, officers, and soldiers, all claim, in their own spheres, some sort of exclusive privilege: and these privileges, whether of an honorary, or of a more substantial kind, are violently asserted and rendered grievous to the rest of the community, in proportion as the assistance of the military force is more evidently necessary to, and more frequently employed by, the government. These things cannot be otherwise.

Now, if we look into the facts that take place in

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to seize the *five members*, attended by a retinue of about two hundred servants, was the actual spark that set in a blaze the heap of combustibles which the preceding contests had accumulated. The parliament, from that fact, took a pretence to make military preparations in their turn; and then the civil war began.

England, we shall find that a quite different order prevails from what is above described. All courts of a military kind are under a constant subordination to the ordinary courts of law. Officers who have abused their private power, though only in regard to their own soldiers, may be called to account before a court of common law, and compelled to make proper satisfaction. Even any flagrant abuse of authority committed by members of courts-martial (9), when sitting to judge their own people, and determine upon cases entirely of a bare military kind, makes them liable to the 464
animadversion of the civil judge (*p*). All offences committed by persons of the military profession are to be 466
determined upon by the civil judge. Any use they may make of their force, unless expressly authorized and directed by the civil magistrate, makes them liable to be convicted of murder for any life that may have been lost. To allege the duties or customs of their profession, in extenuation of any offence, is a plea which the judge will not so much as understand. Whenever claimed by the civil power, they must be delivered up immediately. Nor can it, in general, be said that the countenance shown to the military profession by the ruling power in the state has constantly been such as to inspire the bulk of the people with a disposition tamely to bear their acts of

(9) These Courts have their authority by stat. 22 Geo. II. c. 33, which is explained by stat. 19 Geo. III. c. 17; and they sit for the trial of offences against the Articles of War (see the first mentioned stat.), only in consequence of the Mutiny Act (which is before spoken of), for a period of from twelve to eighteen months, according to the station of the troops, in which the offence shall call for the assembling such a court.—EDITOR.

(*p*) See Lieut. Frye's case, London Gazette, 15 Nov. 1746.

oppression, or to raise in magistrates and juries any degree of prepossession sufficient to lead them always to determine with partiality in their favour.

467 The subjection of the military to the civil power, carried to that extent it is in England, is another characteristic and distinctive circumstance in the English government.

It is sufficiently evident that a king does not look to his army for his support, who takes so little pains to bribe and unite it to his interest.

In general, if we consider all the different circumstances in the English government, we shall find that the army cannot procure to the sovereign any permanent strength,—any strength upon which he can rely,—and from it expect the success of any future and distant measures.

The public notoriety of the debates in parliament induces all individuals, soldiers as well as others, to pay some attention to political subjects; and the liberty of speaking, printing, and intriguing, being extended to every order of the nation by whom they are surrounded,

468 makes them liable to imbibe every notion that may be directly contrary to the views of that power which maintains them.

The case would be still worse if the sovereign should engage in a contest with a very numerous part of the nation. The general concern would increase in proportion to the vehemence of the parliamentary debates: individuals, in all the different classes of the public, would try their eloquence on the same subjects; and this eloquence would be in great measure exerted, during such interesting times, in making converts of the soldiery: these evils the sovereign could not obviate,

nor even know, till it should be in every respect too late. A prince, engaged in the contest we suppose, would scarcely have completed his first preparations,—his project would scarcely be half ripe for execution,—before his army would be taken from him. And the more powerful this army might be, the more adequate, seemingly, from its numbers, to the task it is intended for, the more open it would be to the danger we mention.

Of this, James the Second made a very remarkable experiment. He had augmented his army to the number of thirty thousand. But when the day came in which their support was to have been useful to him, some deserted to the enemy; others threw down their arms; and those who continued to stand together, 469
showed more inclination to be spectators of, than agents in, the contest. In short, he gave all over for lost, without making any trial of their assistance.

From all the facts before-mentioned, it is evident 470
that the power of the crown, in England, rests upon foundations quite peculiar to itself, and that its security and strength are obtained by means totally different from those by which the same advantages are so incompletely procured, and so dearly paid for, in other countries.

It is without the assistance of an armed force that the crown, in England, is able to manifest that dauntless independence of particular individuals, or whole classes of them, with which it discharges its legal functions and duties. Without the assistance of an armed force, it is able to counterbalance the extensive and un- 471
restrained freedom of the people, and to exert that resisting strength which constantly keeps increasing in a superior proportion to the force by which it is opposed, —that ballasting power by which, in the midst of bois-

terous winds and gales, it recovers and rights again the vessel of the state (*q*).

It is from the civil branch of its office the crown derives that strength by which it subdues even the military power, and keeps it in a state of subjection to the laws, unexampled in any other country. It is from a happy arrangement of things it derives that uninterrupted steadiness, that invisible solidity, which procure to the subject both so certain a protection and so extensive a freedom. It is from the nation it receives
472 the force with which it governs the nation. Its resources are accord, and not compulsion,—free action, and not fear,—and it continues to reign through the political *drama*, the struggle of the voluntary passions of those who pay obedience to it.

On the peculiar Foundations of the English Monarchy as a Monarchy.

The reader will also find, that several remarkable new instances prove the fact of the peculiar *stability* of the executive power of the British crown, and exhibit a much more complete delineation of the

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(*q*) *There are many circumstances in the English government, which those persons who wish for speculative meliorations, such as parliamentary reform, or other changes of a like kind, do not perhaps think of taking into consideration. If so, they are, in their proceedings, in danger of meddling with a number of strings, the existence of which they do not suspect. While they only mean reformation and improvement, they are in danger of removing the talisman on which the existence of the fabric depends; or, like the daughter of King Nisus,* (Scylla.—Ed.), *of cutting off the fatal hair with which the fate of the city is connected.* (Megara besieged by Minos.—Ed.)

advantages that result from that stability in favour of public liberty.

These advantages may be enumerated in the following order: I. The numerous restraints the governing authority is able to bear, and the extensive freedom it can afford to allow the subject, at its own expense: II. The liberty of speaking and writing, carried to the great extent it is in England: III. The unbounded freedom of the debates in the legislature: IV. The power to bear the constant union of all orders of subjects against its prerogatives: V. The freedom allowed to all individuals to take an active part in government concerns: VI. The strict impartiality with which justice is dealt to all subjects, without any respect whatever of persons: VII. The lenity of the criminal law, both in regard to the mildness of punishments, and the frequent remission of them: VIII. The strict compliance of the governing authority with the letter of the law: IX. The needlessness of an armed force to support itself by, and, as a consequence, the singular subjection of the military to the civil power.

The above-mentioned advantages are peculiar to the English government. To attempt to imitate them, or transfer them to other countries, with that degree of extent to which they are carried in England, without at the same time transferring the whole order and conjunction of circumstances in the English government, would prove unsuccessful attempts (*r*).

(*r*) Many persons, satisfied with seeing the elevation and upper parts of a building, think it immaterial to give a look under ground and notice the foundation. Those readers, therefore, who choose, may consider this chapter as a kind of foreign digression, or parenthesis, in the work.

CHAPTER XIII.

How far the Examples of Nations who have lost their Liberty are applicable to England.

472 EVERY government (those writers observe, who have treated on these subjects) contains within itself the efficient cause of its ruin,—a cause which is essentially connected with those very circumstances that had produced its prosperity,—the advantages attending the English government cannot therefore (*according to these writers*) exempt it from that latent defect which is secretly working its ruin; and M. de Montesquieu, giving his opinion both of the effect and the cause, says, that "as all human things have an end, the English constitution will lose its liberty,—will perish; and that as
473 Rome, Lacedæmon, and Carthage, perished—so England will perish when the legislative power shall have become more corrupt than the executive." (1)

Though it cannot be pretended that any human establishment can escape the fate to which we see every thing in nature is subject, nor is the author so far prejudiced by the sense he entertains of the great advantages of the English government as to reckon among

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(1) Sp. Laws, vol. 2, b. 11, c. 6. This chapter is supposed to have been written, not by Montesquieu, but by the Lord Chancellor York.—EDITOR.

them that of eternity, it may however be observed in general, that as it differs by its structure and resources from all those with which history makes us acquainted, so it cannot be said to be liable to the same dangers. To judge of one from the other is to judge by analogy where no analogy is to be found.

The writer of the above opinion having neglected, (as indeed all systematic writers upon politics have done), to inquire attentively into the real foundations of power and of government among mankind, the principles he lays down are not always so clear, or even so just, as we might have expected from a man of so 474
acute a genius. When he speaks of England, for instance, his observations are much too general: and though he had frequent opportunities of conversing with men who had been personally concerned in the public affairs of this country, and he had been himself an eye-witness of the operations of the English government, yet, when he attempts to describe it, he rather tells us what he conjectured than what he saw.

The examples he quotes, and the causes of dissolution which he assigns, particularly confirm this observation. The government of Rome,—to speak of the one which, having gradually, and as it were of itself, fallen to ruin, may afford matter for exact reasoning,—had no relation to that of England. The Roman people were not, in the latter ages of the Commonwealth, a people of citizens, but of conquerors. Rome was not a state, but the head of a state. By the immensity of its conquests, it came in time to be in a manner only an accessory part of its own empire. Its power became so great, that, after having conferred it, it was at length no longer able to resume it: and from that moment it

became itself subjected to it, for the same reason that the provinces were so.

475 The fall of Rome, therefore, was an event peculiar to its situation; and the change of manners, which accelerated this fall, had also an effect which it could not have had but in that same situation. Men who had drawn to themselves all the riches of the world, could no longer be content with the supper of Fabricius, or with the cottage of Cincinnatus. The people who were masters of all the corn of Sicily and Africa, were no longer obliged to plunder their neighbours. All possible enemies, besides, being exterminated, Rome, whose power was military, ceased to be an army; and that was the æra of her corruption: if, indeed, we ought to give that name to what was the inevitable consequence of the nature of things.

In a word, Rome was destined to lose her liberty when she lost her empire; and she was destined to lose her empire, whenever she should begin to enjoy it.

But England forms a society founded upon principles entirely different. Here, all liberty and power are not accumulated as it were in one point, so as to leave, every where else, only slavery and misery, and consequently only seeds of division and secret animosity. From one

476 end of the island to the other the same laws take place, and the same interests prevail: the whole nation, besides, equally concurs in the framing of the government; no one part, therefore, has cause to fear that the other parts will suddenly supply the necessary forces to destroy its liberty: and the whole have, of course, no occasion for those ferocious kinds of virtue which are indispensably necessary to those who, from the situation

to which they have brought themselves, are continually exposed to dangers, and, after having invaded every thing, must abstain from every thing.

The situation of the people of England, therefore, essentially differs from that of the people of Rome. The form of the English government does not differ less from that of the Roman republic: and the great advantages it has over the latter, for preserving the liberty of the people from ruin, have been described at length in the course of this work.

Thus, for instance, the ruin of the Roman republic was principally brought about by the exorbitant power to which several of its citizens were successfully enabled to rise. In the latter age of the Commonwealth, those citizens went so far as to divide among themselves the dominions of the republic in much the same manner as they might have done lands of their own. And to 477
them others in a short time succeeded, who not only did the same, but even proceeded to such a degree of tyrannical insolence, as to make cessions to each other, by express and formal compacts, of the lives of thousands of their fellow-citizens (2). But the great and constant authority and weight of the crown, in England, prevent, in their very beginning (as we have seen), all misfortunes of this kind.

At last the ruin of the republic, as every one knows, was completed. One of those powerful citizens to whom we alluded, in process of time, found means to exterminate all his competitors; he immediately assumed the whole power of the state, and erected an arbitrary

(2) As did Augustus, Anthony, and Lepidus.—EDITOR.

monarchy. But such a sudden and violent establishment of a monarchical power, and all the fatal consequences that would result from such an event, are calamities which cannot take place in England. That kind of power has here existed for ages: it is circumscribed by fixed laws, and established upon regular and well-known foundations.

Nor is there any great danger that this power may,
478 by means of those legal prerogatives it already possesses, suddenly assume others, and at last openly make itself absolute. The important privilege of granting to the crown its necessary supplies, we have before observed, is vested in the nation: and how extensive soever the prerogatives of a king of England may be, it constantly lies in the power of his people either to grant or deny him the means of exercising them.

This right, possessed by the people of England, constitutes the great difference between them and all other nations that live under monarchical governments. It likewise gives them a great advantage over such as are formed into republican states, and confers on them a mean of influencing the conduct of the government, not only more effectual, but also incomparably more lasting and secure than those reserved to the people, in the states we mention.

In those states, the political rights which usually fall to the share of the people are those of voting in general assemblies, either when laws are to be enacted, or magistrates to be elected. But as the advantages
479 arising from these general rights of giving votes are never very clearly ascertained by the generality of the people, so neither are the consequences attending particular forms or modes of giving these votes generally

and completely understood. They accordingly never entertain any strong and constant preference for one method rather than another; and hence it always proves too easy a thing in republican states, either by insidious proposals made at particular times to the people, or by well-contrived precedents, or other means, first to reduce their political privileges to mere ceremonies and forms, and, at last, entirely to abolish them.

Thus, in the Roman republic, the mode which was constantly in use for about one hundred and fifty years, of dividing the citizens into *centuriæ* when they gave their votes, reduced the right of the greater part of them, during that time, to little more than a shadow. After the mode of dividing them by tribes had been introduced by the tribunes, the bulk of the citizens indeed were not, when it was used, under so great a disadvantage as before; but yet the great privileges exercised by the magistrates in all the public assemblies, the power they assumed of moving the citizens out of one tribe into another, and a number of other circumstances, continued to render the rights of the citizens more and more inefficient: and in fact we do not find that, when those rights were at last entirely taken from them, they expressed any very great degree of discontent. 480

But the situation of affairs in England is totally different. *The political rights of the people are inseparably connected with the right of property*—with a right which it is as difficult to invalidate by artifice, as it is dangerous to attack by force; and which we see that the most arbitrary kings, in the full career of their power, have never offered to violate without the greatest precautions. A king of England, who would enslave his people, must begin with doing, for his first act, what all 481

other kings reserve for the last; and he cannot attempt to deprive his subjects of their political privileges, without declaring war against the whole nation at the same
482 time, and attacking every individual at once in his most permament and his best-understood interest.

The means possessed by the people of England, of influencing the conduct of the government, is not only in a manner secure against any danger of being taken from them, but they are moreover attended with another advantage of the greatest importance; which is that of conferring naturally, and as it were necessarily, on those to whom they intrust the care of their interests, the great privilege we have before described, of debating among themselves whatever questions they deem conducive to the good of their constituents, and of framing whatever questions they think proper, and in what terms they choose.

This privilege of starting new subjects of deliberation, and, in short, of *propounding* in the business of legislation, which, in England, is allotted to the representatives of the people, forms another capital difference between the English constitution and the government of other free states, whether limited monarchies or commonwealths, and prevents that which, in those states, proves a most effectual mean of subverting the laws favourable to public liberty,—namely, the undermining of these laws by the precedents and artful practices of those who are invested with the executive power of the government.

483 In the states we mention, the *active* share, or the business of *propounding*, in legislation, being ever allotted to those persons who are invested with the executive authority, they not only possess a general power,

by means of insidious and well-timed proposals made to the people, of getting those laws repealed which set bounds to their authority; but, when they do not choose openly to discover their wishes in that respect, or perhaps are even afraid of failing in the attempt, they have another resource, which, though slower in its operation, is no less effectual in the issue. They neglect to execute those laws which they dislike, or deny the benefit of them to the separate straggling individuals who claim it, and, in short, introduce practices that are directly repugnant to them. These practices in a course of time become respectable *usages*, and at length obtain the force of *laws*.

The people, even where they are allowed a share in legislation, being ever *passive* in the exercise of it, have no opportunities of framing new provisions by which to remove the spurious practices or regulations, and declare what the law in reality is. The only resource of the citizens, in such a state of things, is either to be perpetually cavilling, or openly to oppose: and, always exerting themselves either too soon or too late, they cannot come forth to defend their liberty without incurring 484
the charge, either of disaffection, or of rebellion.

And while the whole class of politicians, who are constantly alluding to the usual forms of limited governments, agree in deciding that freedom, when once lost, cannot be recovered (*a*), it happens that the maxim *principiis obsta*, which they look upon as the safeguard of liberty, and which they accordingly never cease to

(*a*) "Ye free nations, remember this maxim: Freedom may be acquired, but it cannot be recovered." *Rousseau's* Social Compact, chap. viii.

recommend, besides its requiring a degree of watchfulness incompatible with the situation of the people, is in a manner impracticable.

But the operation of preferring grievances, which in other governments is a constant forerunner of public commotions, and that of framing new law-remedies, which is so jealously secured to the ruling powers of the state, are, in England, the constitutional and appropriated offices of the representatives of the people.

How long soever the people may have remained in a state of supineness, as to their most valuable interests; whatever may have been the neglect and even the errors of their representatives, the instant the latter come either to see these errors, or to have a sense of their duty, they proceed, by means of the privilege we men-
485 tion, to abolish those abuses or practices which, during the preceding years, had taken place of the laws. To how low soever a state public liberty may happen to be reduced, they take it where they find it, lead it back through the same path, and to the same point, from which it had been compelled to retreat; and the ruling power, whatever its usurpations may have been,—how far soever it may have overflowed its banks,—is ever brought back to its old limits.

To the exertions of the privilege we mention, were owing the frequent confirmations and elucidations of the Great Charter that took place in different reigns. By means of the same privilege the act was repealed, without public commotion, which had enacted that the king's proclamation should have the force of law: by this act public liberty seemed to be irretrievably lost; and the parliament which passed it, seemed to have done what the Danish nation did about a century after-

wards. The same privilege procured the peaceable abolition of the Court of Star-chamber,—a court which, though in itself illegal, had grown to be so respected through the length of time it had been suffered to exist, that it seemed to have for ever fixed and rivited the un- 486
lawful authority it conferred on the crown. By the same means was set aside the power which the privy council had assumed of imprisoning the subject without admitting to bail, or even mentioning any cause. This power was, in the first instance, declared illegal by the *Petition of Right;* and the attempts of both the crown and the judges to invalidate this declaration, by introducing or maintaining practices that were derogatory to it, were as often obviated, in a peaceable manner, by fresh declarations, and, in the end, by the celebrated *Habeas Corpus* act (*b*).

We will take this opportunity of observing, in general, 487
how the different parts of the English government mutually assist and support each other. It is because the whole executive authority of the state is vested in the

(*b*) The case of general warrants may also be mentioned as an instance. The issuing of such warrants, with the name of the person to be arrested left blank, was a practice that had been followed by the secretaries of state for above sixty years. In a government differently constituted, that is, in a government in which the magistrates, or executive power, should have been possessed of the *key* of legislation, it is difficult to say how the contest might have been terminated; these magistrates would have been but indifferently inclined to frame and bring forth a declaration which would abridge their assumed authority. In the republic of Geneva, the magistracy, instead of rescinding the judgment against M. Rousseau, of which the citizens complained, chose rather openly to avow the maxim, that standing *uses* were valid derogations from the written law, and ought to supersede it. This rendered the clamour more violent than before.

crown, that the people may without danger delegate the care of their liberty to representatives:—it is because they share in the government only through these representatives, that they are enabled to possess the great advantage arising from framing and proposing new laws: but for this purpose it is again absolutely necessary that a correspondent prerogative of the *crown*, that is to say, a *veto* of extraordinary power, should exist in the state.

It is, on the other hand, because the balance of the people is placed in the right of granting to the crown its necessary supplies, that the latter may, without danger, be intrusted with the great authority we mention: and that the right, for instance, which is vested in it, of judging of the proper time for calling and dissolving parliaments (a right absolutely necessary to its preservation) (3) may exist without producing, *ipso facto*, the ruin of public liberty. The most singular government upon earth, and which has carried farthest the
488 liberty of the individual, was in danger of total destruction, when Bartholomew Columbus was on his passage to England, to teach Henry the Seventh the way to Mexico and Peru.

As a conclusion of this subject (which might open a field for speculation without end) we will take notice of an advantage peculiar to the English government, and which, more than any other we could mention, must contribute to its duration. All the political passions of mankind, if we attend to it, are satisfied and provided

(3) As affairs are situated in England, the dissolution of a parliament on the part of the crown is no more than an appeal to the people themselves.—EDITOR.

for in the English government; and whether we look at the monarchical, the aristocratical, or the democratical part of it, we find all those powers already settled in it in a regular manner, which have an unavoidable tendency to arise, at one time or other, in all human societies.

If we could for an instant suppose that the English form of government, instead of having been the effect of a concurrence of fortunate circumstances, had been established from a settled plan by a man who had discovered, before-hand and by reasoning, all those advantages resulting from it which we now perceive 489
from experience, and had undertaken to point them out to other men capable of judging of what he said to them, the following is, most likely, the manner in which he would have expressed himself:—

Nothing is more chimerical (he might have said) than a state either of total equality, or total liberty, amongst mankind. In all societies of men, some power will necessarily arise. This power, after gradually becoming confined to a smaller number of persons, will, by a like necessity, at last fall into the hands of a single leader; and these two effects (of which you may see constant examples in history) arising from the ambition of one part of mankind, and from the various affections and passions of the other, are absolutely unavoidable.

Let us, therefore, admit this evil at once, since it is impossible to avoid it. Let us, of ourselves, establish a chief among us, since we must, some time or other, submit to one; we shall by this step effectually prevent the conflicts that would arise among the competitors for that station. But let us, above all, establish him single; lest, after successively raising himself on the ruin of his 490
rivals, he should finally establish himself whether we

will or not, and through a train of the most disadvantageous incidents.

Let us even give him every thing we can confer without endangering our security. Let us call him our sovereign; let us make him consider the state as being his own patrimony; let us grant him, in short, such personal privileges as none of us can ever hope to rival him in; and we shall find that those things which we were at first inclined to consider as a great evil, will be in reality a source of advantage to the community. We shall be the better able to set bounds to that power which we shall have thus ascertained and fixed in one place. We shall thus render more interested the man whom we shall have put in possession of so many advantages, in the faithful discharge of his duty; and we shall have thus procured, for each of us, a powerful protector at home, and, for the whole community, a defender against foreign enemies, superior to all possible temptation of betraying his country.

You may also have observed (he would continue) that in all states there naturally arise around the person or persons, who are invested with the public power, a class
491 of men, who, without having any actual share in that power, yet partake of its lustre,—who, pretending to be distinguished from the rest of the community, do from that very circumstance become distinguished from it; and this distinction, though only matter of opinion, and at first thus surreptitiously obtained, yet may become in time the source of very grievous effects.

Let us therefore regulate this evil, which we cannot entirely prevent. Let us establish this class of men, who would otherwise grow up among us without our knowledge, and gradually acquire the most pernicious

privileges. Let us grant them distinctions that are visible and clearly ascertained: their nature will thus be the better understood, and they will of course be much less likely to become dangerous. By the same means also, we shall preclude all other persons from the hopes of usurping them. As to pretend to distinctions can thenceforward be no longer a title to obtain them, every one who shall not be expressly included in their number must continue to confess himself one of the people; and, just as we said before, let us choose ourselves one master that we may not have fifty, we may now say, let us establish three hundred lords, that we 492
may not have ten thousand nobles.

Besides, our pride will better reconcile itself to a superiority which it will no longer think of disputing. Nay, as they will themselves see that we are beforehand in acknowledging it, they will think themselves under no necessity of being insolent to furnish us a proof of it. Secure as to their privileges, all violent measures on their part for maintaining, and at last perhaps extending them, will be prevented: they will never combine with any degree of vehemence, but when they really have cause to think themselves in danger; and by having made them indisputably great men, we shall have a chance of often seeing them behave like modest and virtuous citizens.

In fine, by being united in a regular assembly, they will form an intermediate body in the state, that is to say, a very useful part of the government.

It is also necessary (our reasoning lawgiver might add) that we, the people, should have an influence upon government: it is necessary for our own security; it is no less necessary for the security of the government

itself. But experience must have taught you, at the
493 same time, that a great body of men cannot act, without being, though they are not aware of it, the instruments of the designs of a small number of persons; and that the power of the people is never any thing but the power of a few leaders, who (though it may be impossible to tell when or how) have found means to secure to themselves the direction of its exercise.

Let us, therefore, be also before-hand with this other inconvenience. Let us effect openly what would, otherwise, take place in secret. Let us intrust our power, before it be taken from us by address. Those whom we shall have expressly made the depositories of it, being freed from any anxious care about supporting themselves, will have no object but to render it useful. They will stand in awe of us the more, because they well know that they have not imposed upon us: and instead of a small number of leaders, who would imagine they derive their whole importance from their own dexterity, we shall have express and acknowledged representatives, who will be accountable to us for the evils of the state.

But above all, by forming our government with a
494 small number of persons, we shall prevent any disorder that may take place in it from ever becoming dangerously extensive. Nay, more, we shall render it capable of such inestimable combinations and resources, as would be utterly impossible in the government of all, which never can be anything but uproar and confusion.

In short, by expressly divesting ourselves of a power, of which we should, at best, have only an apparent enjoyment, we shall be entitled to make conditions for ourselves: we will insist that our liberty be augmented;

we will, above all, reserve to ourselves the right of watching and censuring that administration which will have been established by our own consent. We shall the better see its faults, because we shall be only spectators of it: we shall correct them the better, because we shall not have personally concurred in its operations.

He might have added,— As we will not seek to counteract nature, but rather to follow it, we shall be able to procure ourselves a mild legislation. Let us not be, without cause, afraid of the power of one man; we shall have no need either of a Tarpeian rock, or of a council of *Ten*. Having expressly allowed to the people a liberty to inquire into the conduct of government, and to endeavour to correct it, we shall need neither state prisons, nor secret informers.

The English constitution being founded upon such 495
principles as those we have just described, no true comparison can be made between it and the government of any other state; and since it evidently secures, not only the liberty, but the general satisfaction, in all respects, of those who are subject to it, in a much greater degree than any other government ever did, this consideration alone affords sufficient ground to conclude, without looking farther, that it is also more likely to be preserved from ruin.

And indeed we may observe the remarkable manner in which it has been maintained in the midst of such general commotions as seemed to lead to its unavoidable destruction. It rose again, we see, after the wars between Henry the Third and his barons,—after the usurpation of Henry the Fourth,—and after the long and bloody contentions between the houses of York and

Lancaster. Nay, though totally destroyed in appearance after the fall of Charles the First, and though the greatest efforts had been made to establish another form of government in its stead, yet no sooner was Charles the Second called over, than the constitution was re-established upon all its ancient foundations.

496 However, as what has not happened at one time may happen at another, future revolutions (events which no form of government can totally prevent) may perhaps end in a different manner from that in which past ones have terminated. New combinations may possibly take place among the then ruling powers of the state, of such a nature as to prevent the constitution, in time of peace, from settling again upon its ancient and genuine foundations: and it would ertainly be a very bold assertion to affirm, that both the outward form, and the true spirit of the English government, would again be preserved from destruction, if the same dangers to which they have in former times been exposed should again happen to take place.

Nay, such fatal changes as those we mention may be introduced even in quiet times, or, at least, by means in appearance peaceable and constitutional. Advantages, for instance, may be taken by particular factions, either of the feeble capacity, or of the misconduct of some future king. Temporary prepossessions of the people may be so artfully managed as to make them concur in doing what will prove afterwards the ruin of their own liberty.

497 Plans of apparent improvement in the constitution, forwarded by men who, though with good intentions, shall proceed without a due knowledge of the true principles and foundations of government, may produce effects quite contrary to those which were intended, and in

reality pave the way to its ruin (*c*). The crown, on the other hand, may, by the acquisition of foreign dominions, acquire a fatal independency on the people.

The English government will be no more, either when 498
the crown shall become independent of the nation for its supplies, or when the representatives of the people shall begin to share in the executive authority (*d*).

(*c*) Instead of looking for the principles of politics in their true sources, that is to say, in the nature of the affections of mankind, and of those sacred ties by which they are united in a state of society, men have treated that science in the same manner as they did natural philosophy in the time of Aristotle, continually recurring to occult causes and principles, from which no useful consequence could be drawn. Thus, in order to ground particular assertions, they have much used the word constitution in a personal sense; *the constitution loves, the constitution forbids,* and the like. At other times they have had recourse to *luxury,* in order to explain certain events; and, at others, to a still more occult cause, which they have called *corruption;* and abundance of comparisons drawn from the human body have been also used for the same purposes. (See Volney's Ruins.—Editor). Continued instances of such defective arguments and considerations occur in the works of *M. de Montesquieu,* though a man of so much genius, and from whose writings so much information is nevertheless to be derived. Nor is it only the obscurity of the writings of politicians, and the impossibility of applying their speculative doctrines to practical uses, which prove that some peculiar and uncommon difficulties lie in the way of the investigation of political truths; but the remarkable perplexity which men, in general, even the ablest, labour under, when they attempt to descant and argue upon abstract questions in politics, also justifies this observation, and proves that the true first principles of this science, whatever they are, lie deep both in the human feelings and understanding.

(*d*) And if at any time dangerous changes were to take place in the English constitution, the pernicious tendency of which the people were not able at first to discover, restrictions on the liberty of the press, and on the power of juries, will give them the first information.

CHAPTER XIV.

On the Attempts that at particular Times may be made to abridge the Power of the Crown, and the Dangers by which they may be attended.

It has already been observed that the power of the crown is supported by deeper and more numerous roots
499 than the generality of people are aware of; and there is no cause to fear that the wresting any capital branch of its prerogative may be effected, in common peaceable times, by the mere *theoretical* speculations of politicians. However, it is not equally impracticable that some event of the kind may be brought about through a conjunction of several circumstances. Advantage may, in the first place, be taken of the minority, and even of the inexperience or the errors of the person invested with the kingly authority. Of this a remarkable instance happened in the reign of George I., while that bill, by which the order of peers was in future to be limited to a certain number, was under consideration in the House of Commons, to whom it had been sent by the Lords. So unacquainted was the king at that time with his own interest, and with the constitution of the government over which he was come to preside, that, having been persuaded by that party who wished success to the bill, that the objection made against it by the

House of Commons, was only owing to an opinion they entertained of the bill being disagreeable to him, he 500
was prevailed upon to send a message to them, to let them know that such an opinion was ill-grounded, and that, should the bill pass in their house, it would meet with his assent. Considering the prodigious importance of the consequences of such a bill, the fact is certainly very remarkable (*a*).

When this bill was in agitation, its great constitutional consequences were scarcely attended to by any body. The king himself certainly saw no harm in it, since he sent an open message to promote the passing of it: a measure which was not, perhaps, strictly regular. The bill was, it appears, generally approved out of doors. Its fate was for a long time doubtful in the House of Commons; nor did they acquire any favour with the bulk of the people by finally rejecting it. Yet no bill of greater constitutional importance was ever agitated in parliament; since the consequences of its being passed would have been the freeing the House of Lords, both in their judicial and legislative capacities, from all constitutional check whatever, either from the crown or the nation. Nay, it is not to be doubted, that they would have acquired, in time, the right of electing their own members: though it would be useless to point out here by what series of intermediate events the measure might have been brought about. Whether there existed any actual project of this kind among the first framers of the bill, does not appear; but a certain number of the members of the house we

(*a*) See B. 2, C. 12, p. 387

mention would have thought of it soon enough, if the bill in question had been enacted into a law; and they would certainly have met with success, had they been contented to wait, and had they taken time. Other equally important changes in the substance, and perhaps the outward form, of the government would have followed.

With those personal disadvantages under which the sovereign may lie for defending his authority, other causes of difficulty may concur,—such as popular discontents of long continuance in regard to certain particular abuses of influence or authority. The generality of the public, bent, at that time, both upon remedying the abuses complained of, and preventing the like from taking place in future, will perhaps wish to see that branch of the prerogative which gave rise to them taken from the crown: a general disposition to applaud such a measure, if effected, will be manifested from all quarters; and at the same time men may not be aware, that the only material consequence that may arise from
501 depriving the crown of that branch of power which has caused the public complaints, will perhaps be the having transferred that branch of power from its former seat to another, and having entrusted it to new hands. which will be still more likely to abuse it than those in which it was formerly lodged.

In general, it may be laid down as a maxim, that power under any form of government must exist, and be entrusted somewhere. If the constitution does not admit of a king, the governing authority is lodged in the hands of magistrates. If the government, at the same time that it is a limited one, bears a monarchial form, those portions of power that are retrenched from

the king's prerogative will most probably continue to subsist, and be vested in a senate or assembly of great men, under some other name of the like kind.

The king has an exclusive power in regard to foreign 502
affairs, war, peace, treaties;—in all that relates to military affairs, he has the disposal of the existing army, of the fleet, &c. He may, at all times, deprive 504
the ministers of their employments. And he has the power of dissolving, or keeping assembled, his parliament.

Those persons who think that the prerogative of a king cannot be too much abridged, and that power loses all its influence on the dispositions and views of those who possess it, according to the kind of name used to express the offices by which it is conferred, may be satisfied, no doubt, to behold those branches of power that were taken from a king distributed to several bodies, and shared by the representatives of the people; but those who think that power, when parcelled and diffused, is never so well repressed and regulated as when it is confined to a sole indivisible seat, which keeps the 505
nation united and awake,—those who know that, names by no means altering the intrinsic nature of things, the representatives of the people, as soon as they are invested with independent authority, become, *ipso facto*, its masters,—those persons, will not think it a very happy regulation in the former constitution of Sweden to have deprived the king of prerogatives formerly attached to his office, in order to vest the same either in a senate, or in the deputies of the people, and thus to have entrusted with a share in the exercise of the public power those very men whose constitutional office should have been to watch and restrain it.

To the indivisibility of the governing authority in England, the community of interest which takes place among all orders of men, is owing; and hence arises, as a necessary consequence, the liberty enjoyed by all ranks of subjects. This observation has been insisted upon at length in the course of this work. The shortest reflection on the frame of the human heart suffices to convince us of its truth, and at the same time manifests the danger that would result from making any changes in
506 the form of the existing government, by which this general community of interest might be lessened,—unless we are at the same time also determined to believe, that partial nature forms men in this island with sentiments very different from the selfish and ambitious dispositions which have ever been found in other countries (*b*).

507 But past experience does not by any means allow us
508 to entertain so pleasing an opinion. The perusal of the history of this country will show us, that the care of its legislators, for the welfare of the subject, always kept pace with the exigencies of their own situation. When, through the minority, or easy temper of the reigning prince, or other circumstances, the dread of a superior

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(*b*) Such regulations as may essentially affect, through their consequences, the equipoise of a government, may be brought about, even though the promoters themselves of those regulations are not aware of their tendency. When the bill passed in the seventeenth century, by which it was enacted that the crown should give up its prerogative of dissolving the parliament then sitting, the generality of people had no thought of the calamitous consequences that were to follow: very far from it. The king himself certainly felt no very great apprehension on that account: else he would not have given his assent; and the Commons themselves, it appears, had very faint notions of the capital changes which the bill would speedily effect in their political situation.

power began to be overlooked, the public cause was immediately deserted in a greater or less degree, and pursuit after private influence and lucrative offices took the place of patriotism. When, in the reign of Charles the First, the authority of the crown was for a while annihilated, those very men, who till then had talked of nothing but Magna Charta and liberty, instantly endeavoured openly to trample both under foot.

Since the time we mention, the former constitution of the government having been restored, the great outlines of public liberty have indeed been warmly and seriously defended; but if any partial unjust laws or regulations have been made, especially since the revolution of the year 1689,—if any abuses injurious to particular classes of individuals have been suffered to continue, it will certainly be found, upon inquiry, that those laws and those abuses were of such a complexion, that from them, the members of the legislature well 509
knew, neither they nor their friends would ever be likely to suffer.

If, through the unforeseen operation of some new regulation made to restrain the royal prerogative, or through some sudden public revolution, any particular bodies or classes of individuals were ever to acquire a personal independent share in the exercise of the governing authority, we should behold the public virtue and patriotism of the legislators and great men immediately cease with its cause, and aristocracy, as it were, watchful of the opportunity, burst out at once, and spread itself over the kingdom.

The men who are now the ministers, but then the partners of the crown, would instantly set themselves

above the reach of the law, and soon after ensure the same privilege to their several supporters or dependents.

Personal and independent power becoming the only kind of security of which men would now show themselves ambitious, the *Habeas Corpus* act, and in general all those laws which subjects of every rank mention with love, and to which they look up for protection and
510 safety, would be spoken of with contempt, and mentioned as remedies fit only for countrymen and cits:—it even would not be long before they would be set aside, as obstructing the wise and salutary steps of the senate.

The pretensions of an equality of right in all subjects, of whatever rank and order, to their property and to personal safety, would soon be looked upon as an old-fashioned doctrine, which the judge himself would ridicule from the bench. And the liberty of the press would, without loss of time, be cried down and suppressed, as only serving to keep up the insolence and pride of a refractory people (1).

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(1) The liberty of the press is now established in France, though not to the extent it is carried in this country, as its abuse is severely punished.

The 7th article of the New Constitutional Charter, 1830, ordains that "Frenchmen have the right to publish and print their opinions on conformiug themselves to the laws. The censorship can never be re-established." This article corresponds with the 7th article of the original charter, which ordains that the laws shall repress the abuses of this liberty.

The Viscount Chateaubriand, in his admirable speech made in the chamber of Peers upon the question of offering the crown to the present King of the French, observed, "I take it for granted that freedom is sought for, and especially the *freedom of the press*, by

And let us not believe that the mistaken people, whose representatives we now behold making such a firm stand against the *indivisible* power of the crown, would, amidst the general devastation of every thing they hold dear, easily find men equally disposed to repress the encroaching, while *attainable*, power of a senate and body of nobles.

The time would be no more when the people, upon whatever men they should fix their choice, would be sure to find them ready sincerely to join in the support of every important branch of public liberty.

Present or expected personal power, and independence on the laws, being now the consequence of the 511
trust of the people,—wherever they should apply for servants, they would only meet with betrayers. Corrupting, as it were, every thing they should touch, they could confer no favour upon an individual but to destroy his public virtue; and (to repeat the words used in a former chapter) their raising a man would only be immediately inspiring him with views directly opposite to their own, and sending him to increase the number of their enemies.

All these considerations strongly point out the very

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which, and for which, the people have obtained so brilliant a triumph. Every new monarchy will sooner or later be compelled to gag this liberty. Could Napoleon himself admit of it? The offspring of our misfortunes, and the slave of our glory, the *liberty of the press* can only exist in security *under a government whose roots are deeply seated.* A monarchy, the illegitimate offspring of one bloody night, must always have something to fear from the free and independent expression of public opinion."—EDITOR.

great caution which is necessary to be used in the difficult business of laying new restraints on the governing authority. Let, therefore, the less informed part of the people, whose zeal requires to be kept up by visible objects, look (if they choose) upon the crown as the only seat of the evils they are exposed to; mistaken notions on their part are less dangerous than political indifference; and they are more easily directed than roused;—but, at the same time, let the more enlightened part of the nation constantly remember, that the constitution only subsists by virtue of a proper equilibrium, —by a discriminating line being drawn between power and liberty.

Made wise by the examples of several other nations,
512 by those which the history of this very country affords, let the people, in the heat of their struggles in the defence of liberty, always take heed, only to reach, never to overshoot the mark,—only to repress, never to transfer and diffuse power.

Amidst the alarms that may at particular times arise from the really awful authority of the crown, let it, on one hand, be remembered, that even the power of the Tudors was opposed and subdued,—and, on the other, let it be looked upon as a fundamental maxim, that, whenever the prospect of personal power and independence on the governing authority shall offer to the view of the members of the legislature, or in general of those men to whom the people must trust, even hope itself is destroyed. The Hollander, in the midst of a storm, though trusting to the experienced strength of the mounds that protect him, shudders, no doubt, at the sight of the foaming element that surrounds him; but

they all gave themselves over for lost, when they thought the worm had penetrated into their dykes (*c*).

(*c*) Such new forms as may prove destructive of the real substance of a government may be unwarily adopted, in the same manner as the superstitious notions and practices described in the author's work, entitled *Memorials of Human Superstition*, may be introduced into a religion, so as entirely to subvert the true spirit of it.

CHAPTER XV.

Further Observations on the Right of Taxation. What kind of Danger this Right may be exposed to.

513 THE generality of men, or at least of politicians, seem to consider the right of taxing themselves, enjoyed by the English nation, as being no more than the means of securing their property against the attempts of the crown; while they overlook the nobler and more extensive efficiency of that privilege.

The right to grant subsidies to the crown, possessed by the people of England, is the safeguard of all their other liberties, religious and civil; it is a regular mean conferred on them by the constitution, of influencing the motion of the executive power; and it forms the tie by which the latter is bound to them. In short, this privilege is a sure pledge in their hands, that their sovereign, who can dismiss their representatives at his
514 pleasure, will never entertain thoughts of ruling without the assistance of them.

If, through unforeseen events, the crown could attain to be independent of the people in regard to its supplies, such is the extent of its prerogative, that, from that moment, all the means the people possess to vindicate their liberty would be annihilated. They would have no resource left,—except indeed that uncertain and calamitous one, of an appeal to the sword; which

is no more, after all, than what the most enslaved nations enjoy.

Let us suppose, for instance, that abuses of power should be committed, which, either by their immediate operation, or by the precedents they might establish, should undermine the liberty of the subject. The people, it will be said, would then have their remedy in the legislative power possessed by their representatives. The latter would, at the first opportunity, interfere, and frame such bills as would prevent the like abuses for the future. But here we must observe, that the assent of the sovereign is necessary to make those bills become laws; and if, as we have just now supposed, he had no need of the support of the Commons, how could they obtain his assent to laws thus purposely framed to abridge his authority?

Again, let us suppose that, instead of contenting 515
itself with making slow advances to despotism, the executive power, or its minister, should at once openly invade the liberty of the subject. Obnoxious men, printers, for instance, or political writers, might be persecuted by military violence, or, to do things with more security, with the forms of law. Then, it will be said, the representatives of the people would impeach the persons concerned in those measures. Though unable to reach a king, who personally *can do no wrong*, they at least would attack those men who were the immediate instruments of his tyrannical proceedings, and endeavour, by bringing them to condign punishment, to deter future judges or ministers from imitating their conduct. It may even be added—that, circumstanced as the representatives of the people now are, and having to do with a sovereign who can enjoy no dignity without

their assistance, it is most likely that their endeavours in the pursuit of such laudable objects would prove successful. But if, on the contrary, the king, as we have supposed, stood in no need of their assistance, and moreover knew that he should never want it, it is impossible to
516 think that he would then suffer himself to remain a tame spectator of their proceedings. The impeachments thus brought by them would immediately prove the signal of their dismissal; and the king would make haste, by dissolving them, both to revenge what would then be called the insolence of the Commons, and to secure his ministers.

But even these are vain suppositions; the evil would reach much farther; and we may be assured that, if ever the crown should be in a condition to govern without the assistance of the representatives of the people, it would dismiss them for ever, and thus rid itself of an assembly which, continuing to be a clog on its power, would no longer be of any service to it. This Charles the First attempted to do when he found his parliaments refractory; and the Kings of France, in former times, really did, with respect to the general estates of that kingdom.

And indeed, if we consider the extent of the prerogative of the King of England, and especially the circumstance of his completely uniting in himself all the executive and active powers of the state, we shall find that it is no exaggeration to say that he has power sufficient to be as arbitrary as the Kings of France were of old,
517 were it not for the right of taxation, which, in England, is possessed by the people.

But here a most important observation is to be made; and I entreat the reader's attention to the subject. This

right of granting subsidies to the crown can only be effectual when it is exercised by one assembly alone. When several distinct assemblies have it equally in their power to supply the wants of the prince, the case becomes totally altered. The competition which so easily takes place between those different bodies, and even the bare consciousness which each entertains of its inability to obstruct the measures of the sovereign, render it impossible for them to make any effectual constitutional use of their privilege.

That the crown in England should, on a sudden, ren- 521
der itself independent of the Commons for its supplies,—that is, should on a sudden successfully assume to itself a right to lay taxes on the subject, by its own authority,—is not certainly an event likely to take place, nor indeed is it one that should, at the present time, raise any kind of political apprehension. But it is not equally impracticable that the right of the representatives of the people might become invalidated, by being divided in 522
the manner that has been just described.

Such a division of the right of the people might be effected in various ways. National calamities, for instance, unfortunate foreign wars attended with loss of public credit, might suggest methods for raising the necessary supplies, different from those which have hitherto been used. Dividing the kingdom into a certain number of parts, which should severally vote subsidies to the crown, or even distinct assessments to be made by the different counties into which England is now divided, might, in the circumstances we suppose, be looked upon as advisable expedients; and these, being once introduced, might be continued.

Another division of the right of the people, much

more likely to take place than those just mentioned, might be such as might arise from acquisitions of foreign dominions, the inhabitants of which should in time claim and obtain a right to treat directly with the crown, and grant supplies to it, without the interference of the British legislature.

Should any colonies acquire the right we mention,—had, for instance, the American colonies acquired it,
523 as they claimed it,—it is not to be doubted that the consequences which have resulted from a division like that in most of the kingdoms of Europe, would also have taken place in the British dominions, and that the spirit of competition, above described, would in time have manifested itself between the different colonies. This desire of ingratiating themselves with the crown, by means of the privilege of granting supplies to it, was even openly confessed by an agent of the American provinces (*a*), when, on his being examined by the House of Commons, in the year 1766, he said, "*the granting aids to the crown is the only means the Americans have of recommending themselves to their sovereign.*" And the events that afterwards took place in America, render it evident that the colonies would not have scrupled going any lengths to obtain favourable conditions at the expense of Britain and the British legislature.

(*a*) Dr. Franklin.

CHAPTER XVI.

On the Total Freedom from Violence with which Political Contentions in England are Conducted and Terminated.

In order to give a farther proof of the soundness of the 529
principles on which the English government is founded, and to confute in general the opinion of foreign writers or politicians, who, misled by the apparent heat with which these disputes are sometimes carried on, and the clamour to which they give occasion, look upon England as a perpetual scene of civil broils and dissensions. If we consider, in the first place, the constant tenour of the conduct of the parliament, we shall see that whatever different views the several branches that compose it may at times pursue, and whatever use they may accordingly make of their privileges, they never go, in regard to each other, beyond the terms of decency, or even of that general good understanding which ought to prevail among them.

Thus the king, though he preserves the style of his dignity, never addresses the two houses but in terms of regard and affection; and if at any time he chooses to refuse their bills, he only says that he will consider of them (*le roy s'avisera*); which is certainly a gentler expression than the word *veto*.

The two houses on their part, though very jealous,

each within their own walls, of the freedom of speech, are, on the other hand, careful that this liberty shall never break out into unguarded expressions with regard to the person of the king. It is even a constant rule amongst them never to mention him, when they mean to blame the administration; and those things which they may choose to censure, even in the speeches made by the king in person, and which are apparently his own acts, are never considered but as the deeds of his ministers, or, in general, of those who have advised him.

The two houses are also equally attentive to prevent
530 every step that may be inconsistent with that respect which they owe to one another. The examples of their differences with each other are very rare, and have been, for the most part, mere misunderstandings. Nay, in order to prevent all subject of altercation, the custom is, that, when one house refuses to assent to a bill presented by the other, no formal declaration is made of such refusal; and that house whose bill is rejected, learns its fate only from hearing no more of it, or by what the members may be told as private persons.

In each house, the members take care, even in the
531 heat of debate, never to go beyond certain bounds in their manner of speaking of each other: if they were to offend in that respect, they would certainly incur the censure of the house. And as reason has taught mankind to refrain, in their wars, from all injuries to each other that have no tendency to promote the main object of their contentions, so a kind of law of nations (if it may be so called) has been introduced among the persons who form the parliament and take a part in the debates: they have discovered that they may very well be of opposite parties, and yet not hate and persecute

one another. Coming fresh from debates carried on even with considerable warmth, they meet without reluctance in the ordinary intercourse of life; and, suspending all hostilities, they hold every place out of parliament to be neutral ground (1).

(1) It may be said, that these differences will at some period lead to such a collision between the two houses of parliament as shall destroy the Monarchy. This, however, all well-thinking persons will see is an impossibility, so long as the equilibrium before observed, is maintained. Such occasional differences must take place—collision has even taken place—yet all has been reconciled. What were the consequences when the Reform Act passed the House of Commons. The Peers are, as an independent body of the state, the guardians of the Constitution—they balance the power of the people—they are necessary to support the rights as well of the crown as of the people against the encroachments of both. They saw the popular feeling, and yielded to the measure; and that great political party who were before its greatest enemies, now that it has become the law of the land, are its greatest supporters. The same feelings of reconciliation were shewn upon the passing the Act for Catholic Emancipation. The natural bias of the people is for monarchy, and they will maintain it. No collision therefore between the two legislative bodies can possibly disturb it—they are interested in its preservation equally with the people; and while their interests on all sides are uniform—while there exists a counterbalancing power, there can be no danger in such a collision. These reconciliations that take place between the leaders of parties, by which the most violent and ignorant class of their partizans are bewildered, and made to lose the scent, prevents the party spirit, by which the public are usually influenced, from producing those lasting and rancorous divisions in the community, which have pestered so many other free states, making of the same nation, as it were, two distinct people, in a kind of constant warfare with each other. By the frequent coalitions that have taken place between *Whig* and *Tory* leaders, and the changes of opinion that have consequently followed, even that party distinction the most famous in the English history has now become useless; the meaning of the words has thereby been rendered so perplexed, that no person can any longer give a tolerable definition of them; and those persons who now and then aim at gaining popularity, by claiming the merit of

532 But are not the English perpetually making complaints against the administration? and do they not

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belonging to either party, are scarcely understood. New names or distinctions of party have followed the Reform Act. The name of Tory is changed to *Conservative*—the *principle of the Conservatives* is declared to be the maintenance of the three estates of the realm inviolable. These were also *the professed principles* of the party heretofore called by the name of *Whig*, and it were devoutly to be wished, that these two great parties, by whatever name they may be called, looking at the respective rank, station, and property of each, would make one common cause for the welfare of the people, and the peace and happiness of the young Sovereign upon the throne. The Conservatives declare themselves Reformers of all real abuses. The Whigs, (if the term may be used for want of any other intelligible name,) declare the same. These are the two great political parties in the country. Any other party, by whatever name called, professing democratic principles, can never maintain itself, or arrive at sufficient power, to do serious harm. The political rights of the people are inseparably connected with the right of property, and let the property of the people be placed in danger by *any party*, and its influence is at once at an end. Enough has been said in this volume, to prove that such principles can never be maintained in England: a party, and particularly an *openly avowed* republican party, may be useful for the sake of opposition, and to expose abuses; it may tend to keep the two great parties in a constant state of exertion for wholesome reform, as without it they might be inactive, and they are powerful enough to see that it does not work mischief, or disturb the Constitution. The body of the people are not revolutionists. This has been amply illustrated by many facts within the last century, and as civilization increases, which it is daily doing through commercial enterprise, so the people will be brought more together, education will spread, and the people will gain the power of *political reflection*—they will, thus enlightened, gather round the throne and Constitution with increased strength and veneration, and protect themselves, by supporting the equilibrium of power in the government under which they live, thus verifying the words of Montesquieu, in his Sp. Laws, B. 20, C. 7, "They know better than any other people upon earth, how to value at the same time these three great advantages,—religion, commerce, and liberty."—EDITOR, see also his note, *supra*, 90.

speak and write as if they were continually exposed to grievances of every kind?

Undoubtedly, is the answer; in a society of beings subject to error, dissatisfactions will necessarily arise from some quarter or other; and, in a free society, they will be openly manifested by complaints. Besides, as every man in England is permitted to give his opinion upon all subjects, and, as to watch over the administration, and complain of grievances, is the proper duty of the representatives of the people, complaints must necessarily be heard in such a government, and even 533
more frequently, and upon more subjects, than in any other.

But those complaints, it should be remembered, are not, in England, the cries of oppression forced at last to break its silence. They do not suppose hearts deeply wounded. Nay, we will go farther—they do not even suppose very determinate sentiments; and they are often nothing more than the first vent which men give to their new and yet unsettled conceptions.

The agitation of the popular mind, therefore, is not in England what it would be in other states; it is not the symptom of a profound and general discontent, and the forerunner of violent commotions. Foreseen, regulated, even hoped for by the Constitution, this agitation animates all parts of the state, and is to be considered only as the beneficial vicissitude of the seasons. The governing power, being dependant on the nation, is often thwarted; but, so long as it continues to deserve the affection of the people, it can never be endangered. Like a vigorous tree which stretches its branches far and wide, the slightest breath can put it in motion; but it acquires and exerts at every moment a new degree of

534 force, and resists the winds, by the strength and elasticity of its fibres, and the depth of its roots.

In a word, whatever revolutions may at times happen among the persons who conduct the public affairs in England, they never occasion the shortest interruption of the power of the laws, or the smallest diminution of the security of individuals. A man who should have incurred the enmity of the most powerful men in the state—though he had, like another *Vatinius*, drawn upon himself the united detestation of all parties,—might, under the protection of the laws, and by keeping within the bounds required by them, continue to set both his enemies and the whole nation at defiance.

The limits prescribed to this book do not admit of entering into any farther particulars on the subject we are treating here; but if we were to pursue this inquiry, and investigate the influence which the English government has on the manners and customs of the people, perhaps we should find that, instead of inspiring them with any disposition to disorder or anarchy, it produces in them a quite contrary effect. As they see the highest powers in the state constantly submit to the laws, and they receive, themselves, such a certain
535 protection from those laws whenever they appeal to them, it is impossible but they must insensibly contract a deep-rooted reverence for them, which can at no time cease to have some influence on their actions. And, in fact, we see that even the lower class of the people, in England, notwithstanding the apparent excesses into which they are sometimes hurried, possess a spirit of justice and order superior to what is to be observed in the same rank of men in other countries. The extra-

ordinary indulgence which is shown to accused persons of every degree is not attended with any of those pernicious consequences which we might at first be apt to fear from it. And it is, perhaps, to the nature of the English constitution itself, (however remote the cause may seem,) and to the spirit of justice which it continually and insensibly diffuses through all orders of the people, that we are to ascribe the singular advantage possessed by the English nation, of employing an incomparably milder mode of administering justice in criminal matters than any other nation, and at the same time of affording, perhaps, fewer instances of violence or cruelty.

Another consequence which we might observe here, as flowing also from the principles of the English government, is the moderate behaviour of those who 536
are invested with any branch of public authority. If we look at the conduct of public officers, from the minister of state, or the judge, down to the lowest officer of justice, we find a spirit of forbearance and lenity prevailing in England, among the persons in power, which cannot but create surprise in those who have visited other countries.

Two circumstances more shall be mentioned here, as peculiar to England; namely, the constant attention of the legislature in providing for the interests and welfare of the people, and the indulgence shown by them to their very prejudices; advantages these, which are, no doubt, the consequence of the general spirit that animates the whole English government, but are also particularly owing to the circumstances peculiar to it, of having lodged the active part of legislation in the hands of the representatives of the nation, and com-

mitted the care of alleviating the grievances of the people to persons who either feel them, or see them nearly, and whose surest path to advancement and fame is to be active in finding remedies for them.

It is not meant, however, to affirm, that the English
537 government is free from abuses, or that all possible good laws are enacted, but that there is a constant tendency in it, both to correct the one, and improve the other. And that all the laws which are in being are strictly executed, whenever appealed to (2), may be looked upon as the characteristic and undisputed advantage of the English Constitution,—a constitution the more likely to produce all the effects we have mentioned, and to procure in general the happiness of the people, since it has taken mankind as they are, and has not endeavoured to prevent every thing, but to regulate every thing; the more difficult to discover, because its form is complicated, while its principles are natural and simple. Hence it is that the politicians of antiquity, sensible of the inconveniences of the governments they had opportunities of knowing, wished for the establishment of such a government, without much hope of ever seeing it effected (*a*): even Tacitus, the best of them all, considered it as a project entirely chimerical (*b*). Nor was
538 it because he had not thought of it, had not reflected on it, that he was of this opinion: he had sought for

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(2) This remark applies equally to France at this time.—EDITOR.

(*a*) "Statuo esse optime consitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, modice confusa."—CIC. *Frag.*

(*b*) "Cunctas nationes et urbes, populus, aut priores, aut singuli, regunt. Delecta ex his et constituta reipublicæ forma, laudari facilius quam evenire: vel si evenit, haud diuturna esse potest."—TAC. *Ann.* lib. iv.

such a government, had had a glimpse of it, and yet continued to pronounce it impracticable.

Let us not, therefore, ascribe to the confined views of man, to his imperfect sagacity, the discovery of this important secret. The world might have grown old, generations might have succeeded generations, still seeking it in vain. It has been by a fortunate conjunction of circumstances,—I shall add, by the assistance of a favourable situation,—that Liberty has at last been able to erect herself a temple.

Invoked by every nation, but of too delicate a nature, as it would seem, to subsist in societies formed of such imperfect beings as mankind, she showed, and merely showed herself, to the ingenious nations of antiquity, who inhabited the south of Europe. They were constantly mistaken in the form of the worship they paid to her. As they continually aimed at extending dominion and conquest over other nations, they were no less mistaken in the spirit of that worship; and though 539
they continued for ages to pay their devotions to this divinity, she still continued, with regard to them, to be the *unknown* goddess.

Excluded, since that time, from those places to which she had seemed to give a preference, driven to the extremity of the Western World, banished even out of the Continent, she has taken refuge in the Atlantic Ocean. There it is, that, freed from the dangers of external disturbance, and assisted by a happy prearrangement of things, she has been able to display the form that suited her; and she has found seven centuries to have been necessary for the completion of her work.

Being sheltered, as it were, within a citadel, she there reigns over a nation which is the better entitled

to her favours, as it endeavours to extend her empire, and carries with it, to every part of its dominions, the blessings of industry and equality. Fenced in on every side with a wide and deep ditch, the sea,—guarded with strong out-works, its ships of war,—and defended by the courage of her seamen, she preserves that mysterious essence, that sacred fire so difficult to be kindled, and which, if it were once extinguished, would, perhaps, never be lighted again. When the world shall have been again laid waste by conquerors, she will still continue to show mankind, not only the principle that ought to unite them, but, what is of no less importance, the form under which they ought to be united. And the philosopher, when he considers the constant fate of civil societies amongst men, and observes the numerous and powerful causes which seem, as it were, unavoidably to conduct them all to a state of incurable political slavery, takes comfort in seeing that Liberty has at length disclosed her secret to mankind, and secured an asylum to herself.

APPENDIX.

No. I.

3 & 4 WILL. IV. CAP. XXVII.

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

[24th July, 1833.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall, in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim, shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only, shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male.

II. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

III. And be it further enacted, That, in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent, shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect to the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and, when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

IV. Provided always, That, when any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

V. Provided also, That a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

VI. And be it further enacted, That, for the purposes of this act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

VII. And be it further enacted, That, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

VIII. And be it further enacted, That, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

IX. And be it further enacted, That, when any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upward shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

X. And be it further enacted, That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

XI. And be it further enacted, That no continual or other claim upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action.

XII. And be it further enacted, That, when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.

XIII. And be it further enacted, That, when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

XIV. Provided always, and be it further enacted, That, when any acknowledgement of the title of the person entitled to any land or rent, shall have been given to him or his agent, in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgement shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent shall be deemed to have first accrued at, and not before, the time at which such acknowledgement, or the last of such acknowledgements, if more than one, was given.

XV. Provided also, and be it further enacted, That, when no such acknowledgement as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress, or bring an action to recover such land or interest at any time within five years next after the passing of this act.

XVI. Provided always, and be it further enacted, That, if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities herein-after mentioned, (that is to say), infancy coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress, or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid, shall have ceased to be under any such disability, or shall have died (which shall have first happened).

XVII. Provided nevertheless, and be it further enacted, That no entry, distress, or action, shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may

have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

XVIII. Provided always, and be it further enacted, That, when any person shall be under any of the disabilities herein-before mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

XIX. And be it further enacted, That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any Island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act.

XX. And be it further enacted, That, when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled, for an estate or interest in possession, shall have been barred by the determination of the period herein-before limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land, or rent, no entry, distress, or action, shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless, in the meantime, such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited, or taken effect, after or in defeasance of such estate or interest in possession.

XXI. And be it further enacted, That, when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period herein-before limited, which shall be applicable in such case, no such entry, distress, or action, shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred.

XXII. And be it further enacted, That, when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period herein-before limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action.

XXIII. And be it further enacted, That, when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates, to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same per-

son, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid; then, at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right, to take effect after, or in defeasance of, such estate tail.

XXIV. And be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity, shall bring any suit to recover the same, but within the period during which, by virtue of the provisions herein-before contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same, as he shall claim therein in equity.

XXV. Provided always, and be it further enacted, That, when any land or rent shall be vested in a trustee, upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.

XXVI. And be it further enacted, That, in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or, with reasonable diligence, might have been, first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bonâ fide purchaser, for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed.

XXVII. Provided always, and be it further enacted, That nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act.

XXVIII. And be it further enacted, That, when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless, in the meantime, an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by

the mortgagee, or the person claiming through him; and, in such case, no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such morgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but, where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after, or in defeasance of, his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage, as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and, where such of the mortgagees, or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

XXIX. Provided always, and be it further enacted, That it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit, to recover any land or rent within such period as herein-after is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say), the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years, taken together, shall amount to the full period of sixty years; and if such times, taken together, shall not amount to the full period of sixty years, then during such further number of years, in addition to such six years, as will with the time of the holding of such two persons, and such six years, make up the full period of sixty years; and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

XXX. And be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit, or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as herein-after is mentioned, (that is to say), the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such

incumbencies, taken together, shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

XXXI. Provided always, and be it further enacted, That, when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but, when a clerk shall have been presented by his Majesty, upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.

XXXII. And be it further enacted, That, in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit, shall be limited accordingly.

XXXIII. Provided always, and be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit, or other action, or any suit, to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title.

XXXIV. And be it further enacted, That, at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively, might have been made or brought within such period, shall be extinguished.

XXXV. And be it further enacted, That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

XXXVI. And be it further enacted, That no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or

in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry, sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii præ-locuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for freebench or dower) shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four.

XXXVII. Provided always, and be it further enacted, That, when on the said thirty-first day of December, one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as aforesaid, in respect of such land, such writ or action may be brought at any time before the first day of June, one thousand eight hundred and thirty-five, in case the same might have been brought if this act had not been made notwithstanding the period of twenty years, hereinbefore limited shall have expired.

XXXVIII. Provided also, and be it further enacted, That, when, on the said first day of June, one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent, cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June, one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away.

XXXIX. And be it further enacted, That, no descent, cast, discontinuance, or warranty, which may happen or be made after the said thirty-first day of December, one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

XL. And be it further enaated, That, after the said thirty-first day of December one thousand eight hundred and thirty-three, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

XLI. And be it further enacted, That, after the said thirty-first day

of December, one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit.

XLII. And be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that, where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

XLIII. And be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity.

XLIV. Provided always, and be it further enacted, That this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.

XLV. And be it further enacted, That this act may be amended, altered, or repealed, during this present session of parliament.

No. II.

2 & 3 WILL. IV. CAP. LXXI.

An Act for shortening the Time of Prescription in certain Cases.

[1st August, 1832].

WHEREAS the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of in-

convenience and injustice; for remedy thereof, be it enacted, by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

II. And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

III. And be it further enacted, That, when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

IV. And be it further enacted, That each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

V. And be it further enacted, That, in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and, if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that, in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done: and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter herein-before mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

VI. And be it further enacted, That, in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim.

VII. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

VIII. Provided always, and be it further enacted, That, when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

IX. And be it further enacted, That this act shall not extend to Scotland or Ireland.

X. And be it further enacted, That this act shall commence and take effect on the first day of Michaelmas Term now next ensuing.

XI. And be it further enacted, That this act may be amended, altered, or repealed, during this present session of parliament.

No. III.

2 & 3 WILL. IV. CAP. C.

An Act for shortening the Time required in Claims of Modus decimandi, or Exemption from or Discharge of Tithes. [9th August, 1832.]

WHEREAS the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes; Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That all prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence shewing, in cases of claim of a modus decimandi, the payment or render of such modus, and, in cases of claim to exemption or discharge, shewing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a modus decimandi, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the modus claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and, if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and, where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence shewing such payment or render of modus made, or enjoyment had, as is herein-before mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that, if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to shew such payment or render of modus made, or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up

the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing.

II. And be it further enacted, That every composition for tithes which hath been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be, and the same is hereby confirmed and made valid in law; and that no modus, exemption, or discharge shall be deemed to be within the provisions of this act, unless such modus, exemption, or discharge shall be proved to have existed and been acted upon at the time of, or within one year next before, the passing of this act.

III. Provided always, That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action, relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of parliament, or within one year from the end thereof.

IV. Provided also, and be it further enacted, That this act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition.

V. Provided also, and be it further enacted, That, where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned.

VI. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

VII. And be it further enacted, That, in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the modus, or exemption, or discharge claimed, was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and, if the other party shall intend to rely on any

proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.

VIII. And be it further enacted, That, in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

IX. Provided also, and be it further enacted, That this act shall not extend to Scotland or Ireland.

No. IV.

3 & 4 WILL. IV. CAP. LXXIV.

An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance. [28th August, 1833.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, that, in the construction of this act, the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments of any tenure (except copy of court-roll), and whether corporeal or incorporeal, and any undivided share thereof, but, when accompanied by some expression including or denoting the tenure by copy of court-roll, shall extend to manors, messuages, lands, tenements, and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands; and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; and the expression "estate tail," in addition to its usual meaning, shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right; and the expression "tenant in tail" shall mean, not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee," shall mean a person entitled to a base fee, or

to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court-roll, and also to lands of any tenure in Ireland or elswhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate, or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing, as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament, or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement; and, where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: Provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

II. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied, or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery: and any fine or common recovery which shall be levied or suffered contrary to this provision shall be absolutely void.

III. And be it further enacted, That, in case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into, or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement, to make, or to procure to be made, such a disposition under this act, as will effect all the purposes intended to be effected by such fine or recovery; but, if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then

the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make, or procure to be made, such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and, in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable, under such covenant or agreement, to execute or to procure to be executed, some deed whereby the person intended to levy such fine or suffer such recovery, shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but, if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.

IV. And be it further enacted, That no fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the same manor; and the court shall order such fine to be vacated only as to the lord of the said manor; and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid, shall still remain as good and valid against and as binding upon the conusors thereof, and all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid, shall still remain as good and valid against and as binding upon the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid.

V. And be it further enacted, That if, at any time before or after the

passing of this act, a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and, subsequently to the levying or suffering thereof, a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then, and in every such case, the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid, and binding as the same would have been if the tenure had not been altered or changed ; and that, in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery; and, in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

VI. And be it further enacted, That, in every case in which at any time, either before or after the passing of this act, the tenure or ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not, by any law in force on the first day of this session of parliament, be barred of his right to reverse the same, such lands, provided, within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel, shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January, one-thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents, and services as they would have been subject to, if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

VII. And be it further enacted, That, if it shall be apparent, from the deed declaring the uses of any fine already levied, or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusur or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the

same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

VIII. And be it further enacted, That, if it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

IX. Provided always, and be it further enacted, That nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act.

X. And be it further enacted, That no common recovery already suffered or hereafter to be suffered, shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly inrolled.

XI. And be it further enacted, That no common recovery already suffered, or hereafter to be suffered, shall be invalid, in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of, or had power to dispose of an estate in possession, not being less than an estate for a life or lives, in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

XII. Provided always, and be it further enacted, That, where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and, where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and, where any person who would have been barred by any fine or common recovery if valid, shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common

recovery if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and, if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery, shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

XIII. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places, and kept by such persons as the said court of Common Pleas shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Lancaster and all the proceedings thereof, shall be deposited in such places, and kept by such persons as his Majesty's justices of assize for the county palatine of Lancaster for the time being shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the court of Pleas of the county palatine of Durham, and all the proceedings thereof, shall be deposited in such places, and kept by such persons as the said court of Pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed; and, while the said records and proceedings respectively shall be kept by such persons respectively, searches may be made, and extracts and copies obtained as heretofore, and on paying the accustomed fees; and, when any of the records and proceedings shall, by the order of the court or justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made, and extracts or copies obtained, at such times, and on paying such fees, as shall from time to time be ordered by the court or justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed.

XIV. And be it further enacted, That all warranties of lands which, after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

XV. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be

claimed by, or which, but for some previous act would have been vested in, or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination, or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this act authorized to be made.

XVI. Provided always, and be it further enacted, That where, under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled "Certain alienations made by the wife of the lands of her deceased husband shall be void," the power of disposition herein-before contained as to such lands, shall not be exercised by her, except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands.

XVII. Provided always, and be it further enacted, That, except as to lands comprised in any settlement made before the passing of this act, the said act of the eleventh year of the reign of his Majesty King Henry the Seventh shall be, and the same is hereby repealed.

XVIII. Provided always, and be it further enacted, That the power of disposition herein-before contained shall not extend to tenants of estates tail, who, by an act passed in the thirty-fourth and thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled "An act to embar feigned recovery of lands wherein the King is in reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct.

XIX. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the King's most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute; saving always the rights of all persons, in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

XX. Provided always, and be it further enacted, That nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein.

XXI. Provided always, and be it further enacted, That, if a tenant in tail of lands shall make a disposition of the same, under this act, by way of mortgage, or for any other limited purpose, then, and in such case, such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity, as well as at law, to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected. Provided always, that, if the

estate created by such disposition shall be only an estate *per autre vie*, or for years, absolute or determinable; or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien, or incumbrance shall be created without a term of years, absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall, in equity, be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected.

XXII. And be it further enacted, That if, at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands, or any of them, under the same settlement, any estate for years, determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being, for all the purposes of this act, deemed the prior estate), shall be the protector of the settlement, so far as regards the lands in which such prior estate shall be subsisting, and shall, for all the purposes of this act, be deemed the owner of such prior estate, although the same may have been charged or incumbered, either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted, or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement, within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor, shall be deemed an estate under the same settlement, within the meaning of this clause.

XXIII. Provided always, and be it further enacted, That, where two or more persons shall be owners, under a settlement within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would, in respect thereof, have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall, for all the purposes of this act, be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement, to the extent of such undivided share.

XXIV. Provided always, and be it further enacted, That, where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled or agreed or directed to be settled to her separate use, she and her husband together shall, in respect of such estate, be the protector of such settlement, and shall be deemed one owner; but, if such prior estate shall by such settlement have been settled or agreed or directed to be settled to her separate use, then, and in such case, she alone shall, in respect of such estate, be the protector of such settlement.

XXV. Provided always, and be it further enacted, That, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement, by way of confirmation, or where the settlement shall merely have the effect of restoring an estate: in either of those cases, such

estate shall, for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

XXVI. Provided always, and be it further enacted, That, where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not, in respect thereof, be the protector of such settlement.

XXVII. Provided always, and be it further enacted, That no woman in respect of her dower, and (except in the case herein-after provided for, of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three) no bare trustee, heir, executor, administrator, or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator, or assign, shall be the protector of a settlement.

XXVIII. Provided always, and be it further enacted, That where, under any settlement, there shall be more than one estate prior to an estate tail, and the person who shall be the owner, within the meaning of this act, of any such prior estate, in respect of which, but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall, by virtue of such clauses, or either of them, be excluded from being the protector; then and in such case the person (if any) who, if such estate did not exist, would be the protector of the settlement, shall be such protector.

XXIX. Provided always, and be it further enacted, That, where already, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of, either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

XXX. Provided always, and be it further enacted, That, where any person having, either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would, under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector; then, and in every such case, the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

XXXI. Provided always, and be it further enacted, That where, under any settlement of lands made before the passing of this act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands, for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to

make the tenant to such writ of entry or other writ, be the protector of such settlement.

XXXII. Provided always, and be it further enacted, That it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement, in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector; and, by means of a power to be inserted in such settlement, to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper, by deed, to appoint protector of the settlement, in the place of any one person, or number of persons, who shall die, or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: Provided nevertheless, that, by virtue or means of any such appointment the number of the persons to compose the protector shall never exceed three: Provided further, nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof: Provided further, nevertheless, that the person who, but for this clause, would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place.

XXXIII. Provided always, and be it further enacted, That, if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper, or the Lords Commissioners for the custody of the great seal of Great Britain, for the time being, or other the person or persons for the time being intrusted by the Kings's sign manual, with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement, in lieu of the person who shall be such lunatic or idiot, or of unsound mind, as aforesaid; or, if any person, protector of a settlement, shall be convicted of treason or felony; or, if any person, not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant; or, if it shall be uncertain whether such last-mentioned person be living or dead; then his Majesty's high court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid: or, if any settlor entailing lands, shall, in the settlement by which the lands shall be entailed, declare that the person who, as owner of a prior estate under such settlement, would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead; then the said court of Chancery shall, as to

the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate: or if, in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

XXXIV. Provided always, and be it further enacted, That if, at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is herein-before authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed.

XXXV. Provided always, and be it further enacted, That, where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred, to exercise, as to the lands in respect of which there shall be such protector, the power of disposition herein-before contained.

XXXVI. And be it further enacted, That any device, shift, or contrivance by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and that the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

XXXVII. Provided always, and be it further enacted, That the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act.

XXXVIII. Provided always, and be it further enacted, That when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring inrolment, make a disposition, of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby

created, shall if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition, there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such consent: Provided always, that, if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him.

XXXIX. And be it further enacted, That, if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be ipso facto enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person.

XL. And be it further enacted, That every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: Provided, nevertheless, that no disposition by a tenant in tail shall be of any force, either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either expressed or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed; and, if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the dispostion shall be acknowledged by her as herein-after directed.

XLI. Provided always, and be it further enacted, That no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such a lease, shall be a rack rent, or not less than five-sixth parts of a rack rent), shall have any operation under this act unless it be inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled "For Inrolment of Bargains and Sales," shall, if inrolled in the said court of Chancery within the time prescribed by this clause, be as good and valid

as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth.

XLII. And be it further enacted, That the consent of the protector of a settlement to the disposition under this act of a tenant in tail, shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

XLIII. And be it further enacted, That if the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

XLIV. And be it further enacted, That it shall not be lawful for the protector of a settlement, who, under this act, shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

XLV. And be it further enacted, That any married woman, being, either alone or jointly with her husband, protector of a settlement, may, under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

XLVI. Provided always, and be it further enacted, That the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's high court of Chancery either at or before the time when the assurance shall be inrolled.

XXVII. And be it further enacted, That, in cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement, which, in a court of law, would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof, in equity, and no consent by a protector of a settlement to a disposition of lands under this act, by a tenant in tail thereof, in equity, shall be of any force, unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law.

XLVIII. Provided always, and be it further enacted, That, in every case in which the Lord High Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's high court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said court of Chancery (as the case may be), while protector of such settlement, shall, on the motion or petition in a summary way, by a tenant in tail under such set-

tlement, have full power to consent to a disposition, under this act, by such tenant in tail; and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid, shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said court of Chancery (as the case may be), to make such orders in the matter as shall be thought necessary; and, if such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said court of Chancery (as the case may be), shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

XLIX. Provided always, and be it further enacted, That, in every case in which the Lord High Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's high court of Chancery, shall be the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

L. And be it further enacted, That all the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court-roll, except that a disposition of any such lands under this act by a tenant in tail thereof whose estate shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof whose estate shall be merely an estate in equity, may be made either by surrender or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained.

LI. Provided always, and be it further enacted, That if the consent of the protector of a settlement to the disposition of lands held by copy of court-roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protector, and produced to the lord of the manor of which the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless such deed shall be so executed and produced; and on the production of the deed the lord, or steward or deputy steward, shall by writing under his hand, to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court-rolls of the manor; and the indorsement, purporting to be so signed, shall of itself be primâ facie evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered, the lord of the manor, or his steward, or the deputy of such steward, shall indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls.

LII. Provided always, and be it further enacted, That if the consent of the protector of a settlement to the disposition of lands held by copy of court-roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender, that such consent had been given, and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy of such steward, shall cause the memorandum, with such statement therein as to the consent, to be entered on the court-rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrender therein stated to be made; and the entry of the memorandum on the court-rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court-rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward, shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court-rolls; and the entry of such surrender on the court-rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court-rolls, or a copy thereof.

LIII. Provided always, and be it further enacted, That a tenant in tail of lands held by copy of court-roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the land thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum signed by him, testifying the entry of the same on the court rolls: Provided always, that every deed by which lands held by copy of court-roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the manor of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered.

LIV. Provided always, and be it further enacted, That in no case where any disposition under this act of lands held by copy of court-roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment otherwise than by entry on the court rolls.

LV. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, so much of an act passed in the sixth year of the reign of his late Majesty King George the

Fourth, intituled "An Act to amend the laws relating to bankrupts," as empowers the commissioners named in any commission of bankrupt issued against a tenant in tail to make sale of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof such bankrupt shall be seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown shall be, and the same is hereby repealed: Provided always, that such repeal shall not extend to the lands, whatever the tenure may be, of any person adjudged a bankrupt under any commission of bankrupt, or under any fiat, which, in pursuance of the said act of the sixth year of the reign of King George the Fourth, or of any former act concerning bankrupts, or of an act passed in the first and second years of the reign of his Majesty King William the Fourth, intituled "An Act to establish a court of bankruptcy," hath been or shall be issued on or before the thirty-first day of December, one thousand eight hundred and thirty-three: Provided also, that such repeal shall not have the effect of reviving in any respect the acts repealed by the said act of the sixth year of the reign of King George the Fourth, or any of them.

LVI. And be it further enacted, That any commissioner acting in the execution of any fiat, which, after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act passed in the first and second years of the reign of King William the Fourth, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: Provided always, that if, at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case, the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

LVII. And be it further enacted, That any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the

same could at the time of such disposition have been enlarged into under this act, by the person so entitled, if he had not become bankrupt.

LVIII. And be it further enacted, That the commissioner acting in the execution of any such fiat as aforesaid, under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjuged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act, with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

LIX. And be it further enacted, That every deed, by which any commissioner, acting in the execution of any such fiat as aforesaid, shall, under this act, dispose of lands not held by copy of court-roll, shall be void unless inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof; and every deed, by which any commissioner, acting in the execution of any such fiat as aforesaid, shall, under this act, dispose of lands held by copy of court-roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court-roll, and he shall give his consent by a distinct deed, the consent shall be void, unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls; and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

LX. And be it further enacted, That if any commissioner, acting in the execution of any such fiat as aforesaid, shall, under this act, dispose of any lands of any tenure of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his

not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if, at the time of the disposition by such commissioner as aforesaid, there had been no such protector.

LXI. And be it further enacted, That, if a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt, at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act, if, at the time of the adjudication of such bankruptcy, there had been no such protector, and the commissioner, acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt, had disposed of such lands under this act.

LXII. Provided always, and be it further enacted, That, where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement,

and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act: Provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

LXIII. And be it further enacted, That all acts and deeds done and executed by a tenant in tail of lands, of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all person claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

LXIV. Provided always, and be it further enacted, That, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid, under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate, and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt.

LXV. And be it further enacted, That any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid, under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands, shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say) in case, at the time of the bankrupt's decease, there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall, at the time of the disposition, be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement, who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue, who, if the base fee had not been created, would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement, who, in the manner required by this act, shall consent to the disposition.

LXVI. And be it further enacted, That every disposition, which under this act may be made by any commissioner acting in the execution of any

such fiat as aforesaid, of lands held by copy of court-roll, shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner, may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs, and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance, if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted.

LXVII. And be it further enacted, That the rents and profits of any lands, of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act, shall in the mean time, and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and, in case any action of trespass shall be brought for taking any such distress, may plead thereto the general issue, and give this act or other special matter in evidence; and also, in case any such distress shall be replevied, shall have power to avow or make cognizance, generally in such manner and form as any landlord may now do by virtue of the statute made in the eleventh year of the reign of his Majesty King George the Second, intituled "An Act for the more effectual securing the payment of rents, and preventing frauds by tenants," or by any other law or statute now in force, or hereafter to be made, for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents, and servants, shall also have all such and the same remedies, powers, privileges, and advantages of pleading, avowing, and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof, as landlords, their bailiffs, agents, and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions, and agreements, in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands, for the nonobservance of any such covenant, condition, and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions, and agreements, as the bankrupt would have had in case he had not been adjudged a bankrupt: Provided always, that this clause shall apply to all lands held by copy of court-roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

LXVIII. And be it further enacted, That all the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons, as fully and effectually as if this act had throughout extended to lands of any tenure in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland.

LXIX. Provided always, and be it further enacted, That, in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's high court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's high court of Chancery in England.

LXX. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, an act passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled " An Act for repealing an act passed in the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled ' An Act for the relief of persons entitled to entailed estates to be purchased with trust monies,' and for making further provision in lieu thereof," shall be, and the same is hereby repealed, except as to such proceedings under the act hereby repealed as shall have been commenced before the first day of January, one thousand eight hundred and thirty-four, and which may be continued under the authority and according to the provisions of the act hereby repealed: Provided always, that the act repealed by the said act of the seventh year of the reign of his late Majesty King George the Fourth shall not be revived.

LXXI. And be it further enacted, That lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall, for all the purposes of this act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court-roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court-roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case, where under this clause a disposition shall be to be made

of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands of money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment, in the same manner as herein-before required in regard to lands not held by copy of court-roll.

LXXII. And be it further enacted, That, so far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly herein-before contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland: Provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland, to be so sold as aforesaid, shall be inrolled in his Majesty's high court of Chancery in Ireland, within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's high court of Chancery in England, within six calendar months after the execution thereof, and not in his Majesty's high court of Chancery in Ireland; saving always the rights of the King's most Excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold.

LXXIII. And be it further enacted, That any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by this act required to be inrolled in his Majesty's high court of Chancery in England or Ireland.

LXXIV. And be it further enacted, That every deed required to be inrolled in his Majesty's high court of Chancery in England or Ireland, by which lands, or money subject to be invested in the purchase of lands, shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required; except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled.

LXXV. And be it further enacted, That it shall be lawful for his Majesty's high court of Chancery in England, as to deeds to be inrolled in England under this act, and for his Majesty's high court of Chancery in Ireland, as to deeds to be inrolled in Ireland under this act, from time to time to make such orders as the court shall think fit, touching the

amount of the fees and charges to be paid for the inrolment of such deeds, and to be paid for searches for such deeds in the office of inrolments, and to be paid for copies of the inrolments of deeds under this act, where such copies are examined with the inrolments, and signed by the proper officer having the custody of such inrolments.

LXXVI. And be it further enacted, That it shall be lawful for his Majesty's court of Common Pleas, at Westminster, from time to time, to make such orders as the court shall think fit, touching the amount of the fees and charges to be paid for the entries of deeds by this act required to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court-roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants in tail of lands held by copy of court-roll, and for entries of such surrenders, or the memorandums thereof on the court rolls.

LXXVII. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case, except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in, or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment, shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this act shall not extend to lands held by copy of court-roll, of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this act, have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

LXXVIII. Provided always, and be it further enacted, That the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

LXXIX. And be it further enacted, That every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided.

LXXX. And be it further enacted, That such judge, master in Chan-

cery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and, in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.

LXXXI. And be it further enacted, That, for the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy, signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

LXXXII. Provided always, and be it further enacted, That any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

LXXXIII. And be it further enacted, That, in those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a master in Chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: Provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

LXXXIV. And be it further enacted, That, when a married woman shall acknowledge any such deed as aforesaid, the judge, master in Chancery, or commissioners taking such acknowledgment, shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed; which memorandum, subject to any alteration which may from time to time be directed by the court of Common Pleas, shall be to the following effect; *videlicet*,

"THIS deed, marked [*here add some letter or other mark, for the purpose of identification*], was this day produced before me [*or* us] and acknowledged by therein named to be her act and deed; previous to which acknowledgment the said was examined by me [*or* us], separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her."

And the same judge, master in Chancery, or commissioners shall also sign a certificate of the taking of such acknowledgment, to be written or engrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the court of Common Pleas, shall be to the following effect; *videlicet*,

"THESE are to certify, That, on the day of , in the year one thousand eight hundred and , before me the undersigned Sir Nicolas Conyngham Tindal, Lord Chief Justice of the court of Common Pleas at Westminster, [*or* before me Sir James Parke, Knight, one of the justices of the court of King's Bench at Westminster; *or* before me the undersigned James William Farrer, one of the masters in ordinary of the court of Chancery; *or* before us A. B. and C. D. two of the perpetual commissioners appointed for the for taking the acknowledgments of deeds by married women, pursuant to an act passed in the year of the reign of his Majesty King William the Fourth, intituled an Act [*insert the title of this act*], *or* before us the undersigned A. B. and C. D. , two of the commissioners specially appointed pursuant to an act passed in the year of the reign of his Majesty King William the Fourth, intituled an Act [*insert the title of this act*], for taking the acknowledgment of any deed by , the wife of appeared personally , the wife of , and produced a certain indenture, marked [*here add the mark*], bearing date the day of and made between [*insert the names of the parties*], and acknowledged the same to be her act and deed: And I [*or* we] do hereby certify, that the said was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me [*or* us], apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same."

LXXXV. And be it further enacted, That every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in Chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman, as shall from time to time be required in that behalf; and, if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate, and the affidavit, to be filed of record in the said court of Common Pleas.

LXXXVI. And be it further enacted, That, when the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment, thereby made by any married

woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment.

LXXXVII. And be it further enacted, That the officer of the court of Common Pleas with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates, and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient; and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

LXXXVIII. And be it further enacted, That, after the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged, shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

LXXXIX. And be it further enacted, That the Lord Chief Justice of the court of Common Pleas at Westminster, shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

XC. And be it further enacted, That, in every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of a manor any lands held by copy of court-roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender, in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands, were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid.

XCI. Provided always, and be it further enacted, That, if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court-roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife,

either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a feme sole, and, when done, executed, or made by her, shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred: Provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's high court of Chancery, shall be the protector of a settlement in lieu of her husband.

XCII. And be it further enacted, That this act shall not extend to Ireland, except where the same is expressly mentioned.

XCIII. And be it further enacted, That this act, or any part thereof, may be altered, varied, or repealed by any act or acts to be passed in the present session of parliament.

No. V.

3 & 4 WILL. IV. CAP. CVI.

An Act for the Amendment of the Law of Inheritance.

[29th August, 1833.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision, or the context of the act, shall exclude such construction, be interpreted as follows; (that is to say), the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels, and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities,

rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child of other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression, "the person last entitled to land," shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word, "assurance," shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, That, in every case, descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; in which case, the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited, shall, in every case, be considered to have been the purchaser, unless it shall be proved that he inherited the same.

III. And be it further enacted, That, when any land shall have been devised by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and, when any land shall have been limited by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof.

IV. And be it further enacted, That, when any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

V. And be it further enacted, That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

VI. And be it further enacted, That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

VII. And be it further enacted and declared, That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

VIII. And be it further enacted and declared, That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

IX. And be it further enacted, That any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female; so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

X. And be it further enacted, That, when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four.

XI. And be it further enacted, That this act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four.

XII. And be it further enacted, That, where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first

day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir, if this act had not been made, shall become entitled, by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four.

No. VI.

3 & 4 WILL. IV. CAP. CV.

An Act for the Amendment of the Law relating to Dower.
[29th August, 1833.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

II. And be it further enacted, That, when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in jointenancy), then his widow shall be entitled in equity to dower out of the same land.

III. And be it further enacted, That, when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

IV. And be it further enacted, That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

V. And be it further enacted, That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

VI. And be it further enacted, That a widow shall not be entitled to dower out of any land of her husband when, in the deed by which such

land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

VII. And be it further enacted, That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when, by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

VIII. And be it further enacted, That the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.

IX. And be it further enacted, That, where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

X. And be it further enacted, That no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

XI. Provided always, and be it further enacted, That nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them.

XII. And be it further enacted, That nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

XIII. And be it further enacted, That no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris.

XIV. And be it further enacted, That this act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge, executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.

No. VII.

3 & 4 WILL. IV. CAP. CIV.

An Act to render Freehold and Copyhold Estates Assets for the payment of Simple and Contract Debts. [29th August, 1833.]

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force; Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Com-

mons in this present parliament assembled, and by the authority of the same, That, from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided always, that, in the administration of assets by courts of equity, under and by virtue of this act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

No. VIII.

3 & 4 WILL. IV. CAP. XLII.

An Act for the further Amendment of the Law, and the better Advancement of Justice. [14th August, 1833.]

Whereas it would greatly contribute to the diminishing of expense in suits in the superior courts of common law at Westminster, if the pleadings therein were in some respects altered, and the questions to be tried by the jury left less at large than they now are, according to the course and practice of pleading in several forms of action; but this cannot be conveniently done otherwise than by rules or orders of the judges of the said courts from time to time to be made; and doubts may arise as to the power of the said judges to make such alterations without the authority of parliament: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That the judges of the said superior courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and may, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when this act shall take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise for carrying into effect the said alterations, as to them may seem expedient; and all such rules, orders, or regulations shall be laid before both houses of parliament, if parliament be then sitting, immediately upon the making of the same, or, if parliament be not sitting, then within five days after the next meeting thereof, and no such rule, order, or regulation shall have effect until

six weeks after the same shall have been so laid before both houses of parliament; and any rule or order so made shall, from and after such time aforesaid, be binding and obligatory on the said courts and all other courts of common law, and on all courts of error into which the judgments of the said courts or any of them shall be carried by any writ of error, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament: Provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be in force.

II. And whereas there is no remedy provided by law for injuries to the real estate of any person deceased committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal; for remedy thereof be it enacted, That an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.

III. And be it further enacted, That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation herein-after expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.

IV. And be it further enacted, That, if any person or persons that is

or are or shall be entitled to any such action or suit, or to such scire facias, is, or are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, non compos mentis, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that, if any person or persons against whom there shall be any such cause of action is, or are, or shall be, at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.

V. Provided always, That, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or, in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

VI. And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff that he take nothing by his plaint, writ, or bill, or, if in any of the said actions the defendant shall be outlawed, and shall after reverse the said outlawry, That, in all such cases, the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

VII. And be it further enacted, That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the twenty-first year of the reign of King James the First, intituled "An Act for limitation of actions, and for avoiding of suits in law."

VIII. And be it further enacted, That no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

IX. And be it further enacted, That, to any plea in abatement in any court of law of the nonjoinder of another person, the plaintiff may reply

that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors.

X. And be it further enacted, That, in all cases in which after such plea in abatement the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement or any subsequent plea in abatement are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person: Provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

XI. And be it further enacted, That no plea in abatement for a misnomer shall be allowed in any personal action, but that, in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and, in case such summons shall be discharged, the costs of such application shall be paid by the party applying, it the judge shall think fit.

XII. And be it further enacted, That, in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.

XIII. And be it further enacted, That no wager of law shall be hereafter allowed.

XIV. And be it further enacted, That an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator.

XV. And whereas it is expedient to lessen the expense of the proof of written or printed documents, or copies thereof, on the trial of causes; be it further enacted, That it shall and may be lawful for the said judges, or any such eight or more of them as aforesaid, at any time within five years after this act shall take effect, to make regulations by general rules or orders, from time to time, in term or in vacation, touching the voluntary admission, upon an application for that purpose at a reasonable time before the trial, of one party to the other of all such written or printed documents, or copies of documents, as are intended to be offered in evidence on the said trial by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause in case of the omitting to apply for

such admission, or the not producing of such document or copies for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said judges shall seem meet; and all such rules and orders shall be binding and obligatory in all courts of common law, and of the like force as if the provisions therein contained had been expressly enacted by parliament.

XVI. And whereas it would also lessen the expense of trials and prevent delay if such writs of inquiry as herein-after mentioned were executed, and such issues as herein-after mentioned were tried, before the sheriff of the county where the venue is laid; be it therefore enacted, That all writs issued under and by virtue of the statute passed in the session of parliament held in the eighth and ninth years of the reign of King William the Third, intituled "An Act for the better preventing frivolous and vexatious suits," shall, unless the court where such action is pending, or a judge of one of the said superior courts shall otherwise order, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such sheriff, instead of the justices or justice of Assize or Nisi Prius of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the court from whence the same shall issue at a day certain, in term or in vacation, in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of Assize or Nisi Prius.

XVII. And be it further enacted, That, in any action depending in any of the said superior courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed twenty pounds, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ with the finding of the jury thereon indorsed at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues.

XVIII. And be it further enacted, That, at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, shall certify under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new inquiry or trial, or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such jury, on the trial of such issue or issues, shall be as valid and of the like force as a verdict of a jury at Nisi Prius; and the sheriff, or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are herein-after given to judges at Nisi Prius.

XIX. Provided also, That all and every the provisions contained in the statute made and passed in the first year of the reign of his present Majesty intituled "An Act for the more speedy judgment and execution in actions brought in his Majesty's courts of law at Westminster, and in the court of Common Pleas of the county palatine of Lancaster, and for amending the law as to judgment on a cognovit actionem in cases of bankruptcy," shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon such writs of inquiry, and writs for the trials of issues, in like manner as if the same were expressly re-enacted herein.

XX. And be it further enacted, That, from and after the first day of June, one thousand eight hundred and thirty-three, the sheriff of each county in England and Wales shall severally name a sufficient deputy, who shall be resident or have an office within one mile from the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff.

XXI. And be it further enacted, That it shall be lawful for the defendant in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), by leave of any of the said superior courts where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading, as the said judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct.

XXII. And whereas unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen; be it therefore enacted, That, in any action depending in any of the said superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of any of the said courts, may on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place.

XXIII. And whereas great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances as to some particular or particulars between the proof and the record or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record; And whereas it is expedient to allow such amendments as herein-after mentioned to be made on the trial of the cause; be it therefore enacted, That it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a manda-

mus, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record of postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea, or the writ, as the case may be, and returned together with the record or writ; and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had: provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms aa the court shall think fit, or the court shall make such other order as to them may seem meet.

XXIV. And be it further enacted, That the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts, according to the evidence, and thereupon such finding ahall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

XXV. And be it further enacted, That it shall be lawful for the parties in any action or information, after issue joined, by consent and by order of any of the judges of the said superior courts, to state the facts of the case, in the form of a special case, for the opinion of the court, and to agree that a judgment shall be entered for the plaintiff or defendant by confession, or of nolle prosequi, immediately after the

decision of the case, or otherwise, as the court may think fit; and judgment shall be entered accordingly.

XXVI. And in order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, That, if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action, on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined, but, in that case, a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him.

XXVII. And be it further enacted, That the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence.

XXVIII. And be it further enacted, That, upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: Provided that interest shall be payable in all cases in which it is now payable by law.

XXIX. And be it further enacted, That the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of insurance made after the passing of this act.

XXX. And be it further enacted, That, if any person shall sue out any writ of error, upon any judgment whatsoever, given in any court in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error, for the delaying thereof.

XXXI. And be it further enacted, That in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant

shall have judgment for such costs, and they shall be recovered in like manner.

XXXII. And be it further enacted, That, where several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.

XXXIII. And be it further enacted, That, where any nolle prosequi shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf.

XXXIV. And be it further enacted, That, in all writs of scire facias the plaintiff obtaining judgment on an award of execution, shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined; and that, where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf.

XXXV. And whereas, it is provided in and by a statute passed in the sixth year of the reign of his late Majesty, intituled "An Act for consolidating and amending the law relative to jurors and juries," that the person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury: And whereas the said provision does not apply to cases in which the plaintiff has been nonsuited, and it is expedient that the judge should have such power of certifying, as well when a plaintiff is nonsuited, as when he has a verdict against him; be it therefore enacted, That the said provision of the said last-mentioned act of parliament, and every thing therein contained, shall apply to cases in which the plaintiff shall be nonsuited, as well as to cases in which a verdict shall pass against him.

XXXVI. And whereas it would tend to the better despatch of business, and would be more convenient, and better assimilate the practice, and promote uniformity in the allowance of costs, if the officers on the plea side of the courts of King's Bench and Exchequer, and the officers of the court of Common Pleas at Westminster, who now perform the duties of taxing costs, were to be empowered to tax costs which have arisen, or may arise, in each of the said courts indiscriminately; be it therefore enacted, That it shall be lawful for the judges of the said courts, or such eight or more of them as aforesaid, by any rule or order to be from time to time made, in term or vacation, to make such regulations for the taxation of costs by any of the said officers of the said courts indiscriminately as to them may seem expedient, although such costs may not have arisen in respect of business done in the court to which such officer belongs, and to appoint some convenient place in which the business of taxation shall be

transacted for all the said courts, and to alter the same when and as it may seem to them expedient.

XXXVII. And be it further enacted, That it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime.

XXXVIII. And be it further enacted, That such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined: Provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: Provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distresses so made as aforesaid.

XXXIX. And whereas it is expedient to render references to arbitration more effectual; be it further enacted, That the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference, without the leave of the court by which such rule or order shall be made or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwitstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may from time to time enlarge the term for any such arbitrator making his award.

XL. And be it further enacted, That, when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment of expenses and for loss of time as for and upon attendance at any trial: Provided also, that the application made to such court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.

XLI. And be it further enacted, That, when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed

that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

XLII. And whereas it would be convenient if the power of the superior courts of common law and equity at Westminster to grant commissions for taking affidavits to be used in the said courts respectively should be extended; be it further enacted by the authority aforesaid, That the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the great seal, the said courts of law, and the several judges of the same, shall have such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they now have in all and every the shires and counties within the kingdom of England, and dominion of Wales, and town of Berwick-upon-Tweed, and the Isle of Man, by virtue of the statutes now in force; and that all and every person and persons wilfully swearing or affirming falsely in any affidavit to be made before any person or persons who shall be so empowered to take affidavits under the authority aforesaid, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open court in which such affidavit shall be intitled, and be liable to be prosecuted for such perjury in any court of competent jurisdiction in that part of the United Kingdom in which such offence shall have been committed, or in that part of the United Kingdom in which such person shall be apprehended on such a charge.

XLIII. And whereas the observance of holidays in the said courts of common law during term time, and in the offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient, and tends to delay in the administration of justice; be it therefore enacted by the authority aforesaid, That none of the several days mentioned in the statute passed in the sessions of parliament holden in the fifth and sixth years of the reign of King Edward the Sixth, intituled "An Act for keeping holidays and fasting days," shall be observed or kept in the said courts, or in the several offices belonging thereto, except Sundays, the day of the nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week.

XLIV. And be it further enacted, That this statute shall commence and take effect on the first day of June, one thousand eight hundred and thirty-three.

XLV. And be it further enacted, That nothing in this act shall extend to that part of the United Kingdom called Ireland, or that part of the United Kingdom called Scotland, except in the cases herein-before specially mentioned.

No. IX.

1 VICT. CAP. XXVI.

An Act for the Amendment of the Laws with respect to Wills.
[3rd July, 1837.]

BE it enacted by the Queen's most Excellent Majesty, by and with the

advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say), the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the court of wards and liveries, and tenures in capite and by knights service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the court of wards and liveries, and tenures in capite and by knights service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, That an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of wills, wards, and primer seisins, whereby a man may devise two parts of his land;" and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the explanation of wills;" and also an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An act how lands, tenements, etc. may be disposed by will or otherwise, and concerning wards and primer seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for prevention of frauds and perjuries," and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for prevention of frauds and perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the amendment of the law and the better advancement of justice," and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the amendment of the law and the better advancement

of justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the law concerning common recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for prevention of frauds and perjuries'" as relates to estates pur autre vie; and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England, and in his Majesty's colonies and plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain doubts and questions relating to the attestations of wills and codicils concerning real estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain difficulties in the disposition of copyhold estates by will," shall be, and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates pur autre vie to which this act does not extend.

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

IV. Provided always, and be it further enacted, That where any real

estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services, as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

VI. And be it further enacted, That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same

shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

IX. And be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

X. And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.

XII. And be it further enacted, That this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the laws relating to the pay of the royal navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of the marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

XIII. And be it further enacted, That every will executed in manner herein-before required shall be valid without any other publication thereof.

XIV. And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall

be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any crediti tor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions).

XIX. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, That every will shall be construed,

with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXV. And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

XXX. And be it further enacted, That where any real estate (other

than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIII. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, That this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

XXXV. And be it further enacted, That this act shall not extend to Scotland.

XXXVI. And be it enacted, That this act may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament.

No. X.

1 VICT. CAP. XXVIII.

An Act to amend an Act of the third and fourth years of his late Majesty, for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

[3d July, 1837.]

WHEREAS doubts have been entertained as to the effect of a certain

act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled "An Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto," so far as the same relates to mortgages; and it is expedient that such doubts should be removed: Be it declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, any thing in the said act notwithstanding.

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