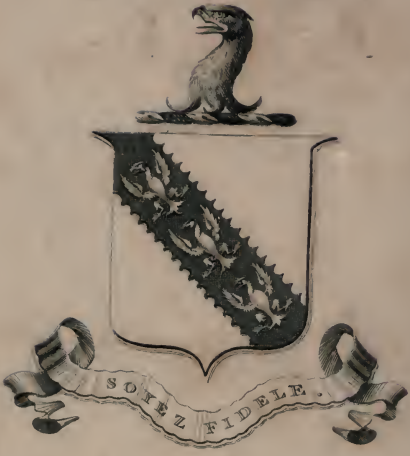

J. Ommsley.

A

CONCISE VIEW

OF THE

CONSTITUTION

OF

ENGLAND.

BY GEORGE CUSTANCE.

SECOND EDITION,
CORRECTED AND ENLARGED.

" ———What nation is there so great, that hath statutes and judgments so righteous?——— "

Deut. iv, 8.

" Est sane respublica nostra propè divinitus initio constituta, usque adeò ut nulla unquam vel Grecæ vel Romanæ civitatis constitutio fuerit perfectior; imo, nec Plato nec Aristoteles nec legumlatorum ullus meliorem civitatis formam cogitatione comprehendere potuit; tam suavi enim concentu et quasi harmonicâ tres pervulgatæ rerumpublicarum formæ in unam speciem tam parantur, ut nec Aristoxeni tibiam, nec Timothei fides modulatiores fuisse putem."

Memoirs of the Life of Sir William Jones.—Appendix viii

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ADVERTISEMENT.

THE very flattering testimonies of approbation of his work, with which the Author has been honored by many highly respectable persons, have induced him to send another edition of it into the world. He hopes it is improved by considerable additions; and he has spared no pains to avail himself of the remarks of judicious friends, in order to render the whole as suitable as possible for the higher classes in schools.

TO

WILLIAM WILBERFORCE, Esq.

MEMBER OF PARLIAMENT

FOR THE

County of York;

WHOSE PHILANTHROPY AND ELOQUENCE WERE EXERTED NEARLY TWENTY YEARS, IN A FREE SENATE, FOR THE ABOLITION OF THE SLAVE TRADE, SO LONG THE REPROACH OF GREAT-BRITAIN; WHOSE PERSEVERING ZEAL IN THE CAUSE OF HUMANITY, AFTER SUSTAINING REPEATED REPULSES, AT LENGTH OBTAINED A SIGNAL VICTORY OVER AVARICE AND INJUSTICE, CRUELTY AND OPPRESSION; WHOM THOUSANDS, "WHO WERE "READY TO PERISH," BLESS, AND WHOSE NAME WILL BE HAD IN GRATEFUL REMEMBRANCE, BY MILLIONS YET UNBORN;

THE FOLLOWING WORK,

IS HUMBLY INSCRIBED,

By the AUTHOR.

Kidderminster, September 1st, 1808.

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ERRATA.

Page 219, lines 5 and 6, for *Congè de lire*, read *Congè d' elire*,

Page 421, line 8 from the bottom, for *Thi* read *This.*

PREFACE.

At no period of the history of England was an acquaintance with its constitution more necessary than at the present. There is, indeed, no lack of *professional* knowledge of the subject. We have only to attend upon the different courts, to be convinced, that the profoundest erudition is combined with the most inflexible integrity, as well in the advocate who pleads our cause, as in the judge who expounds the law. But whilst every Englishman experiences the effects of impartial justice, very few understand the nature of the source from which it flows. Many a man knows the advantages of possessing silver and gold, who never descended into the earth to explore the rich and extensive mines that furnish these precious metals. At a time, therefore, when our government is threatened with destruction by a cruel and relentless foe, how desirable

is it that a knowledge of that unrivalled constitution under which it is our happiness to live, should be generally diffused through all ranks of society. The books on this subject already before the public, are too voluminous and learned to answer this end.

The design, then, of the following work, is simply to instruct the rising generation in the fundamental principles of that admirable constitution which equalises the rights of all, from the king to the peasant; which is venerable for its antiquity, because it was founded upon freedom, in the earliest ages; which many of our forefathers defended by their swords; and which every Briton should be ready to seal with his blood.

There is, indeed, in every Englishman, a sort of *hereditary* affection for the constitution and government, which disseminates a general spirit of loyalty throughout the land; yet many truly loyal persons are incapable of defending their principles, when attacked by evil and designing men; who under the pretence of

patriotism, have nothing in view but their own aggrandizement. Doubtless, one great cause of political discontent, is the almost total ignorance of constitutional principles, which pervades the greater part of the community. They who are acquainted with the system of the English government, cannot but value it as being the source of our civil and religious liberty; and therefore must admire it more and more in proportion as they view and comprehend the secret springs which regulate all its motions. How important, then, to every Englishman, is a knowledge of the "origin, nature, and safe-"guards of government and civil liberty; of the "principles of public and municipal law; and "of the theory of political, commercial, finan-"cial, and military administration."*

The superior excellence of the British constitution consists in that happy union of monarchical aristocratical, and democratical government, which, whilst it secures from the evils attendant

* See lord Grenville's beautiful Preface to lord Chatham's Letters to his Nephew.

on each, amply supplies the collective benefits of all. In this triangular glass, the beauties of our political economy are clearly discerned in all their rich variety of shade.

The English is precisely that form of government which the Roman orator pronounced to be the best possible, inasmuch as he conceived that it neither provoked to rebellion by the severe infliction of punishment, nor led to a licentious anarchy by its total neglect.* Such a government, Tacitus likewise imagined to be the most beneficial of any; although he thought that it was rather to be hoped for than expected; and if ever adopted, that it could not long continue.† But in this happy island, the speculations of these great men have been realized. England is the favoured soil which early received the seeds, gradually nourished the plant, and has at length matured the only "*tree of liberty*" that has been found to shelter beneath its

* Cic. de Repub. lib. ii.

†. Tac. Ann. lib. iv. sec. 33.

branches, person, property, and life, from the scorching beams of every kind of tyranny. Not that perfection attaches to our constitution, or that it is free from abuse; but there is a constant tendency in it to correct the latter, and promote the former. Perhaps the author may be thought to carry his partiality too far in considering the English Constitution as the very *perfection* of human wisdom. He does not, indeed, conceive it possible for the limited intellect of man to model a government more complete in theory; nor, does he believe, whilst human nature continues what it is, that it is in the power of any nation to secure a larger measure of true *practical* liberty, than Britons enjoy under their existing constitution. It would, however, be the height of folly to deny that very serious departures from first principles have crept in; but the English constitution possesses this peculiarity, that it can *legally* and peaceably *renew* itself. It can by coolly deliberating effect that reformation which in other countries may be attempted, but can never be accomplished by *popular* clamour and violence.

The blessings which Britons inherit are so peculiar, and so eminently distinguish their government and nation from all others, that it is impossible for the contemplative mind not to confess the author of them to be divine. That the minutest concerns of kingdoms and states are all ordered according to the infinite wisdom of an overruling Providence, few will deny. They then who believe that the conquest of Canaan by the Israelites was a *consequence* of Joseph's telling his dreams to his brethren, will have no doubt that the settlement of the protestant church of England under queen Elizabeth was the *effect* of the marriage of Henry VIII. with his brother's widow: or, that the levying of the shipmoney by Charles I. was a part of the scaffolding erected to build the throne of the house of Brunswick. The author therefore makes no apology for having occasionally made a moral reflection, as he conceives none will be thought necessary by wise and good men.

The author disclaims all pretension to originality in the following work. He professes only

to have compiled such a number of facts as might convey to young persons a tolerably correct idea of an important and interesting subject; and he hopes that his little volume, like the smaller end of a telescope, will bring those objects nearer that are placed at too great distance from the generality of readers, in more expensive works.

The intelligent reader will readily perceive that the Author, in this compilation, has principally made use of Blackstone's Commentaries, of De Lolme on the English Constitution, of Burke on the French Revolution, and of Hume's History of England, with Smollett's Continuation. He is also much indebted to Burn's Ecclesiastical Law, to Gibson's Codex, to Furneaux's Letters to Blackstone, and to other Authors of established credit. He would think himself highly culpable, did he not cordially embrace this opportunity of acknowledging the kindness of many judicious friends, to whom he is under obligations, for a variety of valuable suggestions.

INTRODUCTION.

THERE is much propriety in the remark which has been often made, that religion sustains more injury from the wounds inflicted by pretended friends, than from the assaults of her avowed enemies. The writings of Deists, from time to time, have uniformly called forth the zeal and talents of the advocates of christianity; and the collision of controversy has produced the sparks of truth, which gradually kindling, and at length bursting into a flame, have illumined the minds of thousands, who would otherwise have remained in Pagan darkness. In short, the more christianity is investigated, the better it will be understood; and the better it is understood, the more it will be valued.—The same may be said with regard to the English Constitution.

The seditious productions of disloyalty, have stirred up many to write in defence of that government, under whose benign influence we continue to enjoy such inestimable blessings,

whilst other nations have suffered from the licentiousness of anarchy, and are still groaning under the oppression of military despotism. Thus thousands have been instructed in the principles of the British constitution, by political writers; and in proportion as they have made themselves acquainted with the foundation upon which that constitution rests, they have become attached to its interests, and felt a lively concern for its permanency and prosperity. The revolutionary storms, which of late have dashed in pieces the governments of other nations, have, we trust, more firmly fixed the anchor of ours in every British heart, and thus preserved us, under Divine Providence, from the general wreck.

A competent knowledge of the fundamental principles of the constitution, is not only an essential accomplishment of every English gentleman and scholar; but is also a desirable acquisition for all ranks of men amongst us, from the highest to the lowest.

Experience teaches us that early impressions are not easily effaced from the mind; an elementary knowledge, therefore, of the English government, cannot be inculcated too soon, nor too generally diffused. The beauties of our constitution should be engraven, rather than painted, upon the minds of our youth; and the sooner

the skill of the artist is employed in this important work, the better. The Romans were very sensible of the advantages which the state would derive from the political cultivation of the minds of their children. Hence their *boys* were taught to commit to memory the *twelve tables*, as a necessary lesson, not only that they might obtain a knowledge of their laws and government, but feel also a veneration for them.* There surely is not less reason to inform the minds of youth on such a subject in England than in Rome. And if attachment and obedience to the laws were in any degree the fruit of a heathen education, what good effects may not be expected when loyalty is grafted on the minds of our children upon *christian* principles!

In the instruction of young persons, however, in the principles of the constitution, one great point to be attended to, is to inculcate on every one a reverence of those branches of the legislature from which his own rank excludes him.

Self-importance will readily induce the young prince, who hopes one day to wear the crown, to admire the monarchical part of our system; but it will be more difficult to make him understand, that the two houses of parliament are the

* "Discebamus enim pueri xii. (tabulas) ut carmen necessarium." Cic. de legib. lib. 2. sec. 23.

very pillars which give stability to the throne. Again, the noble stripling will soon learn and be delighted with his own consequence in the state, arising from those hereditary honours and privileges to which he is born; but he will probably be more slow in comprehending the benefits which his own order derives either from the king or the commons. So, likewise, the commoner will eagerly adopt the speculative notions, that all power originates with the *people*, and that no man ought to be taxed without his own consent; but tell him that his liberty could not long exist were it not for the strong barrier of the house of lords, which prevents the popular torrent in a stormy day, from sweeping away the throne; tell him, that it is every way better for *him*, that the king alone should execute the laws, than that they should be administered by any number of his subjects; and he will probably reply, "these "are hard sayings, who can hear them?"

Every Englishman is interested in the preservation of the government, and therefore ought, in some degree, to be acquainted with its maxims: without some knowledge of which, he exposes himself to the censure and inconvenience of living in society without understanding his own relation to it.

A certain degree of knowledge of the constitution will be very useful even to the lower orders of

society. The *mechanic* and *peasant* who understand something of those fundamental principles which secure to them their lives and liberties, will not be easily drawn aside from their loyalty by the insidious arts of pretended patriots. When they fully comprehend the advantages of subordination of rank, they will be content with the station in which Providence has fixed them; at least, they will endeavour to rise to a higher situation only by acquitting themselves well in the place which they now occupy. The community will naturally appear to them like a regular army, in which there is only one commander in chief, a few field officers, some captains, subalterns, and non-cominissioned officers, with a numerous battalion of rank and file. They will perceive that the safety of all depends upon the united skill and bravery of the whole; and hence, like well disciplined troops, every man will be found watching at his post.

The science of government, as a branch of polite literature, deserves to be cultivated by the members of the three learned professions. It would, indeed, be quite superfluous to observe that this science ought to be well studied by every *lawyer*, were it not obvious that a man may be a very accurate practical *conveyancer* and yet be very ignorant of the *theory* of the constitution,

of the origin of our laws and customs, and of the changes which from time to time they have undergone. Just as a medical man may by mere habit and experience adopt a successful routine of practice, without having even read a system of anatomy, or knowing any thing of the science of physiology.

It is desirable that *medical men* should possess such a knowledge of the law, as will enable them to acquit themselves with credit in courts of justice, when called upon to give their evidence in various instances of medical jurisprudence; and particularly in cases of infanticide and insanity.

It sometimes happens, too, that medical men are suddenly called in to sick persons who have not made any legal arrangement of their temporal affairs; the equitable distribution of whose property is of the utmost importance to the future happiness of their families. In such cases, and where the physician apprehends a fatal termination of the disorder, it behoves him in a suitable manner to apprize at least the near relatives of the patient of his real danger, in order that they may point out to him the propriety of settling his concerns.* And as the matter is sometimes very urgent, either from the hazard of delay, or from the unseasonableness of the hour, it will often be

* Gregory on the Duties and Qualifications of a Physician.

of great advantage if the medical attendant understand the law so far at least as it regards the execution of last wills and testaments.

A competent knowledge of the law will be both ornamental and useful to *clergymen*. It will not only give them a brighter polish as gentlemen, but will also enable them to understand many things that are connected with their profession: such as, advowsons, simony, tythes, marriages and other ecclesiastical matters. The character, too, of a clergyman, as a messenger of peace, makes it is bounden duty to promote the *temporal* as well as eternal peace of his parishioners, by all prudent means: and the influence which his rank gives him in the parish, ought to be uniformly employed for this twofold purpose. Many opportunities will be afforded a clergyman, especially in villages, of adjusting the differences between his neighbours, and thus preventing expensive litigations. If, however, he be ignorant of the laws, he will either mislead the disputants, or must altogether decline the pleasing office of a peacemaker. But if he be tolerably acquainted with them, he may summon his contentious neighbours to the bar of reason, and boldly ask, "Is it so, that there is not a wise "man among you? no not one that shall be able "to judge between his brethren? But brother, "goeth to law with brother. Now, therefore,

" there is utterly a fault among you, because ye " go to law one with another."

Gentlemen of rank and fortune are particularly inexcusable if they remain ignorant of the laws of their country; without a certain knowledge of which, they cannot properly discharge the *duties* of their respective stations. For let it be remembered, that rank, and riches, and learning, and influence, are all talents committed to individuals by a kind Providence for the *public* good. These great advantages are not bestowed to enable their possessors to squander them in expensive dissipation, or waste their own time in splendid idleness. On the contrary, where much is given, much will be required. Persons, therefore, distinguished by the bounties of Providence, should enquire how they may best employ the gifts with which they are favoured, for the good of their fellow creatures and the honour of God. The far greater part of gentlemen, indeed, must be content with doing what good they can within the sphere of their influence, as private men. A few, however, will be called upon to appear as public characters. Some will be appointed to the *magistracy*. But how can they distribute justice to their fellow subjects without such a knowledge of the laws as they had opportunities of acquiring, and which it was their duty to have obtained.

Ignorance of the constitution and laws will be peculiarly disreputable to him who aspires to the honour of a seat in *parliament*. A candidate thus disqualified, can, in fact, desire to fill so responsible a situation only from the low motive of gratifying his vanity and ambition; and the obtaining of it would probably produce no better effect than to increase that self-importance which induced him to add *one* to the phalanx of a party. And surely he must be altogether unworthy of the dignified name of a *senator*, who is so incompetent to act as a public counsellor. How can he with any propriety consent to a new law, who is ignorant of the old one which it is meant to alter or repeal? The physician who is unacquainted with the qualities and effects of the medicines in daily use, must be a very unfit person to consult about a new remedy for any disorder.

But the obligation which is laid upon every *nobleman* to make himself thoroughly acquainted with the constitution and laws of his country, is still greater; inasmuch as he is a hereditary counsellor of the crown, and judge over the lives of his peers and the property of all the subjects of the realm. And when he reflects, that he is a member of that high court whose sentence in the last resort is irrevocable; when he considers, that of the determination of this high tribunal there can be no correction nor even a review, and that

from it there can be no appeal; how indispensably necessary must it appear to him that he should well understand the laws of the land.

Above all, how highly important it is, that all those *personages* should be well instructed and grounded in the true principles of the British constitution, whose exalted birth renders it possible that they may one day be called to sway the royal sceptre.* The king of England is the greatest of all monarchs so long as his conduct is regulated by the laws. The art of reigning is his profession; which, like all other professions, must be well learned to be successfully practised. The merited fate of James II. furnishes an useful lesson by which our kings may learn how greatly their authority and safety will be endangered by going beyond the constitutional bounds. It was the misfortune of France, that the power of her monarchs was never accurately defined by any written laws. It is the happiness of England, that the royal prerogative is clearly ascertained; and the glory of her king, that he has never once during his extended reign, stepped over the prescribed limits of his authority. It is this regard to the laws, that secures the British throne,

* If the reader wish to have his mind impressed with the importance of this sentiment, he is referred to that excellent work entitled "Hints towards forming the Character of a young "princess."

because it fixes it upon the permanent basis of the hearts of the people, instead of making it dependant on the instability of military power. So long, therefore, as the sovereign manifests a due attachment to the laws, he cannot fail to be loved, obeyed, and defended by his brave and loyal subjects. And indeed the uninterrupted integrity with which the laws have been administered by the princes of the house of Hanover, is the best pledge which Englishmen can have that the "threefold bond which ties our constitution "together" will never be torn asunder by any future monarch of that illustrious race. If, then, a knowledge of her admirable constitution were duly cultivated by all ranks of the community, England would not be disappointed in "*expect-*"*ing every man to do his duty.*"

CONCISE VIEW, &c.

CHAPTER I.

Of LAWS in general.

THE term LAW, in a restricted sense, may be defined, to be the rule of *human* action, implying those precepts by which man is commanded to make use of his reason in the general regulation of his conduct.

There are however different kinds of Law, to which men, in general, are subjected. There is the *Law of Nature*, dictated by God himself; to whose will, man, as an absolutely dependant creature, is necessarily bound in all points unreservedly to submit. This law is coeval with mankind, is binding upon all men, in all countries and at all times; and no human laws are of any validity if contrary to it. Both its

existence and universality are demonstrated by the voice of conscience, heard in secret by every man, whether Christian, Jew, Mahometan, or Pagan. "All men are a law unto themselves; "which shew the works of the law written in "their hearts, their conscience also bearing "witness, and their thoughts the mean while "accusing, or else excusing, one another."

There is also the *Law of Revelation;* or that divine law which is to be found only in the holy Scriptures. It corresponds with the original law of nature; and comprehends both the *moral* law and those *positive* institutions which God has reserved for himself the right to enact, and with which, as a rational creature, man must comply; because the manifestation of the divine will is a sufficient reason why he should do so.* This divine Revelation, God was pleased, at "sun-"dry times, and in divers manners, to give in "time past unto the fathers, by the prophets, "but hath in these last days spoken unto us by "his Son," and his Apostles, in compassion to the imperfection and blindness of our reason. The weight of all human laws rests upon these

* See Dr. WILLIAMS' elaborate Essay on the Equity of divine Government, page 54.

two laws of Revelation and Nature; that is, they are not binding upon the conscience if suffered to contradict them.

There is likewise the *Law of Nations;* or that law which depends entirely upon the rules of natural law; or upon mutual compacts, treaties, and leagues, between the several communities of mankind. This law, which is a kind of public rule arising out of public policy, appears to have been instituted by general consent in Europe, about the time the feodal system began to crumble under its own weight. The rights and duties of the various Sovereignties where then distinctly marked; and the princes of the civilized world, soon considering their different empires as blended in one immense commonwealth, came at length to be governed by a moral sense of mutual obligations, and regulated by what (from its generality) was denominated the law of nations.

That this law is binding on the consciences of rulers, is very evident, from various parts of the old testament; and from "*truce breakers*" being classed in the new with "*traitors,*" and those who are "lovers of pleasures, more than lovers of God." A wilful and unjust violation, therefore, of public treaties, will probably bring

down upon the offending nation, the righteous judgments of the Almighty.*

Martial Law, is a prompt, arbitrary and violent method of decision by military execution. A dreadful procedure which is usually adopted in times of rebellion, in virtue of the royal prerogative, to avoid the dangers arising from the tardiness of the proceedings in the established courts of Law. The kings of England, however, have not always limitted the exercise of this law to times of civil commotion. In 1552 king Edward VI. granted a commission of martial law, when there was no rebellion or insurrection: and queen Elizabeth finding that neither the lord mayor nor the star chamber could repress the disorders occasioned by the idle vagabonds who infested the streets of London, gave a commission to Sir Thomas Wilford, to execute such offenders "speedily by martial law." But in our day, the proclaiming of martial law in any part of the united kingdom would probably not be adopted without the sanction of the whole legislature.

Again, the *Municipal Law*, is that rule of civil conduct which is prescribed by the supreme power in a state. This law is called a *rule*,

* Compare Joshua ix. from 15 to the 21 ver. with 2 Sam. xxi. 1.

because it is a matter of injunction which must be obeyed; and is distinguished from *counsel* or *advice*, which may be followed or not, as a man sees fit. It differs also from a *compact* or *agreement*: the language of a compact being, "I will, or will not do thus;" that of law, "thou shalt, or shalt not do it:" and hence the law is defined to be a *rule*.

But this municipal law, is called also a *rule* of *civil conduct*; because it regards man as a citizen, bound to other duties towards his neighbour, than those of mere nature and revelation: duties which he has engaged in, by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society. But the bare resolution confined to the breast of the legislator, without manifesting itself by some external sign, can never be properly a law; and therefore this municipal law, is a rule *prescribed*. The resolution of the legislator must be made known to the people who are to obey it: this may be done in various ways, either by universal tradition and long usage, as is the case of the common law of England; or *vivâ voce*, by proper officers appointed for that purpose, as is done with regard

to proclamations and acts to be publickly read in churches; or by writing or printing, as is the general course taken with all our acts of parliament. But this civil rule of conduct must be prescribed by the *supreme power in the state.* Sovereignty and legislature are not capable of subsisting one without the other; and the latter being the greatest act of superiority that can be exercised by one being over another, it is requisite to the very essence of a law, that it be made by the supreme power.

Now there are certain qualities which are requisite for supremacy: namely; wisdom, goodness, and power; and where these are most likely to be found, there the sovereign authority should be placed by the founders of different states, either expressly, or by their tacit consent. This supremacy admits of different modifications; and hence have arisen those various forms of government noticed by ancient political writers. These have been usually considered under three heads, (viz.) Democracy, when the sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community: Aristocracy, when it is deposited in a council, composed of select members; and Monarchy, when it is intrusted in the hands of a single person. Each of these forms has its

peculiar excellencies. A Democracy is usually best calculated to direct the end of a law; Aristocracy, to invent the means by which that end shall be obtained; and, a Monarchy, to carry those means into execution.

The British constitution partakes of the advantages of the three forms, whilst it is happily exempted from the anarchy of the first, the insolence and oppression of the second, and the tyranny of the third. The sovereignty or power of making laws being lodged in the King, Lords, and Commons, the subjects of Great-Britain derive all the benefits which can be obtained from any human government; for in no other shape could we be so certain of finding the three great qualities of supremacy so well and so happily united; to the exclusion of most of those obvious inconveniencies which are necessarily the result of any form of unmixed government.

We see then, that the *right* of the sovereign power to make laws, arises from that *political* union by which all persons consent to submit their own private wills, to the will of those to whom the supreme power and authority are instrusted. For as man cannot enjoy the advantages of civilized society without parting with some of his *natural rights;* so experience teaches us, that it is best, for a community of individuals

to delegate their right of governing themselves to a few persons, who are most qualified by their wisdom to make such laws as will be for the mutual benefit of the whole.

But since the people are bound to conform themselves to the will of the state, it is expedient that they receive directions from it, declaratory of its will. Hence it follows, that it is the *duty* of the supreme power, not only to make laws, which are to ascertain the boundaries of *right* and *wrong;* but also to adopt certain methods of commanding the one, and prohibiting the other.

Now every law may be said to consist of *four* parts; one *declaratory*, whereby the rights to be observed, and the wrongs to be avoided, are clearly defined;—another *directory*, whereby the subject is instructed and enjoined to observe those rights and abstain from the commission of those *wrongs;*—a third, *remedial*, whereby a method is pointed out to recover a man's private rights, or redress his private wrongs;—and lastly the *sanction*, whereby it is signified what penalty shall be incurred by those who commit any public wrongs, and transgress or neglect their duty. Yet every thing human is imperfect, and the wisdom and sagacity of man cannot, in framing a law, provide for every unforeseen circumstance. And as *words* are often so inde-

finite as to admit of different constructions, and as obsolete terms often make that very obscure, which was formerly exceedingly obvious; it is very proper, that some rules should be observed respecting the *interpretation* of laws.

The most rational method to interpret the will of the legislator, is by exploring his intentions at the time the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law.

With regard to *words*, they are generally to be understood in their usual and most known signification; not merely regarding the propriety of grammar, but also their general and popular use. And if *words* happen to be dubious, their meaning may be established from the *context*. It may be of singular use to compare a word, or a sentence, whenever it is ambiguous, equivocal, or intricate. Thus the preamble is often called in to help the construction of an act of parliament.

Again, *words* are always to be understood as having a regard to the *subject matter* of an act. Thus when a law of Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of

grain; but when it is considered that the statute was made to repress the papal usurpations, and that the nominations to benefices by the Pope were called *Provisions*, we shall see that the restraint is intended to be laid only on such provisions.

And in respect to the *effects* and *consequences* of an act, where words bear none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. But the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is, by considering the *reason* and *spirit* of it, or the cause which moved the legislature to enact it; and from this method of interpreting laws by the reason of them, arises what is called *equity;* by which is meant the correction of that, wherein the law (by reason of its universality) is deficient.

CHAPTER II.

Of the LAWS of ENGLAND.

THE municipal law of England, or the rule of civil conduct, may be divided into two kinds: the unwritten, or common law; and the written, or statute law.

The common law, again, is distinguishable into three kinds, namely, *general customs;* the *particular customs* of certain parts of the kingdom; and likewise those *particular laws* that are by custom observed only in certain courts and jurisdictions.—The goodness of a custom receives its weight and authority from its having been used time out of mind.

General customs, or the common law, properly so called, is that law by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles an infinite number of particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires.

These customs are to be ascertained, and their validity to be determined, by the judges in the several courts of justice. They are the depositories of the laws; the living oracles, who must resolve all cases of doubt, and who are bound by an oath to decide according to the law of the land.

The judges obtain a knowledge of the common law from being long personally accustomed to the judicial decisions of their predecessors; and those decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.

The doctrine of the law is, that rules and precedents must be followed: when any critical question, therefore, arises, in the determination of which former precedents may give light and assistance, recourse is had to the registers of the judgments of cases, and all proceedings previous thereto, which are carefully preserved, under the name of *records*, in public repositories set apart for that purpose. The decisions of the judges are handed down to posterity in numerous volumes of *reports*, which are short histories of cases, taken down by persons present at the determination.

The *second* branch of the unwritten law, are those *particular customs* which affect only the

inhabitants of particular districts. Which customs, or some of them, are doubtless the remains of a multitude of local customs; out of which the common law as it now stands, was at first collected by king Alfred, and afterwards by king Edgar and king Edward the Confessor; each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament.

Gavelkind is one of these particular customs, and still obtains in Kent and some other parts of England; but was abolished in Ireland in 1604. This custom ordains, amongst other things, that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike. And formerly, during the feodal system, if any of the family died after partition was made, his portion was not shared out among his sons, but the chieftain made a new partition, at his discretion, of the lands of the deceased among the surviving brothers.

Such likewise is the custom of *borough-english*, an ancient tenure, by which, younger sons inherit family estates; a custom which still exists in Kent, and some other parts of the kingdom. It seems to have originated in very early times amongst the Tartars, whose eldest sons emigrating, the youngest remained with their fathers, and were taken care of by them.

And such also are many *particular customs* within the city of *London*, with regard to trade, apprentices, widows, orphans, and a variety of other matters, which are good only by special usage.

The rules relating to particular customs regard either the *proof* of their existence, *their legality* when proved, or the usual method of *allowance*.

As to *gavelkind* and *borough-english*, the law takes particular notice of them; and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto.

With regard to the rules of *proof;* in other cases it must be observed, that all private customs must be pleaded, and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alledged. The trial in both cases is by a jury of twelve men, and not by the judges: but if the existence of a

custom of London be brought in question, it is tried by certificate from the Lord Mayor and Aldermen, by the mouth of their Recorder; unless it be such a custom as the corporation itself is interested in. But after a custom is proved to exist, there are several things requisite to establish its *legality*, or to make it a *good* custom; as, that it has been so long used, that the memory of man runneth not to the contrary. It must have been *continued;* as, any interruption of the *right* would cause a temporary ceasing; and a revival of it gives it a new beginning, which will be within the memory of man. It must have been *peaceable* and acquiesced in; not subject to contention and dispute. Customs must not be *unreasonable;* they ought to be certain:—they must be (when established) compulsory; and not left to the option of every man, whether he will use them or not. And lastly, they must be *consistent* with each other; for one custom cannot be set up in opposition to another.

With respect to the *allowance* of special customs: it may be remarked, that customs, in derogation of the common law, must be construed strictly; and all special customs must submit to the king's prerogative. Therefore, if the king

purchase lands of the nature of *gavelkind*, at his demise his eldest son alone shall succeed to those lands.

A *third* branch of the common law, are those *peculiar laws*, which, by custom, are adopted and used only in certain courts and jurisdictions. Such, for instance, are the *civil* and *canon* laws. By the former is generally understood, the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digests of Justinian; and the novel constitutions of himself and some of his successors. By the *canon* law, is meant a body of Roman ecclesiastical law, relative to such matters over which that church either has, or pretends to have, the proper jurisdiction.

The courts in which the civil and canon laws are permitted (under certain restrictions) to be used, are the courts of the archbishops and bishops, called the ecclesiastical courts; the military courts; the courts of admiralty; and the courts of the two universities. In all, their reception, in general, and the different degrees of that reception, are grounded entirely upon custom.

It is necessary to remark a few particulars relative to them all: and, first, The courts of common law have the superintendency over these

courts, to restrain them. Secondly, The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them: and lastly, An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England.

The *written* laws of the kingdom are now to be noticed; or those statutes, acts, or edicts, which are made by the king's Majesty, by and with the advice and consent of the Lords spiritual and temporal in parliament assembled; and these are *general* or *special*; *public* or *private*.

A *general* or *public* act of parliament, is an universal rule that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*.

Special or *private* acts, are rather exceptions than rules, being those which operate only upon particular persons and private concerns: and of these the judges are not bound to take notice, unless they be formally shewn and pleaded.

Again, there are *declaratory* statutes, or those which the parliament enacts to declare what the common law is and ever hath been, to avoid all disputes, where the old custom of the king-

dom is almost fallen into disuse, or become disputable.

So likewise there are *remedial* statutes which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, or from any other cause whatever.

In attending to the rules to be observed in the construction of statutes, it may be remarked that there are three points to be considered in the exposition of all *remedial* laws; namely, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath supplied to cure this mischief.

Again, a statute, which treats of things and persons of an inferior rank, cannot by any *general words* be extended to those of a superior. Thus a statute treating of *Deans* and *others having spiritual promotions*, is held not to extend to Bishops.

With respect to *penal* statutes, they must be construed *strictly*; though the statutes against *frauds* are to be liberally and beneficially expounded. The reason of this difference, is, that the former statutes act upon the offender, the

latter upon the offence: and in all statutes, one part must be construed by another, so that the whole, if possible, may stand. Supposing the common law and a statute should differ, the former gives place to the latter; and an old statute is superseded by a new one. But if a statute that repeals another, be itself repealed afterwards, the first statute is hereby revived without any formal words for that purpose.

It may be further noticed with regard to the construction of acts of parliament, that such as are derogatory from the power of subsequent parliaments are not binding; and that statutes which are impossible to be performed, are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to reason, they are, with regard to those consequences, void.

CHAPTER III.

Of the COUNTRIES subject to the LAWS of ENGLAND.

WALES continued for many centuries independent on England; but was subdued and divided amongst the conquerors by William I. in 1091; and was completely annexed to the crown of England in 1203: yet it was not governed altogether by her laws until the reign of Henry VIII. In 1535 an act was passed, enacting, that the dominion of Wales shall for ever be united to the kingdom of England; that all Welchmen born shall have the same liberties as other the king's subjects; that lands in Wales shall be inheritable according to the English tenures and rules of descent; that the laws of England and no other shall be used in Wales; with many other provisions with regard to the regulation of the police of this ancient principality. By this union of Wales with England, twenty-seven members were added to the House of Commons; no county or town in Wales sending more than one member to parliament, except the county of Monmouth, which returns two.

Scotland, the ancient *Caledonia*, was on the death of Alexander III. disputed by twelve candidates; who submitting their claims to the arbitration of Edward I. of England, in 1285, gave him an opportunity to conquer it. Its regalia and crown were taken and brought to England, with the coronation chair, now in Westminster Abbey, in 1296; but the public records of the kingdom were all lost in conveying them back from London by sea, in 1660.

The union of the kingdom of Scotland with England was attempted in 1604; and again in 1670; but was not accomplished till May 1, 1707, in the reign of queen Anne.

The parliaments of both kingdoms agreed to twenty-five articles of union; the purport of the most considerable of which was, that on the 1st of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one by the name of *Great-Britain*: that the succession to the monarchy of Great-Britain shall be the same, as was before settled with regard to that of England; that the united kingdom shall be represented by one parliament: that there shall be a communication of all rights and privileges between the subjects of both Kingdoms, except where it is otherwise agreed: that the coin, weights, and measures; the laws relating to

trade, customs and the excise, shall be the same in Scotland as in England: that sixteen peers shall be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the House of Commons.

There are, however, several fundamental and essential *conditions* of the union. The most prominent of which, are, the preservation of the two churches of England and Scotland in the same state that they were in at the time of the union; and the continuance of the municipal laws of Scotland, which are to be still observed in that part of the island, unless altered by parliament.

The town of *Berwick-upon-Tweed* was originally part of the kingdom of Scotland: it has, however, been many times alternately in the hands of the English and Scots; but was at length reduced into the possession of the crown of England, by king Edward I. It received a charter from that prince; and was confirmed in all its privileges and customs, by the legislature, in the reigns of Edward IV. and James I.

Although, therefore, it has some local peculiarities derived from the ancient laws of Scotland; yet it is clearly a part of the realm of England, being represented by burgesses in the House of

Commons, and bound by all the acts of the parliament of the united kingdom.

Ireland, originally called Ierne, Hibernia, and Scotia, was formerly governed by kings of its own, till conquered by Henry II. who, as well as his successors, were styled Lords of Ireland, until Henry the VIII. when the title of King of Ireland was first assumed by that monarch.

The laws of England were received and sworn to by the Irish nation, assembled at the Council of Lismore, in the reign of Henry II. and although Ireland continued from that time to the present reign a distinct kingdom; still it remained in a state of dependance on England, and necessarily conformed to, and was bound by, such laws as the superior state thought proper to prescribe or sanction.

But the delay occasioned by sending over acts of parliament to the British ministry before they could pass into a law, created much inconvenience. This evil, with some others, turned the thoughts of the English Cabinet to an union of Great-Britain and Ireland.

This great political measure was completed on the 2d of July, 1800; when an act was passed, in order to promote and secure the essential interests of Great-Britain and Ireland, and to

consolidate the strength, power, and resources of the *British* empire.

This statute comprehends eight articles, by which, among other things, it is provided; that, upon the 1st of January, 1801, Great-Britain and Ireland shall be for ever united into one kingdom, to be represented in one parliament, to be styled "The parliament of the united kingdom of Great-Britain and Ireland;" and that the succession to the crown shall continue limited and settled as at present; that the representation of Ireland in parliament shall consist of four Lords spiritual of Ireland, by rotation of sessions; and twenty-eight Lords temporal of Ireland, elected for life by the peers of Ireland, to sit and vote in the House of Lords; and, that one hundred Commoners be the number to sit and vote in the House of Commons, on the part of Ireland: that any peer of Ireland may be elected to sit in the House of Commons of the united kingdom, unless previously elected to sit in the House of Lords.

It is further provided, that the churches of England and Ireland be united into one protestant episcopal church; and the church of Scotland to remain as formerly established; that the subjects of Ireland shall have the same privileges as the subjects of Great-Britain; and, that all

laws in force at the union, and all courts of jurisdiction within the respective kingdoms, shall remain, subject to such alterations as may appear proper to the united parliament.

The *Isle* of *Man* is a distinct territory from England, and not governed by its laws; neither does any act of parliament extend to it, unless it be particularly named therein; and then it is binding there. This island was formerly subject to the kings of Norway; then to John, and Henry III. of England; and afterwards, to the kings of Scotland. It was conquered from the Scots by Montacute, earl of Sarum; to whom Edward III. gave the title of King of Man. It fell by inheritance to the duke of Athol, 1735; but being purchased of his Grace for £70,000, was annexed to the crown of England, in 1765; and subjected to the regulations of the British excise and customs.

The *Islands* of *Jersey*, *Guernsey*, *Sark*, *Alderney*, and their appendages, formerly belonged to the duchy of Normandy; and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws; but an appeal lies from them to the king and council in the last resort.

They are not bound by common acts of the Imperial Parliament, unless particularly named in them.

Besides these Islands, our *Colonies* in more distant countries, are also, in some respect, subject to the laws of England.

In the kingdom of England, however, are comprehended, not only Wales and the town of Berwick; but the main, or high seas, are also a part of this realm; for there the courts of admiralty have jurisdiction; but they are not subject to the common law.

The main sea begins at the low water mark. But between the high and the low water mark, where the sea ebbs and flows, the common law and the admiralty have an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land, when it is an ebb.

The territory of England is divided into the ecclesiastical and civil departments. The ecclesiastical department is also divided into two provinces, those of Canterbury and York.

A province, is the circuit of an archbishop's jurisdiction. The province of Canterbury includes twenty-one dioceses; that of York, three, besides the bishoprick of the Isle of Man, which was annexed to it by Henry VIII.

Every diocese is divided into archdeaconries; each archdeaconry, into rural deaneries; and every deanery into parishes.

A *Parish*, is that circuit of ground which is committed to the charge of one minister, having

the care of souls in it. These districts are computed to be nearly ten thousand in number.

It is difficult to say how ancient this division of parishes is; but Cambden says, England was divided into parishes by archbishop Honorius about the year 630. It is probable, however, that they were gradually formed; and parish churches endowed with the tithes that arose within the circuit assigned.

Before this division of England into parishes, the bishops and clergy lived together in common; and the latter were sent out occasionally to preach, as the bishops judged expedient. But when the number of christians increased, and especially after the whole island professed christianity, the itinerant and occasional mode of preaching became insufficient. Besides the ordinances of Baptism and of the Lord's Supper, requiring to be administered to a whole community, a settled ministry became absolutely necessary, for the regular administration of these indispensable offices. The bishops therefore, who were the instruments of converting the nation from the Saxon idolatry, fixed the bounds of parochial cures. At first, any of the old idolatrous temples that were left standing, were used for christian worship; and afterwards, the lords of manors, from time to time, built

churches for the use of the tenantry of their several manors. These they endowed with suitable provisions for the maintenance of the minister; and it was this which gave the primary title to the patronage of laymen. But the reduction of the whole country into the same division of parishes, was, doubtless, the gradual work of successive generations.

The settling of the bounds of parishes depends upon immemorial customs; and care is, or ought to be taken, by annual perambulations, to ascertain and preserve them. In the times of popery, these necessary excursions were accompanied with great abuses of feastings and superstitious processions. And it is even now usual for the parishioners on such occasions to call for refreshments at the houses of certain persons in the boundaries; but no claim can be made as due of *right;* the custom having been declared to be against law and reason.

The *civil* part of the territory of England is divided into counties, hundreds, tithings, or towns. Which division as it now stands seems to owe its original to king Alfred; who to prevent the rapines and disorders which formerly prevailed in the realm, instituted *tithings*, so called because ten freeholders with their families, made one. These all dwelt together, and were

sureties to the king for the good behaviour of each other.

The terms, tithing, town, or vill, are of the same signification in law, and comprehend the several species of cities, boroughs, and common towns.

A *hundred* was originally made up of ten tithings, consisting of ten times ten families, and is governed by the high constable. In some of the northern counties the hundreds are called *wapentakes*, because the people at a public meeting, formerly confirmed their union with the governor, by touching a weapon.

A *County* or shire, is a district made up of an indefinite number of hundreds. *Shire* is a Saxon word, signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the Count of the Franks; that is, the earl or alderman of the shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in latin, *vice-comes*; and in english, sheriff or shire-reeve, signifying the officer of the shire; upon whom the civil administration of it is now totally devolved. In some counties there is an intermediate division between the shire and the hundreds, as *Lathes* in Kent, and *Rapes* in Sussex. Where a county is divided into *three* of these intermediate jurisdic-

tions, they are called *trithings*. These trithings still subsist in the large county of York, where by an easy corruption they are denominated *ridings;* the north, the east, and the west-riding.

In England there are forty counties, and twelve in Wales.

There are also counties *palatine;* such as those of Chester, Durham, and Lancaster, so called, *a palatio;* because the owners thereof, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in these counties *jura regalia*, as fully as the king has in his palace. Of these three, the county of Durham is the only one in the hands of a subject. The earldom of Chester was united to the crown by Henry III. and has ever since given title to the king's eldest son. And by various acts of parliament, the inheritance to the whole lands of the dutchy of Lancaster is vested in the crown.

The *Isle* of *Ely*, likewise, is a royal franchise, the bishop, having by grant of king Henry I. *jura regalia*, within the said isle; whereby he exercises a jurisdiction over all causes, as well criminal as civil.

Counties *corporate*, are certain cities and towns, to which, out of special grace and favour, the kings of England have granted the privilege to be counties of themselves, and not to be com-

prised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Worcester, and generally the cities of the realm; besides the five towns of Kingston-upon-Hull, Nottingham, Newcastle-upon-Tyne, Poole, and Southampton.

CHAPTER IV.

OF THE *Absolute RIGHTS OF INDIVIDUALS.*

ALTHOUGH the "Rights of Man" is a term, of late years, become odious, from the shameful prostitution of it to the basest political purposes, yet, undoubtedly, the English constitution acknowledges the thing itself.

By the *rights* of individuals, is meant, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. A sober statement therefore, of these, so as to make every Englishman acquainted with them, is perfectly consistent with the most genuine loyalty.

The absolute rights, of Englishmen then, usually called their liberties, are founded upon nature and reason, and coeval with our form of government. They are usually included in one general appellation, (viz.) the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint but from the law of nature. But every man who is a member of a civilized society, gives up a part of his natural liberty, in consideration of the advantages he derives from such wholesome laws as the community shall establish. So that political or civil liberty, is in short, nothing more or less than natural liberty, laid under such restraint as benefits both the individual, who gives up a part of it, and likewise the community whose safety requires that he should do so.

The natural rights of the people of England, which are secured to them by their constitution and laws, are, the right of personal security; the right of personal liberty; and the right of private property.

The right of personal security, consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

Life, in a legal sense, begins as soon as an infant is capable of stirring in its mother's womb;

and therefore wilfully to kill it by any means, the law considers as a high misdemeanour, and, in a moral view, it is certainly *murder*.

A man's limbs, the law contemplates as the gifts of his wise Creator, to enable him to protect himself from external injuries in a state of nature; and therefore, by various statutes it is enacted, that no man shall forfeit his life or member, without being brought to answer by due process of law.

His body, health, and reputation, are also protected by law, as without these it is impossible to have any perfect enjoyment of any other right. The *personal* liberty of the subject consists in the power of loco-motion, of changing one's situation or moving one's person to whatever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.

This is strictly a natural right, and the language of the great charter is, "that no free-"man shall be taken or imprisoned but by the "lawful judgment of his equals, or by the law "of the land."

Should any Englishman be deprived of his personal liberty, by the arm of power, or the decree of any illegal court, he shall, upon demand of his council, have a writ of *habeas*

corpus, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do, as justice shall appertain; and lest the habeas corpus act should be evaded by demanding unreasonable bail, it is declared by 1 W. and M. c. 2. that excessive bail ought not to be required.

This important privilege cannot be guarded with too great watchfulness; for if once the magistrate be left to imprison arbitrarily whom he chooses, there will soon be an end of all other rights and privileges.

If it be asked, "how then can a man be law-"fully imprisoned?" The obvious answer is: When he is committed by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing under the hand and seal of the magistrate, and must specify the cause of commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner: for as Festus very properly observed, it is "unreasonable to send "a prisoner, and not to signify the crimes laid "against him."—Circumstances, however sometimes arise, which render it necessary, for the

safety of the state, to *suspend* the *habeas corpus* act, for a limited time; but the legislature only can authorize the executive power to imprison any *suspected* persons, without assigning any reason for so doing.

The celebrated statute usually called the *habeas corpus* act, was passed in the reign of Charles II. May 27, 1679; which, by affording to the subject complete security against arbitrary imprisonment, made some reparation for the severities and cruelties committed under the administration of that licentious monarch. It was, indeed, the oppression of an individual which gave rise to this famous act. One Francis Jenks having moved at Guildhall, to petition the king for a new parliament, was committed to the Gate-house, by the privy council, where he was kept two months, having applied in vain to the judges for a writ of *habeas corpus*.* The principal provisions of this act are, to fix the period for bringing the *body* of the prisoner into court, according to the distance of the prison; and in no case, can the time allowed, exceed twenty days: to oblige the keeper within six hours to furnish the prisoner with a copy of his commitment; and to prevent a re-commitment

* De Lolme.

for the same offence, if the prisoner be once delivered by a writ of *habeas corpus*. Any judge who shall deny a writ of *habeas corpus*, shall forfeit £500 to the party aggrieved.

The king may by his prerogative prevent any man from *going* abroad; and this may sometimes be for the safety of the state; but he cannot *send* any subject out of the kingdom, against his *will*. He cannot even constitute any person lord lieutenant of Ireland, or an ambassador to a foreign court, without his consent; for this might, in fact, be a sort of honourable exile.

The right of *property* consists in the free use, enjoyment, and disposal of all one's acquisitions, without any controul or diminution, save only by the laws of the land. By a variety of statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter and the law of the land; and that no man shall be disinherited, or put out of his franchise or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and declared void.

Private property cannot be taken for the public good; nor any tax levied upon the subject without his consent, expressed by his representative in parliament. Such then are the absolute

rights of Englishmen. But in vain would it be to have those rights ascertained and declared, unless the constitution had provided some method to secure the actual enjoyment of them.

It has therefore established some auxiliary privileges of the subject, to enable him to maintain and protect the three principal rights of personal security, personal liberty, and private property. These subordinate rights are principally,

The constitution of parliament, which will be treated of at large hereafter:

The limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should either mistake, or legally exceed them, without the consent of the people:

The right of every Englishman of applying to the *courts of justice* for redress of grievances; where his cause must be tried and determined by course of law:

The *right* of the subject of *petitioning* the king, or either house of parliament: and,

Lastly, the *right* of every man, *of having arms*, for his *self-defence* and *preservation*, such as are allowed by *law*, according to his degree.

In these several particulars consist the liberties of Englishmen; liberties, which are more generally talked of, than understood. As, however,

they are our birth-right, it is important that we should rightly understand them; and as it is our privilege to enjoy, so should it be our constant care to maintain and defend them.

The history of our liberties was written in letters of blood, which our fathers shed; and we should be ready, if called upon, to transmit a *continuation* of it in the same indelible characters, down to our posterity.

CHAPTER V.

Of the LEGISLATIVE POWER.

It has already been seen, that the authority of making laws is lodged in the supreme power of a state.

In all tyrannical governments, the right of making and enforcing the laws, is vested in one and the same man, or in one and the same body of men; but in England the legislative and executive powers are wisely separated. Therein consits a great excellency of the British, over all other governments upon the face of the globe.

It is this peculiarity that has enabled England to raise her lofty head as far above all the rest of the nations, as the stately oak excels the meanest shrub. Nor does it form any objection to this assumption, that a very similar mode of government obtains in the United States of America; for whatever excellency is to be found there, must, in all justice, be allowed to have been derived from England. But the American government is like a child who exhibits the lineaments of his father's face, yet wants the vigour and stability of his experience and age.

It is presumed, indeed, that 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.

The parliament of England, in which the legislative authority is vested by the constitution, consists of king, lords, and commons.

The word parliament is derived from the French, "*parler*," to speak, and signifies the great council of the nation. Parliaments or general councils, are coeval with the kingdom itself; and have existed under the several names of *michel-synoth*, or great council; *michel-gemote*,

or great meeting; and more frequently *witlena-gemote,* or the meeting of the wise men.

The learned, however, are not agreed as to the period when the parliament, as it now stands, was instituted; that is, when the commons first began to form a distinct assembly from the lords; but it is supposed that the parliament was, in the main, the same as it now is, so long ago as the 17th year of king John, A. D. 1215.

No writs, indeed, were issued to summon knights, burgesses, and citizens to parliament, till the year 1266, being the 49th of Henry III. But in 1283, Edward I. held a parliament at Shrewsbury, where the lords sat in the castle, and the commons in a barn; and in 1337, the lords and commons are expressly mentioned in a parliament that met at Eltham, in Kent, in a palace of Edward II. the remains of which, now converted into a barn, are extant at this day.

In the further consideration of the British parliament, it will be necessary to attend to the manner and time of its *assembling.* It is usually and regularly summoned by the king's writ or letters, issued out of chancery by advice of the privy council at least forty days before it begins to sit. Yet, his Majesty may issue his royal proclamation for the meeting of parliament in not less than fourteen days from the date of such

proclamation, notwithstanding any previous adjournment to a longer day.

The parliament cannot meet by its own authority; it being a branch of the royal prerogative to convene it at such time and place as the king shall think fit. There would be a manifest inconvenience attending the right of the parliament to meet of its own accord; for it is impossible to conceive that both houses, and all the members of each, should ever agree unanimously as to the time and place of meeting. Still as it is highly becoming its dignity and independence, that parliament should be called together by none but one of its own constituent parts, there is the greatest propriety as well as advantage in vesting this authority constitutionally only in the king; because being a single person, his will may be uniform and steady. 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. Necessity may indeed supersede all law; and hence the convention parliament which restored king Charles II. met a month before his return, by its own authority; and had not such a parliament met, it would

have been morally impossible for the kingdom to have been settled again in peace. But the acts even of this parliament were held as nugatory by some eminent lawyers, and therefore to remove all doubts respecting them, they were confirmed in the next parliament by statute 13 Car. II. c. 7.

History affords us another striking instance where the necessity of the case compelled and justified the two houses convening without the usual writs of the king, in order to settle the government. In 1688 king James II. having voluntarily abdicated the throne, the prince of Orange was called over by the voice of the whole nation, and having delivered these realms from popery and tyranny, was placed in the vacant throne by a convention parliament. The proceedings of this parliament were likewise ratified by statute of 1 W. and M. c. 1.

Hence it may be clearly inferred, that notwithstanding extreme cases justify the lords and commons of the realm in holding a convention, yet the rule laid down, is in general certain that the king only can convoke a parliament. And this he is obliged to do, at least once a year, for the redress of grievances and the dispatch of business.

It is necessary to enquire next into the *constituent parts* of parliament: these are, the king's

Majesty, sitting there in his royal political capacity; and the three estates of the realm, the lords spiritual, the lords temporal, and the commons.

Here it may be remarked, that the total disjunction of the executive and legislative powers would be no less destructive to liberty, than their perfect union. Thus, when king Charles I. passed a bill destroying his sole prerogative to dissolve the parliament, it soon assumed both the civil and military administrations, and overturned both church and state.

When the parliament meets, the king and the lords spiritual and temporal sit in one house, called the house of lords; and the representatives of the people in another, called the house of commons.

The king, being the head, the beginning, and the end of parliament, always meets the two houses on their coming together, either in person, or by commissioners appointed to represent him; without which, there can be no beginning of parliament. And he only has the power to prorogue and dissolve it.

There is a very important advantage in the king's being a branch of the legislature, besides his having the power of dissolving it; and that is, his possessing the privilege of *rejecting* any

bill that may have passed both houses, and thereby preventing, in time, any encroachment upon his royal authority. So that the legislative cannot abridge, by law, the executive power of any of its rights; because the law must perpetually stand as it now does, unless all the branches of the legislature agree to alter it.

Herein consists the superior excellence 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 power 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 splendor 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 etat*, 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, liberty secured, and the blood of millions spared.

But to return:—Is there no danger, it may be asked, of the executive making intrenchments upon the legislative power? Certainly there would be, had not the constitution wisely kept it within due bounds, by bestowing upon the two houses the privilege of impeaching and punishing the king's counsellors for any evil and pernicious measures. It is far more beneficial to the public that his counsellors, rather than the king himself, should be answerable for his political conduct; because, were the king in person to be impeached and punished, it would destroy his constitutional independence, and overthrow the government.

By the lords *spiritual,* as a constituent part of parliament, is to be understood the two archbishops and twenty-four bishops of England, and four bishops of Ireland. Formerly there were twenty-six mitred abbots and two priors in the house of lords, but they were removed from

their seats at the dissolution of the monasteries by Henry VIII.

The right by which the English bishops sit in the upper house, arises from their holding, or being supposed to hold, certain baronies under the king.

Before the conquest, the bishops, during the Saxon government, held their lands under the spiritual tenure of frankalmoigne, or free alms; but in 1072, William the Conqueror, in order to subject the estates of the clergy, to all civil charges and assessments, changed the frankalmoigne into the feudal tenure of barony. This obliged the bishops to attend in parliament, which they complained of as a great hardship; and hence originated the quarrel between Henry II. and Thomas-á-Becket, archbishop of Canterbury.

But although the lords spiritual are distinct from the lords temporal, they do not vote separately. They are indeed in acts of parliament usually distinguished, yet in practice they are blended together under one name, of *the lords;* they mingle in their votes, and the majority of such intermixture binds both estates. So that notwithstanding the ancient distinction still nominally continues, the lords spiritual and temporal form but one estate: and a bill would undoubt-

edly be valid which should pass the house, although every bishop were to vote against it. There are many instances of this, but it will be sufficient to mention only the act of uniformity of 1 Elizabeth, c. 2. which was carried with the dissent of all the bishops; and hence the bill runs, "Be it enacted by the queen's highness, "with the assent of the lords and commons, in "this present parliament assembled."

In 1642, during the violence of party dissentions, the bishops were excluded from parliament by the multitudes that flocked towards Westminster and insulted them. They drew up an address to the king and house of lords, stating their undoubted right to sit and vote in parliament; and protesting against all laws, votes, and resolutions, as *null* and *invalid*, which should pass during their constrained absence. The house of lords held a conference with the commons on the subject; the issue of which was, the impeachment of the twelve bishops who signed the protestation.

Respecting the validity of a bill that should pass by the bishops making the majority, whilst every temporal peer present dissented, there is some doubt. Mr. Justice Blackstone is of opinion that such a bill would be valid; but Sir Edward Coke seems to think that this would be

rather an *ordinance* than an act of parliament. Professor Christian, however, has no doubt but that any act would be valid, although either all the temporal or all the spiritual lords were absent; or if present, were to dissent at the time of its passing the house; unless, indeed, any precedent could be produced to the contrary.

The lords temporal, consists of all the peers of the realm, by whatever titles of nobility they are distinguished, whether dukes, marquisses, earls, viscounts, or barons. The bishops are not, strictly speaking, peers of the realm, but only lords of parliament.

The number of the lords temporal is indefinite, and may be increased at the pleasure of the crown. Some of them sit in the house by descent, as do all the ancient nobility; some by creation, as do all new made peers; others by election, as do the Scotch and Irish peers since the union of the three kingdoms.

There are sixteen peers chosen for Scotland, who hold their seats only during the term of each parliament; and twenty-eight peers of Ireland, who are elected for life.

The prerogative which the king enjoys of increasing the peerage at his pleasure, may, at first view, appear dangerous to the state; but in reality, it is not so; on the contrary, it is advan-

tageous to it. For in every well regulated government, a distinction of rank is necessary; and it is beneficial to the community that a laudable spirit of emulation should be diffused through it, which may give life and vigour to the whole. In order, therefore, to reward such as are eminent for their services to the public, the constitution has empowered the king to confer honours whenever and to whomsoever he will. And such reward, while it is gratifying to the individual upon whom the honour is bestowed, has the recommendation of not being burthensome to the people at large.

Ambition in a republican government is indeed a very dangerous principle to inculcate and countenance; but under a mixed monarchy like ours, it can easily be kept within due bounds, and yet encouraged without affecting the safety of the empire. Thus we have seen a popular privy counsellor struck off the list, and a noble commander of a fleet or an army superseded; and an enterprising individual suddenly raised to the peerage, with equal ease and safety to the nation.

The house of lords is the principal constitutional support of the rights of the crown and people; whilst it forms a barrier to withstand the encroachments of both. It also creates and pre-

serves that gradual scale of dignity, which proceeds from the peasant to the king, rising like a pyramid from a broad foundation, and terminating in a point. As titles of nobility are expedient in our happy constitution, it is highly important that the owners of them should form an independent and separate branch of the legislature; for if they could only elect representatives, who should sit and vote in parliament, with the representatives of the people, their privileges would soon be borne down by the popular torrent, which would not fail to level all distinctions.

CHAPTER VI.

The same Subject continued.

In a free state every man, who is supposed to be a free agent, ought to be in some measure his own governor; and therefore one branch of the legislative power very properly resides in the people, or *house of commons*.

The *commons* consist of all such men of property in the kingdom as have not seats in the

house of lords; every commoner having a voice in parliament, either personally or by his representatives.

In a large state it is absolutely impossible for every man to sit and vote in person in the legislative assemblies; indeed it is obvious that such a mode would create only tumult and confusion, and prove an effectual hinderance to all public business. Our laws, therefore, are enacted on the part of the people by representatives.

The landed property of the whole kingdom is represented by knights of the shire; and the mercantile interest by citizens, and burgesses, who are returned for the different cities and privileged boroughs. And as many of the members who are returned to parliament are military and naval characters, the interests of those professions are naturally attended to; nor is the welfare of literature less protected by the members for the three universities of Oxford, Cambridge, and Dublin.

It was not till the reign of James I. that the universities enjoyed the permanent privilege of being represented there. So little was the advantage of the lower house of parliament at first understood, that in the reign of Edward I. no intelligence could be more disagreeable to

any borough, than to find that it must elect, or to any individual than that he was elected, to a trust to which no honour then attached. At this time, it was usual for the members to give sureties for their attendance before the king and parliament; their charges being respectively borne by their constituents. But the weight and influence of the house of commons increased from time to time, till it arrived at its present rank and authority in the legislature.

The number of representatives sent to parliament for England, Wales, and the town of Berwick, is five hundred and thirteen; for Scotland, forty-five; and one hundred for Ireland; making the house of commons to consist of six hundred and fifty-eight members.

When a member is once elected, he is returned to serve for the whole realm, and not obliged to confine his parliamentary conduct to the views and exclusive interest of the county, town, or university that sent him to parliament. No maxim can be more unconstitutional than that a member is *bound* to vote on all questions conformably to the instructions of his constituents. For to say nothing of the delay which must often arise, from his being obliged to consult them, it is plain, that in electing him they have virtually transferred their own legislative wisdom and

power into his hands, to be employed by him, as he, upon all occasions, shall think fit. This appears evident from the very writ of summons itself, which enjoins the election of a representative, "to advise his Majesty, in the great "council of the nation, touching certain difficult "and urgent affairs concerning the king, and "defence both of the kingdom and church of "England." This clearly implies, that the constituents are to send representatives to parliament, not only for their own, but likewise for the public welfare. Suppose then, that a "cer-"tain difficult and urgent affair" should be proposed in the house of commons for discussion, and a member, towards the end of the debate, were to rise and address the chair to this effect, "Mr. Speaker, I highly approve the measure "now under consideration, having been con-"vinced by the learned arguments I have just "heard, that it will be very salutary to the whole "kingdom, and in particular to my constituents; "I am sorry, therefore, that I have received "their positive instructions to vote against it; "the more so, as I have no doubt that, had *they* "been here and heard the debate, they would "have directed me to support the motion." 'O *rem ridiculam, Cato, et jocosam.*' How truly ridiculous and absurd! A member cer-

tainly ought to consult his constituents about their *local* interests, respecting which they are better judges than himself; but as to questions of general policy, he has the sole constitutional *right* to vote agreeably to his own conviction.

If indeed a representative should do any thing which his constituents may justly consider as injurious to them, or if they disapprove his general political conduct, they have a remedy at hand, which they can administer at the next election. And a representative well knowing that his constituents can refuse to return him again, will probably often think it prudent and proper to consult with them and attend to their *wishes*, in matters in which they are exclusively concerned.

Respecting the legislative power of the commons, they have none but in conjunction with the lords and the king; the consent of the three branches of the legislature being requisite to make any law that shall bind the subject. It is true, that in the time of civil madness and anarchy, when democratic violence and rage overpowered all law and reason, the commons passed a vote on the 4th of January, 1648, "that "whatever is enacted or declared for law by the "commons in parliament assembled, hath the "force of law; and all the people of this nation "are concluded thereby, although the consent

"and the concurrence of the king or house of "peers be not had thereto." It is not very surprising that such a vote should have been passed by men who murdered* their king on the 30th of the same month. But this absurd and unconstitutional vote was rendered nugatory by statute of 13 Car. II. c. 1. which expressly declares, that "if any person shall maliciously or advisedly "affirm, that both or either of the houses of "parliament have any legislative authority "without the king, such person shall incur all "the penalties of a *premunire*:" that is, he shall be put out of the king's protection, forfeit all his lands and goods, and be imprisoned, and ransomed at the king's will. Each house of parliament, however, has a constitutional power of making laws to bind its own respective members, in matters relating to their own privileges, but no farther.

It will next be proper to take a view of the *laws* and *customs* which relate to parliament, *as*

* In denominating the death of king Charles I. a murder, the author is not actuated by the feelings of *political* party: nor has he any intention to decide on the *expediency* of the king's execution. The fact he conceives to be, that *power* being providentially placed in the hands of the parliamentary leaders, they mistook it for *authority*; and by exercising that power they grossly violated the *existing* laws, and *thus* were guilty of *murder*.

one aggregate body. The power and jurisdiction of parliament are so transcendent and absolute, as not to be confined within bounds, either as it respects persons or causes. The British parliament consisting of king, lords, and commons, is, in short, invested with *absolute* power, or with that sovereign and uncontroulable authority, which in every government must reside somewhere. This sovereign authority consists in the power of making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding laws, concerning matters of all possible descriptions; whether ecclesiastical or temporal; civil, military, marine, or criminal. It can regulate or new model the succession to the crown; as was done in the reigns of Henry VIII. and of William III. It can alter the established religion of the land; as was done at the reformation, under Henry VIII. and in the reigns of Edward VI. of his two sisters, Mary and Elizabeth, and in many other subsequent periods. It can also change the constitution of the kingdom and of parliament itself; as was the case by the acts of union with Scotland in the reign of Queen Anne, and with Ireland during the present reign. Nor is it necessary that violence and popular tumult should prevail in order to alter the constitution of parliament, since the several

statutes for triennial and septennial elections were enacted with the usual constitutional forms, after deliberate and interesting discussions.

In short, such exalted ideas have some writers had of this legislative power, that they have denominated it the *Omnipotence* of parliament; by which expression, certainly nothing more is meant than that parliament can do every thing that is morally possible for human power to effect; and that no earthly authority can render nugatory its solemn acts. Nor is there any inherent *right* or supreme *power* in the people to remove or alter the legislature, should it abuse its trust. For however just it may appear in theory, that the people should possess such a power, no such thing can be admitted in practice; because no government would make provision for such a desperate an expedient, as must effectually destroy all laws, and render any legislature feeble in its measures, and precarious in its continuance. The British parliament, therefore, may, with the strictest propriety, be said to be absolute and without controul; for as the people cannot *lawfully* alter the whole, neither can they change or destroy any particular branch of the legislature. And the experience both of ancient and modern times has uniformly taught us, that all changes in the government, which are brought

about by *illegal* violence, invariably terminate in the arbitrary despotism of one military tyrant.

The constitution has made ample provision to prevent the important duties of a legislator from falling into the hands of those who would be unfit to discharge them. But as no human wisdom or foresight can effectually prevent all possibility of abuse, so it must needs be, that offences in this case will come. The custom and law of parliament prohibit any one sitting and voting in either house, who has not attained the age of twenty-one years: and if a member of either house be convicted of any crime, each respective house has a right and power to adjudge such an one disabled and incapable of holding his seat any longer.

Every member of parliament must, in the presence of the house, take the oaths of allegiance, supremacy, and abjuration; and subscribe and repeat the declaration against transubstantiation and invocation of saints, and the sacrifice of the mass. But no alien can sit in parliament, although he be naturalized.

The high court of parliament, like every other court, has its own peculiar law, called, "the law of parliament," which has its original in this one maxim, "that whatever matter arises "concerning either house of parliament, ought

"to be examined, discussed, and adjudged in "that house to which it relates, and not else-"where." And each house enjoys this privilege independently on the other: so that the lords will not permit the commons, for instance, to interfere respecting the election of a peer of Scotland or of Ireland; nor will the commons allow the lords to meddle with the election of a knight of the shire, or a burgess; nor can any of the courts of law determine the merits of either case.

The *privileges* of parliament are very large and indefinite; and they are so, in order to maintain the dignity and independence of the two houses against the power of the executive authority. If the privileges of parliament were exactly defined, a manifest inconvenience would arise; for then the crown might easily invent some new case, that would harrass any refractory member, and destroy the liberty of the legislature.

Amongst the privileges of parliament, that of *freedom of speech* stands the most conspicuous. This privilege the British senate enjoys in a degree superior to any other legislative assembly. It is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament; and then

recognized by his Majesty. The statute of 1 W. and M. declares that "the freedom of speech "and debates, and proceedings in parliament, "ought not to be impeached or questioned in "any other place or court out of parliament."

Another privilege of parliament consists in the protection of the persons of peers and members of the house of commons from arrest, so that they cannot be taken into custody without a breach of parliament. The privilege of parliament, however, does not extend to *treason*, *felony*, nor to those offences in which *sureties of the peace* might be demanded; nor to the case of writing and publishing seditious libels. The privilege of parliament is not given to its members for their own sakes, but as a guard which the constitution has set over their persons and necessary attendants, for the security of that duty they owe to the public. But the dominion of the law being paramount to the privilege of parliament, its members cannot throw the plea of privilege as an obstacle to the regular course of justice in matters of high concern to the public.* The person of a legislator is indeed sometimes arrested, but communication of the

* See Lord Lyttelton's incomparable speech in the house of lords on the case of John Wilkes, Esq. 1763.

fact must be made to the house of which he is a member; as he cannot be lawfully detained without the consent of the said house. Ever since the revolution, however, it has been usual to make the communication immediately after the arrest of a member, with the reason of his detention.

The *franking of letters* is also a privilege common to the members of both houses of parliament; which, being formerly grossly abused, is now so restricted by statute, that no member of parliament can frank more than ten, or receive more than fifteen letters in any one day. No letter or package so franked or received, may exceed the weight of one ounce.—If any person be convicted of forging or counterfeiting the superscription, or of altering the date, of any letter or packet, in order to avoid the payment of the duty of postage, he shall be deemed guilty of felony, and shall be transported for seven years.

There are some privileges *peculiar to the house of lords*, though they are but few. One of these, which is very ancient, was declared by the charter of the forest, and confirmed in parliament the 9th of Henry III. By this privilege, every lord spiritual or temporal in passing through the king's forest when summoned to parliament, may kill one or two of the king's deer, without

warrant; provided he do it in view of the forester, or on blowing a horn if he be absent.

And in order to preserve a dignity in their proceedings, and to have the benefit of their advice in points of law, the house of lords have a right to be attended by the judges, the king's learned council, who are serjeants, and by the masters of the court of chancery.

Again, every peer can, by licence obtained from the king, make another lord of parliament his *proxy*, to vote for him in his absence: a privilege withheld from the commons, because they are themselves only proxies for their constituents.

The peers also enjoy the right of *protest*; that is, each peer may, with leave of the house, enter upon the journals of the house his reasons for dissent, whenever a vote passes contrary to his wishes.

Further, all bills must have their origin in the house of lords, that in their consequences, may in any way affect the *rights* of the *peerage*; and may not be altered or amended in the other house.

And, lastly, the statutes of the 6th Anne, c. 23, and 39th and 40th Geo. III. c. 67, expressly provide for the *election* of the Scotch and Irish peers of parliament, prescribing the oaths of the electors, directing the mode of balloting, and

prohibiting the peers electing from being attended by an unusual retinue; and enacting that no other matters shall be treated of in these assemblies, save only the elections, on pain of incuring a *premunire*.

But there are also laws and customs *peculiar* to the *house of commons*; they relate principally to the raising of taxes, and the election of members to serve in parliament. It is the ancient indisputable privilege and right of the house of commons, that all *grants* of *subsidies* or parliamentary aids do begin in their house; and the commons have at all times been so anxiously tenacious of this privilege, that they have never suffered the lords to make any change in the money bills which they have sent them; but only allowed their lordships simply and solely either to accept or reject them.

The supplies being raised on the body of the people, it is proper that they alone should have the right of taxing themselves, by their representatives; but although this is the reason generally given for this privilege of the commons, it does not seem a good one; for it is obvious, that a very large share of the taxes is raised upon the property of the lords; the commons, therefore, not being the only persons who are taxed, cannot, in any fairness, have the exclu-

sive privilege of taxing. But as the lords are a permanent hereditary body, created at pleasure by the king, they are supposed to be more liable to an undue influence of the crown than the commons, who are freely chosen by the people, and when elected are only a temporary body. Hence, there would be great danger from a power in the lords to raise the supplies upon the people; and it is sufficient for their own safety and for the public service, that they enjoy the right of *rejecting* any tax bill, should the commons appear to them, at any time, too lavish and improvident in their grants.

By a tax or money bill is meant, any bill under which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; whether for the exigencies of the state, or for private benefit, or for any particular district or parish.

This important privilege of raising or withholding the supplies, is the very life and soul of the house of commons; upon it their *very being* may be said to exist: for, at a dissolution of the parliament (at all times in the power of the king), the commons completely vanish; whereas the lords, being an hereditary body, still exist. Aware, therefore, of the amazing advantages that they derive from the power of granting the

supplies to the crown, the commons have always watched over this privilege with the most fostering and anxious solicitude. Hence the warmth, nay, the resentment, with which they have always rejected even the amendments proposed by the lords in their money bills. Such is the indignation shewn by the commons at any, the most distant, attempt of the lords to encroach upon this right, that, when any money bill is returned by the lords with the slightest alteration, it is treated with great contempt. It has sometimes been literally *kicked* out of the house, without so much as being examined. When a money bill, however, is altered by the lords, it is now usual for the speaker to state to the house, that the bill containing an objectionable clause, the house cannot, consistently with its ancient privilege, but reject it; and it is then rejected accordingly. The last time the lords contended with the commons respecting their right to alter a money bill, was in 1671, during the reign of Charles II. when the altercations between the two houses ran so highly, that the king was obliged to prorogue the parliament, notwithstanding he thereby lost the intended supplies. Ever since, this momentous privilege of the commons has remained undisputed.

Another important privilege peculiar to the house of commons, is the election of representa-

tives; and this is guarded against abuse and usurpation by many salutary laws, which may be comprehended under three heads; (viz.) the qualifications of electors,—the qualifications of the elected,—and the proceedings at elections.

All popular states have been obliged to establish certain qualifications for *electors;* because persons without any property are supposed to be easily brought under undue influence by the rich and great, and to have no will of their own. Hence every Briton, without exception, is not entitled to vote for a member of parliament.

The principle upon which the constitution of suffrages is framed in this country, is to combine as much as possible both numbers and property; so that there is scarcely an individual, who has real property, but has also a vote in elections, in some part of the kingdom or other. There is no proportionate regard paid to the extent of property, so that the richest man in the kingdom has but one vote at one place; yet if his property lie in different parts of the kingdom, he will most likely have a right to vote for many representatives. Every person qualified to vote for a knight of the shire, must have a freehold estate of the annual value of *forty shillings*, situated in the county represented. The holders of beneficial leases for a long term of years cannot vote,

because these were not in existence at the time when the statutes respecting elections were made; nor can copyholders, because formerly they were only vassals, absolutely dependant on their lord. A leasehold, however, vested in an individual for life, entitles him to vote.

Forty shillings a year seems a small sum to qualify a man to vote, under the idea of its making him independent: but it was sufficient formerly for a man with proper industry to furnish himself with the necessaries of life, and keep himself independent of any one if he would; and is thought to have been equivalent to twenty pounds at the present day.

No person under the age of twenty-one years can vote for any member; nor any one convicted of perjury. An estate fraudulently obtained to qualify a voter, will not entitle him to vote in virtue of it.

A freeholder must have been in possession of his freehold twelve months, before he can vote for a knight of the shire; unless it came to him by descent, marriage settlement, will, or promotion to a benefice or office; and every person who votes in respect of an annuity or rentcharge, must have registered it with the clerk of the peace twelve calendar months before. In mortgaged or trust estates, the person in possession

has the right of voting, under the restrictions already mentioned; and to prevent the fraudulent splitting of freeholds, only one person can vote for any house or tenement. No estate will qualify an elector to vote, unless it has been assessed to the land tax, at least twelve months before the election; and no tenant by copy of court roll can be permitted to vote as a freeholder.

The *citizens* and *burgesses* in parliament are the representatives of the mercantile and trading interests, as the knights of the shire are of the landed property. It is true that some boroughs having no trade, and scarcely any inhabitants, return members to parliament; whilst many large flourishing trading towns are not in possession of such a privilege. This inequality is easily explained, by considering that formerly it was left to the crown to summon occasionally the most flourishing towns to send representatives to parliament; so that as towns increased in trade and grew populous, they were admitted to a share of the legislature. But unfortunately the deserted boroughs continued to be summoned as well as the towns to which their trade was transferred; with the exception of a few towns, which petitioned to be eased of the expence of maintaining their members, to which at that time they were compelled. The rate of wages to members

of parliament established in the reign of Edward III. was four shillings a day to knights of the shire, and two shillings to a citizen or burgess;—a sum that would now barely free them through a turnpike.

The right of *electors* in *boroughs* has occasioned infinite disputes, since it varies according to the charters, customs, and constitutions of the respective places. By statute, however, of 2 Geo. II. c. 24. the right of voting in a borough for the future shall be allowed according to the last determination of the house of commons concerning it; and by statute 3. Geo. III. c. 15. no freeman of any city or borough shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before the election, provided his claim to vote be not founded upon birth, marriage, or servitude.

As to the qualifications of the *elected*, or rather of persons to be elected members of parliament, some of these depend upon the law and custom of parliament, and others upon certain statutes.

No aliens or minors can be elected to sit in parliament. Nor can any of the twelve judges sit in the house of commons; because they sit though they do not vote, in the house of lords. Clergymen cannot be elected to the house of commons, because they sit in the convocation.

In the year 1801, indeed, the Reverend Horne Tooke was returned for the borough of Old Sarum; and some doubts being entertained by the house as to his eligibility, he was permitted to retain his seat; but an act was immediately passed, which disqualifies all priests and deacons, and ministers of the church of Scotland, in future, to be representatives of the people in parliament. All persons attainted of treason or felony are likewise disqualified,—for they are not fit to sit any where. Nor are the sheriffs of counties, nor mayors, and bailiffs of boroughs eligible in their respective jurisdictions, because they are the returning officers; however they may be elected in other places, where they are not official characters. It is not necessary that a member should be an inhabitant of the place for which he is chosen.

Certain *offices* render the holders of them ineligible to sit in parliament; such as commissioners for prizes, agents for regiments, officers of the excise and customs, clerks of the treasury, navy, exchequer, &c. &c. No one is eligible who holds any new office under the crown created since 1705, or any pension during the pleasure of the king, or for any term of years. If any member accept of an office under government, he vacates his seat, but is capable of being reelected. An

officer in the army or navy, however, does not vacate his seat by receiving a new commission.

It is necessary that every candidate have a clear estate of freehold or copyhold to the value of £.600 per annum, to render him eligible as a knight of the shire; and of £.300 per annum in estate, to be elected a citizen or burgess. The eldest sons of peers, and of persons qualified for knights of the shire, and canditates for the universities, are excepted from this general rule.

Every subject of the realm is eligible, of common right, to a seat in the house of commons, under the restrictions already specified; but the member returned must make oath of his qualification, and give the particulars in writing at the time of taking his seat.—So much as to the *electors* and *elected*.

Let us proceed to take a view of the legal proceedings at *elections* of members of parliament.

Elections must be proceeded in according to the law of parliament, and a variety of statutes made for their regulation.

As soon as the parliament is summoned, the lord chancellor sends his warrant to the clerk of the crown in chancery, who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that

county, and every city and borough therein, which is customarily represented. But if a vacancy happen during the sitting of parliament, the speaker of the house of commons issues his warrant for an election of a new member, by order of the house; and without such order, if a vacancy occur by death, during a recess for upwards of twenty days. The sheriff, within three days after receiving his writ, must send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members; and the returning officers must proceed to the election within eight days from the receipt of the precept, giving four days notice of the same, and return the persons chosen, together with the precept to the sheriff. In the borough of New Shoreham, in Sussex, the election must be within *twelve* days, with *eight* days notice of the same.

With respect to a *county election*, the sheriff, himself must attend at the next county court after the delivery of the writ, to proceed in the election, at the most usual place; which cannot be altered without the consent of all the candidates, and then ten days public notice must be given of the time and place of election. If the county court should fall upon the day of delivering the writ, or within six days after, the sheriff

may adjourn the court and election to some other convenient time, not longer than *sixteen* days, nor shorter than *ten*.

The law has made very wise provisions for securing the freedom of elections; for as soon as the time and place of election are fixed for counties or boroughs, all soldiers quartered in the place, are compelled to remove, at least one day before the election, to the distance of two miles or more, and not to return till one day after the poll is ended.

The house of commons has the right of determining the merits of the case in all disputed elections; and it has frequently determined, that riots at an election make it void.

By a vote, too, of the commons, it has been declared, that no lord of parliament, or lord lieutenant of a county, has any right to interfere at elections; and it is provided by statute, that the lord warden of the cinque ports shall not recommend any members there. Should any officer of the public revenues presume to interfere in elections, by persuading or dissuading any voter, he would be liable to a forfeit of £.100, and be disabled to hold any office.

Thus are the popular elections made as secure against the violence and compulsion of the crown

and nobility, as human laws can make them; but such is the depravity of human nature, that the freedom of elections is much more endangered by the very candidates and electors themselves, than by any other persons whatever. The infamous practice of bribery and corruption, like a swelling flood, breaks down all barriers, and ingulfs thousands in the ocean of drunkenness and perjury.

There are, indeed, severe laws against these abominable practices, but they are often evaded, and it is to be feared ever will be, so long as the human heart remains "deceitful above all "things, and desperately wicked." It may, however, be observed, that it is unlawful, after the date of the writ, for any one to give or promise to give money or entertainment to the electors, either to particular persons or to the place in general, in order that he may be elected, on pain of being incapable of serving in parliament. And if any money, gift, office, employment, or reward be given, or promised to be given, to any voter at any time, in order to influence him to give or withhold his vote, as well he who takes as he who offers the bribe, forfeits £.500, and is for ever incapable of voting and holding any office in any corporation. But if any person guilty of bribery, will, before

conviction, discover some other offender of the same kind, he is indemnified for his own offence, and exempted from its due punishment.

Before the sheriff or other returning officer proceeds in the election upon the day appointed, he must take an oath against bribery, and for the due execution of his office; the candidates also, if required, must swear to their qualifications, the electors in counties to theirs; and the electors both in counties and boroughs are likewise compellable to take the oath of abjuration, and that against bribery and corruption.

When a poll is demanded at any election, it must commence either that day, or at farthest upon the next, and shall be continued from day to day (Sundays excepted) until it be finished; and it shall be kept open at least seven hours each day, between eight in the morning and eight at night; but if it should be continued till the *fifteenth* day, then the returning officer shall close the poll at or before three in the afternoon, and shall immediately, or upon the next day, publicly declare the names of the persons who have the majority of votes; and he shall forthwith make a return accordingly, unless a scrutiny be demanded by any candidate, or by two or more of the electors, and he shall deem it necessary to grant the same; in which case it shall be

lawful for him to proceed thereupon; but so as that in all cases of a general election, if he have the return of a writ, he shall cause a return of the members to be filed in the crown office on or before the day upon which the writ is returnable. If he be a returning officer, acting under a precept, he shall make a return of the members at least six days before the day of the return of the writ.

After the elections are closed, the sheriff returns the whole of the precepts, with the persons elected by the majority; together with the writ for the county, and the knights elected thereupon, to the clerk of the crown in chancery, before the day of meeting, if it be a new parliament; or within fourteen days after the election, if it be an occasional vacancy; under penalty of £.500.

If the sheriff or returning officer make a false return, the former is liable to a penalty of £.100, and the officer of a borough or city of £.40, besides being subject to an action for double damages, by the statute of king William. Any person who should bribe the returning officer, shall, on conviction, forfeit £.300.

The persons returned are necessarily the sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal.

The method which the house takes when an election petition is presented to it, is regulated by the excellent statute called "Grenville's act," under its present improved state. This act directs the way by which a select committee shall be appointed to try the merits of a disputed election; and how they shall proceed in their examination of witnesses, and deliberations on the case. The whole committee, consisting of fifteen members, take a solemn oath in the house, that they will give a true judgment according to the evidence; and every question is determined by a majority. If the committee report that the petition or defence is frivolous or vexatious, the party aggrieved shall recover costs.

On the first day of the meeting of every new parliament, the lord steward of his Majesty's household administers the necessary oath to the members present; and then executes a commission empowering certain members specified in it to administer the same oath to others.

The office or trust of a member of parliament cannot be resigned, but every member is obliged to discharge the duties of it, unless he can shew such cause as the house, in its discretion, shall think a sufficient excuse for his non-attendance

upon a *call* of the same. If the house be not satisfied with the reason which any member gives for not attending, when it is called over, he is ordered into the custody of the serjeant at arms. A form which is attended with an expence to the party of about £.5 per day. On the motion of some friend, the house then orders him to be released from the custody, upon paying the usual fees.

The only way in which a member, who wishes to retire from parliament, can vacate his seat, is to accept of an office under the crown. And it is now usual to grant the office of steward of the Chiltern Hundreds to any member who asks for it, to enable him to vacate his seat. The Chiltern Hundreds in Buckinghamshire, and the manor of East Hundred in Berks, are districts that belong to the crown. For time immemorial they have had officers belonging to them, with the title of stewards; who, it is remarkable, derive neither honour nor profit from their appointments; so that in fact these stewardships are now merely nominal offices, which, however, answer the purpose for which they are bestowed.

Such being the laws, little else is wanting but a vigorous and conscientious application of them, to secure the freedom of elections.

CHAPTER VII.

The same Subject continued.

Upon the opening of every session of parliament the king either in person or by his commissioners addresses both houses in a speech from the throne. This speech is taken into consideration by each house, and a suitable address of thanks to his Majesty voted. But as the precedence due to the crown was formerly taken undue advantage of, the house of commons maintains its claim of choosing for itself the order in which it will transact its business. That the king's speech, therefore, may not be the *first* subject of debate, the clerk of the house usually prepares a bill of little or no importance, which obtains the honour of being read before the king's speech is discussed. At the beginning of the sessions too the house of commons fixes a day as the last upon which it will receive petitions on private bills.

It is now proper to consider the method of *making laws*. This is much the same in both

houses; and it is necessary to premise, that, for the dispatch of business, each house of parliament has its speaker. The lord chancellor, or any other appointed by the king's commission, presides, and regulates the formality of business in the house of lords; and if the king should not appoint one, it is said, the house can elect their speaker.

The house of commons always elect their own speaker, who must be presented to the king for his approbation.

Mr. Hume says that Peter de la Mere, chosen in the first parliament of Richard II. was the first speaker of the house of commons; but this seems to be a mistake, for it appears by the rolls of parliament, that Sir Thomas Hungerford addressed king Edward III. in the name of the commons, to pray that he would pardon several persons who had been convicted in impeachments. And even Sir Thomas is not mentioned as if his office was a novelty.*

The speaker of the house of commons cannot give his opinion or argue a question in the house; whereas the speaker of the upper house may, if he be a lord of parliament. But they

* Professor Christian.

both preside, to keep order and regulate the debates in their respective houses.

In both houses the act of the majority binds the whole. This majority is openly declared, so that the people at large may judge of the conduct of their representatives; and this notoriety must necessarily produce a very beneficial effect in preserving the integrity of the members of both houses. It is true, that when the house of commons is about to divide, the speaker orders the gallery to be cleared, and all strangers are obliged to withdraw, that the members may be free from all popular influence in giving their votes. But as two *tellers* are appointed to count the votes on each side, there can be no collusion or deception in the decision of any question; while, at the same time, this method is attended with sufficient publicity for every constitutional purpose. Indeed it has ever been held the law, rule, and usage of the house of commons, that all strangers were there only by sufferance. Whenever, therefore, a member gives notice to the speaker that he perceives any strangers, it is the invariable custom for the speaker to order them to withdraw; otherwise the serjeant at arms would take them into custody, and thus enforce the standing order of the house, for their exclusion.

The publishing of the speeches delivered in parliament is a very modern practice, and certainly a breach of the privileges of its members; and as it may at any time be prohibited by the enforcing of the standing order of the house, printers of newspapers should be very careful, lest, by their misconduct, they should deprive us of a daily indulgence, which we are very apt to regard as one of our inherent rights.

In the house of commons the speaker cannot vote, unless the *ayes* and *noes* be equal, and then his casting vote decides the majority: but in the house of lords the speaker votes with the house; and if the *contents* and *non-contents* be equal, the non-contents have the effect of an absolute majority.

The commons cannot proceed to business unless there be *forty* members present; and to insure a full attendance on any particular occasion, the house is frequently ordered to be called over upon a certain day.

Two peers, however, besides the speaker, are sufficient to constitute a house of lords; but it often happens, that an order is made for the lords to be summoned.

The business in parliament is preceded every day of its sitting by prayers, which are read to the lords, by the junior bishop; and by the chaplain to the commons, in the lower house.

To bring a bill into the house of commons, if the relief sought by it be of a private nature, it is necessary to prefer a petition; which is presented by a member, and usually sets forth the grievance desired to be removed. And if the petition be founded on facts that may in their nature be disputed, it is then referred to a committee of members, who examine the matter alleged, and report it accordingly to the house; and then (or otherwise, upon the mere petition), leave is given to bring in the bill.

With respect to public bills, they are introduced by way of motion to the house, without any petition; and it is usual, first of all, for a member to give notice of his future intention, to move for leave to bring in his bill.

Acts of parliament were first introduced into the house according to the modern custom in the reign of Henry VI. all bills drawn before that time being in the form of petitions. For it was long after its creation, or rather separation from the barons, that the house of commons was conscious of its own strength and dignity.

When leave is given to bring in a bill, the persons directed to bring it in, present it in a competent time to the house, drawn out upon paper, with a number of void spaces, where any thing occurs that is dubious, such as dates, penal-

ties, or sums of money to be raised, &c. which is, in fact, only the skeleton of a bill.

When a private bill begins in the house of lords, it is referred to two of the judges, to examine into the facts, to settle all technical proprieties, and to see that all necessary parties consent. The bill is now read a *first* time, and at a convenient distance a *second;* and after each reading, the speaker opens the substance of the bill to the house, and puts the question, whether it shall proceed any farther. For the introduction of the bill, as well as the bill itself in all its different stages, may be opposed, and if the opposition prevail by a majority, the bill must be dropped for that session.

After the second reading, the bill is *committed*; that is, referred to a committee which is selected by the house in matters of small moment; but on a bill of consequence, the house resolves itself into a committee of the whole house, consisting of all its members. This is effected by the speaker's quitting the chair, which another member is appointed to take, who is styled chairman of the committee. In this committee the speaker may sit, debate, and vote as a private member.

In the committee the bill is discussed, clause by clause, amendments made, the blanks filled

up, and sometimes the bill new modelled. The chairman now *reports* it to the house, with such amendments as the committee have made; and then the house reconsiders the whole bill, and the question is again put upon every clause and amendment.

When the house has agreed or disagreed to the amendments of the committee, and sometimes added new ones of its own, the bill is ordered to be *engrossed*, or written in a strong gross hand, upon one or more long rolls of parchment sewed together. When this is done, the bill is read a *third* time, and further amendments are sometimes made to it. New clauses may be even now added to the bill, but this must be done by tacking a separate piece of parchment to it, called a *rider*.

The speaker now again opens the contents of the bill; and holding it up in his hands, puts the question whether the bill shall *pass*. If this be agreed to, the title to it is then settled; and one of the members is directed to carry it to the lords for their concurrence. The member then goes, attended by several others, to the bar of the house of lords, and there delivers the bill to their speaker, who comes down from his chair, called the woolsack, to receive it. Here it goes through the same forms (except engrossing) as in the other house: if rejected, no further notice is

taken of it. If the lords agree to the bill, they send a message to the commons, by two masters in chancery, saying, that they have agreed to the same; and the bill remains with the lords, if they have made no amendments in it. But if any amendments be made, they are sent with the bill to the commons, for their concurrence: should the commons not consent to the amendments, a *conference* usually follows between members deputed by each house, to adjust the difference; and if both parties remain inflexible, the bill is lost.

When the commons agree to the amendments, the bill is sent back to the lords, with a message to acquaint them therewith: and the same forms are observed *(mutatis mutandis)* when the bill originates in the house of lords.

An *act of grace*, however, is first signed by the king, and then read *once* only in each house, without any engrossing or amendment.

When the bills have passed both houses, they are always deposited in the house of lords, to wait the royal assent; excepting bills of supply, which, after passing the lords, are returned to the house of commons.

The giving of the *royal assent* to bills, is a matter of great ceremony; and may be done, either by the king in person, or by commission.

In the former case, the king goes in his state coach, drawn by eight horses, to the house of lords, where he appears in his crown and royal robes; and, sending for the commons to the bar of the house, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of parliament, in Norman french. His Majesty is attended by the great officers of state and heralds. A seat on the right hand of the throne is preserved for the prince of Wales. The other princes of the blood sit on the left hand of the king; and the lord chancellor upon a close bench removed a little backwards. The viscounts and barons face the throne, upon benches, or wool-packs, covered with red cloth or baize. The bench of bishops runs along the house to the bar on the right hand of the throne; as that of the dukes and earls does on the left. The chancellor and judges sit between the barons and the throne. It is generally thought that the house sitting upon wool, is symbolical of wool being formerly the staple commodity of the kingdom. Upon solemn occasions, the lords appear in their parliamentary robes. None of the commons have any robes, excepting the speaker, who wears a long black silk gown; which, when he appears before the king, is trimmed with gold

When the king consents to a public bill, the clerk declares "*Le roi le veut*," "The king "wills it to be so;" if to a private bill, "*Soit "fait comme il est desirè*," "Be it as it is "desired."

A money bill is carried up and presented to the king, by the speaker of the house of commons; and the royal assent is thus expressed, "*Le roi "remercie ses loyales sujets, accepte leur bene- "volence, et aussi le veut.*" "The king thanks his "loyal subjects, accepts their benevolence, and "wills it so to be."

For an act of grace, which begins with the royal assent, the clerk of the parliament thus pronounces the gratitude of the subject, "*Les "prelates, seigneurs, et commons en ce present "parliament assemblèes, au nom de touts vous "autres sujets, remercient tres humblement votre "Majesté, et prient a Dieu vous donner en santé "bonne vie et longue.*" "The prelates, lords, and "commons, in this present parliament assembled, "in the name of all your other subjects, most "humbly thank your Majesty, and pray God "to grant you in health and wealth long to live."

The royal assent may also be given by commission; in that case the king grants letters patent to certain lords therein named, under his great seal, signed with his hand, and notified in his

absence to both houses assembled together in the house of peers. When the royal assent, in either ways, is given to a bill, then it becomes an act of parliament, and not before.

But the king is invested with the same constitutional power of rejecting any bill, as the two houses of parliament enjoy; and it is said, that queen Elizabeth carried this privilege so far, as to negative at one time *forty-eight* bills that had passed both houses. The last time the royal dissent was given to a bill was in the year 1692, when king William III. refused to pass the bill for triennial parliaments into a law, although two years afterwards he consented to the measure.

In refusing his assent to a bill, the king employs the gentlest language; "*Le roi s'avisera*," "The king will advise on it."

Such, then, being the necessary forms through which every bill must pass before it can have the force of a law; it is impossible that the people at large can be taken by surprise: for there is not only time allowed for the members to discuss every subject deliberately in the house, but sufficient opportunity afforded to the people out of doors to petition against any measure which they may conceive will be injurious to their interests.

Formal *promulgation* of an act is not necessary to give it the force of law; because every man is supposed to be present by his representatives, at its making. But copies of it are usually printed at the king's press, and transmitted to the chief magistrates throughout the kingdom, for the public information.

A law once made cannot be repealed, amended, or dispensed with, but by going through the same forms, and by the same authority of parliament by which it was enacted. The king himself cannot dispense with any penal statute, without consent of parliament. An act of parliament having power to bind every subject in the realm, and even the king himself, if named therein, is the highest authority upon earth, which this kingdom acknowledges.

By the authority of each house, the parliament is *adjourned* every day. By which, nothing more is meant than a continuance of the session from one day to another. Sometimes, indeed, it is adjourned for a fortnight together; as at the Christmas and Easter holidays, or upon any other particular occasion. But the adjournment of one house does not adjourn the other; each acting by its own authority.

The king has, properly speaking, no power to adjourn the parliament; but whenever he

signifies his pleasure that both houses should adjourn to a certain day, it is usual for both lords and commons to obey the king's will; because a refusal would certainly be followed by a prorogation.

A *Prorogation*, is the continuance of parliament from one session to another; as an adjournment is of the session from day to day. The parliament is prorogued by the king's authority, expressed either by the lord chancellor in his Majesty's presence, or by commission from the crown, or sometimes by proclamation. In either of these ways, a prorogation puts an end to the session; and the bills which had been begun, but not finished, must be resumed *de novo*, in the next session, and go through all the same forms as at first, before they can pass into laws.

A *dissolution*, is the civil death of parliament, and is effected by the *king's will*, expressed either in person or by representation. The king only has the power of dissolving the parliament, because he has the sole right of convening it.

It would be very dangerous both to the king and the constitution, if the two houses of parliament had a right to dissolve themselves; for then they might choose to become perpetual. This was actually the case in the reign of Charles I. who unguardedly passed a bill to continue the

parliament then in being, till it should please to dissolve itself. The consequence was, that the king fell a sacrifice to the inordinate power he had unadvisedly created, and the whole government was subverted.

A dissolution of parliament takes place also at the *demise of the crown;* but the parliament in being continues for six months after the death of any king or queen, if not sooner prorogued or dissolved by the successor. Should the parliament be adjourned or prorogued at the time of the royal decease, it shall nevertheless immediately assemble. Or, if there be no parliament existing at the time, the members of the last parliament shall convene, and be a parliament again. And as danger might arise from the king's prerogative of perpetuating the parliament, a dissolution of it necessarily takes place, likewise, *by time.*

Formerly, the parliament was *triennial;* but now the period of its legal existence is seven years. This alteration was effected by statute 1 Geo. I. ch. 38, in order professedly to avoid the frequent recurrence of expence at elections, and to preserve the peace and security of government, just then recovering from popish rebellion.

A dissolution of parliament affords the subject an opportunity of shewing his disapprobation of

his representative, by refusing to send him again to parliament; or of expressing his satisfaction of his conduct by re-electing him. And the representatives knowing that a day will come, when they shall be obliged to appeal to the voice of the people; and that they themselves are equally bound, with their constituents, by the laws they pass, will naturally be careful to enact none but what appear to them to be equitable, reasonable, and salutary.

CHAPTER VIII.

Of the EXECUTIVE POWER.

It has already been observed, that a striking feature in the English constitution, is the separation of the executive, from the legislative power; and that consequences extremely beneficial to the people, result from the depositing of the execution of the laws in the hands of an individual. If the executive authority were lodged in the hands of more persons than one, a diversity of opinion would often arise; and indecision, delay, and danger, consequently

ensue. A stagnation in the head, would necessarily paralise the members, and ultimately destroy the very life of the Body Politic. The late experiment in a neighbouring nation of an executive directory, composed of several persons, may serve to shew us what great miseries come upon a land when "many are the princes "thereof."

The general consent of the people, evidenced by long and immemorial usage, has vested the executive power of the English government in the person of the king or queen; for it is indifferent to which sex the crown descends.

This consent of the people, however, is not to be so understood, as though there really ever were a time and place, when and where, the population of the island met together to *choose* their king; there being no traces of any such event in any history. And although this *choice of the people* is a favourite article in the creed of some speculative politicians; it is probable, that the fact never existed in any country since the world began. Nothing, at least, is farther from the truth, than that the crown is so held by the king of England.

It does not consist with the limits of this work to enter into enquiries respecting the origin of governments in general, or of the English

government in particular. The subject is confessedly involved in much obscurity; and after all that has been, or can be said, respecting it, the best solution of the difficulty is given in few words by an inspired writer, who affirms that "the powers *that be,* are ordained of God." The probability is, that the earliest governments were universally monarchies; that the wisest, most upright, or bravest man obtained the ruling power, by the general consent of the community;* and that the title of king, was that by which the chief governor in every nation was originally distinguished.† But whatever the origin of our government may have been, the king of Great-Britain is, at this day, king by a fixed rule of succession, according to the laws of his country.

Beyond all controversy, the English government has been monarchial from the remotest period of its existence. That the royal office has always been *hereditary,* and not *elective,* has never been denied but by the republicans, who beheaded king Charles I. They, indeed, asserted

* Omnès antiquæ gentes regibus quondam paruerunt. Quod genus imperii primum ad homines justissimos et sapientissimos deferebatur. Cic. de Legibus. lib. 3.

† —— Reges (nam in terris nomen imperii id primum fuit)— Sallust. Bell. Catil.

the inalienable right of the *people* to *elect* their supreme governor; and soon afterwards, with great consistency, the crown was offered to Cromwell, by a house of commons, convened by the sole authority of the usurper. But the title of Cromwell himself to the supreme power, rested merely upon the instrument of government, which was drawn up by a council, consisting only of his general officers. What share the *people* had in proposing to make him a king, may be seen in the histories of that time.

In 1656, Cromwell summoned a parliament; when, not trusting to the good-will of the people, he used every art to influence the elections, which he had new modelled, in order to fill the house with those who would be devoted to him. But after all his precautions, he found the majority would not be favourable to him; he therefore placed a guard at the door, and no one was permitted to enter the house of commons who did not produce a warrant from his council. This packed parliament voted a renunciation of all title in Charles Stuart, or any of his family; and at length, on the motion of alderman Pack, one of the members for London, passed a bill for investing the usurper with the dignity of king.—So much, then, for the *choice of the people.*

The grand fundamental maxim respecting the right of succession to the throne of England and its dependencies, is, "that the crown is, by "common law and constitutional custom, *here-* "*ditary;* 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."

The crown of England is *hereditary.* Not that a *divine right,* to the throne is intended; for a *hereditary* succession and a *divine right* have no necessary connection; as may be seen in several of the kings of Israel. The jewish establishment was peculiarly *theocratic;* and the kings of that distinguished race were, in a literal sense, the "*Lord's anointed.*" But the rulers of all other nations have been, and still are, subject to the general and ordinary dispensations of Divine Providence.

The hereditary right to the crown, acknowledged by the laws of England, originated with the wise founders of our constitution, who preferred making it a hereditary rather than an elective monarchy. Their policy has obtained the general consent and an established usage; and consequently the king has the same title

to the crown, that a private man has to his hereditary estate.

If, indeed, there were no corruption in the human heart to endanger the exercise of just principles, an elective monarchy would be most favourable to the liberties of the subject; because the most suitable person would, probably, under such circumstances, be chosen to the supreme authority. But the experience of all ages has convinced every considerate man, that popular elections are unavoidably attended with great inconvenience; and that undue influence, ambition, power, and artifice, will almost always prevail over virtue and integrity.

And the fact is, as we learn from history, that the elections of the ancient imperial governors were universally accompanied with bloodshed and murder. It is true, that the more modern Polish and German rulers have been elected with less cruelty and slaughter since the number of voters has been diminished; yet the elevation of these elective princes to the throne, formerly raised the bitter waters of discontent and sedition to an alarming height, and they subsided latterly only in proportion to the fall of the fountain from which they flowed. But what Englishman, who has witnessed the scenes of riot and confusion which are exhibited at the

election of a representative in parliament, will not rejoice that the succession to the crown is marked out with a constitutional precision! that a rule is laid down, which is uniform, universal, and permanent; and that hereby the peace and freedom of the state are preserved!

The particular mode of inheritance to the crown, corresponds, in general, with the feudal descent, marked out by the common law in the succession to estates.

The crown descends, lineally, to the issue of the reigning monarch, as it did from king John to Richard II. through a regular succession of six generations. The right of primogeniture amongst the males, and of the males in preference to the females, is also a constitutional rule in the descent of the crown. Thus Edward V. took the crown in preference to Richard, his younger brother, and to Elizabeth, his elder sister. Upon failure of the male line, the crown descends to the eldest of the female issue, and the heirs of her body, lawfully begotten; and not jointly to the female issue of the same degree, as in common inheritances.

This descent of the crown to the female line in failure of the male issue, is an ancient British custom. For our forefathers were often led to battle by women, and they paid no regard to sex

with respect to the individual who adminstered the executive government.*

The doctrine of representation likewise prevails in the descent of the crown, as in other inheritances; thus Richard II. succeeded his grandfather, Edward III. in right of his father, the black prince; and George III. took the crown, on the demise of his grandfather, George II. in right of his father, Frederick, prince of Wales, and each to the exclusion of all their uncles.

In the event of failure of lineal descendants, the crown devolves to the next collateral relations of the late king, provided they are lineally descended from the royal stock which originally acquired the crown. Thus, Henry I. succeeded to William II. John, to Richard I. and James I. to Elizabeth, being all derived from William the Conqueror. And if there be no kinsman of the whole blood, a relation of the *half* blood will undoubtedly succeed to the throne; as was the case with Mary I. who succeeded Edward VI. and of Elizabeth, who ascended the throne on the death of Mary; all being the children of Henry VIII. and each by different mothers.

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

The doctrine, however, of *hereditary* right, by no means implies an *indefeasible* right to the crown.

The parliament consisting of king, lords, and commons, has the power to defeat this hereditary right, and exclude the next heir, by enacting the inheritance to descend to any one else, whenever it thinks fit. The constitution has lodged this power in the supreme legislature in order to avoid the inconvenience and distress that the whole nation must experience, were an *idiot* or *lunatic* necessarily to inherit the throne; and on the other hand, to avert the miseries that must accrue to the reigning monarch, at all times, were any such authority expressly confided to the people, who are so liable to be influenced by caprice, and hurried on by the most ungovernable passions. Hence it is plain, that the English constitution disclaims all such political theories, as a *right*, inherent in the *people*, either to choose or to set aside their king. This is clear from the bill, called, the "Decla-"ration of right;" in which the lords and commons consider it, "as a marvellous provi-"dence, 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,* for which, from the " bottom of their hearts, they return their " humblest thanks and praises." King James II. had broken the *legal* conditions of the compact of sovereignty; and by abdicating, had vacated the throne. But the two houses, in the bill of rights, did not thank God that they had found a fair opportunity to assert a right to *choose* their own governors, much less to make an election the *only lawful* title to the crown: but on the contrary, in order to exclude for ever the doctrine of " a right to choose our own governors," a subsequent clause of that immortal law just mentioned, declares, that " the lords spiritual " and temporal, and commons, do, in the " name of all the people aforesaid, most humbly " and faithfully submit *themselves, their heirs,* " and *posterity for ever;* and do faithfully pro- " mise, that they will stand to, maintain, and " defend their said Majesties, and also the " *limitation of the crown,* herein specified and " contained, to the utmost of their powers." Is it not, then, very surprising that any sensible person can infer the doctrine of " a right to " choose our own governors," from the revolution in 1688? since if we had possessed it before, it is clear that the English nation did at that time most solemnly renounce and abdicate it, for

themselves and for all their posterity for ever. Our ancestors wisely considered that however speciously the *abstract* principle of such a right might appear in theory, it could never in the nature of things be reduced to practice.

The true spirit of our constitution, not only in its settled course, but in all its revolutions, is, *hereditary* succession to the reigning monarch, whether he obtained the crown by law or by force. Hence, in our laws, the king in his political capacity is said never to die; because he lives in his successor; although like other men he is naturally mortal.

The regular inheritance of the British throne has, indeed, been often changed and usurped by fraud and violence; as will be seen by a short historical view of our kings. But the beautiful feature of hereditary succession marked the infancy of our government, bloomed in its manhood, and is indelibly graven in the wrinkles of its increasing age.

It is now time to take, historically, a *constitutional* view of the *royal title* to the crown of England. Egbert, who was the first king of England, and last of the Saxon heptarchy, was king of the West Saxons, by a long and uninterrupted descent from his ancestors, of above 300 years; and united the heptarchy in one monarchy

under him in the year 828. How his ancestors obtained their titles, it is in vain for us to enquire, since there are no documents that will satisfy such political curiosity. So it was, that Egbert became sole monarch of England, partly by the consent of the other six kingdoms of the heptarchy, and partly by conquest over them.

From Egbert, the crown descended regularly for two hundred years, through a succession of fifteen princes, to the death of Edmund Ironside, without any deviation or interruption; except that the sons of king Ethelwolf succeeded to each other, without regard to the children of the elder branches; and also that king Edred, the uncle of Edwy, reigned about nine years, during the minority of Edwy, on account of the troubles of the times. But when of age Edwy assumed the reigns of government.

At the death of Edmund Ironside, Canute, king of Denmark, obtained the kingdom by violence, and a new family possessed the throne. Three of his heirs succeeded to the crown, and on the death of Hardicanute, the ancient Saxon line was restored in Edward the Confessor, who was the next of kin then in England. On the decease of Edward, Harold II. usurped the government; for Edgar Atheling, the grandson of Ironside, was the lawful heir. Harold

being defeated at the battle of Hastings, was dispossessed of the throne by William the Conqueror. Robert, the eldest son of the conqueror, being duke of Normandy by his father's will, was kept out of the possession of the crown of England, by the arts and violence of his brothers, William II. and Henry I. who succeeded their father.

The real heiress to Henry, was his daughter, the empress Matilda; but Stephen usurped the throne, having only the feeble title of being grandson to the conqueror, by his mother's side.

Henry II. the undoubted heir of the conqueror after his mother Matilda, and also lineally descended from Edmund Ironside, the last of the Saxon hereditary kings, succeeded Stephen.

Henry was succeeded by Richard I. who dying childless, the right vested in his nephew Arthur, the son of Geoffry, his next brother; but John the surviving brother of the king, seized the crown, to the exclusion of his nephew; the doctrine of representation being then not clearly understood.

Henry III. who succeeded his father, king John, had an indisputable title, for Arthur and his sister Eleanor both died without issue, and the crown descended from Henry to Richard II. in a regular succession of five generations.

Richard II. resigned the crown, which was taken possession of by Henry IV. who was the son of John of Gaunt, duke of Lancaster, fourth son of Edward III. His title, however, was not a just one; for Lionel, duke of Clarence, third son of Edward III. left a daughter Philippa, from whom descended the house of York. But Henry having a large army at that time at his command, asserted his title with effect. And by statute 7 Henry IV. ch. 2. it was enacted, "that the inheritance of the crown and realms "of England and France, and all other the "king's dominions, shall be *set and remain* in "the person of our sovereign lord the king, and "in the heirs of his body issuing." By which statute, it is obvious that the title of Henry appeared at that time very doubtful; and it is equally clear, that the king and parliament had the right of changing and limiting the succession of the crown.

But "the beginning of strife is as when one "letteth out water." No man can tell, when a river breaks through its banks and rushes from its accustomed channel, what devastation it will occasion. The usurpation of Henry gave rise to the contest between the houses of York and Lancaster; the princes of which, like Sampson's foxes, spread, by their jarring interests, desola-

tion and misery through the land for several subsequent generations.

Henry was succeeded by his son and grandson, Henry V. and Henry VI. In the reign of this weak prince the house of York asserted its dormant title; and after intestine war and bloodshed for seven years, at length established it in the person of Edward IV.

In all acts wherein Edward had occasion to speak of the Henries of the house of Lancaster, he calls them "lately in *deed*, not of *right*, "kings of England;" and hence first arose the distinction of a king "*de jure*," and a king "*de facto*."

On the death of Edward, the crown descended to his eldest son, Edward V. who with his brother the duke of York, are generally believed to have been murdered in the tower, by order of their uncle, Richard, duke of Gloucester; after he had insinuated into the populace, a suspicion of the bastardy of the two young princes, and of their sister, Elizabeth, to whom the crown by right devolved, on the death of her brothers. But the wicked and unnatural uncle usurped the government, under the name of Richard III. He enjoyed, however, the fruits of his villainy a little more than two years, when his tyranny excited Henry, Earl of Rich-

mond, to assert his title to the crown. Richard being slain in the battle of Bosworth, Richmond took possession of the crown by the style of Henry VII. although nothing could be more preposterous than his claim; for he was descended from a natural son of John of Gaunt, whose own title had been exploded. Henry, however, was confirmed in the throne by an act of parliament, in the first year of his reign. But the right of the crown was undoubtedly in Elizabeth, the daughter of Edward IV. This princess, the heiress of the house of York, Henry married, in 1486, and thus settled the fierce and bloody contests between the two families. How mysterious are the ways of God! How often does he overrule the wickedness of man, for the accomplishment of the greatest benefits to the world! Had it not been for the atrocity of Richard, his nephews and their heirs would have reigned; and probably the horrors of a civil war been much longer protracted. Or had he conducted the affairs of government with justice and moderation, instead of wearying out the people with oppression and tyranny, so monstrous a title as that of the earl of Richmond's would never have been asserted. But having succeeded in his pretensions as the heir of the house of Lancaster, Henry married Elizabeth,

who after the murder of her brothers, became the undoubted heiress not only of the house of York, but also of the conqueror, the common royal stock.

Henry VIII. the issue of this marriage, became therefore king, by a clear and indisputable hereditary right; and to him his three children succeeded in regular order. Edward VI. following his father, was succeeded by his two sisters. Yet the parliament exercised its constitutional right of regulating the succession, by passing various acts respecting the legitimacy or illegitimacy of king Henry's two daughters, queen Mary and queen Elizabeth.

On the death of queen Elizabeth, the line of Henry VIII. became extinct; and the crown of course devolved on king James VI. of Scotland and first of England, who was the lineal descendant of Henry VII. whose eldest daughter by Elizabeth of York, married James IV. of Scotland. So that king James had an undoubted hereditary right to both the English and Scottish crowns; and was the heir both of Egbert and William the conqueror. In James, therefore, centered all the claims of the houses of York and Lancaster; and what is more remarkable, in him, also, the old Saxon line was restored.

James believed firmly in the doctrine of the "divine right of kings," but the parliament in recognizing his succession, by statute 1 James I. ch. 1. mentioned not a word about any right *immediately* derived from God, but simply acknowledged his Majesty "as being lineally, "justly, and lawfully, next and sole heir of the "blood royal of this realm."

James was succeeded by his eldest son, the unfortunate king Charles I. whose unconstitutional judges told that unhappy monarch, that he was an *elective* prince; and as such, accountable to his people, *in his own proper person;* although nothing could be more absurd and false than such a doctrine, since Charles could deduce an undeniable hereditary title for more than 800 years, and was unquestionably the real heir of Egbert, the first king of England. To be sure it was very natural that men who were about to strike off the head of the king, not by the just sentence of the law, but with the arm of violence, should deny the constitutional inviolability of his person. Nor is it surprising, that in the commission of such an act, as putting his Majesty to death, they should tell him he was an *elective* and not a *hereditary* king. For they could not but foresee that the demise of the king would only make way for his son, if they admitted the

ancient doctrine of hereditary succession to the crown. That such a successor would call them to an account for the death of his father, they naturally kept in mind, when they talked about an *elective* prince to the exclusion of a *hereditary* monarch.

The violent death of king Charles, made way for the usurpation of Cromwell, who assumed the title of lord protector.

After an interregnum of about eleven years, a solemn parliamentary convention of the states, restored the crown to the right heir, king Charles II. In their proclamation to restore the king, the convention declared that "immediately on "the death of king Charles I. his Majesty "Charles II. was the lineal, just, and lawful "next heir of the blood royal of this realm; "and to him they most humbly and faithfully "submit and oblige themselves, their heirs, and "posterity for ever."

During this reign, a bill passed the commons to exclude the king's brother, the duke of York, from the succession, on the ground of his being a papist, but was rejected by the lords, and the king also declared he never would consent to it; so that on the death of Charles, the duke succeeded by the name of James II. But from this attempt of the commons to exclude James

from the succession, it was clearly and universally acknowledged, that the crown was an inheritance indefeasible, unless by parliament. And also that the parliament had the power of defeating the inheritance.

The infatuated king James, after various and notorious attempts to establish an arbitrary government, independently on the law, voluntarily vacated the throne by abdication. But our ancestors very prudently voted in both houses of parliament, that the misconduct of king James amounted only to an *endeavour* to subvert the constitution. The Scotch convention, however, declared "that king James VII. being a professed papist, had not taken the oath required "by law; but had, by the advice of evil and "wicked counsellors, invaded the fundamental "constitution of this kingdom, and altered it "from a legal and limited monarchy, to an "arbitrary despotic power, whereby he had "*forefaulted* the crown, and the throne was "become vacant." Thus, by simply declaring the throne vacant, it followed of course, that the two houses of parliament had the sole right and power of filling it up in such a manner as they should judge most proper. This right they exercised by the following declaration, dated February 12th, 1688, stating, "that William

"and Mary, prince and princess of Orange, "be, and be declared king and queen, to hold "the crown and royal dignity during their lives, "and the life of the survivor of them; and "after their deceases, the said crown and royal "dignity to be to the heirs of the body of the "said princess; and for default of such issue, "to the princess Anne of Denmark, and the heirs "of her body; and for default of such issue, to "the heirs of the body of the said prince of "Orange." From this important transaction justified clearly from the necessity of the case, some have inferred the *inherent right of the people of England to cashier their kings.* Yet nothing can be more fallacious than such reasoning; it being the indispensable duty of every *christian* to submit himself to the *lawful* authority established in his country. So long then as the king of England governs his conduct by the laws of his realm, he cannot be resisted or dethroned by his subjects, without their being guilty of open rebellion against God.

Towards the end of the reign of king William, the duke of Gloucester, the son of Anne (afterwards queen), dying, with him all hopes of a protestant succession failed: and the parliament had previously enacted, that no person professing the popish faith should ever be capable of inhe-

riting, possessing, or enjoying the crown of these realms.

In this dilemma, therefore, the remainder of the crown, expectant on the death of king William and queen Anne without issue, was settled by statute 12 and 13 W. III. ch. 2. on the princess Sophia, dowager electress of Hanover, and grandaughter of king James I. and on the heirs of her body, being protestants.

Queen Anne succeeded to the throne on the death of king William; she died without issue, but surviving the princess Sophia, of Hanover, transmitted the crown to her son and heir, king George I. To him succeeded his son, king George II. on whose demise, his grandson, the present king ascended the throne of his ancestors. Can we possibly refuse to acknowledge and admire the wisdom and goodness of the Divine conduct towards this nation, which are so visibly displayed at almost every turn of our public affairs? The power of parliament had secured Great-Britain against ecclesiastical tyranny, by the exclusion of every *popish* pretender to the crown; and now it pleased God by the death of the duke of Gloucester to cut off the arbitrary race of the *Stuarts*, and thus make way for the accession to the British throne of a new dynasty, whose princes have been uni-

formly the friends, the protectors, the promoters both of civil and religious liberty.

Upon the whole view of the subject, it may be clearly seen that the title to the crown is at present *hereditary*, though not altogether as absolutely so as formerly; because, before the revolution the crown went to the next heir, without any restriction; but now the descent is conditional, being limited to such heirs only of the body of the princess Sophia, as are *protestant* members of the church of England, and are *married* to none but *protestants*.

The line of succession having repeatedly been changed by parliament, different common stocks have been thereby created. The first common royal stock was king Egbert; then William the conqueror; afterwards, these two were united in the person of king James I. which continued till the abdication; and now the common stock is the princess Sophia of Hanover.

It is penal to dispute the constitutional power of the king and parliament to new-model and alter the succession: for by statute 6 Anne, ch. 7. it is enacted, "that if any person mali-"ciously, advisedly, and directly, shall maintain "by writing or printing, that the kings of this "realm, with the authority of parliament, are "not able to make laws to bind the crown and

" the descent thereof, he shall be guilty of high " treason; or if he maintain the same by only " preaching, teaching, or advised speaking, he " shall incur the penalties of a *premunire*."

This power has been often exercised, as circumstances required; either by a convention, when there was no king, as in the proclaiming of king Charles II. and the filling up of the vacancy which James II. had occasioned; or, by the king and parliament, in the various instances that have been stated.

It is not to be imagined that king James *destroyed* the monarchy when he abdicated the throne, and thus dissolved the constitution: by no means; for although a king may abdicate for his own person, he cannot abdicate for the monarchy, any more than the house of lords or house of commons can renounce each its share of legislative authority.

Neither was the placing of king William upon the throne, making the monarchy *elective*. The necessity of the case obliged the convention parliament to fix the crown somewhere: but they adhered to old principles, and enacted the *succession* of the crown; so that they did not change the substance, but regulated the mode of succession, and described the persons who should inherit the crown for ever. The monarchy,

therefore, is as purely hereditary *now*, as it ever was.

The real fact, then, with regard to the constitution, both in its settled course and in all its revolutions, has ever been this: that whoever came into possession of the crown, or however he came into it, whether by law or by force, the hereditary succession was either continued or adopted.

It may be said, that if a vacancy happen in the throne, by whatever cause, the English people have *then* a right to frame a government for themselves. It is true, that this right devolves to the two houses of parliament, as the constitutional organs by which the will of the people may be expressed; for the preamble to the bill of rights expressly declares, "that the lords "spiritual and temporal and commons, assem-"bled at Westminster, lawfully, fully, and freely "represent all the estates of the people of this "realm." But it is worthy of observation, how carefully and delicately the convention parliament in 1688 disclaimed the assumption of such an *abstract* right as some have contended for. In the statute of 1 W. and M. the parliament prays the king and queen, "that it may be *declared* "and enacted, that *all and singular* the rights "and liberties, *asserted and declared*, are the

" true *ancient* and indubitable rights and liberties " of the people of this kingdom."

And in all the various changes of the succession to the crown, it has been the uniform policy of our legislators to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity. By this means, our constitution preserves an unity in so great a diversity of its parts. We have an inheritable crown, an inheritable peerage; and a house of commons, and a people inheriting privileges, franchises, and liberties, from a long line of ancestors. The true constitutional notion, therefore of the right of succession to the crown of the united kingdom, consists in the happy medium between an elective monarchy, which will ever be productive of tumult and anarchy; and an indefeasible divine right, which when coupled with *unlimited* passive obedience, is slavish and dreadful. But the chief excellency of the hereditary right of the kings of England is, that it is closely interwoven with those liberties that are equally the inheritance of the subject; an union beautiful in theory, and the most beneficial in practice.

CHAPTER IX.

Of the ROYAL FAMILY.

HAVING taken a view of the king's title, it will be right in the next place to consider his Majesty's Royal Family; the first and most considerable branch of which, acknowledged by the laws of England, is the *queen*.

By the queen, may be understood, either the queen *regent*, or sovereign, who holds the crown, in her own right; as did the first Mary, queen Elizabeth, and queen Anne: or, the queen *consort;* that is, the wife of the reigning king: or, the queen *dowager;* that is, the widow of a deceased king. The queen *consort*, has, by virtue of her marriage, many prerogatives different from other wives.

She is a public person, distinct from the king; and is able to purchase lands, to convey them, and make leases, without the concurrence of her lord, which no other married woman can do. The queen can also receive a grant from the king, which no other wife can do from her husband.

And she has likewise separate courts and officers distinct from the king's, not only in ceremony, but in law. Her Majesty can sue and be sued alone, without joining her husband. She may have separate property in goods as well as lands; and may dispose of them by will. In short, the law considers her, in all respects, as a single and not as a married woman. And Sir Edward Coke assigns a reason for this singularity: "The king," says he, "being continually engaged in public "affairs, the common law would not have him "troubled about his wife's domestic concerns; "and therefore has vested the sole power of "transacting them in the queen herself."

There are, moreover, several privileges enjoyed by the queen. She pays no toll; nor can she be amerced in any court. But in general, unless expressly exempted by law, she is upon the same footing with other subjects; she herself being the king's subject, and not his equal. Her life and person, however, are placed under the same security as the king's; it being equally high treason to compass or imagine the death of the one as of the other. And to violate her person is also high treason; not only in him who commits the crime, but in the queen likewise, if she be consenting.

Should the queen be accused of any species of treason, she must be tried by the peers of parliament; as was queen Anna Boleyne, in the reign of king Henry VIII.

The law considers the husband of a queen *regnant*, as prince George, of Denmark, was to queen Anne, only as her subject; and he may be guilty of high treason against her; but in the instance of conjugal infidelity, he is not under the same *penal* restrictions as the queen. For although an illegitimate heir might succeed to the crown through the frailty of a queen *consort*, yet no such danger arises from the inconstancy of the husband of a queen *regnant*.

It is not high treason, however, to conspire the death of a queen *dowager*, or to violate her chastity; because the succession to the throne is not thereby endangered. Yet to preserve the royal dignity, no man can marry the queen dowager without special license from the king.

The queen dowager does not lose her regal dignity by marrying a subject; for Catharine, queen dowager of Henry V. married *Owen Tudor*, a private gentleman; and yet maintained an action against the bishop of Carlisle, by the name of Catharine, queen of England.

The *prince of Wales*, or heir apparent to the crown, his *royal consort*, and the *princess royal*,

or the king's eldest daughter, are likewise peculiarly regarded by the laws. It is high treason to conspire the death of the prince. And for the same reasons as have already been assigned, it is no less a crime to violate the chastity of his royal consort, or of the princess royal; for the latter being inheritable to the crown, on failure of the male issue, is more respected by the laws than her youngest sisters.

The heir apparent to the crown is usually made prince of Wales, and earl of Chester, by special creation, and investiture; but being the king's eldest son, he is by inheritance duke of Cornwall, without any new creation.

Edward II. was the first prince of Wales. When his father had subdued the kingdom of Wales, he promised the people of that country, upon condition of their submission, to give them a prince who had been born amongst them, and who could speak no other language. Upon their acquiescence with this deceitful offer, he conferred the principality of Wales upon his second son, Edward, then an infant. But this creation has not been confined to the heir *apparent*, for both queen Mary and queen Elizabeth were created by their father, Henry VIII. princesses of Wales; each of them at the time being only heiress *presumptive* to the crown. Elizabeth was

created princess of Wales on the illegitimation of Mary.

The rest of the royal family are to be considered in a two-fold view. In an extensive sense, the royal family includes all the protestant issue of the princess Sophia of Hanover: but in a more confined meaning, it comprehends none but those who are in a certain degree of relationship to the reigning prince; and to them the law pays an extraordinary regard and respect.

The privileges enjoyed by the *younger branches* of the royal family, are in general the same as all other subjects have in common. The king's children, however, have the privilege of sitting at the side of the cloth of state in the parliament chamber; and, together with the king's brothers, uncles, grandsons, and nephews, they take the precedence of all other nobility.

The royal family is certainly subject to pay taxes, unless expressly exempted (which is always the case) in every tax bill. But the peculiar privileges of the royal family are greatly counterbalanced by the legal restraints laid upon all the branches of it, with regard to marriage. For by statute 12 George III. ch. 11. no descendant of 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 void. Yet any of the royal family of the age of twenty-five years, may, after a twelvemonth's notice given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And in case such prohibited marriage be contracted, all persons solemnizing, assisting, or being present at it, shall incur all the penalties of a *premunire*.

CHAPTER X.

Of the COUNCILS.

Kings, as well as every other denomination of chief executive magistrates, are but men. And when it is remembered that they inherit the same corrupt nature, are governed by the same unhallowed passions, and are liable to the same fallible judgments as their subjects; when, likewise, the extent, the weight, and the importance of civil

government are duly considered; the necessity and wisdom of allowing them counsellors to assist them in the discharge of their duties, the support of their dignities, and the exertion of their prerogatives, will be abundantly manifest to all.

Monarchs, in all ages, have enjoyed the privilege of being assisted in the administration of government, by confidential servants, denominated counsellors. At least, the important office of a counsellor is as ancient as the book of Job, in which, mention is made of the "kings "and *counsellors* of the earth." The utility of this office may likewise be collected from the inspired pages. "In the multitude of *counsel-* "*lors*," says Solomon, "there is safety:" and Isaiah is instructed to promise the Jews, "that "the Lord would restore their *counsellors*, as at "the beginning." The removal of wise and upright men from the head of public affairs, is to be regarded as a serious calamity. "Behold! "the Lord, the Lord of Hosts, doth take away "from Jerusalem, the judge, the prudent and "the honourable man, the *counsellor*, and the "eloquent orator."

The constitution of England has, from the beginning, allotted to the king various councils, to advise his Majesty, respecting the adoption and execution of the public measures. Of these

councils, is the *high court* of parliament, which has been already spoken of.

The *peers* of the realm are, by their birth, hereditary counsellors of the king, and may be called together by him to impart their advice, either in time of parliament or when no parliament is sitting. As hereditary counsellors, the peers at all times, enjoy a freedom from arrest, because the law supposes that they are always either assisting the king with their counsel for the public welfare, or keeping the safety of the realm, by their skill and bravery. They were formerly, frequently convened to give the king their advice in state affairs; but the practice has of late fallen into disuse, being rendered unnecessary by the frequent and more regular meetings of parliament.

A peer of the realm has a right, in virtue of his character, as hereditary counsellor of the crown, to *demand* an audience of the king, to lay before him, with decency and respect, such matters as he shall consider of importance to the state. And therefore in the reign of Edward II. it was made an article of impeachment against the two Hugh Spencers, "that they would not "suffer the great men of the realm, the king's "good counsellors, to speak with the king, only "in their presence."

The *judges*, also, are the king's counsellors in matters of law, but in no other sense.

But the principal council of the king is his *privy council*; called by way of eminence, "the "council." The members of which, are so constituted by the king's sole will; and are excluded from it by his causing their names to be struck out of the book.

The privy council in ancient time, consisted of only about twelve members; afterwards it was increased to thirty by Charles II. and now the number is indefinite. A privy counsellor continues such during the life of the king who chooses him, subject to removal at his pleasure. No inconvenience arises from the extension of the number of the privy council, as those only attend who are specially summoned for that particular occasion upon which their advice and assistance are required. The *cabinet council*, as it is also sometimes called, consists of those ministers of state who are immediately honoured with his Majesty's confidence, and who are summoned to consult on the important and arduous discharge of the executive authority. Their number and selection depend solely upon the king's pleasure; and each member of that council receives a summons

or message for every attendance.* No part, however, of the executive authority of the king is vested in his privy council: the constant style of the law being the king *in* council, and not the king *and* council. The whole business centres in the sovereign, who, indeed is advised by his council; but it is said, that the votes of the members are not even counted.†

As to the *qualifications* of a privy counsellor, any natural born subject of the united empire is capable of being made one, upon his taking the proper oaths for the security of the government, and the test for the safety of the church. But a naturalized foreigner is prohibited from sitting in the council, by statute 12 and 13 W. III. ch. 2. A person, however, who is born abroad of English parents is not thereby disqualified.

The *duty* of a privy counsellor appears from his oath of office, which consists of seven particulars: first, To advise the king according to his cunning and discretion. Secondly, to advise for the king's honour and good of the public, without partiality, through affection, love, meed, doubt, or dread. Thirdly, To keep the king's council secret. Fourthly, To avoid corruption. Fifthly, To help and strengthen the execution

* Professor CHRISTIAN.——† DE LOLME.

of what shall be there resolved. Sixthly, To withstand all persons who would attempt the contrary. And lastly, in general to observe, keep, and do, all that a good and true counsellor ought to do to his sovereign lord.

The *power* of the privy council is to enquire into all offences against the government, and to commit offenders to safe custody, to take their trial in some of the courts of law. But lest this power should be arbitrarily employed to the oppression of the subject; any one who suffers a false imprisonment by the privy council, is entitled to a writ of *habeas corpus* as much as if he had been committed by an ordinary justice of the peace. Thus the late John Wilkes, Esq. obtained a verdict with £.1000 damages and full costs of suit, against the secretary of state, who committed him to the tower under a general warrant, afterwards declared to be illegal. And lest they should avail themselves of the royal sanction to justify any unlawful or dangerous measures of the government, the constitution has very properly made them answerable to the public for the king's political conduct, instead of making him accountable in his own person. But as their exalted stations and important duties necessarily expose them to the envy of their fellow subjects, the law has assigned them certain

privileges, to secure them against attempts and conspiracies to take away their lives. By statute 9 Anne, ch. 16. it is enacted, "that *any* "*person* who shall unlawfully assault and strike "or wound any privy counsellor, in the exe- "cution of his office, shall be a felon, without "benefit of clergy." Which statute was made in consequence of the daring attempt of the Sieur Guiscard, who when under examination for high treason, before a committee of the privy council, stabbed Mr. Harley, afterwards earl of Oxford, with a penknife.

Privy counsellors also have honorary *precedence*, next to the knights of the garter.

The king can dissolve the privy council at his pleasure; he can also discharge any individual member, or the whole of it, and appoint another, whenever he pleases. The confidential servants of the crown, who are sometimes denominated in popular language, "the administration," the king removes from the cabinet when he sees fit, with as much ease as he changes the ornaments and furniture of his drawing room. It is usual, however, for the ministers, when they find they can continue in office no longer, voluntarily to resign. But should they not do this, a written message is sent them, signifying, "that his Majesty has no further occasion for

their services." And this official notice they must implicitly obey, by delivering up their respective seals of office to the sovereign at the time appointed. But to prevent inconvenience on the king's demise, the council continues six months afterwards unless sooner dissolved by his successor.

Such are the duties and privileges of the privy council; and whoever duly reflects that upon their wisdom, diligence, and integrity, the interests and happiness of the whole kingdom very much depend, will see the propriety of our public petition, that God would "be pleased "to bless the lords of the council, and all the "nobility, with grace, wisdom, and under-"standing."

CHAPTER XI.

Of the DUTIES of the KING.

We learn from the sacred scriptures, that "there is no power but of God," and that subordination in society is clearly his wise and merciful dispensation.

The king of England is exalted highly above the people whom he governs; and the constitution regards his person as so sacred, that no jurisdiction upon earth has power to try him in a criminal way, much less to condemn and inflict any punishment upon him. No suit, even in civil matters, can be brought against the king, for no court can have any authority over him. The placing of the *person* of the king above the law is not the effect of a mere visionary theory, or of idle superstition and folly, as too many absurdly imagine; but is the result of the profound wisdom of our forefathers, who well knew that the liberty and safety even of the meanest subject could be secured only by the free agency of the executive as well as of every branch of the legislative power. But although the king's person is inviolable, yet his *conduct* must be regulated by fixed rules. He must govern according to the known laws of the realm. But it may be asked, "what security have the peo-"ple, that he will do so, since he is not account-"able to them for his actions?" We answer, that, besides the security resulting from the responsibility of his ministers, the king is laid under the solemn obligation of an oath, and being amenable to the bar of God, must give an account of himself to him at the last day. It is a

strong internal evidence of the divine authenticity of the new testament, that rulers and subjects are alike admonished what they ought to be, and what they ought to do; and that the duties of every relation in life are impartially stated without respect of persons. The king is "the "minister of God" to his people, "for good," and consequently he is bound to exercise his high authority, agreeably to the divine will. But whilst he is the minister for good, he is also "a revenger to execute wrath upon him that "doeth evil. Wherefore *we* must needs be sub- "ject not only for wrath, but also for conscience' "sake."

This moral obligation upon the conscience, however, does not prohibit any prince from ruling according to the laws peculiar to the nation which he governs, but makes it his duty to do so, unless such laws militate against the laws of God; therefore it will be proper to enquire into the duties of the king of England, which are incumbent upon him by the constitution of his country.

The principal duty of the king is, doubtless, to govern his people *according to law;* the duties of protection and subjection being reciprocal. These mutual duties are what appear to be meant by the *original contract* between

the king and his people: the terms of which are expressed or implied in the coronation oath, which, by statute 1 W. and M. ch. 6. is to be administered to every king and queen who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops, in presence of all the people; who on their parts do virtually take the oath of allegiance to the crown. The coronation oath is couched in the following solemn words:

The archbishop or bishop shall say: "Will "you solemnly promise and swear to govern "the people of this kingdom of England, and "the dominions thereunto belonging, according "to the statutes in parliament agreed on, and "the laws and customs of the same."

"*The king or queen shall say:* "I solemnly "promise to do so."

Archbp. 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."

Archbp. or bishop. "Will you, to the utmost "of your power, maintain the laws of God, the "true profession of the gospel, and the protes- "tant reformed religion, established by the law? "And will you preserve unto the bishops and "clergy of this realm and to the churches com-

"mitted to their charge all such rights and pri-
"vileges as by law do, or shall appertain unto
"them, or any of them?"

King or queen. "All this I promise to do."

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

And it is required by the bill of rights and act of settlement, that every king and queen of the age of twelve years, either at the coronation, or on the first day of the first parliament that shall happen, shall, upon the throne in the house of peers, repeat and subscribe the declaration against popery.

The coronation oath is the same in substance, as the kings of England took before the revolution. But the wording of it was changed at that period; because the oath itself had been framed in doubtful words and expressions with relation to ancient laws and constitutions, at this time unknown.

CHAPTER XII.

Of the ROYAL PREROGATIVE.

By the king's *prerogative*, is to be understood that special pre-eminence which the king has, in right of his regal dignity, over and above all other persons. The word is derived from *pre* and *rogo*, and signifies something that is required and demanded in preference to all others. There is no stronger proof of the existence of that genuine liberty which is peculiar to Englishmen, than the right they enjoy of discussing and examining, with respect and decency, the limits of this exclusive privilege of the king.

The *direct* prerogatives of the king are of three kinds, (viz.) such as regard his royal character;—those which relate to his royal authority;—and such as refer to his royal income.

The term royal dignity implies not only those large powers and emoluments which the law bestows upon the king in his high political character, and which constitute his prerogative and revenue; but likewise certain attributes of

a great and transcendent nature. By which the people are led to consider him as a very exalted personage, and to pay him that awful respect which may enable him, with greater ease, to carry on the business of government.

The first attribute which the law ascribes to the king is *sovereignty*, or *pre-eminence*; as the minister of God he is inferior to no man, dependant on no man, accountable to no man on earth: for if any foreign jurisdiction had any power over him, as was formerly claimed by the pope, there would be an end to British independence; and if such authority were vested in any domestic tribunal, the destruction of the government would soon follow. Such was the effect of the mock trial of king Charles I. That unhappy prince, firmly, consistently, and *constitutionally* denied the authority of the court that condemned him. But in vain did he plead his own rights and those of his people, before a tribunal erected by democratic violence, which trampling upon the law of the land, completely overturned the constitution. If, indeed, the king invade the rights of the subject, either by private injuries or public oppressions, the law has provided, in both cases, a remedy. Should any person, for instance, have any just demand on the king, in point of property, he must petition him in his

court of chancery, where his lord chancellor will administer right as a matter of grace, though not upon compulsion.

So likewise in cases of ordinary public oppression; as the king, politically speaking, can do no wrong, impeachments and indictments will lie against those evil counsellors and wicked ministers, without whose bad advice and criminal assistance the king could not misuse his power, nor act in contradiction to the laws of the land.

Another political attribute of the king is *absolute perfection*. The ancient and fundamental maxim, that "the king can do no wrong," does not mean that he is not subject to the same passions and infirmities as other men; but that the constitution has prescribed no mode by which he can be made *personally* amenable for any wrong that he may actually commit. The law will therefore presume no wrong where it has provided no remedy. And, in fact, the inviolability of the king is essentially necessary, not for his own private gratification, as the ignorant are too apt to suppose; but for the preservation of the liberty of his subjects. The king, like the sun, shines not so much to exhibit his own splendor, as to animate all around him. He is the centre of attraction; around which the different bodies in the political system

revolve, and by whose influence they are preserved in their proper places and order. The king is not capable, politically, of even *thinking* wrong. For should he make any grant, for instance, contrary to reason, or prejudicial to the state, or to any individual, the law will not impute any blame to him; but suppose that he was misled and ill-advised, and thereupon such grant is rendered void. The two houses of parliament, however, have a constitutional right of remonstrating and complaining to the king, even of those acts of royalty which are properly his own. This is often done in canvassing the messages to each house, signed by the king, and in deliberating on his speeches from the throne. Yet to preserve decency and the freedom of debate, the members usually consider the speeches and messages from the throne, as the compositions of the ministers of state; and therefore have always thought themselves at liberty to examine every proposition in them with freedom. This privilege, however, of examining the personal acts of the sovereign, belongs exclusively to the houses of parliament, and is, even there, to be exercised with all due respect.

A third legal attribute of the king, is his *perpetuity*; for the law ascribes to him, in his

political capacity, absolute immortality. The king never dies. Edward or George may die, but the *king* survives: because, immediately on the natural death of the sovereign, his regal or imperial dignity is vested, by act of law, in his heir, who, without any interregnum or interval, is king, to all intents and purposes. And through the tenderness of the law, the death of the king is usually termed his *demise:* the meaning of which expression is, that in consequence of the disunion of the king's natural and political body, the kingdom is transferred, or demised, to his successor; and thus the royal dignity remains perpetual.

Beside these attributes, the king is possessed of many other powers and authorities, as branches of his royal prerogative; in the due application of which consists the executive power. The king is, in law, properly speaking, the sole magistrate of the nation; all other magistrates deriving their power and authority from him.

In the exercise of the prerogatives which the law has given to the king, he is absolute and irresistable. Yet if that exertion be in its consequences manifestly to the injury of the state, the parliament will call his advisers to a severe account.

The executive prerogatives of the king may be viewed, either with respect to the intercourse of this with other nations; or with regard to its own civil polity and domestic government.

With regard to other nations, the king is considered as the representative or delegate of his people: what, therefore, is done by him in this relation, is the act of the whole community; but what is done without the king's concurrence, is only the acts of private men.

The king has the sole power of sending and receiving ambassadors. The rights, the duties and privileges of ambassadors, are determined by the laws of nature and nations. An ambassador is not subject to the municipal laws of the country to which he is sent; but if he grossly offend, or make any ill use of his character, he may be sent home to his master, and accused before him. However, in the year 1654, during the protectorate of Cromwell, Don Pantaleon Sa, the brother of the Portuguese ambassador, who had been joined with him in the same commission, was tried, convicted, and executed, for the atrocious murder of one Mr. Greenaway, upon the Royal Exchange: but Mr. Hume observes, "the laws of nations were "here plainly violated." Yet such was the dread of Cromwell, that the court of Lisbon

were obliged to acquiesce in the procedure, and soon after signed a treaty of peace and alliance with the protector.

In the reign of queen Anne, it was argued before the judges, whether a foreign ambassador, or any of his retinue, can be prosecuted for debts contracted in this country. The question, however, was never determined. The inquiry was instituted, in consequence of the arrest of the ambassador of Peter the Great, czar of Muscovy; who was taken out of his coach in London, for a debt of £.50, which he had contracted there. At which the czar was so enraged that he insisted that all who were concerned in the affair should be punished with instant death. Instead of complying with this extravagant demand, the queen directed her secretary to inform the czar, "that she could inflict no punish-"ment upon any, even the meanest of her "subjects, unless warranted by the law of the "land; and therefore was persuaded that he "would not insist upon impossibilities." But an act of parliament was immediately passed to prevent the like in future; and this was sent elegantly engrossed and illuminated to the czar, by a special ambassador, with a letter from the queen, which gave full satisfaction; and the offenders were discharged from all further prosecution.

The king's prerogative extends to the making of treaties, leagues, and alliances, with foreign powers; and these treaties, &c. so made by the king, bind the whole nation; but his ministers are accountable to parliament for their conduct in advising the ratification of such treaties as may be deemed prejudicial to the national interest.

The king has also the sole power of making peace or war. But according to the law of nations, a declaration of war ought always to precede the actual commencement of hostilities; that it may be clearly ascertained, that the war is not the act of private persons, but the will of the whole nation, expressed by the authority of its legislative representative. The power of concluding peace is of course vested in the same hands; the parliament having the same salutary check, in both cases, upon the conduct of the ministers, who are the king's advisers.

During a state of warfare, it is usual for the king to grant letters of *marque* and *reprisals* to his subjects, under his great seal; which authorize them to attack and seize the property of the enemy, without hazard of being condemned as robbers or pirates. This privilege the king bestows, in virtue of his prerogative. By authority, likewise, of the king's sign manual, or

licenses from his ambassadors abroad, *passports* are granted, which allow persons a safe-conduct from one nation to another.

In *domestic affairs*, the king's prerogative places him in a great variety of characters. As a constituent part of the legislature, he has the prerogative of rejecting such provisions of parliament as he judges improper to be passed into a law. The expediency of which privilege has already been shewn.

The *military* power is lodged solely in the king, as the generalissimo, or first in military command, within the kingdom: and by virtue of his prerogative, he raises and regulates fleets and armies. And by statute 13 Car. II. ch. 6. he has "the sole command of all fleets and "armies, of forts, and of all other places of "strength in the kingdom; so that the houses of "parliament cannot, nor ought to pretend to the "same." So, also, by the same power, the king can erect beacons, lighthouses, and sea marks, at his pleasure; and if the owner of the land, or any other person, shall destroy them, or shall take down any tree, steeple, or other known sea mark, he shall forfeit £.100, or upon inability to pay, shall be *ipso facto* outlawed.

Although every person assumes the liberty of going abroad whenever he pleases, yet, undoubt-

edly, if the king issue his writ of prohibition under the great seal, or commanding his return when abroad; and in either case the subject disobey, it is a high contempt of the king's prerogative, for which the offender's lands shall be seized till his return; and then he is liable to fine and imprisonment.

Again, although the original power of judicature is lodged in the society at large; yet the king by his prerogative, is the public distributor of justice to all his subjects; and this he conveys to them through the channels of the different courts, which are erected solely by his authority. There the proceedings generally run in his name, pass under his seal, and are executed by his officers.

But such is the infirmity of human nature, that were the judges in any way, as formerly, dependant on the crown, they would doubtless be under strong temptations, in many instances, to pollute the pure streams of justice, and sacrifice the interests of the subjects to the caprice and oppression of those in power. And therefore his present Majesty began his paternal reign with declaring, "that he looked upon the "independence and uprightness of the judges, "as essential to the impartial administration of

"justice; as one of the best securities of the "rights and liberties of his subjects; and as "most conducive to the honour of the crown." Whereupon an act was passed, by which the judges are now continued in office notwithstanding the demise of the crown; and cannot be removed but by a joint address of both houses of parliament to the king. Their salaries, also, are liberal and certain; and when incapacitated for their important duties by age or infirmity, they retire upon a pension, fixed by law.

But this independence of the judges is not the only circumstance which excites our admiration. The existence of the *judicial*, distinct from both the *executive* and *legislative*, powers, is that which gives an English court of justice the preeminence over all others; and renders it, more than any thing else, a preservative of the public liberty. For, if the judicial and legislative powers were united, it is obvious that the lives and liberties of the subject would be at the disposal of arbitrary judges, who would not be guided in their decisions by any fundamental principles of law, but by their own opinions. And the consequences of an union between the judicial and executive authorities would be still more dangerous; for then the privy council would be under strong temptations to expound

the law in that way that would be supposed to be most agreeable to the crown.

We see then that this single act of our gracious sovereign in recommending to his parliament so important a measure, has been the mean of fortifying our liberties with a very strong additional barrier. This alone would justly have endeared the king to his subjects, had he given no subsequent proofs of his earnest desire to extend their civil and religious liberties. This patriotic act of the king is unexampled in history. What was the great charter of our liberties, but the involuntary grant of a cowardly tyrant? What were the religious advantages obtained at the reformation, but the unforeseen effects of the violence of a capricious monarch? What were the civil privileges secured during the reigns of the Stuarts, but the reluctant concessions of princes, who could not resist their parliaments? What, in short, were even the blessings of the glorious revolution, but the conciliating measures of a sovereign whose title rested entirely upon the national feeling? But in this measure we behold the unbiassed, disinterested conduct of a wise and virtuous king, solicitous to provide for the happiness of his people.

The king's prerogative likewise invests him with the privilege of *pardoning* offences. For

being the *prosecutor* in all criminal proceedings, it is reasonable that he should enjoy the delight arising from a judicious exercise of the power of forgiving injuries.

Although his Majesty cannot personally distribute justice, yet in the eye of the law he is always present in his courts. His judges are the mirror by which his image is reflected. And hence, in virtue of his prerogative, the king is said to possess a legal *ubiquity*.

Another branch of the prerogative, is the power of issuing *proclamations*. Not that proclamations can make a new law, or dispense with one already enacted; or that they are binding upon the subject, only as they promulgate any known and acknowledged law. But as the time, manner, and circumstances, of putting laws into execution must frequently be left to the discretion of the executive magistrate; his proclamations are obligatory, when they only enforce the laws already made, and do not go to enact new or dispense with old ones. It is an established law, for instance, that the king may prohibit any of his subjects from leaving the realm. A proclamation, therefore, laying an *embargo* upon all shipping in time of war, has the full force of an act of parliament; but a proclamation laying an embargo in time of peace

upon all vessels laden with wheat, is contrary to law. And yet the celebrated lord Camden, who, as will be hereafter seen, during the period he filled the office of chief justice of the common pleas, so distinguished himself as the maintainer and defender of the genuine principles of the constitution; soon after his elevation to the chancellorship, defended the ministry, upon the ground of *state necessity,* for having issued in time of peace, a proclamation, laying an embargo upon the exportation of corn. The advisers of this measure (which, although expedient, was certainly unconstitutional), were indemnified by a special act of parliament. But lord Camden contended in a debate in the house of lords, that no indemnity was necessary for him and his colleagues; asserting, with some warmth, that the measure was at most "*but a "forty days tyranny.*"* The fact affords a striking illustration of the wisdom which was manifested, in making the judges independent on the crown.

Proclamations, however, which are contrary to law, do not bind the subject, who cannot be punished for his disregard of them. Hence,

* Belsham's Memoirs of the Reign of George III. vol. I.

when seven of the bishops were prosecuted for a libel, because they presented a petition to the throne, humbly shewing that they could not comply with a proclamation of king James II. which went to dispense with an existing law, they were fully acquitted of the charge.

The customary style in proclamations and other official acts of the king which runs in the plural number *we*, instead of the singular *I*, is said to have been introduced by king John, about the year 1199; who probably employed it to communicate part of the merit of his measures to the council who gave him their advice.

As it is impossible that any government can be carried on without a due subordination of rank, the king, by his prerogative, possesses the power of *conferring honours and dignities.*

Nothing can be more proper than that this power should be in the king. For the law supposes, that he who employs his subjects is the best judge of their merits and services; and concludes, that he will bestow honours upon none but those who really deserve them.

The conferring of titles of honour is either expressed in writing, by writ or letters patent, as in the creation of peers and baronets; or by corporeal investiture, as in the creation of a knight.

The king can create new *offices* as well as new titles, but cannot annex new fees to them, nor add new fees to old established offices, for this would be taxing the subject without his consent; and no kind of taxation can be legal but by an act of parliament.

The granting of privileges to individuals, also, such as place or precedence, and charters to corporations, is equally the prerogative of the crown as the conferring of titles and offices.

There is another light in which the law views the king with regard to his prerogative; it considers him as the *arbiter of commerce*. Thus the king settles the establishment of public marts and fairs, with the tolls thereunto belonging. He also regulates the weights and measures, and the coining of money, to which his authority only can give currency. With respect to coining, it is necessary that the materials, impression, and the denomination be attended to.

The money of England was formerly either gold or silver; none other being issued till king Charles II. in 1672, coined and gave currency to copper farthings and halfpennies. It must be stamped by the authority and with the effigy of the king; and as to its denomination, the king's proclamation must fix its value.

The king's proclamation gives currency also to foreign coin; and his Majesty may, at any

time, cry down any coin of the kingdom, and make it no longer current.

Lastly, in virtue of his prerogative, the king is considered by the constitution as the supreme head, *in earth*, of the church of England. A distinction which did not originate at the reformation as some imagine, but which was inherent in the crown long before the time of Henry VIII. as appears by many authors, both lawyers and historians, according to Sir Edward Coke.

It is certain that the king's supremacy is acknowledged not only by the canons and articles of the church, by the 26 Hen. VIII. ch. 1. and other acts of parliament; but is recognised likewise by the common law of the land. By all these laws, the king is considered as head of the church of England, *under God*. Not that the king usurps the headship of Christ over his *spiritual* church, but merely exercises authority over that part of the *visible* church, which is established by law in his dominions. In every christian society there must be rules, that all things may be done "decently and in order." Rules, imply a power lodged somewhere to enforce them; and this power in the church of England the law has vested in the king. By this authority, the king convenes, prorogues, restrains, regulates, and dissolves all synods and ecclesiastical convocations.

The convocation of the clergy in England is the miniature of a parliament, wherein the archbishop presides with regal state; the upper house of bishops, represents the house of lords; and the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, resembles the house of commons, with its knights of the shire and burgesses. This constitution is said to have been owing to the policy of Edward I. who introduced it as a method of taxing the clergy by their own consent.

An assembly of the English clergy, however, is, doubtless, almost as old as the settlement of christianity in Britain. For the *bishop* of every diocese had here, as in all other christian countries, the power of convening the clergy of his diocese in a common synod, council, or convocation, and of transacting with them such affairs as specially related to the order and government of the churches under his jurisdiction. But in the year 1664, by a private agreement between the archbishop and the lord chancellor Clarendon and other the king's ministers, it was concluded that the clergy should silently wave the privilege of taxing their own body, and allow themselves to be included in the money bills prepared by the commons. Since that time the clergy have

been permitted to vote as other freeholders in electing knights of the shire; a privilege which before they did not enjoy. This has made the convocations unnecessary to the crown, and merely nominal in themselves. It is nevertheless agreed, that the convocations are of right to be assembled with every new parliament; and that they may act and proceed as provincial councils, when his Majesty in his royal wisdom shall judge it expedient. But the clergy falling out amongst themselves in the reign of queen Anne, they have never since been allowed to transact any business.

CHAPTER XIII.

Of the REVENUE.

As the advantages of civil government are very great, so the administration of it is necessarily attended with considerable expence. It is but reasonable, too, that the people who derive the benefit resulting from this ordinance of God, should contribute towards the defraying of the unavoidable public expenditure. This should

be done with cheerfulness, because " rulers are " God's ministers attending continually upon " this very thing." That is, with them rests the power of levying tribute, and to them is committed the proper application of it, for the good of the community.

Taxes probably had their origin from those levied by Solon, at Athens, 540 years before Christ. But the first paid in money in this country were in 1067; yet subsidies in kind continued till about 1377.

By the public revenue, is to be understood those supplies which are granted to his Majesty to enable him to support his dignity and maintain his authority and power. It is, in fact, a portion of his property which every subject contributes to the exigencies of the state, in order to secure the rest.

It is just, that they who are encumbered with the management of public affairs, should be amply remunerated. And it is for the benefit of the people that their first magistrate, his family, and attendants, should be supported with dignity and splendor; they are, therefore, very shallow politicians who would attempt to pluck one feather from the plumage of royalty.

The revenue may be denominated, either ordinary, or extraordinary.

In the term ordinary revenue, is included that which has subsisted in the crown time out of mind; or, which has been granted by parliament by way of exchange for such of the king's hereditary revenues as were found inconvenient to the subject.

The right which the commons enjoy of granting supplies to the crown, was gradually ascertained to be inherent in the people. The celebrated Sir Thomas More appears to have been the first man who had the courage to oppose a subsidy demanded by Henry VII. This he did with such effect, although a very young man, not more than 21 years of age, that the house actually refused the supply.*

The crown, indeed, is now in a great measure dependant upon the people for its ordinary support and subsistence. In this very peculiarity of the constitution, consists that fascinating charm, which always softens "the insolence of "office," and has sometimes melted the heart of tyranny itself into courtesy and kindness. This salutary check in the hands of the people, prevents the government from becoming despotic; whilst the absolute power of the king to dissolve the parliament at his pleasure, preserves it from licentiousness and anarchy.

WATKINS' Biographical Dictionary.

Lords of manors, however, and other subjects, frequently regard that as their own inherent right, which, in fact, has been vested in their ancestors by our earlier princes, to whom it originally belonged as part of the royal revenue.

To the king's ordinary revenues belongs the custody of all the lay revenues, lands, and tenements which appertain to an archbishop's or bishop's see; and which, upon the vacancy of any bishoprick, are immediately the right of the king. This was formerly a source of great emolument to the crown; but is now by customary indulgence reduced almost to nothing; for at present all the temporalities are restored untouched to the new bishop at his consecration.

The privilege which the king has of sending one of his chaplains to the new bishop to be maintained by him until he provides him with a benefice, is called the king's *corody;* but this is become an obsolete practice.

Again, the first fruits and tenths of all spiritual preferments in the kingdom were formerly a branch of the royal revenue. The *first fruits* are the first whole year's profits of any spiritual preferment; and the *tenths,* the tenth part of the annual profit of each living. All of which originated in the superstitious devotedness of the popish clergy to the holy see; and being seized

by the rapacity of Henry VIII. were added to the crown at the reformation. The justice, however, of queen Anne, restored to the church what had been so violently wrested from it. And in performing this laudable act, the wisdom of her Majesty was no less conspicuous than her equity; for she granted her royal charter, which was afterwards confirmed by act of parliament, whereby all the first fruits and tenths due to the crown, are vested in the names of trustees for ever; to form a perpetual fund, for the purpose of augmenting small livings. This is what is usually called *queen Anne's bounty*. The trustees of which are now erected into a corporation, and have authority to make rules and orders for the distribution of this fund.

Another part of the ordinary revenue, is the rents and profits of the demesne lands of the crown, being either a share reserved to the crown at the original distribution of property, or such as fell to it by forfeitures, or other means.

The prerogative of purveyance and preemption, also, was anciently a source of considerable profit to the king; but falling into disuse, during the interregnum, the parliament afterwards granted to king Charles II. his heirs and successors for ever, fifteen pence per barrel on all beer and ale sold in the kingdom, in exchange for the old

privileges which had become so oppressive to the people. Besides this hereditary excise, certain rents also were paid to the crown by such persons as were licensed to sell wine. But this part of the ordinary revenue was abolished by statute 30 Geo. II. ch. 9. and an annual sum of £.7000. per annum issuing out of the new stamp duties imposed on wine licenses, was settled on the crown in its stead.

There are several other ancient sources of the ordinary revenue which are now of little moment; and need only to be mentioned; such as, royal fish, shipwrecks, treasure-trove, waifs, and estrays; these under certain circumstances are vested in the crown, as being goods in which no one else claims a property.

Confiscations of property, or forfeitures of lands and goods for offences, are likewise a part of the ordinary revenue of the king. There is one particular forfeiture, called a "*deodand*;" namely, the forfeiture to the king of whatever occasions the death of a person. The origin of which seems to have been this: in the days of popish superstition, it was thought necessary to pray for the souls of departed persons; when, therefore, any one was killed, the instrument of death was forfeited as a price to obtain the prayers of the church for the soul of the de-

ceased. Hence the term "*deodand*," that is, a gift to God. But since the days of papal darkness, the forfeiture goes to the king or lord of the manor.

The king being esteemed in the eye of the law, the original proprietor of all the lands in the kingdom; those lands revert to him which through defect of heirs cannot be claimed by the subject. This branch of the ordinary revenue is called *escheats of lands*.

The *custody of idoits* and *lunatics*, in ancient times increased the royal income, but the crown now derives no profit from this source.

Such is the proper patrimony of the king; which was formerly productive to an alarming and oppressive degree; but fortunately for the subject, these hereditary and casual profits of the crown are almost all alienated from it. To supply the defects of which other methods have been adopted; and these constitute the king's *extraordinary* revenue.

This extraordinary revenue is comprised under the general term of *supplies*, which are granted by the commons of Great-Britain in parliament assembled; who vote a supply to his Majesty, and afterwards consider of the *ways and means* of raising it. But although a vote of the house of commons to raise a supply, be in general

esteemed conclusive; yet the taxes cannot be gathered till they are sanctioned by a specific act of the whole legislature. These supplies are granted by the subjects to enable the government to secure them in the enjoyment of their property, liberties, and lives.

The extraordinary revenue includes the taxes both annual and permanent. The *usual* annual taxes are those upon *land* and *malt*.

The *land tax*, as it now stands, was adopted in lieu of all former tenths, fifteenths, subsidies on lands, hydages, scutages, or talliages; and the method of raising it is by charging a particular sum upon each county, according to the valuation given in A. D. 1692. This sum is assessed upon individuals by commissioners appointed in the act, being the principal landholders in the county, and by their officers.

The *malt tax* is also an annual tax, and is under the management of the commissioners of excise. It has existed ever since 1697, but has been frequently altered by additional imposts, down to the present time.

The *permanent* taxes include the *customs*; by which are meant the duties, toll, or tribute payable on merchandise exported and imported. The importing or exporting of goods without paying the customs, is called *smuggling*; which

is punishable with confiscation of the commodity. This method of defrauding the public revenue, is a manifest breach of the divine law; which commands us, to "render unto Cæsar the things "that are Cæsar's;" and to give unto all their dues; "tribute to whom tribute is due, custom "to whom custom." Indeed, knowingly to purchase *smuggled* goods, is as bad as the buying of goods knowing them to be *stolen*: for wherein, in a moral view, does the difference consist? If one man give 8*s*. for that which is worth 12*s*. and which he knows to have been stolen, and another give the same sum for the like value, which he knows to have been smuggled, the only difference between them seems to be this; that the one steals 4*s*. *out of* his neighbour's house, whilst the other in effect prevents the same sum from *going into* the public treasury. Not that smuggling is exclusively a defrauding of the public revenue; the wilful evasion of the payment of any tax, legally imposed, is equally a transgression of the law of God. However, therefore, this evil practice may be contended for from worldly motives, it cannot be defended upon christian principles.

The *excise* duty is another branch of permanent taxes: this is an inland impost paid either upon the consumption of the commodity, or

upon the retail sale of it. The excise laws were first established in 1643; from which time they have gradually been extended and increased to the present day.

The excise laws have always been rendered exceedingly objectionable to Englishmen, because of their infringement on British liberty; by giving officers power to enter the dwelling houses of those who deal in exciseable articles, at any hour of the day and night; and by the summary proceedings, to inflict the legal penalties before two commissioners or justices of peace, to the utter exclusion of a trial by jury. This rigorous law was first introduced and adopted by the republican parliament, whose career commenced with the cry of *liberty* and reformation. These reformers not only began this mode of entering into private houses; but when the nation had been a little while accustomed to it, they openly and boldly declared "the impost of "excise to be the most easy and indifferent levy "that could be laid upon the people;" and accordingly continued it during the whole of the usurpation.

If we expect a removal of our grievances, real or imaginary, either from a change in the form of the government, or of the persons who administer it, we shall often be disappointed. The

source of all our evils lies too deeply to be eradicated by the wisdom and power of man; for men of all parties and opinions alike partake of a fallen and corrupt nature. "*Hæc omnis "morbi causa.*" This is the real spring from which all our public and private calamities flow. Whoever, therefore, is in office, or whatever be the form of the government, some excess of expenditure; some misapplication of the public money; some preferring of private interest to the public good; and some anxiety to provide for relatives and connexions, may naturally be expected, though they cannot be defended.* To a disregard of the true source of public abuses, is owing that exclusive pretention to patriotism, which usually distinguishes the oppositionist from the minister of state; and to the same cause we may attribute the disappointment which is generally felt upon every change of the ministry, at finding that the candidate for office promised more than he will or can perform when he is in power. "He that fancies he should "benefit the public more in a great station than "the man that fills it, will in time imagine it an

* The author takes this opportunity of acknowledging, once for all, his obligations to the writings of the Rev. and learned Mr. Scott, author of the "Family Bible," &c. &c.

" act of virtue to supplant him; and, as opposi-
" tion readily kindles into hatred, his eagerness
" to do that good to which he is not called, will
" betray him to crimes, which in his original
" scheme were never purposed."* Real patriotism then does not consist so much in a systematic opposition to men in office, as in a conscientious discharge of the duties of our several stations.

The *salt tax*, though not commonly called an excise, because under the management of different commissioners, yet is it subject to the same regulations as excise duties, and makes part of the extraordinary revenue.

The most popular of the permanent taxes, perhaps, of any, is the *postage of letters*. For whilst the government derives from it a very considerable sum the people dispatch their business with far greater ease and cheapness by its means, than they could do in any other way. This tax originated in the parliament of 1643, and the rate of postage has been increased at different times since.

Postmasters in the country are bound to deliver the letters to the inhabitants; and any charge for so doing is illegal.

* See the Rambler, No. 8.

By statute 42 Geo. III. ch. 81. it is enacted, that persons sending letters and packets which ought to be sent by the post, by any stage coach, carts, waggons, or any other conveyances whatever, are liable to forfeit the sum of £.5, to be recovered with full costs of suit by any person who shall inform and sue for the same. But this prohibition does not extend to letters sent with and concerning goods conveyed by any known carrier of goods, nor to letters sent by any private friend in his journey, or by any messenger sent on purpose.

There is another branch of the permanent taxes which is very beneficial both to government and the people; and that is, the *stamp duty*, upon various kinds of paper and parchments. The benefit which the subject derives from this tax, arises from the difficulty to forge any kind of deeds of any standing, being hereby increased. For the commissioners of stamps are often varying their marks, which are imperceptible to all but themselves.

The *house* and *window* tax, a part of the extraordinary revenue, was first established by parliament in the reign of Charles II. by an impost called the hearth money. This was abolished by statute 1 W. and M. ch. 10. but in six years afterwards was virtually revived by a

tax of 3*s*. per house, and also upon all windows exceeding nine; which rate has been gradually increasing to its present amount. The surveyors, commonly called window *peepers*, are allowed by law to survey the outside of windows; and twice a year to pass through any house, into any court or yard to inspect the windows there; but have no right or power to examine the number of windows by going about the inside of the house.

The duty arising from licences to *hackney coaches* and *chairs* in and about London, is another part of the public revenue. In 1654, two hundred hackney coaches were allowed within London and six miles round, under the direction of the court of aldermen. In the reign of Charles II. they were increased to four hundred. These were augmented to seven hundred by statute 5 W. and M. ch. 22. and the duties vested in the crown. Since which time, the number has been raised to one thousand coaches and four hundred chairs. The regulation of which is under a jurisdiction, whereby a very refractory set of men is kept in tolerable order, and the public greatly accommodated at a small expence.

Besides the imposts already mentioned, there are taxes also upon pensions and offices under the crown, upon horses, carriages, servants, hair

powder, dogs, licences for shooting, armorial bearings, &c. &c. all of which come under the general denomination of the king's taxes; and form a part of the permanent duties.

There are likewise the property tax and some other duties which go under the name of "war "taxes;" and these altogether produce yearly an immense sum. The principal part of which is applied to the payment of the interest of the national debt.

By the national debt are meant the public funds, which was an evil consequent on the revolution in 1688. After this great event, which delivered us from popery and slavery, the expences occasioned by our continental wars became so great, that it was thought unadviseable, and at length found impracticable, to raise the supplies within the year. Large sums therefore were borrowed by government, and permanent taxes raised to pay the annual interest to the public creditors; who have a nominal capital in the funds, which may be transferred from one proprietor to another.

From the yearly taxes, the maintenance of the king's household and the *civil list* are supplied. A great variety of items is included in the payments of the civil list; in fact, all those which in any shape relate to the civil government.

Such as salaries to the officers of state, to the judges, and to the king's servants; the expences of foreign ambassadors; the maintenance of the queen and royal family; the king's private expenditure, or privy purse; secret service money; various bounties, pensions, and the like.

Pensions and sinecures bestowed personally or relatively for services to the state, cannot be objected to when they are granted with discretion; but they are greatly abused when given without any regard to real merit. A free government is endangered, whenever, the loyalty of its subjects is purchased: and probably no state has ever recovered that has been once generally infected with the fatal distemper of *bribery*. It is, however, in a moral view, that the evil with us is chiefly to be dreaded. The specious patriot may indeed inflame the popular feelings by an outcry about an increase of *taxes* for pensioners and placemen; but it is probable that were all objectionable sinecures at once abolished, the burdens of the state would be no more lightened by such a measure, than a first-rate ship distressed in a storm would be, by the officers throwing over board their pocket money and trinkets. If indeed there were a

kingdom or society of men perfectly virtuous, the direction of public affairs would be cheerfully committed to the most able; and the rest, so far from envying their exalted station and emoluments, would think themselves happy in living under their guidance and protection. All corruption would vanish, and every one would in some way contribute to the public prosperity. But so long as human nature remains what it is, a perfect government, however hoped for, can never be expected.*

CHAPTER XIV.

Of the MAGISTRACY.

It has already been seen, that the king in virtue of his prerogative, is the sole distributor of justice to his people. But as it is impossible for him personally to administer the law, he delegates or commissions others to act for him in the character of magistrates. A subordinate

* See BUTLER's Analogy, Part 1. ch. 5.

magistracy is marked with the highest antiquity and authority, as it seems to have been first adopted by Moses at the suggestion of Jethro, his father-in-law, whose prudent advice was evidently sanctioned by the divine approbation.* The experience of all succeeding ages has borne testimony to the wisdom of Jethro's council. The wisest even of the heathen were convinced that a magistracy is essential to the very existence of civilized society;† although it admits of being variously modified according to the local circumstances of different nations.

The proper qualifications of magistrates, according to their original institution, are, that they be "able men, such as fear God, men of "truth, hating covetousness." The people have great reason to rejoice when such are in authority, on account of the many blessings attendant on a conscientious discharge of the duties of their office.

The obligation of subjects to obey subordinate magistrates, and render them all due honour, is equally binding as the obedience which they owe to the supreme civil ruler. "Submit your-

* Exodus, ch. xviii. ver. 13—27.

† Magistratibus igitur opus est: sine quorum prudentia ac "diligentia esse civitas non potest." Cic. de Legib. lib. 3.

" selves," says St. Peter, " to every ordinance " of man, for the Lord's sake; whether it be to " the king, as supreme; or unto governors, as " unto them that are sent by him: for so is the " will of God." And St. Paul exhorts, that prayers and thanksgivings be made for " kings, " and for *all* in authority." Hence our excellent liturgy prays for the magistrates, that they may have " grace to execute justice, and to " maintain truth."

Throughout the British dominion, there are several denominations of subordinate magistrates who have jurisdiction and authority: they are principally, the high sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers of the poor.

The *high sheriff* is an officer of very high antiquity; his name being derived from two Saxon words, that signify the *reeve,* or officer of the shire or county. The sheriffs were formerly elected by the people of the county. But to avoid tumults, that custom has been abolished by statute; and they are now appointed in the following manner:

The lord chancellor, the chancellor of the exchequer, the judges, and several of the privy council, assemble together in the exchequer chamber, on the morrow of St. Martin, yearly,

and then and there take an oath, that they will nominate no one from any improper motive: this done, it is agreed upon who shall be sheriff for the present year.

The earl of Thanet, however, is hereditary sheriff of Westmoreland. Which office may descend to, and be executed by, a female; for, "Ann, countess of Pembroke, had the office, "and exercised it in person; and sat at the "assizes at Appleby, with the judges on the "bench."

The election of the shrievalty of Middlesex was granted to the city of London for ever, in very ancient times, upon condition of its paying £.300 a year to the king's exchequer. In consequence of which grant, it always elects two sheriffs, though these constitute but one officer.

The powers and duties of the high sheriff are many and great. In his judicial capacity, he is to hear and determine all causes of 40*s.* value and under, in his county court. He is also to determine the election of knights of the shire, (who may, however, appeal to the house of commons), of coroners also, and to judge of the qualifications of voters. As the keeper of the king's peace, he is the first man in the county;

and, during his office, superior in rank to any nobleman. The high sheriff may commit all persons to prison who disturb the peace of the county, and bind any person in a recognisance to keep it. He is bound to pursue all traitors, murderers, and felons, and commit them to jail for safe custody; and to defend the county against any of the king's enemies, when they come into the land. For which purposes he may call to his assistance the *posse comitatus*, or power of the county, by commanding by his summons every person above fifteen years old, except peers, to attend him, on pain of fine and imprisonment for disobedience.

In his ministerial character, he is bound to execute all process issuing from the king's court of justice. In civil cases he is to serve the writ, to arrest, and take bail; and when the cause comes to trial, he is to summon the jury; when it is determined, he must see the judgment executed. In criminal matters also he does the same, and has the custody of the delinquent, and must execute the sentence of the court, even to death itself. He is the king's bailiff to levy all fines and forfeitures within the county. He has likewise officers under him; such as the under sheriff, bailiff, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of £.500.

The *under sheriff* usually performs all the duties of the office of sheriff, except in a few cases, where the personal presence of the high sheriff is necessary; but he cannot lawfully practise as an attorney during his office, which continues, like the high sheriff's, but one year.

The *bailiffs*, are sheriff's officers appointed in every hundred, to collect fines, and execute writs, &c. within their districts. A *bound*-bailiff, is a special bailiff appointed by the sheriff on account of his adroitness in executing writs, who is usually bound in an obligation for the due discharge of his duty, and is therefore termed a *bound*-bailiff, or as the common people call him a *bum*-bailiff.

Gaolers, are servants of the sheriff, who must be answerable for their conduct. Their duty is to keep safely all such persons as are committed to their custody by lawful warrant; and if they suffer a prisoner to escape, the sheriff must answer for it to the king in criminal matters; and to the party injured in civil cases.

At the assizes, the law allows the sheriff suitable attendants. He may not have more than forty men in livery; yet for the sake of decorum and safety, not fewer than twenty in England, and twelve in Wales, upon forfeiture of £.200.

The office of *coroner* is also very ancient. The coroner is so called, because he has princi-

pally to do with pleas of the crown. The lord chief justice of the king's bench is the principal coroner in the kingdom; and may, if he please, exercise the jurisdiction of that office in any part of it.

In every county there are usually four coroners, and sometimes six.

The coroner is chosen by the freeholders of the county; a writ at common law being issued to the sheriff, to make election of a proper person. He is chosen for life; but may be removed by the king's writ, for a cause to be therein specified; such as living at an inconvenient distance, extortion, corruption, neglect, or misbehaviour.

The duty of a coroner is to enquire, when any one dies by violence, suddenly, or in prison, into the manner of his death; and this must be *on view* of the body; for if the body be not found, no inquest can be held. Every inquest must be held at the very place where the death happened; and the inquiry is to be made by a jury, from four, five, or six of the adjoining towns, over whom the coroner is to preside.

If any one be found guilty of murder or manslaughter, by his inquest, he is to commit the offender for further trial; and also to enquire concerning his goods and chattels, which are thereby forfeited. He is likewise to ascertain

whether any *deodand* falls to the king or lord of the manor by the death of the deceased; and must certify the whole proceedings to the court of king's bench, or to the next assizes.

In cases where the high sheriff may be suspected of partiality, arising from his interest in the suit, or from his being akin to the plaintiff or defendant, exception may be taken to him; and the process must then be awarded to the coroner, in his stead, for execution of the king's writs.

The next denomination of subordinate magistrates to be mentioned, are *justices of the peace*; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The lord chancellor, the lord treasurer, the justices of the court of king's bench, are likewise by their office; and the master of the rolls, by prescription, conservators of the peace throughout the kingdom. The other judges being so only in their own courts. But the sheriff and coroner also are keepers of the peace in their own county; and constables and tithingmen within their own jurisdiction, may apprehend and commit the disturbers of the peace, till they find sureties for keeping it.

Conservators of public liberties where chosen in England from the barons, to circumscribe the

king's power, in 1215. But the first institution of justices of the peace, was not till about the year 1344.

The privilege of electing their magistrates was taken from the people by statute 1 Edward III. ch. 16. which enacts, "that for the better main- "taining and keeping the peace in every "county, good men and lawful should be "*assigned* to keep the peace." But the appellation of *justices* was first given to the maintainers of public order, by statute 34 Edward III. ch. 1. which empowers them to try felonies.

The justices are appointed by the king's special commission, under the great seal. This appoints them jointly and severally to keep the peace, and any two or more of them to enquire of and determine felonies and other misdemeanors. In this commission, some particular justices, or one of them, are directed to be always included, without whose presence, no business is to be done: the words of the commission running thus, "*Quorum aliquem ves-* "*trum, A. B. C. D. &c. unum esse volumus;*" *i. e.* "of whom we will that *A. B.* &c. be one of you;" whence the persons so named are usually termed justices of the *quorum*. But although a justice be put in the commission, he cannot act until he sue out a writ of "*dedimus*

"*potestatem*" from the clerk of the crown, empowering certain persons to administer the usual oaths to him; which done, he is at liberty to act in the capacity of a magistrate.

The 18 Geo. II. ch. 20. is the last statute which prescribes the *qualifications* of justices of the peace. By which every justice is required to have £.100. per annum in estate, clear of all deductions; and if he act without such qualification, he shall forfeit £.100. Of this the justice must make oath. This clear estate of £.100. may consist either in freehold or copyhold, an estate of inheritance or for life, or even in a term of twenty-one years. But this does not extend to corporation justices, eldest sons of peers, heads of colleges, or to the mayors of Oxford and Cambridge; all of whom may act without any qualification by estate.

No practising attorney, solicitor, or proctor, is capable of acting as a justice of the peace.

The office of county justices continues during the pleasure of the king; and is determinable, first, by the demise of the crown, unless the commission be renewed by the successor within six months after. Secondly, by express writ under the great seal. Thirdly, by writ of *supersedeas*, which suspends the power of all justices, but does not destroy it. And, Fourthly,

by a new commission, which virtually, though silently, discharges all former justices not named therein. No sessions can be held without the presence of two justices. In the execution of their office, they may incur penalties for malpractices. But the courts of law usually, and very properly, shew them great indulgence and lenity; presuming, that any mistakes committed by them arise rather from a defect of knowledge of the law, than from wilful negligence or corrupt motives. Yet a verdict against them for *wilful* injury, entitles the prosecutors to double costs.

Constables are of two kinds; (viz.) high constables and petty constables.

There was formerly the office of lord high constable, first created by William the Conqueror, which was hereditary till the year 1521, since which time it has been discontinued, except at coronations; but from his office that of the constables now in use, is clearly drawn.

High constables were first instituted by the statute of Winchester, 13 Edward I. ch. 6. and are appointed at the court-leet of the hundred, or by the justices at the quarter sessions; and are removeable by the same authority.

Petty constables are inferior officers, in every town and parish, subordinate to the high constable of the hundred, and first appointed about

the reign of Edward III. They are made either by the jury at the court-leet; or if no court-leet be held, they are nominated by two justices of the peace.

With respect to the duties of constables: they are in general to keep the peace in their several districts; and for this purpose have power to apprehend and imprison all offenders. But one of the principal duties of the constables, is, to keep *watch* and *ward*, in order to apprehend all rogues, vagabonds, and nightwalkers, and make them give an account of themselves. To assist them in this duty, they may appoint watchmen at their discretion, regulated by the custom of the place. Besides these duties, there are many others attached to this office, by particular acts of parliament.

Surveyors of the highways exactly answer to the *curatores viarum* of the Romans; excepting, that the office of the latter was of rather more dignity and authority than of the former. These surveyors, with us, were first appointed by the statute 2 and 3 P. and M. ch. 8. which ordered, that they should be chosen by the constables and churchwardens; but now by statute 13 Geo. III. ch. 78. they are constituted by two neighbouring justices, and may have salaries allotted to them for their trouble.

The duties attached to this office consist in putting into execution the statutes for the repair of the public roads, leading from one town to another. The surveyors have power to remove all nuisances out of the highways. They are to oblige every person within the parish, between the ages of 15 and 65 to work on the roads, or find a labourer, or compound at certain rates established by the act of 13 and 14 Geo. III. ch. 78.

The law requires every cart-way leading to a market town, to be twenty feet wide at least, if the fences will permit; and it may be increased by the order of two justices, to the breadth of thirty feet, at the expence of the parish. The expences which surveyors incur in repairing the roads, erecting finger-posts, making drains, &c. are to be reimbursed by a rate on the parish, to be allowed at a special sessions.

In aid of the highway rates levied on the separate parishes, certain gates, called *turnpike gates*, are erected upon the high roads in all parts of the kingdom, at which all carriages, horses, and cattle, pay a certain toll. These are under the control of commissioners, and are regulated by various acts of parliament. The first turnpikes were erected at Wadesmill, Caxton, and Stilton, in virtue of an act passed in 1662.

The last public officers to be mentioned are *the overseers of the poor;* who were first appointed in every parish by statute 43 Elizabeth, ch. 2. Before that time the impotent poor subsisted principally on the benevolence of their neighbours; and before the reformation they resorted to the monasteries; where they obtained that relief which confirmed them in habits of indolence and beggary. The poor in Ireland to this day have no relief but from private charity. In Scotland, collections are made at all the church doors every Sunday for the poor; probably in compliance with the apostolic injunction: "Upon the first *day* of the week, let every one "of you lay by him in store, as *God* hath pros- "pered him."

The overseers of the poor are appointed by two neighbouring justices, who must nominate yearly in Easter week, or within one month after, two substantial householders for the office. A woman, who is a substantial householder, may be appointed overseer. Their principal duties consist in raising money, by levying rates on the inhabitants, for the maintenance of the poor that are old, sick, blind, lame, or otherwise incapable of work; and also in finding employment for those who are able to labour.

The poor may gain a settlement in a parish by birth; as in the case of bastards, who belong

to whatever parish they are born in; but legitimate children belong to the parish where their fathers are settled. Marriage likewise gains a settlement; for if a woman marry a man out of the boundaries of her own parish, she belongs to that of her husband. So by renting a tenement of the yearly value of £.10. and residing forty days in the parish, or by paying to the poor's rates; or by executing, when legally appointed, any parochial office for a whole year, if attended with forty days residence, any person may gain a settlement. This privilege is also acquired by being hired for and serving a year in the same service; or by being bound apprentice; for such servant or apprentice belongs to the place of his last forty day's residence.

So if any one reside forty days on his own estate, however small the value, he gains a settlement in the parish, unless he purchased the estate; and in that case he must have paid, *bona fide*, the consideration of £.30, to entitle him to a legal settlement.

The settlement of an intruder may be prevented by an order of two justices of the peace to remove him, upon complaint being made by the overseers; unless the person has a *certificate* from his own parish officers, acknowledging him to be their parishioner; in which case he cannot be removed till he become *actually* chargeable.

No one, however, can be legally removed who is in the way of making a lawful settlement, by hiring a tenement of £.10. yearly rent, or living in an annual service.

CHAPTER XV.

Of the PEOPLE.

THE people in England are usually divided into aliens and natural born subjects. By the former are understood all persons who are born out of the British dominions, and not of English parents; and by the latter, are meant all those who are born within the realm and are under a natural allegiance to the king of Great-Britain.

The term *allegiance* is taken from a latin word, which signifies a *ligament* that *binds* the subject to his sovereign, on account of that protection which he receives from his government. Hence the people are called his majesty's *liege* subjects.

The law distinguishes allegiance into two kinds: the one is natural and perpetual; and the other local and temporary.

Natural and perpetual allegiance, is that which a natural-born subject owes to his prince

from his birth; and which no time nor place can cancel or alter. For as the king protected him in his infantile and helpless state, his allegiance is now due to his sovereign as a debt of gratitude; independently on that security of his life, person, and property, which he continues to receive. An Englishman is not released from allegiance to his natural prince by a residence in a foreign country, nor even by becoming the subject of a foreign ruler. For he cannot serve two masters; and his native prince having a prior claim, it is unreasonable that he should, by his own mere act, dissolve that union between the king and him, which, in fact, cannot be destroyed without a mutual consent. It is a hazardous mistake, entertained by many, that letters of naturalization or certificates of citizenship, granted to British subjects by foreign states, absolve them from that allegiance which is unalterably due from them to the ruler of their native country; for if under such circumstances they should be taken in arms against him, they would certainly be liable to be treated as rebels.

Allegiance is due not only to the regal office, but also to the king's person. Hence arises that affectionate loyalty which so eminently distinguishes every true Briton. This national feeling perhaps, never rose so highly as in the present reign. Certainly no prince ever sat upon a

throne who had juster claims upon the affections of his people, than George III.

Natural-born subjects are bound to their king by an implied, original, and virtual allegiance, before any express promise be made; nevertheless the oath of allegiance may be tendered to every person, whether natural-born or alien, above the age of twelve years. By the oath of allegiance, the subject swears, "that he will be "faithful, and bear *true* allegiance to the king." But all persons in office, must take the oath of abjuration also: an oath which very clearly and explicitly acknowledges the rights of his Majesty, and renounces all adherence to the descendants of the Pretender.

So likewise the oath of supremacy, which principally disavows the Pope's usurped authority in these kingdoms, must be administered to all persons who take upon them any office under the crown.

Local or temporary allegiance, is that which is due to the king from all aliens, so long as they reside in his dominions; and which ceases as soon as they depart out of it. Because, as the king no longer affords them his protection, they no longer owe him allegiance.

Aliens have by no means the same privileges in England as natural born subjects. Nor is it reasonable that they should. They cannot

acquire any real or permanent property; but may trade freely, hire a house to live in, and accumulate *personal* property, which they may dispose of by will.

The children of Englishmen, which are born abroad, are considered as natural born subjects of the king, to all intents and purposes; unless their fathers were banished out of the kingdom for high treason, or were at the birth of such children, in the service of a power at war with Great-Britain. And the children of aliens, born in England, are regarded as natural-born subjects, and entitled to all the same privileges.

A *denizen* is one who is an alien born, but made an English subject by the king's letters patent, a high and incommunicable branch of the royal prerogative. But a denizen has not *all* the privileges of a native; for although he may buy lands, he cannot inherit any; nor can his children, who were born before his denization. Neither can he be a member of the privy council, or of parliament; nor hold any office, civil or military; nor receive any grant of lands from the crown.

Naturalization is the putting of an alien just in the same state as if he had been a natural-born subject; except, only, that he is incapable, as well as a denizen, of being a member of the council, or parliament; of holding offices, grants

from the crown, &c. &c. Naturalization can be performed only by an act of parliament; and no bill, by statute of 12 William III. ch. 2. can be introduced into either house of parliament to naturalize any person, without a clause in it, disabling the subject of it from holding offices, &c. &c. This act was passed from a jealousy of king William's partiality to foreigners.

Before such a bill can be brought in, it is requisite, also, that the person to be naturalized, have received the sacrament of the Lord's Supper one month before the bill be introduced; and that he takes the oaths of allegiance and supremacy in the presence of the parliament.

CHAPTER XVI.

Of the CLERGY.

PREVIOUSLY to taking a view of the law respecting the clergy, it will be proper to give a brief statement of the introduction of the christian ministry into the world.

No sooner had Adam fallen from his original state of righteousness and holiness; and by his

transgression subjected both himself and his posterity to the merited punishment of divine wrath; than God was pleased to declare that the seed of the woman should bruise the serpent's head. Hereby was given the first intimation of that "eternal life, which, he who cannot lie, "promised before the world began." The plan of man's redemption is stupendous, is mysterious. For whether we contemplate its author, the dignity of the person who accomplished it, or ourselves as the objects of its vast design; we are equally astonished and constrained to exclaim, "O! the depths of the riches both of the wisdom "and the knowledge of God! How unsearch-"able are his judgments, and his ways past find-"ing out!" It pleased God to make known to man the scheme of his redemption, by degrees, and in divers manners. In the fulness of time, however, Christ came in the flesh, and made an offering of himself, as the alone sacrifice for sin; and by his meritorious death, he finished the work of man's salvation. Such was the introduction of christianity into the world; the peculiar doctrines of which are comprehended in the emphatical term "gospel," or, "glad "tidings." This gospel has been, still is, and will be to the end of time, manifested to the world, "by preaching which is committed to

" faithful men, according to the commandment " of God our Saviour." They are, therefore, so to be accounted of " as of the ministers of Christ, " and stewards of the mysteries of God."

The ministers of Christ, in the established church of England, are denominated, the *clergy*; a term, however, that comprehends all persons either in holy orders, or in ecclesiastical offices.

Clergymen in holy orders enjoy by law, certain exemptions; not only on account of their sacred character, but also that they may not be hindered in their spiritual duties, by being engaged in temporal affairs. They cannot be compelled to serve on juries, or discharge the duties of any civil office. They are privileged during their attendance on divine service, from arrests in civil suits. And in cases of felony, a clergyman may have his benefit of clergy for any number of clergyable offences; which a layman, even a peer, can receive only upon the first conviction.

But for the same reasons that they are allowed many privileges, the clergy are likewise laid under several disabilities. It has been already stated that they cannot sit in the house of commons; neither are they permitted to engage in any manner of trade, nor sell any merchandise, under forfeiture of the treble value.

By the 75th canon, they are expressly prohibited from "resorting to any taverns, or "alehouses, other than for their honest necessities;" and from "spending their time idly by "day or by night, playing at dice, cards, or "tables, or any other unlawful game; having "always in mind, that they ought to excel all "others in purity of life, and should be examples to the people to live well and christianly." And although the common law very properly allows clergymen to take "reasonable recreations, in order to make them fitter for the performance of their duty and office:" yet "by "the canon law they are prohibited to hunt." Hence, when archbishop Abbot, in 1621, had the misfortune to kill the game-keeper in shooting at a deer, with a cross-bow, at Bramshill park, in Hampshire, the seat of lord Zouch, he was deemed to be incapacitated from discharging the office of primate any longer. But the judges and bishops recommending it to the king, his Majesty granted his grace a dispensation, by which he was restored to his former functions.

By the 76th canon, "No man being admitted "a deacon or minister, shall from thenceforth "voluntarily relinquish the same; nor afterwards use himself in the course of his life, as "a layman, upon pain of excommunication."

The church of England is episcopal, and always has been from the first introduction of christianity into the island.

That the episcopal ordination and government prevailed even in the apostles' days, cannot be doubted by any who give credit to the epistles of St. Ignatius. That holy father died within ten years after St. John the apostle, and was himself bishop of Antioch. He speaks familiarly of the three orders of bishops, priests, and deacons; and it may hence be fairly inferred, that episcopacy originated in the apostolical practice.* "That episcopacy was received "universally in the church, either in the "apostles' time, or presently after, is so evident "and unquestionable, that the most learned ad-"versaries, do themselves confess it." † Nor was it ever called in question for 1500 years after the christian æra.

But whilst wise and good men disagree on this point, it ought in candour to be acknowledged by them all, that the new testament does not speak so decidedly on the subject as to justify

* See bishop LLOYD's Historical Account of Church Government.

† CHILLINGWORTH.

any party in asserting that either this or that form of church government is *positively enjoined.*

The different orders of the clergy of the church of England essential to the constitution of episcopal government, are those of bishops, priests, and deacons. But besides these ministers, there are various other officers of the church, which, although not necessary to the existence of an episcopal church, have been gradually introduced and deemed expedient for the well-ordering and conducting of ecclesiastical affairs. Such are, archbishops, deans, prebendaries, minor canons, archdeacons, church wardens, parish clerks, and the like.

When cities were at first converted to christianity, the bishops were elected by the clergy and people; but as the number of christians increased, such tumults were raised at these popular elections, that at one time no less than *three hundred* persons were killed. The christian emperors and kings to prevent these disorders, took the authority of appointing bishops into their own hands. This plan created many disputations between them and the pope and the clergy. At length after many alterations as to the mode of constituting the bishops in England, it was finally settled, that they should be elective by the dean and chapter, under the king's nomination.

When a bishop dies, therefore, or is translated, the dean and chapter certify the king thereof in chancery, and pray leave of the king to make election. Upon which the king grants his license, which is called, "*congè de lire*; that is, leave to choose. With this writ of "congè de "lire," a letter missive from the king is sent to the dean and chapter, containing the name of the person whom they are to elect; and if they delay the election for twelve days, the king has a right by his letters patent to nominate and appoint whom he pleases to be the new bishop. It is not true, that a clergyman when he is offered a bishoprick answers, "*nolo episcopari*," I will not be made a bishop.

When the election is made, if it be of a bishop, it must be signified to the archbishop of the province by the king's letters patent; and if of an archbishop, then to the other archbishop and two bishops; or, to four bishops, requiring them to confirm, invest, and consecrate the person so elected, on pain of a *premunire* on refusal.

The episcopacy of England consists of the two archbishops of Canterbury and York, and twenty-four bishops; who, upon confirmation, may sit in parliament as lords thereof. There is likewise the bishop of Sodor and Man, who has no seat in the house of lords.

The archbishop is the chief of the rest of the bishops, and of all the inferior clergy in his province; and he exercises episcopal jurisdiction in his own diocese, as well as archepiscopal in his province. Upon receipt of the king's writ, he summons the bishops and clergy in his province to meet in convocation; and to him all appeals are made from the bishops and consistory courts within his jurisdiction.

The archbishop has the right to present to all vacant livings in the disposal of his bishops, if they be not filled within six months from the vacancy. And whenever a new bishop is consecrated, he makes over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is called the archbishop's *option*. This deed binds the bishop, but not his successors.

The archbishop of Canterbury enjoys some privileges above the archbishop of York. For to him belongs the privilege of crowning the kings and queens of England. He hath also, by statute 25 Henry VIII. ch. 21. the power of granting dispensations, in many cases, not contrary to the holy scriptures and laws of God. He, therefore, grants special licenses, to marry

at any time or place, to hold two livings, and the like; and may also confer degrees independently on the two universities.

The powers and authority of the *bishops*, are to ordain the priests and deacons to their sacred offices, inspect the manners of the people and clergy, and punish them by ecclesiastical censures, in order to reformation. They administer the right of confirmation, and induct to all ecclesiastical benefices in their dioceses; every part of which they may visit at their pleasure. They have also their several courts, and are assisted in matters of ecclesiastical law, by their chancellors and other officers.

An ecclesiastical benefice may become vacant by death; by deprivation for any very gross and notorious crime; and also by resignation. A resignation must be made to some superior; consequently a private clergyman must resign to the bishop of his diocese; a bishop, to the archbishop; who can resign to no one but the king himself.

The *dean and chapter* is a council appointed to assist the bishops with their advice, both in ecclesiastical and also in other matters relative to the see.

The origin of the dean and chapter seems to have been an imitation of the division of the

civil government into hundreds, tithings, &c. For when the rest of the clergy were first settled in the several parishes in each diocese, the dean and prebendaries were reserved to perform religious worship at the cathedral; and the chief of them being appointed to preside over the rest (probably ten in number), was called decanus, or dean.

The appointment of the deans varies: some are elected by the chapter, upon the king's "*congè de lire*" and letter missive of nomination, in like manner as the bishops; and others obtain the office by the king's letters patent.

A *chapter* of a cathedral church consists of persons ecclesiastical, canons, and prebendaries, whereof the dean is chief; but with the others he is subordinate to the bishop. The canons and prebendaries are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.

Deaneries and prebends may become void by death, by deprivation, or by resignation. Also, if a dean or prebendary be consecrated a bishop, all his former preferments are vacated; and the king may present to them in virtue of his prerogative.

The *archdeacon* is an ecclesiastical officer appointed by the bishop. He has a kind of

subordinate episcopal authority; and therefore visits the clergy, and has his courts for the punishment of offenders by ecclesiastical censures.

Rural deans, now grown almost into disuse, are very ancient officers of the church. They were endued with a degree of coercive power; and were probably, originally, the deputies of the bishops, to inspect the lives and conduct of the clergy of the several parishes throughout the diocese.

But the most numerous, as well as most laborious order of the clergy, are the parsons, vicars, and curates.

A *parson* is one who has full possession of all the rights of a parish church. He has his name, because in his own *person* he represents the church, which is an invisible body. He is a body corporate in himself, that he may protect the rights of the church, which he personates, by a perpetual succession; and is sometimes called the rector, or governor of the church. During his life, he has the freehold of the parsonage house, glebe, tithes, &c. &c. and for the most part, he has the right to all the ecclesiastical dues in the parish. From some cause or other, the term *parson* has become a name of scorn and derision; but we see, that in point of

fact, it is an appellation of honourable distinction. There is too much reason to fear that the inconsistent lives and conversation of some of the clergy have in all ages occasioned much of that contempt of their sacred order which generally prevails amongst inconsiderate and ungodly men. Yet nothing can be more unreasonable, than to charge any body of men with the failings of any of its individual members. In fact, a man cannot give a more indisputable proof of his being destitute of all true religion himself, than by being fond of displaying his profane wit at the expence of its ministers. He who wantonly defames the servant, can have little regard for the master.

A *vicar* is one who has a spiritual promotion or living under the parson; and is so denominated as officiating *vice ejus*, in his stead. Such promotion is called a *vicarage*. When the parson is a mere layman, and cannot supply the church but by a spiritual person, he is called an *impropriator*, and the living, an *impropriation*.

A *curate* signifies, generally, one who is not instituted to the care of souls; but exercises the spiritual office in a parish under the rector or vicar.

The appointment of a curate must be by the incumbent's nomination of him to the bishop,

whose license is necessary before he can be lawfully admitted to officiate in the church to which he is appointed. He is to be paid such salary as the bishop thinks reasonable.

A licensed curate cannot be removed by his rector or vicar, in order to put another curate in his place. But Doctors Swabey and Adams, of Doctors' Commons, have lately given it as their opinion, "that every license terminates on the "death of the incumbent, who gave the nomi- "nation; and that the succeeding rector may "nominate any other clergyman to the cure, and "claim a fresh licence from the bishop of the "diocese."

The requisites necessary to become a parson or vicar are four; namely, holy orders, presentation, institution, and induction.

No man may presume to execute any of the offices of bishop, priest, or deacon, in the established church, "except he be first called, tried, "examined, and known to have such qualities "as are requisite for the same; and also by "public prayer, with imposition of hands, be "approved and admitted thereunto by lawful "authority."

For the particulars of the method of conferring holy orders upon deacons and priests, and also of consecrating bishops and archbishops, the

reader is referred to the order of this very solemn service, printed in the larger sorts of the liturgy of the church of England.

A person cannot be ordained a deacon under the age of twenty-three years; nor a priest, till he is twenty-four years old; under which age he is incapable of being admitted to any benefice.

The giving of money, directly or indirectly, to obtain orders and license to preach is unlawful. The person giving such orders forfeits £.40; and he who receives them, £.10, and is rendered incapable of any ecclesiastical preferment for seven years afterwards. From the analogy which such conduct bears to the crime of Simon Magus, who offered the apostles money to give him the power of conferring the Holy Ghost on whomsoever he should lay his hands, it is called *simony*. So the giving or taking of money for a presentation or collation, is also simony, and is punishable by statute 31 Eliz. ch. 6.

When a living is vacant, the patron offers whom he pleases in holy orders to the bishop of the diocese, to be instituted to it. But the bishop may refuse such an one on many accounts. As, if the patron be excommunicate and remain in contempt forty days; if the clerk be an alien, under age, an outlaw, or the like; or if he be defective in his faith or morals, or destitute of

sufficient learning. The bishop has the right to examine and judge of the qualifications of all candidates for holy orders, and is not accountable to any temporal court for the measures he takes in his examination.

Upon refusal of the clerk, however, the patron may bring his action at law; and then the bishop must assign the cause of his refusal, which if it be temporal, the judges must determine its validity: but if the fact be denied, a jury must determine it. If the cause be spiritual, as for heresy, and the fact denied, a jury is to decide; but if admitted, the court assisted by learned divines, shall determine its sufficiency. If the bishop should refuse the clerk on account of deficiency of learning, the court may refer him to the archbishop for re-examination, and his decision shall be final.

When a person applies for *institution*, he must shew the bishop his letters of orders, and bring testimonials of his good life and conversation, should the bishop require it. Institution is a kind of investiture of the spiritual part of a benefice, by which the cure of the souls of the parish is committed to the charge of the clergyman.

Collation to a benefice, is when the bishop himself is the patron, and *confers* the living; then

the presentation and institution are one and the same act, and called a collation to a benefice.

Induction is the investiture of the temporal part of the benefice, as institution is of the spiritual; and is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clergyman corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, to give the parishioners sufficient notice and certainty of their new minister to whom they are to pay their tithes.

When a clergyman is instituted to a rectory or vicarage, or licensed to a perpetual curacy, he takes the following oath, in the presence of the bishop or his commissary: "I *A. B.* do "swear that I will perform true and canonical "obedience to the bishop of——— and his suc- "cessors, in all things lawful and honest. So "help me God." Not that this oath implies obedience to the *canons*, as some erroneously suppose, but only to the *lawful* commands of the diocesan. This oath of canonical obedience taken by beneficed clergymen, originated at a much earlier date than the canons of 1603; and was certainly intended to resemble that, which,

under the feudal system, the *tenant*, took of fidelity and obedience to his *lord*. It is, in short, of a similar nature to the oath of allegiance to the sovereign. But as the laity in taking this oath to the king do not swear to obey the statute law; so the clergy by swearing canonical obedience, do not lay themselves under an oath to obey the canons. Stipendiary curates and lecturers are not required to take the oath of canonical obedience; which is a further proof that it is restricted to that obedience which an incumbent is to render to the bishop and his successors.

A bishop, likewise, on his consecration takes an oath of *due reverence and obedience to the archbishop* of his province.*

An incumbent may vacate his benefice either by death, or by cession in taking another living; for he cannot hold two livings without a dispensation.

Consecration to a bishoprick, likewise, vacates the parsonage or vicarage; but by the favour

* For a satisfactory elucidation of this subject, see a pamphlet on "the Nature of the Oath of Canonical Obedience, by Mr. "Vowles, one of the Proctors of the consistorial court of "Bristol."—Rivingtons.

of the crown, the new bishop may hold a living "*in commendam:*" that is, the living may be committed to his care till a proper pastor can be provided for it.

A benefice may also be vacated by resignation, deprivation, or in pursuance of some penal statutes against simony; for maintaining any doctrines derogatory to the king's supremacy, or to the 39 articles, liturgy and homilies; by neglecting after institution to read the liturgy and articles in the church, or make the declaration against popery, &c.

There are about 10,000 parishes in England; and it is said, that the average annual income of the parochial clergy, does not exceed much more than £.100.* A sum far too small for the exigencies of a family. And when it is considered that even this amount is reduced in many cases by the unequal distribution of the ecclesiastical revenue, the situation of the far greater part of the clergy will appear truly deplorable to every pious and feeling mind. How is it then that the payment of the clergy is thought by many such an intolerable grievance? It will perhaps be answered, "the tithes are a fruitful source of "contention, and expensive litigations." But it

* See an Essay on the Revenues of the Church of England.

may reasonably be doubted whether any other mode of supporting the clergy that the legislature might adopt instead of tithes, would be more cheerfully complied with by the majority of the people. For men do not willingly pay for that of which they imagine they have no need. The truth, however, is, that where the clergyman and his parishioners are under the due influence of that religion which they profess, there will be no dispute about tithes. For on the one hand, he will be anxious at all times to convince his flock, that he seeks not *theirs* but *them*;* and on the other hand, the people will by their liberality make it manifest, that they think it perfectly reasonable and just, that they who sow unto them spiritual things, should reap of their carnal things.†

The annual stipend of the *curates*, probably does not exceed on the average £.50; a sum barely sufficient to supply even a single man with the necessaries of life. The legislature has indeed of late somewhat ameliorated the condition of the poorer curates; but this useful body of men certainly requires some further national

* 2 Cor. ch. xii. ver. 14.

† 1 Cor. ch. ix. ver. 11.

provision. They who preach the gospel, ought at least to *exist* by it.

Besides these several spiritual persons, there are other subordinate officers of the church.

Churchwardens, as the representatives of the parish, are the guardians or keepers of the church. They are appointed yearly; sometimes by the parish, sometimes by the minister, and sometimes by both conjointly, according to the custom of the place.

Their office is to repair the church, and make rates for the defraying of the expence; they are also joined with the overseers, in the care and maintenance of the poor. They are authorized to keep the people orderly at church; and are possessed of many parochial powers, invested in them by various acts of parliament. It is the duty also of the churchwardens, to make presentments of all disorderly persons, &c. &c. at the bishop's or archdeacon's visitation.

Parish clerks and *sextons* are likewise regarded by the common law, as persons who have freeholds in their offices. They are generally appointed by the minister; but sometimes by the parish, where the establishment of the custom gives the inhabitants a civil right to the appointment.

By the 91st canon, the qualifications for a parish clerk, are, that he be "twenty years of "age at least; of honest conversation; sufficient "for his reading, writing, and also for his com- "petent skill in *singing*, if it may be."

As psalm-singing constitutes so delightful and profitable a part of public worship, attention should always be paid to this part of his qualification in the appointment of a parish clerk.

The rule laid down for church music in England almost a thousand years ago, was, that a plain and devout melody should be observed. And the rule prescribed by queen Elizabeth in her injunctions to the clergy, was, that "for "the comforting of such as delight in music, it "may be permitted, that in the beginning or in "the end of common prayer, either at morning "or evening, there may be sung an hymn, or "such like song, to the praise of Almighty God, "in the best melody and music that may be con- "veniently devised, having respect that the "sentence of the hymn or song may be under- "stood and perceived."

CHAPTER XVII.

Of DISSENTERS.

THE stated reading of such large portions of the sacred scriptures in every parish throughout the kingdom, is alone such a public blessing, as, in the judgment of many, more than balances all the imperfection, real or supposed, which attaches to the national church. Another obvious advantage arising from the establishment of the church of England, is the *perpetuity* of her creed and worship; notwithstanding the objections that have from time to time been brought against them, either from without or from within. The articles remain the same compendium of scriptural truth; the homilies, the same deposit of "godly and "wholesome doctrine;" and the liturgy, the same sublime and spiritual service as they ever were. They are all, too, as "necessary for "these times," as they were in former, and will be in all future generations; and therefore it is hoped that they will remain immovably fixed, to enlighten and comfort the people of this favoured land to the end of time.

It is not, however, to be expected in a country whose inhabitants enjoy the right of private judgment, that an unanimity of religious opinion should exist. Being no longer mentally enslaved by a superstitious and bigotted priesthood, we are permitted as well as enjoined to "search the "scriptures" for ourselves. Hence, however much it is to be lamented, there will necessarily be a diversity of sentiment with regard to matters both of faith and discipline.

It would be quite foreign from the design of this work to give even a brief historical sketch of the dissenters, since it proposes to state only the law as it relates to that respectable class of his Majesty's subjects.

The grounds of dissent are various. But it may be observed, that the puritans (the name by which the first dissenters were distinguished) separated chiefly on account of their objections to the government and ceremonies of the church; whilst they firmly believed in her doctrinal articles, which, it is presumed, are consonant with the faith of far the greater part of the non-conformists of the present day.

From the first period of the reformation, the protestants manifested that they entertained different views respecting many things; which were perhaps made too much of at that time by all

parties. Although these are now very generally considered to be of inferior moment, compared with the essentials of religion; yet good men are still not sufficiently agreed about them to permit them all to hold communion together in the established church.

The law, therefore, considers all persons as *dissenters* who, from any cause whatever, do not conform to the church of England in the established mode of religious worship, agreeably to the statutes 1 Eliz. ch. 1. and 13 and 14 Car. II. ch. 4, called acts of uniformity. By these acts, all dissenters are subjected to certain penalties; from which, however, they were happily relieved by statute 1 W. and M. ch. 18. called the toleration act, which was confirmed by 10 Anne, ch. 2.

These two acts exempt his Majesty's protestant subjects, dissenting from the church of England, from the penalties of the above and similar statutes, and from prosecution in the ecclesiastical courts, for or by reason of their non-conformity. The benefits of these acts extend only to such protestant dissenters as shall qualify themselves as is therein prescribed.

The acts of uniformity, then, do not apply to such dissenters as shall take the oaths of allegiance and supremacy, and make and subscribe the

declaration against popery, made 30 Car. II. ch. 1, against transubstantiation, invocation of saints, and the sacrifice of the mass.

With respect to dissenting places of worship; no assembly shall be allowed till the place of meeting be certified to the bishop of the diocese, or archdeacon, or justices at the quarter sessions, and be registered, and a certificate thereof given. The meeting-house must be *open* during public worship, the doors being neither barred, bolted, nor locked.

Dissenting teachers, to be qualified as such, must make and subscribe the said declaration against transubstantiation, &c. &c. at the quarter sessions; and declare their approbation of such parts of the 39 articles, as do not relate to the government, ceremonies, and power of the established church, or refer to infant baptism.

Quakers, to have the benefit of the act of toleration, shall make and subscribe the aforesaid declaration, and a declaration of fidelity to the king and of his supremacy; and shall subscribe a profession of their christian belief, in a form of words prescribed by the act.

Dissenting ministers qualified in one county, may officiate in any other, upon producing, if required, a certificate of being so qualified, and swearing and subscribing as above.

If any person misuse such qualified teacher, or disturb a dissenting congregation, the offender shall find two sureties to be bound by recognisance in £.50 each; and in default thereof, be committed to prison till next quarter sessions, and upon conviction forfeit £.20.

Neither the bishops, clerks of the peace, or justices of the quarter sessions can decline at their pleasure to license a meeting-house, or to qualify a dissenting minister; for the act *requires* the proper officers to *register* such places of meeting, &c. &c. upon its being certified. And if through ignorance or perverseness, any of them should refuse, a *mandamus*, upon proper application, will always be granted to compel them to do their duty.

It was for many years believed that the toleration act only suspended the penalties, but did not take away the *crime* of non-conformity. It was supposed that a dissenter might be fined for refusing to serve a civil office; and at the same time incur all the penalties of the test and corporation acts, if he took upon him any such office without taking the sacrament according to the form and custom of the church of England. This was certainly a very great hardship, and altogether inconsistent with the liberal and equitable spirit of the English constitution. At length,

about the year 1762, Allen Evans, Esquire, being chosen sheriff of London, refused to execute the office, upon the grounds of his being a dissenter, and of his not being able conscientiously to take the sacrament at church. For this he was prosecuted by the city of London, who brought the cause before the house of lords by appeal from the commissioners delegates, who had given judgment for the defendant. The house ordered this question to be proposed for the opinion of the judges: "How far the defendant might, in the "present case, be allowed to plead his disability "in bar of action." All the judges, excepting Mr. Baron Perrot, were of opinion, "That the "corporation act expressly rendered the dis-"senters ineligible and incapable of serving; "and that the toleration act amounted to *much* "*more* than a mere exemption from the penal-"ties of certain laws, by freeing the dissenters "from all obligation to take the sacrament at "church; abolishing the *crime* as well as penal-"ties of non-comformity, and allowing and "protecting the dissenting worship; and there-"fore, that the defendant may plead this disa-"bility in bar of the present action." The whole of the arguments of the judges were summed up by the learned lord Mansfield; and upon this ground the house of lords affirmed *nem. con.*

the judgment of the commissioners delegates. It was the opinion of lord Mansfield, that the dissenting worship was not merely *connived* at, but "*established.*" And doctor Furneaux informs us, that Mr. speaker Onslow likewise observed, in a conversation with which he honoured him, "that as far as the authority of "the law could go in point of *protection*, the "dissenters were as *truly established* as the "church of England; and that an established "church, as distinguished from their places of "worship, was, properly speaking, only an "*endowed church.*"

Ever since the toleration act passed, it has been the invariable practice of our kings in their speeches to their parliaments upon their accession to the throne; after declaring their affection to the church of England and resolution to support it, to add, that they will maintain the *toleration* inviolable.

By two statutes of 13 Car. II. ch. 1, called the corporation and test acts, no person can be legally elected to any office relating to the government of any city or corporation, unless within a twelvemonth *before*, he has received the sacrament of the Lord's Supper according to the rites of the church of England; and unless at the same time that he takes the oath

of office, he also take the oath of allegiance and supremacy. And by the test act, all officers, civil and military, must take the oaths, &c. &c. within *six months after* their admission; and also within *three months*, take the sacrament at church, upon forfeiture of £.500, and disability to hold the said office.

But, as through inadvertence, some may neglect to comply with the law, an act is passed before the end of every session of parliament, to indemnify such persons, provided they qualify themselves within a time specified in the act; and provided also, judgment has not been given against them for their former omission. A protestant dissenter may sit in either house of parliament, being duly qualified and taking the usual oaths.

The *Roman catholics* do not enjoy altogether the same privilege as other dissenters; since they cannot sit in either house of parliament. But all the severe and cruel restrictions and penalties to which they were formerly exposed, are now removed by statute 31 Geo. III. ch. 32; which may be called the *toleration act* of the catholics. This act places them and their worship under the same protection as the protestant dissenters; whilst it leaves them equally under the disabilities of the corporation and test acts.

The legislature in its wisdom having then seen fit not only to abolish the *persecution*, but to enact the *protection* of religious worship, under every form; it is the bounden duty of all private christians, to exercise mutual charity and forbearance one towards another. "Ephraim "should no longer envy Judah, and Judah "should no more vex Ephraim."

This christian conduct is enjoined not only in the scriptures, but comes likewise recommended to us by the highest earthly authority. At the commencement of the last parliament, the convocation of the province of Canterbury assured his Majesty, "that they would recommend, in "matters of conscience, mutual forbearance and "forgiveness." To which his Majesty graciously answered, "You may rely on my "unshaken determination to give every encou-"ragement and support to your exertions in "maintaining that mutual forbearance and for-"giveness which so peculiarly belong to the "true spirit and character of the reformed "church, and which are so eminently calculated "to promote the great and important objects of "our holy religion."

CHAPTER XVIII.

Of the CIVIL STATE.

The laity are usually divided into three distinct states; namely, the civil, the military, and the maritime.

The civil state comprehends all orders of men from the highest peer to the lowest peasant, which are not included among the clergy, or amongst either the army or the navy. It may also take in individuals of the three other orders, since a nobleman, a knight, a gentleman, or a peasant may become either a divine, a soldier, or a seaman.

The civil state is divided into the nobility and commonalty.

The nobility are distinguished by the different titles of dukes, marquisses, earls, viscounts, and barons. At the time of the conquest, the temporal nobility consisted only of earls and barons. Long after that period, wealth was considered the only nobility, as there was then but little personal property; and a right to a seat in parliament depended entirely upon the tenure of

landed estate. Agreeably to the general principle in the feudal system, every tenant of land had a right and was obliged to attend the court of his lord. Hence, every tenant *in capite*, i. e. the tenant of the king, was bound to attend the king's court or parliament, the great court baron of the nation.

With respect to the origin of peerage: according to Selden, from the conquest to the latter end of the reign of king John, all who held any quantity of land of the king, had, without exception, a *right* to be summoned to parliament. In the last year of that prince, however, a very important distinction was introduced; viz. the division of these tenants into greater and lesser barons. About this period, *tenure* began to be disregarded, and persons who held no lands of the king were summoned to parliament by *writ*. This custom continued till the 11th of Richard II. when the practice of creating peers by *letters patent* first commenced. In that year, John de Beauchamp, of Holt, in Worcestershire, steward of the household to Richard II. was created by patent, lord Beauchamp, baron of Kidderminster, in tail male; and since that time peerages have been created both by writ and patent, without any regard to tenure and estate.

The barony of Kidderminster, which had been several times extinct, was revived in 1711 by queen Anne, who created Thomas Foley, Esq. baron Foley of Kidderminster. It again became extinct in 1765; and in 1776 was conferred by his present Majesty upon Thomas Foley, Esq. the grandfather of the noble lord, who now enjoys this very ancient and distinguished peerage.

With respect to the origin of the title of a *duke:* the latin name of duke, which was very frequent among the Saxons, signified nothing more than the commanders of their armies. But after the Norman conquest, our kings being dukes of Normandy, would not confer the honour of the title upon their subjects, until the reign of Edward III. That monarch about a year before he assumed the title of king of France, introduced this order of nobility in 1337, by creating his son, Edward the Black Prince, duke of Cornwall, to inflame the military ardour and ambition of his earls and barons.* Afterwards others were raised to the same rank, but the title became quite extinct in the reign of Elizabeth, and was revived about the year 1622 by James I. who created George Villiers, duke of Buckingham.

* See HENRY's History of England.

The title of a *marquis*, is taken from his office to guard the frontiers and limits of the kingdom; which were called the *marches* of Wales and Scotland, when they were enemy's countries. The term is derived from the teutonic word *marche*, a limit. This title was first given as a mere ensign of honour, in the reign of Richard II. who created Robert Vere, earl of Oxford, marquis of Dublin; but the authority of lords marches, or marquisses, was not abolished till the 27th of Henry VIII.

An *earl* is a title of nobility so ancient, that its origin cannot be traced out. Among the Saxons, the earls were called *ealdormen*, or elder men; and also *schiremen*, because each of them had the government of a separate district or shire. After the irruption of the Danes they were called *earles*, and after the conquest, *counts*. But although they did not long retain that title, yet to this day the shires are called counties, from thence; and the wives of earls, countesses.

Henry IV. being either by his wife, his mother, or his sisters, actually related or allied to every earl in the kingdom, had the address to acknowledge that relation, in all his letters and other public acts; and hence the usage of our kings in all writs, commissions, &c. wherein they mention a peer of the rank of an

earl, of styling him "*trusty and well-beloved* "*cousin.*"

The title of *viscount* was not used till the 18th year of Henry VI. who created John Beaumont a peer, by the name of viscount Beaumont.

But the most ancient, general, and universal title of nobility, though the lowest in degree, is that of a *baron.* The most probable opinion respecting the origin of this title, is, that the ancient barons were the same as our lords of manors; to which opinion, the name of court baron gives some sanction. It has been already remarked, that all lords of manors, or barons, who held of the king *in capite*, had seats in parliament. In this king's reign, the number of barons was so great and troublesome, that John found it expedient to divide them; and to summon only the greater barons in person. It is generally supposed that he left the barons of smaller note to be summoned by the sheriff, and to sit by representation with the more powerful nobility. This, however, gave rise to the ultimate separation of the parliament into two houses. This important event was gradually produced and finally accomplished about the year 1295, or twenty-third year of the reign of Edward I. when the knights of the shire withdrawing from the house of peers, and uniting

their interests and votes with the burgesses, constituted the house of commons in its present form.

Here we are naturally led to admire the inscrutable ways of Divine Providence, in making the actions of a tyrannical prince subservient to the liberties of the people. Nothing could be more remote from the mind of king John, than the imparting to the nation the vast benefits which it derives from having two houses of parliament. Such, however, was the effect of his arbitrary division of the nobility into great and little barons.

Exclusively of their capacity as members of parliament and hereditary counsellors of the crown, the nobility are distinguished from the commonalty by other circumstances. In all cases of treason and felony, and misprision of the same, a nobleman shall be tried by his *peers*; but for misdemeanors, as libels, riots and the like, he may be tried like a commoner, by a jury.

This privilege in criminal cases does not extend to the bishops; for although they are lords of parliament, they are not enobled in blood; and of course are not peers with the rest of the lords. *Peeresses*, however, enjoy this distinction; and if a peeress in her own right shall marry a commoner, she still remains noble,

and shall be tried by her peers; but if she be noble only by marriage, and afterwards marry a commoner, she loses her dignity and falls into the rank of her husband. Yet if a duchess dowager marry a baron, she continues a duchess still, because all the nobility are peers.

Peers and peeresses cannot be arrested in civil cases; and have many peculiar privileges attached to their dignity in the course of judicial proceedings.

A peer sitting in judgment gives not his verdict upon oath, like a common juryman, but *upon his honour*. So also he answers to bills in chancery, upon his honour, not upon his oath. But if he be examined in court as a *witness*, either in civil or criminal cases, he must be *sworn* like any other man.

The law shews great tenderness respecting the *honour* of peers. Hence, it is much more penal to spread false reports of them, than of commoners. Scandal against a peer of the realm is called, "*scandalum magnatum*," and is subjected to peculiar punishment, by various acts of parliament.

The refraining, however, merely from "speaking evil of dignities," is a very negative sort of virtue. It is our bounden duty, upon all occasions, to treat our superiors with reverence.

Whether, therefore, we dedicate a book to "the most excellent Theophilus," or address a letter to "the most excellent governor Felix," or to an "elect lady;" whether we "appeal to "Cæsar," make a defence before "king Agrip-"pa," or reply to the rude interruption of the "most noble Festus;" we must be "courteous" to all, rendering them the honour that is due to their respective rank.

Nobility cannot be destroyed but by death or attainder. Even the king by his prerogative cannot *degrade* a peer. This power is vested solely in the legislature. It is a popular notion, that whenever the king makes a peer, he is obliged, if necessary, to allow him a certain income to support his dignity; or if a nobleman by any means become poor, that then the crown must grant him a sufficiency to maintain his rank; but this is a very great mistake. The fact is, that in the reign of Edward IV. George Neville, duke of Bedford, was degraded from his nobility by an act of parliament, on account of his poverty. This solitary instance shews us both the authority of parliament, and the tenderness with which it exercises its uncontroulable powers.

The law regards all the *commonalty* as equals, in respect of their want of nobility; and yet the people, as distinguished from the peerage, are

divided into different degrees. The highest personal dignity, after a nobleman, is a *knight* of the order of St. George, or *of the garter;* first instituted by Edward III. 1344. Next follows (after certain *official* dignities) a *knight banneret*, if conferred upon the person by the king himself in the field, under the royal banners, in time of war; otherwise, he ranks after *baronets*, who are next in order.

The title of baronet was first created in 1611, by king James I. to raise money to enable him to reduce the province of Ulster; and hence, all baronets have the arms of Ulster added to their family coat. Rapin says, that "that one "hundred gentlemen advanced each one thou- "sand pounds, for which this title was conferred "upon them." But Mr. Hume asserts, that "two hundred patents of that species of knight- "hood were disposed of for so many thousand "pounds;" and attributes the invention of the title, and of this mode of raising money, to the earl of Salisbury, the king's minister. It is a title of inheritance, created by letters patent, and usually descends to the issue male.

Knights of the *bath* follow next in order of dignity. They are so called from the ceremony of *bathing* the night before their creation. This order was instituted by Henry IV. and revived by George I.

The lowest order of knighthood, though the most ancient, are *knights bachelors*. King Alfred conferred this dignity on his son Athelston, but it is now fallen into disuse.

These are the only titles of dignity among commoners; those of *esquires* and *gentlemen* being merely names of worship or respect. But before these, all colonels, serjeants at law, and doctors in the three learned professions, take the precedence.

The eldest sons of knights, and the eldest sons of the younger sons of peers in perpetual succession, justices of the peace, and others who bear offices of trust under the king, are denominated *esquires*. Whilst all those who study in the universities, and profess the liberal sciences, and can live without manual labour, are styled *gentlemen*. A *yeoman* is one who possesseth a freehold of £.40 a year, and is qualified to do every act which the law requires to be done by one who is an *honest and lawful man*.

The rest of the community are called *tradesmen*, *artificers*, and *labourers*.

In all legal proceedings every man must be distinguished by the name of his estate, degree, or mystery, in conformity to the statute of 1 Hen. V. ch. 5.

The rules of precedence in England are settled either by established custom, by express statutes,

or by the king's letters patent. The following table exhibits the priority of rank, from the sovereign to the peasant.

Table of Precedency of Rank.

The KING.
The PRINCE of WALES.
The Princes, Sons of the King.
Brothers of the King.
Uncles of the King.
Grandsons of the King.
Sons of the Brothers or Sisters of the King.
Archbishop of Canterbury, Lord Primate of all England.
The Lord High Chancellor, or Lord Keeper.
The Archbishop of York, Primate of England.
The Lord High Treasurer.
The Lord President of the Privy Council.
The Lord Privy Seal.
The Lord High Constable.
Earl Marshal.
The Lord High Admiral.
The Lord Steward of his Majesty's Household.
The Lord Chamberlain of his Majesty's Household.
Dukes, according to their Patents.
Marquisses, according to their Patents.
Eldest Sons of Dukes.
Earls, according to their Patents.
Eldest Sons of Marquisses.
Younger Sons of Dukes.
Viscounts, according to their Patents.
Eldest Sons of Earls.

Younger Sons of Marquisses.

The Bishops of London, Durham, Winchester, and all other Bishops, according to their Seniority of Consecration.

Barons, according to their Patents.

The Speaker of the House of Commons.

Eldest Sons of Viscounts.

Younger Sons of Earls.

Eldest Sons of Barons.

Knights of the Garter.

Privy Counsellors.

The Chancellor of the Exchequer.

The Chancellor of the Duchy of Lancaster.

The Lord Chief Justice of the Court of King's Bench.

The Master of the Rolls.

The Lord Chief Justice of the Court of Common Pleas.

The Lord Chief Baron of the Exchequer.

Judges and Barons of the degree of the *Coife* of the said Court, according to seniority.

Bannerets, made by the King himself in person, under the royal standard, displayed in an army royal, in open war, for the term of their lives, and no longer.

Younger Sons of Viscounts.

Younger Sons of Barons.

Baronets.

Bannerets, not made by the King himself in person.

Knights of the Bath.

Knights Bachelors.

Eldest Sons of the younger Sons of Peers.

Eldest Sons of Baronets.

Eldest Sons of Knights of the Garter.

Eldest Sons of Bannerets.

Eldest Sons of Knights of the Bath.

Eldest Sons of Knights.

Younger Sons of Baronets.

Esquires of the King's Body.
Gentlemen of the Privy Chamber.
Esquires of the Knights of the Bath.
Esquires by Creation.
Esquires by Office.
Younger Sons of Knights of the Garter.
Younger Sons of Bannerets of both kinds.
Younger Sons of Knights of the Bath.
Younger Sons of Knights Bachelors.
Gentlemen entitled to bear arms.
Clergymen, Barristers at Law, Physicians, and Officers in the Navy and Army, who are Gentlemen by profession.
Yeomen.
Tradesmen.
Artificers.
Labourers.

But not to forget the ladies. It may be observed generally, that married women are intitled to the same rank amongst themselves as their husbands enjoy amongst men; and widows retain the rank of their deceased husbands, excepting such rank were merely professional or official. Unmarried women are allowed at all times the same rank amongst females as their eldest brothers bear amongst men during the lives of their fathers.

Such is the difference of rank which the laws and customs of England have wisely established among us. Subordination is the very bond of

society; and without it, no civilized state can exist, or enjoy any practical liberty. As the different bodies in the planetary system gravitate towards each other and towards the sun, as well as the sun towards them, and are thereby preserved from confusion and destruction; so the reciprocal influence which the various ranks in society have upon each other, produces that order and harmony which constitute the public peace and happiness.

Much has been said of late years about *equality*. All men, it is said, are by nature *equal;* and from this proposition a conclusion has been drawn, that all have equal *rights*. Every man, indeed, is born in *sin*, and is at first a helpless creature; and in that sense, all men come into the world upon a level. But in no other respect can they be said to be equal. From our earliest moments we manifest an inequality of disposition, capacity, and inclination; which, "growing with our growth," necessarily leads to that distinction of honour, wealth, and power, which we see obtains in the world.

To assert any other kind of natural equality than that of sinfulness and imbecility, is to resist the plainest evidences of reason and revelation, and to falsify the experience of all nations in every age of the world.

If however by the term *equality* nothing more is meant, than that all men have an equal right to justice or the possession of their rights; so obvious a truth is readily admitted. And where, it may be asked, is this *theory* reduced to *practice* if not in England? In vain will justice ever be looked for on earth if it is not to be found in the British Constitution: which equally protects the peer and the peasant; the rich and the poor; the learned and the ignorant; the master and the servant; and extends its wise provisions equally to all, without any distinction of sex, condition, or age.

It will, probably, be found upon enquiry, that those nations enjoy the highest degree of rational liberty, whose inhabitants are divided into the greatest number of degrees of rank; and where the highest honour, except the supreme executive authority, is accessible to those who compose the lowest order in society. Such is precisely the case in this happy country. Here the meanest peasant may by his industry, integrity, and skill, arrive at the highest post in the church, in the army, or the navy. He may sit in the chief seats of justice, or become the most dignified person in either house of parliament. In short, the hand which now throws the shuttle, or grasps

the plough, may possibly one day guide the helm of state.

If, then, the good order, peace, and happiness of the community depend so much on distinction of rank, every considerate and loyal man will pay a scrupulous regard to all those matters of ceremony and etiquette which are so conducive to its due preservation. And in this view of the subject, a conscientious reverence of our superiors, and a due attention to all the minutiæ which are comprehended in the term *politeness*, evidently become a christian duty.

CHAPTER XIX.

Of the ARMY and NAVY.

Almost every page of history is "polluted "with blood." Pride, and lust, and envy, and ambition, have in all ages conspired against the peace and disturbed the repose of men. These vile and ungovernable passions have at all times been the cause of that "distress of nations," which is the necessary result of all wars. "From "whence come wars and fightings among you?

"come they not hence, even of your lusts?" Self-preservation, however, being the first law of nature, those peaceable nations which are exposed to the rapacity of neighbouring powers, have found it necessary, for their own safety, to assume a warlike character. In every other view, the profession of a soldier is inconsistent in a free state; and, indeed, the laws of England know of no such thing amongst Britons as a *perpetual* soldier. The proper idea of an English soldier is that of a free citizen voluntarily engaging for a time in a military employment, for the defence of his king and country; and not of an armed slave of power, overawing his fellow-countrymen into subjection to a despotic ruler.

All historians agree, that the great king Alfred first settled a national militia in England, and made all his subjects soldiers, by a prudent discipline. Under our Saxon monarchs, armies were entrusted to the command of the dukes, or heretocks, who were vested with very considerable powers: but it does not appear that the kings of England had any body-guard until the reign of Henry VII. This prince at his coronation instituted, partly from pomp, but chiefly for personal security, a band of fifty archers, who were termed yeomen of the guard. Henry, conscious that his title to the crown was very questionable, was

aware that so novel an appearance might naturally impress the people with the idea, that he entertained a jealous diffidence of his subjects; lest, therefore, they should think that this force was raised merely to intimidate them on the present occasion, he declared the institution to be perpetual. Such was the origin of the band of yeomanry, which is continued to this day.

A material alteration took place in our military system after the Norman conquest. King William enforced the feudal law in all its rigour; the whole of which is builded on a military plan. He divided all the lands in the kingdom into knight's fees, in number about 60,215; and for every knight's fee, a knight or soldier, *miles*, was bound to attend the king in his wars for *forty* days in a year; in which time a campaign was usually finished, and a kingdom either conquered or victorious. But in process of time, men grew weary of this bodily fatigue and hardship, and military service in person was exchanged for pecuniary aids to the prince as early as the reign of Henry II. At length the military tenures were abolished, at the restoration, by statute 12 Car. II. ch. 24.

In case, however, of domestic insurrection, or prospect of foreign invasion, provision was made by law for the defence and security of the

nation. The statutes of 27 Hen. II. and 13 Edw. I. ch. 6. obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace; and constables were appointed in all the hundreds, to see that such arms were provided. No man, however, was compelled to go out of the kingdom, nor out of his shire, but on the most urgent necessity; nor provide soldiers, unless by consent of parliament.

Another important change took place in the military system about the time of Henry VIII. Lord-lieutenants were then introduced as standing representatives of the crown, to keep the several counties in military order; and in this state, things continued till the repeal of the statutes of armour, in the reign of James I.

A question was at length started in the long parliament, in the reign of the first Charles, how far the power of the militia did inherently reside in the king, since it rested merely upon immemorial usage. Great heat and animosity were employed in debating this delicate and unconstitutional question; the decision of which, was the cause of the fatal rupture between that unfortunate monarch and the parliament. For the two houses not only denied the prerogative of the crown, but illegally seized into their own hands

the whole power and command of the militia. But the sole right of the king to govern and command the military state, was afterwards recognised by 13 and 14 Car. II. Rules were laid down for putting the whole military power into a method of regular subordination; and the militia as it now stands by law, is principally builded upon the statutes then enacted, although the laws have been frequently altered and amended, down to the present day.

The militia is only for the defence and security of the nation: and it is unlawful, and contrary to the bill of rights, for the king of England to have a standing army in time of peace; unless it be with the consent of parliament.

But as the kingdom would be in great danger from the standing armies upon the continent, were it left at any time entirely without an armed force; the legislature has annually thought it necessary for the safety of the realm, to maintain an army even in time of peace; which, however, is *ipso facto* disbanded at the end of the year, unless continued by parliament.

This military force is kept in due order and discipline by an act of parliament, which passes annually "to punish mutiny and desertion," even with death itself, if an offender should be adjudged by a court martial to suffer it.

Soldiers enjoy many advantages. The royal hospital at Chelsea affords a comfortable asylum for such as are worn out in the service; and many receive pensions for life, upon being discharged. A soldier, too, may settle in any town in the kingdom, without exception, and exercise any trade he pleases, notwithstanding any law, custom, or charter to the contrary. When in actual service, a soldier may dispose of his wages and personal property by a nuncupative will, without those forms and expences which in other cases are necessary to make them effectual in law. Besides these privileges, the soldier enjoys some others; and one, which is very conducive to his comfort, when at a distance, from all endeared connections: all non-commissioned officers and privates *may send and receive letters free of postage*, under certain restrictions.

By the *maritime* state, is intended the whole of the *royal navy*, "the wooden walls of Old "England," the floating bulwark of the island.

The navy is much more congenial with the true principles of the constitution than the army, inasmuch as the liberties of the country cannot be endangered by it.

The existence of the English navy is very ancient; and our kings, in all periods of our history, have paid great attention to its improve-

ment. It had arrived to such a degree of perfection in the 12th century, that the code of maritime laws, called the laws of Oleron, was confessedly composed by our king Richard I. at the isle of Oleron, on the coast of France, then part of the possessions of the crown of England.

For many ages the royal navy was far from numerous; even in the reign of Elizabeth, the number of royal ships did not exceed *thirty-three*, but is now increased to *one thousand one hundred and forty-one*. As our commerce, however, extended, the envy of other nations was excited; we had more territory and *floating* property to defend; and consequently, the enlargement of our naval force gradually became more and more necessary.

The present unrivalled state of the royal navy is, doubtless, very much owing to the salutary provisions of the statutes called the "*navigation* "*acts*." Perhaps a combination of *second* causes may have conduced to that naval skill and prowess, by which we are so eminently distinguished above all other nations. But we must ascribe it all to the wisdom and goodness of God, who always accomplishes his purposes by the most suitable means. He has been pleased to favour us with peculiar blessings. "He hath not dealt "so with any nation." Our privileges being

deposited in this small island of the sea, how appropriate are the means of defence with which his Providence has furnished us! How have these means been enlarged, in proportion as our liberties have been increased by our own laws; or endangered by the envy, ambition, and arrogance of foreign enemies!

The navy is manned principally by the king's commission, empowering the lords of the admiralty to *impress* seamen, as the state of public affairs may require. This method of obtaining sailors appears at first sight to be an invasion of the liberty of the subject. But its lawfulness is unquestionable, and will not admit of doubt in any court of justice.

This public measure has been complained of ever since England has had a navy. But the practice being established by immemorial custom, as well as implied in various statutes, and having been brought down from the earliest period to the present time in a regular succession of precedents, it was the opinion of Sir Michael Foster and others, that it is part of the common law of the land. And, doubtless, if the evil complained of admitted of a remedy compatible with the safety of the community, the enlightened legislature of a free people would long ere now have discovered and enacted it.

It is state necessity only which justifies it. "The practice," says Lord Mansfield, "is "deduced from that trite maxim of the consti- "tutional law of England," 'that private mis- 'chief had better be submitted to, than that pub- 'lic detriment and inconvenience should ensue.'

The practice, too, is plainly defensible from analogy. We have seen, that in case of a foreign invasion or domestic insurrection, the sheriff has the power of calling out the "*posse comitatus*" to suppress the one or repel the other. Now supposing that the people of Norfolk were called out under either of the above circumstances; would it not be folly in them to resist the sheriff, and plead in excuse that they were oppressed, because the inhabitants of Wales were peaceably following their occupations? Every wise man must see, that the *locality* and urgency of the danger legalize the promptitude and partiality employed in applying the remedy. So on the breaking out of a war, the scene of danger, or rather the place where we can most effectually prevent it, is the high sea. The admiralty, therefore, calls out its *posse comitatus* (if the expression may be allowed), and it is absurd in seafaring men to complain of injustice, merely because the landsmen are not compelled to go with them. A seaman can never

be employed but against the enemies of his country. No true Englishman, then, when his services are called for to protect the public safety, will enquire, whether the king's right to compel him to defend his country be the custom of England, or a grant of the legislature. Every measure should, indeed, be adopted to lessen the evil complained of; but after all, it will probably be found, in fact, that the spur of the *press* is wanted to man the navy with effect.*

There are, however, other methods of supplying the navy with seamen, besides *pressing*. Parishes may bind out poor boys apprentices to merchantmen, who shall be protected from the impress for the first three years; and if they are impressed afterwards, their masters shall be allowed their wages. Great advantages in point of wages, are given to volunteer seamen, in order to induce them to enter into the king's service: and every foreign seaman who, during a war, shall serve two years in any man of war, merchantman, or privateer, is *ipso facto* naturalized.

There are certain express rules, articles, and orders, first enacted by the legislature, soon after the restoration, but since amended as-

* On this subject, see JUNIUS, Letter 74.

circumstances arose; by which a regular discipline is kept up in the navy. In these articles, every possible offence is specified, and its proper punishment annexed.

The privileges of sailors are much the same as those enjoyed by soldiers. And Greenwich hospital is to disabled seamen what Chelsea is to wounded soldiers. Neither seamen on board a king's ship, nor a soldier, can be arrested for any debt, unless the amount is sworn to be not less than £.20.

The *marines* are likewise a very important part of the national defence. This useful body of men are soldiers who serve either on shore or on shipboard. They are under the orders of the lords of the admiralty, who exercise their authority over them by virtue of an annual act "for the regulation of his Majesty's marine "forces while on shore."

CHAPTER XX.

Of CORPORATIONS.

All personal rights die with the person; but there are rights which the benefit of society requires to be continued when the person in whom they were first invested is no more. Yet as the formal revival and recognition of these rights in a succession of persons would always be inconvenient and sometimes impracticable, it has been found necessary to create *artificial* persons, who may perpetually maintain and enjoy the original rights by a sort of immortality: these artificial persons are what we call bodies politic, bodies corporate, or corporations. The advantages which are thus secured to the interests of religion, learning, and commerce, have been found by experience to be very great.

A corporation may be very fitly compared to a river; which is the same river, although its parts are continually changing and passing

away.* And as the adjacent fields are fertilized by it from age to age ; so corporations continue to impart to all within their precincts, the various privileges and benefits with which they were at first endowed.

With respect to their origin, Plutarch informs us that they were invented by Numa, as a politic measure to settle the animosities between the Romans and the Sabines. The introduction of them, however, into Europe, seems to have been the work of Lewis the Gross, who erected the French boroughs into corporations, with a view to deliver the people from the feudal slavery, and to give them protection by means of certain privileges and a separate jurisdiction. It appears, from doomsday, that the greatest boroughs with us, were, at the time of the conquest, little more than country villages ; the inhabitants of which were only a number of low dependant tradesmen, not incorporated, and living without any particular civil tie.

The first corporation established in England was the fraternity of St. Thomas à Becket, under the name of "Merchant adventurers," incorporated in the year 1564.

* "ille
"Labitur, et labetur in omne volubilis ævum."
Hor. Ep. ii. Lib. 1.

There are two sorts of corporations regarded by the laws of England; namely, *aggregate* and *sole*.

A corporation *aggregate* consists of many persons united together into one society, and is kept up by perpetual succession. Of which kind, are the mayor and commonalty of a city or borough; the head and fellows of a college; and the dean and chapter of a cathedral.

A corporation *sole* consists of a single person, and his successors, who are incorporated by law, in order to give them some legal advantages, particularly that of perpetuity, which they could not have in their natural persons. In this sense, the king is a corporation *sole;* so is a bishop; some deans and prebendaries; and so is every parson and vicar. This species of corporation is a considerable refinement by the English upon the original Roman principle, which required *three* persons to constitute a corporate body.

If it be considered, that the freehold of the tithes, &c. was originally given to the clergyman of a parish, as a temporal recompence for his spiritual services to the people, and intended to be so to all his successors; the wisdom of the law in making a parson and vicar a body corporate, will be very manifest. For had not the law

prevented it, the freehold would have descended to their heirs, and not to their successors.

There is still another division of bodies corporate; and that is, into *ecclesiastical* and *lay;* in which, either *aggregate* or sole corporations may be comprehended.

Ecclesiastical corporations, are where the members that compose them, are entirely spiritual persons; such as bishops, certain deans, and prebendaries; all archdeacons, parsons, and vicars; and these are *sole* corporations. Deans and chapters are corporations *aggregate.*

These corporations were instituted for the promoting of religion, and the perpetuating of its benefits in the world. *Lay* corporations are of two sorts, *civil* and *eleemosynary.*

Civil corporations are such as the king, who is made a corporation, to prevent the possibility of a vacancy of the throne; for immediately upon the demise of the king, his successor is in possession of all the regal rights and dignities. The mayor and commonalty, bailiff and burgesses, of London, Westminster, and other towns, erected into corporations for the good government of their respective districts, and the promotion of trade and commerce; the colleges of physicians and surgeons for the advancement of medical knowledge; the royal society; the

society of antiquarians; and the two universities for the extension of the various branches of literature; are all civil corporations.

Eleemosynary corporations are all hospitals for the maintenance of the poor, sick, and impotent; and such colleges as are founded for two purposes, viz. for the promotion of piety and learning, and for imparting assistance to the members of those bodies, to enable them the better to prosecute their devotion and studies.

Corporations may be created either by common law, by prescription, or by act of parliament. But as the king's consent is absolutely necessary, every one of these methods may be reduced to this of the king's letters patent, or charter of corporation; for in all cases the king's consent is either implied or expressly given.

When a corporation is erected, it is necessary that a name be given to it; and by that name only it must sue and be sued, and do all legal acts. When corporations are once formed and named, they acquire various powers, rights, capacities, and incapacities. Some of these are incident to all corporations; such as the right of electing members, to keep up perpetual succession; the power of doing all such legal acts as natural persons may perform; of purchasing lands, and holding them for themselves and successors; of

having a common seal, the affixing of which makes one joint assent of the whole community; and of making bye-laws, for the better government of the society: which laws, however, must not be contrary to the laws of the land, otherwise they are void.

There are likewise certain disabilities attached to aggregate corporations. They cannot commit treason, or any other offence, in their corporate capacity; although some individual members may be found so lost to every sense of duty, as to commit the most flagrant crimes. Many other things of this sort that can be done and suffered by individuals, but which cannot be committed or incurred by corporate bodies as such, may be reckoned among their incapacities.

The particular *duty* of a corporation is to act up to the end or design, whatever it be, for which it was created by its founder. But as all corporate bodies, like individuals, are frail and liable to err, the law has provided proper persons to *visit*, inquire into, and correct, all improprieties that arise in any corporation, whether sole or aggregate; and to rectify their irregularities and misconduct.

Formerly the pope, but now the king, is the legal *visitor* of the archbishop or metropolitan; the archbishop has the charge of all the bishops

in his province; and the bishops superintend all deans and chapters, parsons, vicars, and all other spiritual corporations in their respective dioceses.

The founders, their heirs or assigns, are the visitors of all *lay* corporations, whether civil or eleemosynary.

By the *founder* of a corporation, the law, in the strict and original sense of the term, understands the king, who only can incorporate a society; so that in civil corporations, there is no other founder but the king. But with respect to eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the right of visitation devolves, by law, to the patron or endower, his heirs and assigns.

The king exercises his jurisdiction over civil corporations in his court of king's bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed. It is not, however, customary in professional language, to call this authority of the king's bench, a visitorial power.

If the endower of an eleemosynary corporation appoint no one as a visitor, that office devolves on the bishop of the diocese.

Corporations may be *dissolved* by act of parliament, which is boundless in its operation; by the

natural death of *all* its members, in cases of aggregate corporations; by surrender of their franchises into the hands of the king; and by forfeiture of their charters, through negligence or abuse of their privileges. When a corporation has abused its franchise, the method taken to declare it void, is to bring an information, in nature of a writ of *quo warranto*, to inquire by what warrant the members *now* exercise their corporate power, having forfeited it by such and such proceedings. When a corporation is dissolved, the endowment reverts to the heirs of the patron who endowed it. By such dissolution, the debts of a corporation are totally extinguished, so that its individual members are by no means personally or collectively accountable for them.

King Charles II. enforcing the law by issuing the writ of *quo warranto* against the city of London, the rest of the corporations throughout the kingdom were induced to surrender their charters into his hands. The king afterwards restored the charters upon certain conditions, whereby he obtained large sums of money. But after the revolution, the statute 2 W. and M. ch. 8. reversed the judgment against the city of London; and enacted, that its franchises shall never more be forfeited for any cause whatsoever.

CHAPTER XXI.

Of the FEUDAL SYSTEM.

The beauty or value of any thing, is frequently best illustrated by comparing it with its contrast. Thus an object never looks so white as when opposed to one that is black. Nothing heightens our enjoyment of the verdure of spring or the fruitfulness of autumn, so much as the remembrance of the barren aspect and chilling frosts of winter. So if we wish to feel a lively gratitude for the possession of our present civil and religious liberties, we must obtain a clear comprehension of the feudal system, by which our heroic ancestors were for many ages most grievously oppressed. Indeed, some acquaintance with the feudal system is indispensable to the acquiring of a competent knowledge of the rise and progress of our present constitution.

The feudal system originated with the northern tribes, who introduced it into all the Roman provinces which they subdued, in order that they might secure themselves from the revolt of

their newly acquired subjects. At the conquest of England by the Saxons, the invaders thought themselves too well secured by the sea, to make it necessary to adopt a military-establishment; and therefore they annexed but small quantities of land to the offices which were conferred upon their leaders, who continued in their separate commands only during pleasure. But these precarious conditions were not congenial with the feelings of the Norman barons, who had relinquished greater advantages in their own country to follow the fortunes of William. The Conqueror, therefore, in order to keep possession of England, was obliged to copy the military tenures, which now universally prevailed upon the continent. Such was the introduction of this rigorous law into this island. A law, which, whilst it exposed the inhabitants to various hardships, afforded them the advantages of mutual protection, and of promptitude both of council and action.

The fundamental maxim of the feudal law, is, that the king is the supreme lord of all the landed property in the kingdom. This he grants out in large districts to the chief men in the realm, who deal it out in smaller parcels to their inferiors. These allotments were originally called feoda, feuds, fiefs, or fees; signifying in the

northern language, a conditional stipend or reward.

The condition annexed to every feud was, that the possessor should do service faithfully both at home and abroad to him by whom it was granted. For which purpose he took the oath of fealty; and if he violated his oath by not performing the stipulated service, or by deserting his lord in battle, the lands were again to revert to their original owner. Upon this foundation of the feudal law was raised a proper military system, by which an army of feudatories was always ready at a short notice to muster for the defence of the country. The Conqueror, however, was not able fully to establish the feudal law at once in England; but at length, about the 20th year of his reign, he summoned the nobility to attend him at Sarum, where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person, as though they had really received their estates from his bountiful hands. The consequence of which was the compiling of the famous book called *Doomsday*; which ancient record is now remaining in the exchequer, fair and legible, consisting of two volumes, which contain a survey of all the lands in England. It was begun by five justices,

assigned for that purpose in each county, in the year 1081, and finished in 1086. This book is of such high authority in deciding whether lands are ancient demesne or not, that from it there is no appeal. The Conqueror himself submitted to its decision in some cases wherein he was concerned.

William and his son Rufus, well skilled in the niceties of the feudal system, kept up with a high hand all the rigours of its severe doctrines.

In the reign of John, the feudal grievances became so intolerable, that they occasioned his barons or principal feudatories to rise; who choosing Robert Fitzwalter for their general, proceeded to make war upon the king. The barons represented their grievances, and prayed the king to grant them a renewal of the charter of Henry I. and a confirmation of the laws of Edward the Confessor. The king having tried various expedients to elude the blow in vain, at length signed and sealed the *Great Charter* at Runnymead, between Windsor and Staines. This famous deed either granted or secured very important liberties and privileges to the barons, to the clergy, and to the people. From hence, it is obvious that our liberties are not mere invasions of the ancient royal prerogative, but a restoration of the fundamental principles of that excellent constitution of which our ancestors had been deprived by feudal tyranny.

Feuds were granted by words of gratuitous and pure donation, "*dedi et concessi.*" This was perfected by the ceremony of corporal investiture, or open deliverance of possession, in the presence of the other feudatories or vassals. And besides an oath of *fealty*, or profession of faith, to the lord, the vassal or tenant upon investiture usually did *homage* to him, openly and humbly kneeling; being ungirt, uncovered, and holding up his hands both together between those of his lord, who sat before him; and there professing that "he did become his *man* from that day forth, "of life, and limb, and earthly honour." He then received a kiss from his lord. This ceremony was denominated *homage* or manhood, from the stated form of words, "*devenio vester homo.*"

The next consideration after the tenant had done homage, was the service; which, in consequence, he was bound to render as a recompence for the land which he held. This service was twofold; (viz.) to follow, or do *suit* to, the lord in his courts, in the time of peace; and in his armies or warlike retinue, when necessity called him to the field.

The lord was anciently the legislator and judge over all his tenants; and therefore the vassals were bound by their fealty to attend their

domestic *courts baron*, which were instituted in every manor, for doing speedy and effectual justice to all the tenants.

The military branch of the tenant's service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of land.

Feuds were originally granted at the *will* of the lord; afterwards from year to year; then for the *life* of the vassal; and at length they became hereditary. But it was an unalterable maxim in feudal succession, that "none were capable of in-" heriting a feud, but such as were of the blood " of the first feudatory, that is, lineally descend-" ed from him." The descent being thus confined, originally extended to all the males alike. But this being found inconvenient, the *military* feuds at length descended to the eldest son, to the exclusion of all the rest; in imitation of the honorary feuds, or titles of nobility, which were now introduced, and in their nature indivisible.

A feudatory could not alienate, or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of his lord; who on the other hand could not transfer his signiory or protection, without the consent of the vassal.

The chief feudatories being frequently unable to cultivate their own lands, soon found it necessary to commit part of them to inferior tenants; whom they obliged to such *returns* in service, corn, cattle, or money, as might capacitate them to attend their military duties without distraction. And these returns or *reditus* were the origin of rents.

This system, so replete with slavery and hardship, was, after many fruitless attempts to ameliorate it, finally abolished by statute 12 Car. II. ch. 24. which act should be regarded as creating a very important æra in the history of our laws and liberties.

The tenures by which our ancestors held their lands under the feudal system, were shackled with a variety of oppressive appendages; such as aids, relief, wardship, &c. &c. But upon the whole, it may be remarked, that the modern English tenures are freed from these incumbrances, and are all now in effect reduced to two species; (viz.) to *free* tenure in common socage, and *base* tenure by copy of court roll.

CHAPTER XXII.

Of LAST WILLS and TESTAMENTS.

"ALL men think all men mortal but themselves," and thus are they continually deceived. "Their inward thought is, that their houses "shall continue for ever; and their dwelling "places, to all generations; they call their "lands after their own names. Nevertheless "man being in honour, abideth not." Hence we see, "that wise men die, likewise the fool, "and leave their wealth to others." And when "a man dieth, he shall carry nothing away." "He heapeth up riches, but cannot tell who "shall gather them." However, as one generation passeth away, so another riseth up, and occupieth both the places and property of those who have trodden upon the stage of life before them.

In order, therefore, to prevent those endless contentions which would arise upon the death of every man, if it were uncertain to whom his property should descend at his decease; the law

has fixed established rules of inheritance, both to real estate and to personal effects.

The *title*, or the means whereby the owner has a just possession of his property, whether real or personal, is of various kinds. There are titles by descent, by purchase, by occupancy, by prescription, by forfeiture, by alienation, by prerogative, by escheat, by custom, by succession, by marriage, by judgment, by gift, grant, and contract, by bankruptcy, and by testament and administration.

But as it would occupy much more room to detail these several titles than is compatible with the present work, we shall only treat of title by testament and administration, as the one of most general concern.

By the law, every man enjoys the right of continuing his property after his death, in such persons as he shall expressly name. In defect of such appointment or nomination, or where no nomination is permitted, the law of every civilized society has directed the goods to be vested in certain particular persons, to the exclusion of all others. The former method of acquiring personal property, according to the express directions of the deceased, is called a *last will* or *testament*. The latter, which is also according to the *presumed* will of the deceased,

though not expressed, is in England termed an *administration*.

Testaments are unquestionably of very high antiquity. The sacred writings will convince us of their very early use. In the book of Genesis, we learn that Jacob *bequeathed* to his son Joseph a portion of his inheritance, double to that of his brethren. His *will*, indeed, was not carried into execution until many hundred years afterwards. We find, however, that the posterity of Joseph were divided into *two* distinct tribes, those of Ephraim and Manasseh, who had *two* separate inheritances assigned them. But the decendants of each of the other patriarchs formed only *one* single tribe, and possessed only *one* lot of inheritance.

When a person dies intestate, or without a will, the bishop grants letters of *administration*, either to the widow, or to the next of kin, or to both of them, at his own discretion. These persons are styled *administrators*, and are put upon the same footing with regard to suits and accountability, as executors appointed by will. Anciently, when a person died intestate, the law allowed the king to seize upon his goods, as general trustee of the kingdom. But out of favour to the church, this branch of the prerogative was afterwards vested in the prelates, who

were intrusted with the goods of the deceased for charitable purposes. The bishops were supposed to be better judges than laymen what would be for the benefit of a man's soul; and therefore the right of disposing of his effects for that purpose was given up to them by the crown. Being thus possessed of the power to dispose of the effects of the deceased, it followed, of course, that the *probate* of wills should also be their privilege. For it was reasonable, that the *will* of the deceased should be proved to the satisfaction of the person, whose right of distributing his effects for the good of his soul was thereby completely superseded. Upon this footing stands the general law of administration at this day.

All persons, however, cannot make a will. The law prohibits all males under the age of fourteen years, and females under the age of twelve, from disposing of their property. Madmen, fools and idiots, persons grown childish with age, or whose senses are besotted with drunkenness, are incapable of making any will so long as their mental imbecility continues. But if a person of sound mind make a will, such will is not revoked by any subsequent insanity. It is a general rule, to which the queen consort is an exception, that a wife cannot make a will

without the consent of her husband. Yet where personal property is given to a married woman for her sole and separate use, she may dispose of it by will without the consent of her husband. Traitors and felons, likewise on account of their criminal conduct, are prohibited from making a will from the time of their conviction.

The nature of a testament may be gathered from its definition, which is "the legal declaration of a man's intentions, which he wills to be performed after his death."

Testaments are divided into two sorts; (viz.) *written*, and *verbal* or *nuncupative*. The former of which is committed to writing; the latter depends entirely upon oral evidence, being declared by the testator, in extreme cases, before a sufficient number of witnesses, and afterwards reduced to writing.

A *codicil* is a supplement to a will; or, an addition made by the testator, annexed to, and to be taken, as part of a testament. This also may be written or nuncupative.

Nuncupative wills and codicils, however are subjected to the following restrictions. No written testament shall be revoked or altered by a subsequent nuncupative will (except when made by mariners at sea, and by soldiers in *actual* service), unless the same be in the life

time of the testator committed to writing and read over to and approved by him; and unless the same be proved to have been so done by the oaths of *three* such witnesses, at the least, as are admissible upon trials at common law.

No nuncupative will shall in any wise be good where the estate bequeathed exceeds £.30; unless proved by *three* such witnesses as aforesaid, who were present at the making thereof; and unless they, or some of them, were specially required to bear witness thereto by the testator himself; and unless it was made in his *last* sickness, in his own habitation or dwelling house, or where he had been previously resident ten days, at the least; except he be surprised with sickness on a journey, or from home, and dies without returning to his own house. No nuncupative will shall be proved by the witnesses after six months from the making of it, unless it were put in writing within six days. Nor shall it be proved till *fourteen* days after the death of the testator; nor till process hath first issued to call in the widow, or next of kin, to contest it, if they think proper.

The testamentary words must be spoken with an intent to bequeath. Any loose idle discourse, in the last illness of the deceased, is not sufficient;

for he must require the byestanders to bear witness of his real intentions. The will must be made at home, unless prevented by unavoidable accident; it must be made in the testator's *last illness*; it must not be proved at too long a distance from his death; nor yet too hastily and without notice: so carefully has the legislature guarded against any frauds in setting up *nuncupative* wills; and hence they are now seldom heard of.

But with respect to *written* wills: a testament of chattels, written in the testator's own hand, though it should have neither his name nor seal to it, nor any witness present at its publication, is good; provided their be sufficient proof of the document being in his own hand writing. And although written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions and approved by him, it has been held to be a good testament of the personal estate. But it is the safer and more prudent way, for the testator to sign, seal, and publish it, in the presence of witnesses.

As no testament is of any force till after the death of the testator, the last overthrows all former wills he may have made. But the republication of a former will revokes one of a subsequent date, and establishes the first again.

But the *devising of lands* is altogether of a different nature from the testaments of personal estates. It is a conveyance by statute, unknown to the feudal or common law, and not under the same jurisdiction as wills relating to personal property.

In general, no will of lands was permitted till the reign of Henry VIII. and then only of a certain portion; for it was not till after the restoration that the power of devising real property became so universal as at present. Before the conquest, however, lands were devisable by will, but the privilege was destroyed by the introduction of the military tenures.

By statute 29 Car. II. ch. 3. all devises of lands and tenements shall not only be in writing, but shall also be signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be subscribed in the presence of the person devising by three or four credible witnesses, otherwise the devise shall be entirely void, and the land shall descend to the heir-at-law. A will, even if made beyond sea, bequeathing land in England, must be attested by three witnesses.

A will, however, devising copyhold land, does not require to be witnessed; it is sufficient

to *declare* the uses of a surrender of such copyhold land made to the use of the will. The party to whom the land is given, becomes intitled to it by means of the surrender, and not by the will. In devising a copyhold, therefore, it is necessary to surrender it to the use of one's last will and testament, and in the will to declare one's intentions and to name a devisee.

An *executor* is he to whom another man commits by will the execution of his last will and testament. All persons are capable of being executors who are capable of making wills, and many others besides; as wives and infants; and even infants unborn may be made executors. But no infant can act as such before the age of seventeen years; till which time, administration must be granted to some other person.

The appointment of an executor is essential to the making of a will; and it may be done either by express words, or such as strongly imply the same. But if no executor be named, or if those named refuse to act, the bishop must grant letters of administration to some one else. In which case, the duty of an administrator varies very little from that of an executor.

If the deceased should die *intestate*, then general letters of administration must be granted by the bishop to such administrator as the sta-

tutes of Edward III. and Henry VIII. direct. By these acts, the bishop is compellable to grant administration to the widow or next of kin. Amongst the kindred, those are to be preferred who are nearest in degree to the intestate. This *nearness* is to be reckoned according to the computation of the civilians, and not of the canonists. The half blood is to be admitted to the administration as well as the whole. If none of the kindred take out letters of administration, a creditor may do it. If the executor refuse, or die intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin. And lastly, in defect of all these, the bishop may grant administration to whomsoever he will.

The duties of executors and administrators are in general very much the same; excepting, first, that the executor is bound to perform a will, which an administrator is not. And secondly, that an executor may do many acts before he proves the will; whereas an administrator can do nothing until letters of administration be issued.

The power and duty, however, of both, authorize and require each to *bury* the deceased in a manner suitable to the estate which he leaves

behind him. Necessary funeral expences are allowed previously to all other debts and charges.

The executor or the administrator must *prove the will* of the deceased. When the will is proved, the original must be deposited in the bishop's registry. A copy thereof upon parchment is made out, under the seal of the bishop, and delivered to the executor or administrator, together with a certificate of its having been proved before him. All which together is usually called the *probate* of a will. In defect of any will, the person entitled to be administrator, must also at this period take out letters of administration, and enter into a bond, with sureties, faithfully to execute his trust.

The executor or administrator must make an *inventory* of all the goods and chattels of the deceased, which he is to deliver in to the bishop upon oath. He is to *collect* all the goods and chattels so inventoried; and to that end, he has very large powers and interests conferred upon him by law.

He must *pay* the *debts* of the deceased. In doing this, he must observe the rules of *priority;* otherwise, on deficiency, he must answer for it out of his own estate. And first, he may pay all funeral charges, and expences of proving the will. Secondly, debts due to the king on

record or speciality. Thirdly, money due for poor's rates, for letters to the post office, &c. Fourthly, debts of record. Fifthly, debts due on special contract; as for rent, bonds, covenants, and the like, under seal. Lastly, debts on simple contracts.

When the debts are all discharged, the *legacies* claim the next regard, which are to be paid as far as the effects will extend.

A *legacy* is a bequest or gift of goods and chattels by testament. The person to whom it is given is styled a legatee; which every person is capable of being, unless particularly disabled by law, as traitors and some others.

If a *legatee* die before the testator, the legacy is lost or *lapsed*, and sinks into the *residuum*. And if a contingent legacy be left to any one; as *when* he attains, or *if* he attain the age of twenty-one, and he die before that time, it is a lapsed legacy. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy. It is an interest which commences *at present*, although it be paid *hereafter:* and if the legatee die before that period, his representatives shall receive it out of the testator's personal estate.

A *donation, causa mortis*, is when a person in his last sickness, supposing his dissolution

near, delivers or causes to be delivered to another, the possession of any personal goods, to keep, *in case of death;* and to restore them to the owner, if he should recover and live.

When all the debts and legacies of a person deceased are discharged, the *residuum*, if any, must be paid to the residuary legatee, if any be appointed by the will. If there be no residuary legatee, then the residuum must be divided amongst the next of kin of the deceased, in certain proportions, according to their degree of kindred. This division of the residuum must be regulated by the statute of distributions 29 Car. II. ch. 3. which expressly excepts and reserves the custom of the city of London, of the province of York, and all other places having peculiar usages of distributing the effects of persons who die intestate.

Such are the principal circumstances which require to be generally known with regard to last wills and testaments. And whoever duly reflects on the shortness and uncertainty of life, and is properly concerned for the comfort and harmony of those relatives and friends who may survive him, will not delay to "set his house "in order," by bequeathing in a legal manner, an *equitable* distribution of his property.

CHAPTER XXIII.

Of the LIBERTY of the PRESS.

THERE is certainly a proneness in all men, to run into extremes in debating any question of importance. It is natural, that so glorious a subject as the constitution and liberties of England, should have been in every age the fruitful and delightful topic of free discussion. Nor can it be wondered at, that a matter so near the heart of every Briton, should sometimes have roused the warmest feelings of the mind, and hurried the disputants into the most palpable inconsistencies. Thus whilst many earnestly contend, that the British constitution was from the beginning a most glorious fabric, and the wonder of the world; others as warmly assert, that until the death of Charles I. it was a system of the most wretched despotism. The truth is, that some of our liberties are coeval with the soil in which they have attained to such perfection; some have been planted in it by skilful hands at different times, and been cultivated

with the greatest watchfulness and care; whilst others, like seed newly sown, are just springing up, and gradually unfolding their tender leaves.

Amongst the second class of our privileges, may be ranked the *liberty of the press;* which is *now* the birthright of every Briton, and justly esteemed the firmest bulwark of the liberties of this country.

By the liberty of the press is meant, the right which every subject of the British empire enjoys, not only to petition the king and both houses of parliament; but also to lay his opinions and complaints before his *fellow subjects*, by means of an open press. This privilege certainly is not as old as our constitution, but was obtained by the English nation at a late period of its history, and was the result of great struggle and exertion. Freedom was in many other respects confirmed; when the liberty of the subject to express his sentiments freely, either in writing or speaking, was shackled with very considerable restraints.

The liberty allowed by the constitution, and the discordancy of party, having created a propensity in Englishmen for political conversation and writing, the conduct and measures of the king and ministry began soon to be generally canvassed with great freedom in every coffee-room and

tap-house throughout the kingdom. But so lately as the year 1675, the coffee-houses being the scenes of much seditious discourse, were suppressed by the proclamation of king Charles II. The legality of this proceeding, however, being doubted, the proclamation, upon a petition of the coffee-men, was recalled. And politics are now discussed in all places of public resort with as much safety, though not with equal wisdom, as in the senate.

Many of our chronologers who mention it, tell us, that the art of printing was first practised in England by a Mr. Caxton, in 1471, at Westminster, under the patronage of the abbot, Thomas Milling, afterwards bishop of Hereford. Caxton, indeed, long enjoyed the honour of introducing this curious and useful art into England; till a book was discovered, after the restoration, with a date of its impression from Oxford, *anno* 1468. The appearance of this book, of course transferred all the glory from Caxton to the University of Oxford, where it is said to have been introduced by one Corsellis, a foreigner, in 1459. The learned Dr. Conyers Middleton, however, is of opinion, that there is sufficient evidence, that Caxton is intituled to all the honour he at first possessed; and that the pretensions of Oxford cannot be

supported. Be this as it may, it was more than two hundred years after the art was known in England before the liberty of the press was fully established amongst us.

The severity of the court of star chamber was very great against all who presumed to write on *political* subjects. And a very effectual restraint was put upon printing by that dreadful tribunal, when it limited the number of printers and printing presses, and appointed a *licenser*, without whose approbation no book could be published.

Subsequently to the abolition of that court, the long parliament, after their rupture with the king, assumed the same power over the press; which was continued also during the whole of the protectorate. If a legal governor fear a free discussion of his conduct; much more will an usurper dread an inquiry, that may not only question the wisdom of his measures, but dispute his title to the throne. The republican ordinances, with regard to the press, were revived by an act two years after the restoration; and by a similar statute in the reign of James II. These acts expired in 1692; but were renewed for two years longer, although posterior to the revolution. For even king William and his ministers did not conceive that by the freedom

of the press, the minds of men would be so enlightened as to render it safe to trust them with so great an indulgence. They saw nothing like this species of liberty under any other government, in any age of the world; and therefore doubted very much of its salutary effects. At length, however, the parliament refused to grant any further prohibitions; and all restraints upon the liberty of the press were finally removed in 1694.

But it is obvious that this liberty may be employed by wicked men, to the worst of purposes. It may easily be made the vehicle of poisoning the mind, and contaminating the public morals; or rendered the sharpened instrument of private revenge.

The same laws, therefore, which protect every man's person and property, equally defend his reputation from the malevolence of a writer; who although too much of a coward to make an open attack upon his neighbour's person, may cruelly wound him through an anonymous publication.

The publishers of libels and other criminal matters, are consequently liable to heavy punishments, when found guilty, by a jury of their equals.

The liberty of the press, then, consists simply in this: that neither the courts of justice, nor any other judges whatever, can lawfully take any notice of writings *intended* for publication; but only of those that are actually published: and even in these cases, they must proceed in the trial by jury.

On indictments for libels, that is, for satires, defamations, or lampoons, the province of the jury is to determine on the point of law, as well as on the matter of fact. In other words, to decide, not only whether the writing in question has been written by the person charged with having done it, and whether it be really meant of the person named in the indictment; but also whether the contents be criminal or not.

The sending of an abusive private letter, is, in the eye of the law, as much a libel as if it were openly printed; because such a communication has a direct tendency to disturb the public peace. And it may be remarked generally with regard to criminal prosecutions for libels, that 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 break the public peace; and it is obvious, that this may often be as easily done by publishing a truth as a falsehood. Indeed it is this very circumstance that con-

stitutes a publication even of *facts* respecting foreign governments and magistrates, a libel. For two nations at peace with each other, may readily be provoked to actual hostilities by the inconsiderate conduct of individuals, who by their publications choose to vilify foreign powers. Hence it has recently been laid down as law by the highest authority, "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 treated as a libel; and particularly "where it had a tendency to interrupt the amity "and peace between the two countries."*

The advantages of a well-regulated free press are very great. The daily intelligence which is communicated through it to every town and village in the kingdom, puts the inhabitants in possession of the measures of government, the speeches of senators, the charges of judges, and the verdicts of juries. "The publishing of the "proceedings of courts answers most salutary "purposes, and if judges act wrong their pro-"ceedings ought to be published. If *the press* "*were to be gagged* no man can tell where it

* See lord Ellenborough's perspicuous summing up on the trial of John Peltier, esquire, for a libel against Napoleon Buonaparté.

" would end."* By means of it, the whole island is *at once* made acquainted with every circumstance that may endanger any of its privileges; and such a *cooperation* may be suddenly formed in bringing forward the *legal* means of redress, that it must at all times be extremely difficult, as well as hazardous, for public men to violate the fixed principles of the constitution. Hence, every man entrusted with official employment, from the minister of state down to the chairman of the quarter sessions, or the chief magistrate of a corporation; from the commander in chief down to the non-commissioned officer; from the first lord of the admiralty down to the master's mate, feels himself compelled to choose between the satisfaction resulting from a conscientious discharge of his duty, and the disgrace and ruin which must almost inevitably follow a wilful neglect of it.

The liberty of the press is exceedingly conducive to the diffusion of general knowledge. Every kind of truth is hereby greatly promoted. Nothing is lost by free investigation: on the contrary, that which is valuable is made more conspicuous and attracting by candid discussion. Truth, like hardened steel, is inflexible; and

* Lord chancellor MANNERS.

the more it is rubbed, the brighter polish it receives.

But the dissemination of divine truth is of all others the most important advantage of a free press. We who have bibles in such abundance, can form no adequate conception of the eagerness with which our forefathers endeavoured to obtain even *scraps* of an English translation of the scriptures; when a whole copy of them could not be procured or possessed with safety by the laity. In the 33d year of Henry VIII. when a new impression of the English bible was finished, the king by proclamation "required all curates "and parishioners of every town and parish to "provide themselves a copy of it." At first, the bible was *chained* to one of the pillars in the church, where the people resorted in crowds to hear it. He who was able, read aloud, whilst the multitude hung upon his lips, and their ears drank in with avidity the word of life.* How many at the last day will ascribe their salvation to the reading of the scriptures in their own tongue, can be known only to their divine author. However, few perhaps will deny the probability, that a free press will continue to be one of the

*See BURNET's History of the Reformation, vol. 1. b. 3.

grand instruments which Divine Providence will employ in spreading the truths of revelation amongst "every kindred, and tongue, and peo- "ple, and nation," till "the earth be filled with "the knowledge of the glory of the Lord, as "the waters cover the sea."

But this palladium of our civil and religious liberties may be shamefully abused to the base purpose of promoting licentiousness, obscenity, and blasphemy. The press, therefore, is to be watched, lest men, in proposing their opinions to the public, should obtrude such as are inconsistent with good government and the interests of religion. Indeed, the state which does not seasonably check the licentiousness of the press, would afford an opportunity to libellists to endanger the public tranquillity. But whilst the propriety of this vigilance is acknowledged, we have reason to rejoice, that the *censorship* is removed from the arbitrary "court of star "chamber," and placed in the hands of *twelve of our equals.*

The liberty of the press is a privilege justly dear to every Englishman; and ought to be the more highly prized by him, as he enjoys that which no other government in Europe tolerates.*

* See Mr. Mackintosh's splendid defence of John Peltier, Esq.

No tyrannical government, indeed, could possibly long continue with a free press; and therefore, the very existence of this privilege is a proof of the strength and stability of the British executive power; which is found by experience to admit of that extensive freedom both of writing and speaking on political as well as on all other subjects, which Englishmen enjoy. The law, however, will punish all who are *convicted* of libelling any part of the constitution; which, indeed, is founded upon principles so wise and just, that the government has none but a salutary dread of the free discussion of all its measures.

This important and unrivalled privilege of the British press 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.

CHAPTER XXIV.

Of COURTS in general.

VARIOUS are the wrongs and injuries that men commit upon each other, even in civilized states; and these would doubtless be still more numerous were it not for the salutary restraint of human laws. Such wrongs and injuries are either of a civil or of a criminal nature.

Under the former description may be reckoned every species of trespass, nuisance, waste, subtraction, or disturbance. And likewise, all kinds of injuries proceeding from or affecting the crown.

Under the latter are comprised all offences against God and religion; against the law of nations; against public justice; against the public peace; against public trade; against the public health and economy; against the persons, habitations, and property, of individuals. Our limits will not, however, admit of treating specifically of these several denominations of civil and criminal offences. But this is the less neces-

sary, inasmuch as every description and modification of offence is a breach of one or other of the Ten Commandments; which teach us two things, our duty towards God and our duty towards our neighbour. Happily therefore we have no need of referring to *law books* to ascertain how we ought to act one towards another; for the work of the law is written in every man's *heart*, his *conscience* also bearing him witness. And if any man will but do unto others upon all occasions as he would they should do unto him under similar circumstances, he will never suffer any thing from the laws of England; which are constantly stretched forth to protect him. It is sufficient, then, to remark, generally, that "the "law is not made for a righteous man, but for "the lawless and disobedient;" that is, only such are amenable to its tribunals and liable to its penalties.

"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 inspired volume, that "if "one man sin against another the judge shall "judge him." Every well regulated government, therefore, has its courts in which persons duly qualified and authorized preside for the adminis-

tration of justice. The institution is of divine appointment; and its end is, that the people may be judged with just judgment.*

It will be proper, then, to describe the nature of courts in general, with their various proceedings in administering justice, both between the king and subject, and between one subject and another.

A *court* is defined, to be "a place where "justice is judicially administered." The sole execution of the laws being vested by our constitution in the king, it follows that all courts of justice within this realm originate only from his Majesty; his consent to their existence being at all times either expressed or implied. The law always contemplates the king as present in his courts, although, in fact, he is only represented there by his judges.

Courts are distinguished into courts of *record*, and courts *not of record*.

A court of *record* is that were the acts and judicial proceedings are enrolled in parchment, for a perpetual memorial and testimony. These *rolls* are called the records of the court. All courts of record are the king's courts, and no other court has any authority to fine and imprison.

* Deut. ch. xvi. ver. 18.

A court *not of record*, is that of a private man, whom the law will not intrust with any discretionary power over the fortune and liberty of his fellow subjects. Such are the courts-baron in every manor, and other inferior jurisdictions, where the proceedings are not enrolled or recorded.

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 for it; and the *judicial power*, which is to examine into the fact, determine the law arising upon it, to ascertain whether any injury have been done, and by its officers to apply the remedy.

The usual assistants in the higher courts are attornies, and advocates or counsel.

An *attorney at law* is one who is put in the place, stead, or *turn* of another, to manage his matters of law for him. Formerly every suitor was obliged to appear in person to prosecute or defend his own cause; which is still the law in criminal cases. An idiot cannot appear by his attorney, because he has not discretion to enable him to appoint a suitable person in his stead. He must therefore appear in person, and the judge is bound to take care of his interest, and admit the best plea in his behalf, that any one in court can suggest.

No person can practice as an attorney in any court but in that of which he is sworn an attorney; and as he enjoys many privileges in that court, so he is also peculiarly subject to the censure and animadversion of its judges. To enable an attorney to practice in the court of chancery, it is necessary that he be admitted a solicitor therein. And none can act as attornies at the quarter sessions, but such as have been regularly admitted into some superior court of record: and attornies are subjected to various other regulations, by different statutes.

Advocates, or as they are commonly called, *counsel,* are of two degrees, barristers and serjeants. The former are admitted, after a considerable period of study and standing, in the inns of court; and are in all the old law books styled, *apprentices,* being looked upon merely as learners; and not qualified to execute the full office of an advocate till they were of sixteen years standing. At which time they may be called to the honourable state and degree of serjeants.

Serjeants at law are bound by a solemn oath to do their duty to their clients.

His Majesty's two principal counsel are the attorney general and solicitor general, who may be either barristers or serjeants. The king's

counsel cannot be employed in any cause against the crown, without special license; hence they cannot publickly plead in court *for* a prisoner, or a defendant in a criminal prosecution, without license, which is never refused. But in obtaining it, an expence of about £.9. is incurred.*

Counsel are indulged with liberty of speech in defence of their clients; and are not answerable for any matter spoken by them relative to the cause in hand, and suggested in their client's instructions, although it should prove a groundless reflection on the reputation of another. But if they mention an untruth of their own invention, the party injured may bring his action.

By the statute of 3 Edward I. ch. 28, counsel may be punished for collusion and deceit, with imprisonment for a year and a day, and perpetual silence in the courts. But to the honour of our courts, the corruption of judges and the treachery of counsel are crimes now unheard of in this country. Indeed the wisdom and integrity of the British courts are justly proverbial; and never shone with more resplendent lustre than during the present reign.

* Professor Christian.

CHAPTER XXV.

Of the COURTS of COMMON LAW and EQUITY.

The several courts of justice acknowledged in this country, are either such as have general jurisdiction throughout the whole realm, or private and special jurisdiction only in particular places.

Of the former, there are the universally established courts of common law and equity, the ecclesiastical courts, the courts military, and courts maritime.

The lowest court of justice known in England is the court of *piepoudre*; so called, according to Sir Edward Coke, because justice is administered as soon as dust can fall from the foot. It is a court of record incident to every fair and market; of which the steward of him who owns or has the toll of the market is the judge.

The jurisdiction of this court takes cognizance of all matters of contract that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of

the action arose there. This court seems to have been instituted to do justice expeditiously among the variety of persons who resort to a market or fair from distant parts. A writ of error, however, lies in the nature of an appeal from this court to the courts at Westminster.

A *court baron* is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. Its nature is two-fold: it is either a customary court, appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance; or it is a court of common law, called the court of the barons, or the freeholders' court, being composed of the lord's tenants, who were *equals* of each other, and were bound by their feudal tenure to assist their lord in administering domestic justice.

But its most important business is to determine by writ of right, all controversies relating to the right of lands within the manor; and to hold plea of any personal actions of debt, of trespass on the case, &c. where the damages do not amount to forty shillings. It is not a court *of record*, but a writ of *false judgment* and not a writ of *error*, lies to the court of Westminster to rehear the case.

A *hundred court* is only a larger court baron, being held for all the inhabitants of a particular

hundred instead of a manor. It resembles a court baron in all respects, except that it has jurisdiction over a larger extent of territory.

A *county court* is incident to the jurisdiction of the high sheriff. It is not a court of record, but may hold pleas for damages under the value of forty shillings. The real judges of this court are the freeholders of the county; and the sheriff is the ministerial officer. But the proceedings are removable from hence into the king's superior courts.

The court of *common pleas*, styled by Sir Edward Coke the lock and key of the common law, is a court of record. It was originally held in the king's own hall *(aula regis,)* and followed him whithersoever he went. But it was fixed by the *great charter*, that it should in future be always held at Westminster-hall, for the convenience of the subject; which it has been ever since.

By the term "common pleas," is meant all civil actions between man and man, as distinct from the "pleas of the crown;" which term comprehends all crimes and misdemeanors. In this court of common pleas there are one chief and three puisne judges, created by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law

rising in civil causes. But a writ of error lies in nature of appeal from this court into the court of king's bench.

The court of *king's bench* is the supreme court of common law in the kingdom; and has its name from the custom of the king formerly sitting there in person. This court also has one chief and three puisne judges, who are by their office the sovereign conservators of the peace and supreme coroners of the land. For some centuries past, this court has usually been held at Westminster, an ancient palace of the crown; but might remove with the king to any other part of the kingdom, if he thought proper to command it.

The jurisdiction of the court of king's bench is very high and transcendent. It keeps all inferior courts within their due bounds. It superintends all civil corporations in the kingdom. It commands magistrates and others to do their duty in every case where there is no other specific remedy. Its authority is not confined to civil, but it takes cognizance also of criminal causes. The former is what is called the crown side or crown office; the latter is the plea side of the court.

This is a court of appeal, and into it may be removed, by writ of error, all determinations of

the court of common pleas, and of the inferior courts; and even of the court of king's bench in Ireland. But from it also an appeal lies to the house of lords, or to the court of exchequer chamber.

In the reign of a queen, it is called the queen's bench; and during the protectorate of Cromwell, it was termed the upper bench.

The *court of exchequer* is a very ancient court of record, and a court of law and equity also. It is inferior in rank both to the court of king's bench and of the common pleas. It was set up by king William I. as a part of his "*aula regia*," although brought to its present state and order by king Edward I. It is designed, principally, to order the revenues of the crown, and to recover the king's debts and duties. It has the name of exchequer from the chequered cloth, resembling a chess-board, which covers the table there; and upon which, when certain of the king's accounts are made up, the sums are marked, and scored with counters.

This court 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.

The court of equity is held in the exchequer chamber, before the lord treasurer, the chancellor

of the exchequer, the chief baron, and three puisne barons. Its original business is to call the king's debtors to account, by bill filed by the attorney general; and to recover lands, tenements, or any goods, chattels, &c. belonging to the crown.

The common law part of this jurisdiction, originates in a fiction in law. The writ upon which all proceedings here are grounded is called a "*quo minus*;" in which the plaintiff suggests, that he is the king's farmer or debtor, and that the defendant hath done him an injury or damage complained of; "*quo minus sufficiens existit*;" by which he is the less able to pay the king his debt or rent. So that now, any person, as well the king's debtors, may sue and be sued in this court. The same privilege holds with regard to the equity side of the court; as any one may file a bill against another upon the bare suggestion that he is the king's accomptant; which is never controverted. On the equity side of this court, the clergy have long used to exhibit their complaints for the non-payment of their tithes, although the chancery has of late years had a large share of this business. From the equity side of this court, appeals lie immediately to the house of peers: but from the common law side, a writ of error

must be brought into the court of exchequer chamber; and from their determination, a writ of error will lie to the house of lords, by statute 31 Edward III. ch. 12.

These three last mentioned courts were formerly parts of the *aula regia*, a court which William the Conqueror established, when he arrogated to himself the whole judicial power. This formidable tribunal, which received appeals from all the courts of the barons, and decided in the last resort on the estates, honour, and lives of the barons themselves, kept the first nobleman in the kingdom under the same control as the meanest subject.

The *high court of chancery* is the most important of all the king's civil courts of justice. It has its name from the judge presiding in it, who is styled the lord chancellor. His name is derived from a latin word, signifying cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction.

The lord chancellor is appointed merely by the delivery of the king's great seal into his custody; whereby he becomes an officer of the greatest weight and power of any in the kingdom, and takes precedency of every temporal lord.

By his office, the chancellor becomes a privy counsellor, and speaker of the house of lords. To him belongs the appointment of all justices of the peace throughout the kingdom; and he is patron of all the king's livings under the yearly value of £.20 in the king's books. He is also the general guardian of all infants, idiots, and lunatics; and has the superintendance of all charitable uses in the kingdom.

The celebrated Sir Thomas More was the first layman who was appointed lord chancellor. In 1530, he obtained the great seal; which had previously always been given to the clergy, who monopolized nearly the whole learning of the times, and were supposed to be the best judges of matters of conscience.

There are two tribunals in the court of chancery; the one ordinary, which is a court of law; the other extraordinary, being a court of equity.

The jurisdiction of the ordinary court is to hold plea, upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea of petitions when the king has been advised to do any act in prejudice of the subject's right. In this court also are held pleas of personal actions, where any officer or minister of the court is a party.

When judgment is given in chancery, upon demurrer, or the like, a writ of error lies into the court of king's bench.

In this ordinary legal court is kept the *officina justitiæ;* out of which, all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcies, idiocy, lunacy, &c. &c. do issue. Formerly, all writs relating to the subject, and the returns to them, were kept in a hamper, *in hanaperio;* and others belonging to the crown, in a little bag, in *parva baga;* and hence, the distinction of the *hanaper* office, and *petty-bag* office, in the court of chancery.

The jurisdiction of the extraordinary court, or court of equity, enables the chancellor to moderate and temper the written law; and in his decisions, he subjects himself only to the law of nature and conscience. From the equity court in chancery, an appeal lies immediately to the house of peers.

There is a great difference between appeals from a court of equity, and writs of error from a court of law. In the first place, the former may be brought upon any interlocutory matter; the latter upon only a definitive judgment. And secondly, on writs of error the house of lords pronounces the judgment; on appeals it

gives direction to the court below to rectify its own decree.

The court of *exchequer chamber* has no original jurisdiction, but is only a court of appeal to correct the errors of other courts. Into it, causes are sometimes adjourned for the consideration of the judges, before judgment is given in the courts below. The judges in this court are all the judges of the superior court, and sometimes also the lord chancellor.

The *supreme court* of judicature in the kingdom, is the house of peers, which is in all causes the last resort; and from its decision there can be no farther appeal. But every subordinate jurisdiction must submit to its judgments. The house of lords became the supreme court of appeal from all inferior courts, on the abolition of the *aula regia*.

The courts of *assize* and *nisi prius* are courts of general jurisdiction and use; and are derived out of, and act as auxiliaries to, the foregoing courts that have been mentioned. These courts are composed of two or three commissioners, who are twice every year sent by the king's special commission all round the kingdom, to try, by a jury of the respective counties, the truth of such matters as are then under dispute in the courts of Westminster-hall.

In the four northern counties the assizes are taken only once a year; but in London and Middlesex, courts of *nisi prius*, there called *sittings*, are holden in and after every term, before the chief or other judge of the several superior courts.

These commissioners seem to have come into use in the room of the justices, *in eyre*, or itinerant justices; who were regularly delegated by Henry II. to go round the kingdom once in seven years to try causes; and, by magna charta, were directed to make a circuit once in every year into every county.

The commissioners of *assize* and *nisi prius* must be two of the king's justices, of the one bench or the other, or the king's serjeants sworn. Their circuits are usually made in the respective vacations after hilary and trinity terms. But such is the jealousy of the law, that it is enacted by statute 33 Henry VIII. that no lawyer shall be a *judge of assize* in his native county; yet in the *criminal* courts he may execute his office as a commissioner of *oyer* and *terminer*, and of *gaol delivery*, within the county where he was born or resides.

The authorities, by virtue of which the judges sit, upon their circuits, are five; (viz.) the commission of the *peace;* a commission of *oyer* and

terminer; a commission of general *gaol delivery;* a commission of *assize;* and the authority of *nisi prius,* which is a consequence of the commission of assize. But the business at the county assizes is generally divided, in popular language, into that of the *crown bar* and the *nisi prius bar.* At the former, all criminal prisoners are arraigned; and at the latter, the civil causes are tried. All *causes* commencing in the courts of Westminster-hall are appointed to be tried there by a jury returned from the county wherein the cause of action arises; but with this proviso, "*nisi prius* "justiciarii ad assisas capiendas venerint," *unless before* the day prefixed, the judges of assize should come into the said county and hold an assize. This they are sure to do, and there dispose of the cause; which saves much trouble and expence to all the parties concerned.

Such are the several courts of law and equity of general jurisdiction throughout the kingdom; which originated and were perfected by the united wisdom of our ancient kings Alfred and Edward I. The policy of the great Alfred was, to bring justice home to every man's door, whereby cheapness and dispatch were insured to him. Length of time has indeed obscured some of the fainter lines of the incomparable judicial institu-

tions of these great princes, but the spirit and form of them are still attended to; so that the most impartial justice is administered to every individual, whatever his rank may be. But should any one be dissatisfied with the determinations of these courts, he can appeal to the house of lords, in the last resort, whose judgment must be final. This court being composed of learned and pious bishops and of noble peers, whose rank and education, whose honour and conscience, whose interest and reputation, all combine to constitute it as perfect a seat of justice as can be looked for in this world; it is highly reasonable as well as expedient, that from its solemn decision there should be no appeal.

But besides these general courts, there are many others of a more limited jurisdiction, pertaining to the ecclesiastical, military, and maritime states.

In the time of our Saxon ancestors, the rights of the church and of the laity were determined at the same time, and by the same judges; there being no distinction between the lay and ecclesiastical jurisdictions. The bishop of the diocese, and the earl or alderman, or in his absence the high sheriff, used to sit together in the county court. In ecclesiastical matters, indeed,

a deference was paid to the superior opinion of the bishop; and to that of the sheriff in temporal decisions.

After the Norman conquest, however, king William was prevailed upon by the clergy to sanction the separation of the ecclesiastical from the temporal court. He prohibited, by his charter, any spiritual cause from being tried in the secular courts; and commanded the suitors to appear before the bishop alone, who was to adhere to the canon law as the rule of his judicial conduct. But the union of these courts was restored at the accession of king Henry I.

The popish clergy were highly displeased at this change; and ordained in their synod at Westminster, 3 Henry I. that no bishop should attend the discussion of temporal causes, which soon dissolved the union. When Stephen usurped the throne, the clergy exacted from him an oath, that the bishops should have the sole jurisdiction of all ecclesiastical persons and causes.

Amongst the various ecclesiastical courts, are the *archdeacon's* court, the *consistory* court, the court of *arches*, annexed to which is the court *of peculiars*. There are likewise the *prerogative* court, for the trial of all testamentary causes where the deceased has left *bona notabilia* within two different dioceses; and the court of

delegates, appointed by the king's commission, to represent his royal person and hear all appeals made by virtue of statute 24 Henry VIII. ch. 12. None of these ecclesiastical courts, however, are courts of record.

The only *military* court known to the laws of England, is the court *chivalry*, now fallen into disuse.

The *maritime* courts, or such as have jurisdiction to determine all injuries committed upon the high seas, are the court of *admiralty* and its courts of appeal.

There are likewise courts whose jurisdiction is confined to particular places and districts. Such are the *forest courts*, instituted for the government of the king's forests in different parts of the kingdom. The court of *commissioners* of *sewers*, whose authority is to overlook the repairs of sea banks, sea walls, &c. &c. The *court of policies of insurance*; the *palace court*, which, with the ancient court of *marshalsea*, is now holden in the borough of Southwark, once a week, to determine all personal actions that shall arise within *twelve* miles of his Majesty's palace of Whitehall. Besides these are the several local courts of the principality of Wales; of the dutchy of Lancaster; of the counties palatine of Chester, Lancaster, and Durham; and of the royal

franchise of Ely. In all which places the judges sit by virtue of a special commission from the owners of the franchise, and not under the great seal of England. There are likewise the courts of the *cinque ports*; the *stannary courts*, in Cornwall and Devonshire; the courts of *London*, and other corporate towns; all which originated in the special favour of the king to the respective districts.

Again, there are the *courts of conscience*, established by statute in different parts of the kingdom, to determine in a summary way all causes of debt not exceeding £.5, and in most places not above 40s.

Lastly, there are the chancellor's courts, in the two universities of *Oxford* and *Cambridge*, to determine all civil actions where a scholar or privileged person is one of the parties, except in cases where a right of freehold is concerned. This privilege was granted first to Oxford by Henry III. A. D. 1244. In the third year of Elizabeth a similar distinction was bestowed upon the university of Cambridge; and by statute 13 Elizabeth, ch. 29, *all* the charters of both universities were confirmed.

CHAPTER XXVI.

Of TRIAL in CIVIL ACTIONS.

A brief sketch of the different courts having been given, it will be proper to take a succinct view of the methods of proceeding therein, both in civil actions and in criminal cases. In doing this, however, the following observations will be restricted to the forms observed in the courts of general jurisdiction; for if there be any peculiarities in conducting the business in the inferior courts, they are of a local nature, and consequently of little importance to the public. But in general, trials are conducted much the same in the lower courts, as before the superior tribunals.

The beginning, then, of a civil suit, is the *original writ.* When a person has received an injury, and is determined upon seeking the remedy provided by law, he sues out from the court of chancery an *original,* or the writ which is applicable to his particular case. This is directed to the sheriff, requiring him to com-

mand the offender to do justice to the party aggrieved, or to appear in court to answer the accusation against him. The sheriff is bound to make a *return* of the writ, and this should be done on the first day of the term following; but as the law allows the defendant *three days* grace for his appearance, the court does not usually sit for dispatch of business till the *fourth*, or *appearance* day. The means of compelling the defendant to appear in court is called the *process*, of which the primary step is, the giving of the party notice, by *summons*, to obey the original writ. If the defendant disregard this warning, a *pone* is issued out, or writ of attachment, so called from the words of the writ, "*pone per* "*vadium et salvos plegios*," put by gage and safe pledges, A. B. the defendant, &c. If after *attachment* he neglect to appear, he is farther compelled by writ of *distringas*, commanding the sheriff to distrain the defendant of his goods if he do not appear. And if he have no goods, then a writ of *capias* is issued, empowering the sheriff to take the defendant's body, and bring him into court on the day of the return to answer the plaintiff of his plea. If after repeated writs of *capias* and *proclamation* made, the defendant do not appear and cannot be found, an *outlawry* takes place. Such outlawry is putting a man

out of the protection of the law, and is attended with forfeiture of all his goods and chattels to the king. But the common practice is to issue the writ of *capias* in the first instance; and the sheriff can only serve the defendant with a copy of the writ and a written notice to appear by his attorney in court to defend the action. But if the plaintiff make *affidavit* that the cause of action amounts to £.10 and upwards, then he may arrest the defendant. An *arrest* must be by corporal seizing or touching the defendant's body; the bailiff cannot enter his house by violence, but must watch his opportunity to take him. When the defendant is regularly arrested he must either go to prison for safe custody, or put in *bail* to the sheriff, as security for his appearance. This *appearance* is effected by putting in bail *to the action*. These bail, who must be at least two in number, must enter into a recognizance in a sum equal, or sometimes double, to that which the plaintiff has sworn to; whereby they undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him. Such then is the *process* or mode which the law appoints for bringing the defendant into court to try the suit and abide the issue.

After process follow the *pleadings;* that is, the plaintiff states a declaration of his case; to which the defendant must in a reasonable time make his *defence,* or put in a *plea,* otherwise the plaintiff will at once recover judgment by default; unless he and the plaintiff can agree to make up the matter.

Pleas are of two sorts; *dilatory* pleas, and pleas *to the action.*

The fourth stage of an action is the *issue,* which is the end of all the pleadings; and is either upon matter of *law* or matter of *fact.* The former is called a *demurrer;* which confesses the facts to be true, but denies that any injury is thereby done to the plaintiff. The latter, or an issue of *fact,* is where the *fact* only is disputed. When he who denies the fact has tendered the issue, both parties are said to join issue, having agreed to rest the fate of the cause upon the decision of a jury of the country; and this brings us to the trial in open court.

A *trial,* then, or *probation,* is the mode which the law of the land has settled for a criterion of truth and falsehood.

In civil cases the law acknowledges seven species of trials; (viz.) by record; by inspection; by certificate; by witnesses; by wager of battle; by wager of law; and by jury.

A trial by *record* is where a matter of record is pleaded in any action; and the defendant pleads that there is no such record existing. Upon this, issue is joined, and the plaintiff is allowed time to produce the said record, and on his failure the defendant shall have judgment to recover.

The cases usually tried by *record* are titles of nobility. Thus, whether such a one be earl or no earl, whether baron or no baron, shall be tried by the king's patent only, which is matter of record.

The trial by *inspection* is when the point or issue is the object of sense; so that the judges upon the testimony of their own senses may decide the question. As in cases of nonage, idiotism, and the like.

So, also, the issue respecting any circumstances relative to a particular day past, may be tried by inspection of the almanack by the court. Thus, an appeal upon a writ of error was once made from an inferior court, at *Lynn Regis*, assigning the error to be, that the judgment was given on a Sunday, it appearing to have been on the 26th of February, in the twenty-sixth of Elizabeth. Upon inspecting the almanacks of that year, the fact was found to be so; and the judgment was reversed accordingly.

The trial by *certificate* is allowed in such cases where the evidences of the person certifying is the only proper criterion of the point in dispute. As, if A. B. assert that he was at Jamaica at such a time, the court may determine the fact upon a certificate under the hand and seal of the governor of that island.

The trial *by witnesses,* without the intervention of a jury, is the only method of trial known to the civil law: in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined. But it is very rarely used in our law, which prefers the trial by jury before it in almost all cases.

The trial by *wager of battle,* and the trial by *wager of law,* are both now quite out of use, and therefore need only to be mentioned.

But the principal criterion of truth known to the law of England, is the trial *by jury.* The trial *per pais,* or *by the country.* A mode of trial which seems to have been coeval with the first civil government of this happy country.—As a better opportunity will offer hereafter of treating more largely of juries, it is now only observed, that in civil cases there are two kinds of juries, *special* and *common.*

When the plaintiff intends to try his cause, he is obliged to give the defendant fourteen days

notice, if the trial is to be at the sittings in London and Westminster; but if at the courts in the country, ten days notice is sufficient. The defendant, however, or plaintiff, may, upon good cause shewn to the court, obtain leave to defer the trial till the next assizes. But if the cause be called on in court for trial, then the record is handed to the judge, while the jury is called and sworn, to observe what issues the parties are to maintain and prove to the satisfaction of the jury.

Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff may be suspected of partiality in returning his jurors.

In forming a special jury, the sheriff, upon motion in court and a rule granted thereupon, is to attend the proper officer with his freeholders' book; and the officer is to take indiscriminately *forty-eight* of the principal freeholders, in the presence of the attornies on both sides; who are each of them to strike off *twelve*, and the remaining twenty-four are returned upon the *panel*, or small piece of *parchment*.

A *common* jury is one that is returned by the sheriff, according to the directions of the statute of 3 Geo. II. ch. 25; which directs, that the

sheriff shall return one and the same panel for every cause to be tried at the same assizes, containing not less than *forty-eight* nor more than *seventy-two* jurors; and that their names being written on tickets, shall be put into a box or glass, and when each is called, *twelve* of these persons whose names shall be first drawn out of the box shall be sworn on the jury, unless absent, challenged, or excused; or unless a previous view of the lands, or place, &c. in question, shall have been thought necessary by the court.

If the court should think such a view necessary, then six or more of the jurors returned, to be agreed on by the parties, shall be appointed by special writ, to have the matter in dispute shewn to them, by two persons named in the writ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previously to any other jurors. But the jurors may be *challenged* by either party.

Challenges are of two kinds; challenges to the *array*, and challenges to the *poll*. The former is an exception to the whole panel in which the jury are *arranged* or set in order by the sheriff, in his return. This challenge may be made upon account of partiality or some default of the sheriff; or when there is reasonable ground to

suspect his integrity. The latter are exceptions to particular persons, and may be made for four different reasons. On account of *honour*; as if a lord of parliament be impanelled upon a jury, he may be challenged by either party, or he may challenge himself. On account of *defect*; as if a juror be an alien born; or if he have not a sufficiency of estate to qualify him; that is, unless he be a freeholder or a copyholder of £.10 a year in England, or £.6 in Wales, or a leaseholder for the term of 500 years absolute, or for any term determinable upon life or lives, of the clear yearly value of £.20 a year, over and above the rent reserved. On account of suspicion of *partiality*; and this may be either a *principal* challenge, or to the *favour*. The former is where the cause assigned carries with it *primâ facie*, evident marks of suspicion; as where the juror is of kin to either party, within the ninth degree; or where he is otherways interested in the decision. The latter is where the party has no principal challenge, but objects only some probable circumstance of suspicion, as acquaintance and the like. Lastly, a challenge may be on account of some *crime* that affects the juror's credit, and makes him infamous.

But it is possible that, from unavoidable causes, a sufficient number of unexceptionable

jurors may not appear at the trial. In that case either party may pray a *tales;* i. e. a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency. And the judge has power to award a *tales* of persons present in court. These, however, are liable to the same challenges as the principal jurors till the legal number of *twelve* be completed.

These twelve men are called the jury *(jurata),* because they are now separately *sworn,* well and truly to try the issue between the parties, and a true verdict to give, according to the evidence.

The *pleadings* are now opened to the jury by the counsel on that side which holds the affirmative of the question in issue. The evidence is then gone through in support of the case.

The counsel on the other side next opens the *adverse* case, and likewise supports it by evidence; after which, the party which began is heard in reply.

Evidence, is that which makes clear or ascertains the truth of the very fact or point in issue, either on the one side or the other. This evidence may be either such as is given in proof, or that which the jury may receive by their own private knowledge.

Proofs, are either *written,* or *parol* evidence, that is, by word of mouth.

Written proofs, are records, and ancient deeds of thirty years standing, which prove themselves; but modern deeds and other writings must be attested and verified by *parol* evidence of witnesses.

In all civil causes one general rule is laid down; that the best evidense the nature of the case will admit of, shall always be required, if possible to be had: otherwise, the best evidence that can be had, shall be allowed.

Parol evidence, or *witnesses*, are procured by a writ of "*subpœna ad testificandum.*" This *commands* them, laying aside all pretences and excuses, to appear at the trial, on pain of £.100 to be forfeited to the king; and a penalty of £.10 to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. No witness, however, unless his reasonable expences be tendered him, is bound to appear at all; nor, if he appear, is he obliged to give evidence till such charges are actually paid him; except he resides within the bills of mortality, and is summoned to give evidence within the same.

All persons, of whatever religion or country, who have the use of their reason and are not *interested*, are *competent* witnesses. But the jury are at liberty to judge of their *credibility*.

One credible witness is sufficient to establish a fact; though the concurrence of more certainly strengthens the proof. But it is an invariable rule, that no man shall be a witness in his own cause.

Positive proof is always required where the nature of the case admits of it; but if that *cannot* be had, *circumstantial* evidence, or the doctrine of *presumptions*, must take place. The oath administered to the witness, obliges him to depose not only the truth, but the *whole* truth; that is, he is to divulge all that he knows of the matter, whether he be examined as to any particular point or not. His evidence is to be given in *open* court, in the presence of the parties, their attornies, counsel, and all bystanders, and before the judge and jury.

Each party is at liberty to except to the *competency* of the evidence. Any exceptions are publicly stated to the judge, who as publicly allows or disallows them in the face of the country.

If the judge, through inadvertence, ignorance, or design, should mistake the law in directing the jury, then the counsel, on either side, may require and compel him publicly to seal a *bill of exceptions*; stating the point wherein he is supposed to err.

The public examination of witnesses, *viva voce*, is attended with many advantages. For hereby a witness is deterred from saying an untruth, which he might not be afraid of asserting at a *private* investigation. The sudden manner, too, in which questions are put to him, either by the judge, the counsel, or the jury, has a direct tendency to develope the truth. The confronting of adverse witnesses is likewise a means of obtaining a clear discovery of facts; whilst the judge and jury have an opportunity from the presence of the witnesses of judging of their quality, age, education, understanding, and inclinations. All which is manifestly in favour of the disclosure of the truth, and of the detection of falsehood.

If a juror know any thing of the matter in issue, he may be sworn as a witness, and give his evidence openly in court.

The evidence being gone through on both sides, the judge proceeds to sum up the whole to the jury, in the presence of the parties, their counsel, and all others, in open court. In doing which, his lordship observes wherein the main question or principal issue lies, states what evidence has been adduced in its support, and gives his opinion to the jury in matters of law arising upon that evidence.

If the case be not very clear, the jury then retire from the bar to consider of their verdict. They must be kept entirely by themselves, and not suffered to speak to either of the parties, or their agents; nor to receive any fresh evidence in private; nor cast lots for whom they shall decide; as any of these circumstances would invalidate their verdict. And to avoid intemperance or unnecessary delay, they are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. If they should not be agreed before the judges are about to leave the town, they are not to be threatened or imprisoned. Yet the judges are not bound to wait for their decision, but may take them from town to town through the circuit, in a cart, until they can make up their minds.

When the jury are agreed, they return back to the bar; and before the verdict is delivered, the plaintiff is bound to appear in court by himself, or his attorney, or counsel, in order to answer the amercement to which he is liable, if he fail in his suit. If the plaintiff do not appear, he is said to be *nonsuit*, and no verdict can be given; and therefore it is usual for him, when he or his counsel perceive that he has not sufficient evidence to maintain his issue, to be

voluntarily *nonsuited*. Whereupon the action is ended, and the defendant shall recover his costs. The reason of this practice is, that after a *nonsuit* the plaintiff may commence his action again; but after a verdict and judgment against him, he cannot attack the defendant again upon the same grounds.

A *verdict*, means, *to speak truly*; and by it the jury openly declare to have found for the plaintiff or defendant.

A *special* verdict, is when the jury simply state the naked facts as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole of the matter the court shall be of opinion that the plaintiff had the cause of the action that they find for him; if otherwise, then they find for the defendant.

A *special case*, is another species of verdict, where the jury find generally for the plaintiff, subject to the opinion of the judge or court above, on a *special case* stated by the counsel on both sides, with regard to a matter of law.

When the verdict is given and recorded in court, the trial is at an end, and the jury is discharged.

The *judgment* of the court follows the verdict of the jury; but it may be suspended and finally

arrested; for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial through surprise, inadvertency, or misconduct, the party may have sufficient relief in the court above, by obtaining a new trial; which is always granted when the reasons for applying for one are sufficiently weighty.

Arrests of judgment arise from *intrinsic* causes appearing on the face of the record. Of this kind are, first, where the declaration varies totally from the original writ: secondly, where the verdict differs materially from the pleadings or issue thereon: or thirdly, if the case laid in the declaration be not sufficient in point of law to found an action thereon.

If judgment be not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll or record. But where judgment is arrested, each party pays his own costs.

Judgments are not the determination of the judge, but the sentence of the *law*, and are of four sorts.—First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer*: secondly, where the law is admitted by the parties and the facts disputed; as in the case of

judgment upon a *verdict:* thirdly, where both the law and the fact arising thereon are admitted by the defendant; which is the case of judgment by *confession* or *default:* or lastly, where the plaintiff is convinced that either fact or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *nonsuit* or *retraxit.*

As the consequence of judgment, *execution* will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings. And then he has his remedy to reverse them by several writs, in the nature of appeals.

The principal method of redress in wrong judgments by way of appeal, is by a *writ of error* to some superior court. A writ of error for some supposed material mistake, assigned in the proceedings of a court of record, lies, in the last resort, to the house of lords; whose decision cannot be reversed nor even reviewed.

Where judgment has not been suspended, superseded, nor reversed, *execution* follows, or the law is put in force, according to the nature of the action.

The different writs of execution must be sued out within a year and a day after judgment is

entered; otherwise the court concludes that the judgment is satisfied and extinct. Yet the defendant may be compelled to shew cause why the judgment should not be revived, &c. &c.

Such is our admirable mode of trial by jury in civil actions. A mode, the best calculated for investigating the truth of facts, and for securing the property and reputation of every Englishman.

CHAPTER XXVII.

Of COURTS of EQUITY.

ALTHOUGH there is some difference with regard to the forms of practice adopted in the court of chancery, and the equity court of exchequer, yet the same system of redress is pursued in each.

Equity, in its true and genuine import, is the soul and spirit of all law. *Positive* law is construed, and *rational* law is made by it. Nothing more is intended by equity, than the sound interpretation of the law. The words of the law itself may, and often are, too general, too special, or otherwise defective. In such case, it is the province of equity to expound their true meaning.

However the courts of law and equity may differ in their outward forms, they rest upon the same substantial foundation. Their proceedings are dissimilar in the mode of proof, the mode of trial, and in the mode of relief. But the essential difference between them, consists in the different modes of administering justice in each.

With respect to the mode of *proof:* when facts, or their leading circumstances, depend only on the knowledge of the party, a court of equity applies itself to his *conscience*; and purges him, upon oath, with regard to the transaction. The truth being hereby once discovered, the judgment is the same in equity as it would have been had the same facts appeared in a court of law.

The mode of *trial* in courts of equity, is by interrogatories, administered to the witnesses; upon which, their dispositions are taken in writing, wherever they happen to reside. If, therefore, the cause arise in a foreign country and the witnesses live on the spot; if in cases arising in England the witnesses are abroad, or soon to leave the kingdom; or if witnesses residing at home are aged and infirm; a court of equity may and will grant a commission to examine them.

As to the mode of *relief:* the want of a more specific remedy than can be obtained in the

courts of law, gives a concurrent jurisdiction to a court of equity in a great many cases. As in executing agreements, which a court of equity will cause to be carried into strict execution, instead of giving damages for their non-performance. And in other instances, a more extensive and specific relief may be had in courts of equity, than can be obtained in the courts of law.

A suit in chancery commences by preferring a bill to the lord chancellor, in the style of a petition, "humbly complaining, sheweth to "your lordship, your orator A. B. that," &c. &c. setting forth the circumstances of the case at length, as some fraud, trust, or hardship; "in "tender consideration whereof, and for that "your orator is wholly without remedy at the "common law;" relief is therefore prayed at the chancellor's hands, and also a process of subpœna against the defendant, to compel him to answer, upon oath, to all the matter charged in the bill, &c. &c.

The bill preferred, must be signed by counsel, as a certificate of its decency and propriety.

When the bill is filed, process of subpœna is taken out, commanding the defendant to appear and answer to the bill, on pain of forfeiture of £.100; and if he do not appear within the time

limited by the rules of the court, he is then said to be in *contempt*. The consequence of which is an *attachment*. This is a writ in the name of a *capias*, directed to the sheriff, commanding him to attach or take up the defendant, and bring him into court. If the sheriff should return that the defendant *non est inventus*, i. e. was not found, then an *attachment with proclamations* issues. Which enjoins the sheriff to cause proclamations to be made throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If this writ also should be returned with a *non est inventus*, a commission of *rebellion* is awarded against him, for not obeying the king's proclamations, according to his allegiance. And four commissioners therein named, or any of them, are ordered to attach him wherever they find him, as a rebel to the king's government.

If notwithstanding a *non est inventus* be still returned, the court then sends a *serjeant at arms* in quest of him. And if he elude the search of the serjeant also, then a *sequestration* issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court.

After an order of sequestration is issued, the plaintiff's bill is to be taken *pro confesso*, and a

decree to be made accordingly. And thus much if the defendant abscond. But if the defendant be taken in any stage of this process, he is transmitted to the fleet, or other prison, till he put in his appearance, or answer, or perform what else this process is issued to enforce. He must also clear his contempts by paying the costs which the plaintiff has incurred thereby.

If the defendant should be a body *corporate*, the process is by *distringas*, to destrain them, by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court.

But if the defendant be a peer of the realm, the lord chancellor sends a copy of the bill together with a *letter missive* to him, to request his appearance. If he neglect to appear, he may be served with a subpœna; and if he still continue in contempt, a sequestration issues out immediately against his lands and goods. The same process is pursued against a member of the house of commons, except only that the lord chancellor does not send his letter missive to him.

But should the defendant appear regularly and take a copy of the bill, he is then to *demur*, *plead*, or *answer*.

A *demurrer* in equity, is nearly of the same nature as a demurrer in law. It is an appeal to

the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill. If the demurrer be overruled, the defendant is ordered to answer.

A *plea*, may be either to the jurisdiction, shewing that the court has no cognizance of the cause; or to the *person*, shewing some disability in the plaintiff, as by outlawry, excommunication and the like; or it is in *bar*, shewing some matter, wherefore the plaintiff can demand no relief.

In equity courts, an *answer* is the most usual defence that is made to the plaintiff's bill. It is given in upon the oath of a commoner, or the honour of a peer or peeress. But where there are amicable defendants, their answer is usually taken without oath, by consent of the plaintiff.

If the defendant live within twenty miles of London, his answer must be obtained by swearing him before one of the masters of the court. If he reside farther off, there may be a commission to take his answer in the country; where the commissioners administer to him the usual oath. The answer being then sealed up, is carried by one of the commissioners up to the court. Or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it.

The answer must be signed by counsel and must either deny or confess all the material parts of the bill; or it may confess and avoid; that is, justify or palliate the facts. If none of this be done, the answer may be objected to as insufficient, and the defendant be compelled to put in a more satisfactory one. In his answer, the defendant may pray to be dismissed the court; but if he have any relief to pray against the plaintiff, he must do it by an original bill of his own, called a *cross-bill*.

After an answer is put in, the plaintiff, upon payment of costs, may amend his bill; either by adding new parties or new matter; and the defendant is obliged to answer afresh to such amended bill.

If the plaintiff now find sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause, upon bill and answer only. But in that case, he must take the defendant's answer to be true in every point. Should this not be the case, the plaintiff is then to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be the reverse; which he is ready to prove, as the court shall award. Upon which the defendant

rejoins, averring the like on his side. which is *joining issue* upon the facts in dispute.

The next step is to prove these facts; which is done by examining witnesses, and taking their *depositions* in writing. The witnesses near London are examined at an office appointed; and those in the country, by commissioners.

When all the witnesses are examined, the depositions may be published. After which, they are opened for the inspection of all the parties, and copies may be taken. The cause is now ripe to be set down for *hearing*; which may be done at the procurement of the plaintiff or defendant, before either the lord chancellor, or the master of the rolls, according to the direction of the clerk in court, the nature of the suit, and the arrear of causes depending before each.

The decrees of the master of the rolls are valid, but subject to be discharged or altered by the chancellor, and cannot be enrolled till they are signed by his lordship.

The method of hearing causes in court is this: the parties on both sides appearing by their counsel, the plaintiff's bill is first opened, and the defendant's also by the junior counsel on each side After which the plaintiff's leading counsel state the case, the matters in issue, and the

points of equity arising thereon. Then such depositions as are called for by the plaintiff are read by one of the six clerks; and the plaintiff may also read any part of the defendant's answer; and after this, the rest of his counsel proceed to make their observations and arguments. The defendant's counsel then goes through the same process for him, except that they may not read any part of his answer. And the counsel for the plaintiff are heard in reply. The court then pronounces the *decree*, adjusting every point in debate according to *equity* and good conscience.

If either party think himself injured by the decree, he may petition the court for a *rehearing*. But the petition must be signed by two respectable counsel, certifying that it is their opinion that the cause is proper to be reheard. But after the decree is once signed and enrolled, it cannot be reheard or rectified, but by a bill of review, or by appeal to the house of lords.

A bill of *review* may be had upon apparent error in judgment appearing upon the face of the decree; or by special leave of the court, upon oath made of the discovery of new matter, or evidence which could not be possibly had or used at the time when the decree passed. But the dernier resort of the party who thinks himself aggrieved, is an appeal to the house of lords.

This is effected by petition to that high court, and not by *writ of error*. But no *new* evidence is admitted in the house of lords, upon any account.

CHAPTER XXVIII.

Of PUNISHMENT.

LET us now enquire into the nature of crimes and their punishment. In the preceding chapters, those offences have been considered which arise between man and man. The discussion of the present chapter relates to the *criminal* law, or *pleas of the crown*. The king is the proper prosecutor for every public offence; because, as the collective dignity of the community centres in his Majesty, he is supposed to be personally injured whenever any member of the body politic suffers.

A *crime*, is an act committed or omitted in breach of a public law, which either forbids or commands it.

A *misdemeanor*, is a term of milder import, and signifies any indictable offence which does

not amount to felony; such as perjury, battery, libels, conspiracies, &c.

Laws, for the punishment of those who commit any crime, are necessarily enacted for the good government and security of the state; and such laws being once made by the supreme authority for the regulation of the conduct of the whole community, it is expedient that the chief magistrate should be armed with the power of enforcing them. "He beareth not the "sword in vain; for he is the minister of God, "a revenger to *execute* wrath upon him that "doeth evil." And punishments have been devised, denounced, and inflicted by human laws, in consequence of the disobedience of those who have been guilty of such outrages as, if permitted with impunity, would soon loosen all the bands of society.

Human punishment may be considered with regard to its power, end, and measure.

With respect to the *power* or right of the legislature to inflict 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 law of nature, which authorize 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

* See Gisborne's Moral Philosophy, chap. xi.

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 absolutely 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.*

The sole design, then, of the legislature in enacting punishments, is to prevent the commission of the same crimes in future. This is effected in three ways: either by the amendment of the offender himself, in suffering corporal punishments, such as exile, fines, imprisonments, and the like; or by the deterring of others by the dread of example, which gives rise to all ignominious and open punishments; or by depriving the criminal of the power of doing further mischief, which is accomplished

* Rom. ch. iii. ver. 20—26. 1 Peter, ch. iii. ver. 18. See also Butler's Analogy, part 2, ch. v.

either by death, perpetual imprisonment, or banishment for life. These, however, very seldom are, and ought never to be inflicted but when the offender appears incorrigible. But if upon his trial, various circumstances lead to a fair conclusion that there is no hope of his amendment, it would be injustice to the public to delay any longer the heaviest punishment of such a criminal.

With respect to the *measure* of human punishments; this must be left to the wisdom and discretion of the legislature, to enact such penalties as are warranted by the laws of nature and society. They should be such as seem best adapted to answer the end of preventing future transgression.

The law of *retaliation* is not a proper mode of punishment; because in various instances it would be more than a compensation; as if a court were to award a peasant to strike a *nobleman* who had struck him. In some cases it would not be adequate to the offence; as if a man were sentenced to lose one of his eyes, who had put out the *only* eye of his neighbour. And in other instances it is impossible to apply it; as in the cases of theft, defamation, forgery, &c. &c.

There are some general principles to be regarded in allotting a punishment which shall be adequate to the offence.

It is necessary to attend to the object of an injury; to the violence of passion or temptation with which it was committed; to the age, education, and character of the offender; with a variety of other circumstances which may extenuate or aggravate the commission of a crime; and must point out all the *measure* of punishment.

As punishments, then, are chiefly intended for the prevention of future crimes, it follows, that those offences should be most severely punished which are most destructive of the public safety and happiness; and which a man has the most frequent and easy opportunity of committing. Hence, it is in more cases capital, for a servant to rob his master than for a stranger. So to steal any trifle from one's person, *privately*, of the value of *twelve-pence*, is made capital; but to carry off a load of corn from an open field, is punished only with transportation.

Great severity in the punishment of crimes, is thought by many wise men to defeat its own end. They are of opinion, that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. Because where the severity of laws is very great, the execution of them is hindered by the public

humanity. A feeling man will decline to prosecute, where he thinks the conviction would be followed by excessive punishment; and a merciful prince, under similar circumstances, will be often constrained to pardon the criminal, or dispense with a part of the sentence of the law.

Hence it is often objected that the English criminal code is too *sanguinary*. Perhaps it would be more correct to say, that its provisions too frequently inflict the penalty of death upon offenders: in other words, that the punishment is too often disproportioned to the offence. The term *sanguinary* seems improper, as implying oppression, tyranny, and revenge; yet undoubtedly, whenever the legislature has enacted the punishment of death, it has done it principally with the view of preventing the future commission of the particular crime; and not of exercising an inhuman cruelty. If, therefore, the end of such punishment be not *fully* answered, the fact only proves the incorrigible depravity of those unhappy creatures, who cannot be restrained by the dread even of an ignominious death. Besides, although so many offences are made capital; it is certain, that *comparitively* few executions take place, since the far greater part of capital convicts receive a *conditional* pardon. But, it will be said, "does

"not this very circumstance prove that the "*severity* of the law defeats its own end, by "occasioning an indeterminate relaxation of its "application? Are not men of depraved morals "induced to offend the laws, when they consi- "der the probability that they shall escape their "utmost severity? If you would then pre- "vent the commission of crimes, either abolish "the penalty of death, or, let it or a more "lenient punishment, be *certainly* inflicted. "The *certainty* of suffering even a milder pu- "nishment will deter men from breaking the laws "much more effectually than the sentence of "death, which loses half its terrors, through the "*uncertainty* of its execution." It must be confessed that this is specious, but we doubt whether it be solid reasoning. Is it a fact, that the *certainty* of punishment does in general deter men from sinning? On the contrary, do they not presumptiously go on filling up the measure of their iniquities, more from the delusive hope of escaping *detection*, than refrain from it through the dread of suffering? When sin is once conceived, it operates in *deluding* the mind. Men are "hardened through the *deceitfulness* of "sin." But, unless the *certainty* of any specific punishment can be proved to be a *certain* pre- vention of any particular crime, of sheep steal-

ing, for instance, in *all* persons, the remedy is absolutely inadmissible. For it would preclude that discretion which every British judge ought to have, and which he never fails to exercise in respiting according to the age, the character, and other circumstances of the criminal, the sentence he has been obliged to pass. But what is worse, this *certainty* of punishment, at once plucks out the most brilliant jewel in the royal diadem—the prerogative of *mercy!* If, however, it should be said, that this is not intended; then what becomes of the *certainty* of punishment? Will not the sheep-stealer, the horse-stealer, and other criminals, deceive themselves with the hope, that although they may perhaps be convicted, yet they shall be recommended by a feeling jury, or a compassionate judge, to the royal favour, and so escape punishment altogether? Is it not an undeniable fact, that a great part even of those unhappy convicts who end their shameful lives upon the gallows, deny their guilt, with the halter round their necks, from a delusive hope of the arrival of a pardon, or reprieve?

If, then, the execution of *any* punishment were made *certain*, it would be impossible for the sovereign to fulfil a material part of his coronation oath, which enjoins him to "execute

"judgment in mercy." But where is the subject who would carry his speculations thus far? When the popular Lord Russel denied the king's prerogative to remit the ignominious part of the sentence against Lord Stafford, he surely was influenced more by a misguided zeal, than a sound judgment. Nor did he foresee that the king would so soon have occasion to observe, "that his lordship would now find he was possessed of that prerogative, which in the case "of Lord Stafford he had denied him."*

It is true, that Sir William Blackstone in his luminous commentaries, most unequivocally condemns the severity of our criminal code; but it is equally certain that the practice of inflicting capital punishments is justified by the great and excellent Sir Matthew Hale. They, therefore, who are of opinion that the English criminal law cannot be too severely reprobated, ought to reflect that the wisest men, the profoundest lawyers, the most exemplary christians have and still do differ in opinion on this very delicate and difficult subject.

* Hume's Reign of Charles II.

CHAPTER XXIX.

Of HOMICIDE.

NOTWITHSTANDING it has been already stated that a specification of different crimes fall not within the limits allotted to this work; the subject of the present chapter is introduced as affording a favourable opportunity of bearing our public, though feeble, testimony against those species of homicide which the laws of *honour* and *custom* sanction rather than reprobate.

The greatest crime that can possibly be committed against the *persons* of any of the king's liege subjects, is the wilful taking away of that life which is the immediate gift of God. A man has no right to destroy his own life; much less is he authorized to deprive his neighbour of his; except when under certain circumstances he is either permitted or commanded to do so by the laws of nature or revelation. But as the best action may be nullified by the unworthy *motive* from which it originated; so even the killing of a fellow creature is an act altogether innocent, if there be a total absence of all malicious intention

or premeditated design. The laws of England, therefore, with their usual regard to reason and revelation, very properly contemplate homicide in three points of view; viz. as justifiable, excusable, and felonious.

Homicide, imports in law, the killing of *any* human being.

Justifiable homicide is of various kinds. It may be such as arises from some unavoidable *necessity*, without the consent of the will of the person killing, and is therefore without any blame. As, when the *law requires* it, one, by virtue of his office, puts another to death. Again, homicide is justifiable when it is committed to advance the public justice; as when an officer in the execution of his office, either in a civil or criminal case, kills a man who resists him. So, likewise, if a man be killed in attempting to commit a robbery, or in breaking open a house *in the night time*, the slayer commits only a justifiable homicide; and the law considers that he has done a commendable rather than a blameable act. Indeed it is a constitutional maxim, that one may lawfully kill another who forcibly attempts to commit any crime that is punishable with death.

Excusable homicide is of two sorts; either by misadventure, or upon a principle of self-defence.

Homicide by *misadventure*, is where one in doing a lawful act kills another without any intention of hurting him. As if a parent, or master, or an officer, in *moderately* correcting a child, apprentice, or a soldier, happen to occasion his death, it is only a *misadventure*, because the act of *moderate* correction is lawful. But neither the manner, nor instrument, nor measure of the correction must exceed the bounds of *moderation* and reason; otherwise, if death ensue, it will be murder, or manslaughter at the least, according to circumstances.

Homicide in self-defence, is that whereby a man by killing his assailant, may protect himself from assault, in the course of a sudden quarrel. This is what the law terms *chance-medley*, or a *casual* affray. But if both parties be actually combating at the time when the mortal stroke is given, then the slayer is guilty of manslaughter. So that to constitute a homicide in *self-defence*, it must appear that the slayer had no other possible means of saving his own life but by killing his antagonist.

Felonious homicide, is the killing of any human creature without justification or excuse. This may be done either by destroying *one's self* or another.

A *felo de se*, or self-murderer, is one who deliberately puts an end to his own life; or com-

mits any *unlawful* act, the consequence of which is his own death; as if in maliciously shooting at another, the gun burst and kill him.

Suicide admits of accessories; as if one persuade another to kill himself, and he do so, the adviser is guilty of murder.

Wilful suicide is the most heinous crime that a man can possibly commit. For the same rebellious act by which he invades the prerogative of the Almighty, instantly cuts him off from all possibility of repentance, and hurries him uncalled before his offended God.

——— "Dreadful attempt!
Just reeking from self-slaughter, in a rage
To rush into the presence of our Judge;
As if we challenged him to do his worst,
And matter'd not his wrath."*———

But suicide is also a crime against the king, who has an interest in the life of every one of his subjects. The law of England, therefore, has annexed such punishment to this horrid crime, as the nature of the case admits. He who is guilty of it, has indeed removed his *conscious part* beyond the reach of human power;

* Blair's Grave.

which can, however, act upon his reputation and property. To affect the former, therefore, the law directs that the *dead* body shall have an ignominious burial, by being interred in the king's highway, with a stake driven through it. And with respect to his property; all his goods and chattels shall be forfeited to the king. The end of the law in inflicting this degradation and confiscation, so well calculated to restrain any one who regards his own character or the interests of his family, from committing so dreadful a crime, is almost wholly defeated by the too common practice of juries in returning verdicts of *lunacy;* when the evidence is far from justifying such a decision. Before a jury give a verdict of lunacy, they should well consider, whether, if the deceased had in the same state of mind killed another instead of himself, the *evidence* before them would have *obliged* them to acquit him of *wilful murder*. It is, indeed, a common notion, that none but a *madman* would have destroyed himself. But surely this sort of reasoning is very absurd: for is not the *drunkard* mad, who wastes his time and property; who, by stupifying his senses and enervating his body, commits a kind of lingering suicide; who, although he is positively assured that no drunkard *can* enter into the kingdom of heaven, still

deliberately persists in his sin? Is not the *adulterer* mad, who, in defiance of the plainest dictates of reason, and of the importunate remonstrances of conscience, dares to violate the wife even of his most intimate friend, notwithstanding the alarming truth is constantly sounded in his ears, that "whoremongers and adulterers God "will judge?" Yet, who thinks of extenuating the guilt of either on the ground of *lunacy?*

A mistaken tenderness for the relatives of the deceased, and an unwillingness to deprive them of his property by their verdict, doubtless sometimes bias the conduct of a coroner and his jury. But they have nothing to do with *consequences*, and no consideration ought to come in competition with the solemn obligation of their oath; which requires the jury to give a verdict *according to the evidence.*

The other species of *criminal* homicide, is that of killing another person; and this is divided into *manslaughter* and *murder.*

Manslaughter, is defined to be, "the unlawful "killing of another without malice either ex- "pressed or implied; which may be either "voluntarily upon a sudden heat; or involun- "tarily, but in the commission of an unlawful "act."

If upon a sudden quarrel two persons fight, and one of them kill the other; or if upon such occasion they go out into a field and fight, this being one continued act, the killing is *voluntary* manslaughter. But if in either case there be sufficient *cooling time* for the passions to subside and reason to interpose, and the person provoked *afterwards* kill his adversary, then he is guilty of murder. So if two men deliberately agree to fight for a wager, and one of them kill the other, it is murder; because the act of going out to fight for a wager, was in itself *unlawful*.

Yet, in contempt of all law, the brutal custom of *pugilism* is daily practised amongst us. Even the magistracy itself is openly insulted by the previous notice of these murderous combats, which is given in the public newspapers; the editors of which, by disgracing their columns with a disgusting minuteness of detail after the battle is over, give a lamentable proof of their own vitiated taste and feelings; and thus prostitute the liberty of the press, to the great injury of the public morals. Pugilism is a science which might have been very suitably displayed in a Roman amphitheatre before an assemblage of Heathen spectators; but is surely a disgraceful practice in a *christian* country. The laws no doubt are sufficient to restrain these daring

offenders against public order, were there not a culpable remissness in enforcing them.*

Involuntary manslaughter differs from homicide excusable by misadventure. The latter always happens in consequence of a lawful act; but the former, in the commission of one that is unlawful. The crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender is punished with fine and forfeiture of all his goods and chattels.

The legal definition of the horrible crime of *murder* is, "when a person of sound memory "and discretion, unlawfully killeth any reasonable creature in being, and under the king's "peace, with malice aforethought, either express or implied."

The *unlawful killing* may take place by poisoning, starving, striking, drowning, or by any

* The magistrates of the county of Cambridge very laudably passed certain resolutions at the last Christmas quarter sessions, to prevent the disgraceful practice of prize-fighting. Mr. justice Grose, in his charge to the grand jury at the last Lent assizes, highly commended their conduct, and called upon the public in general to assist them in their endeavours; and observed, that if after such notice any persons should abet such practices, they would on conviction be liable to twelve months imprisonment.

Cambridge Chronicle, March 19th, 1808

other means by which death may be wilfully inflicted on a human creature. A man may be guilty of murder although he strike no blow nor primarily intend the death of another; as if a parish officer should shift a pauper from parish to parish till he dies for want of food and proper care. But to constitute any killing *murder*, it is necessary that the party die within a year and a day after the cause of the death was administered.

The grand criterion, however, which distinguishes *murder* from all other *killing*, is, that the killing must be committed with *malice aforethought*; and this in law may be either express or implied.

Express malice, is when one kills another with deliberate design; which design is evidenced by some overt act, as lying in wait, antecedent threats, former grudges, and concerted schemes to accomplish his diabolical purpose.

Deliberate *duelling* falls under this description of *express malice*. And the law of England has justly fixed the crime and punishment of murder upon both the principals and accessories of this unchristian practice. Nothing more is necessary with us to check this daring violation of all law, human and divine, than the same firmness and integrity on the trial of a duellist, which so eminently distinguish an English jury upon all other occasions.

Perhaps it will be asked, what are *men of honour* to do, if they must not appeal to the pistol and the sword? The answer is obvious: if one *gentleman* have offended another, he cannot give a more indisputable proof of genuine courage, than by making a frank acknowledgment of his fault and asking forgiveness of the injured party. On the other hand, if he have received an affront, he ought freely to forgive, as he hopes to be forgiven of God. "The "discretion of a man deferreth his anger; and it "is his glory to pass over a transgression." But if either party madly aggravate the matter by sending a challenge to fight, the other must not be a partaker of his sin, if he would "obey God "rather than men."

Still it will be said, that a *military* or *naval* officer at least must not decline a challenge if he would maintain the character of a man of courage. But is it not insulting the loyalty and good sense of the brave defenders of our laws, even to imagine that they, of all men, must violate them to preserve their honour; since the king has expressly forbidden any military man to send a challenge to fight a duel, upon pain of being cashiered, if an officer; and of suffering corporal punishment, if a non-commissioned officer or private soldier? Nor ought any officer or soldier

to upbraid another for refusing a challenge, whom his Majesty positively declares *he* considers as having only acted in obedience to his royal orders, and fully acquits of any disgrace that may be attached to his conduct.* Besides, what necessary connexion is there between the foolhardiness of one who risques the eternal perdition of his neighbour and himself in an unlawful combat, and the patriotic bravery of him who, when *duty* calls, boldly engages the enemy of his king and country? No one will dispute the bravery of the excellent colonel Gardiner, who was slain at the battle of Preston Pans, in the rebellion in 1745. Yet, he once rejected a challenge with this dignified remark: "I fear "sinning, though you know I do not fear fighting."† The fact is, that fighting a duel is so far from being a proof of a man's possessing *true* courage, that it is an infallible mark of his *cowardice*. For he is influenced by "the fear "of man," whose praise he loveth more than the praise of God.

It is also murder by *express* malice, if a master or teacher upon a sudden provocation beat his

* See Articles of War, sec. vii.

† See Doddridge's Life of Colonel Gardiner;—an interesting piece of biography, which is worthy the perusal of every officer in the army and navy.

servant or scholar in a cruel and unusual manner so that he dies, although the offender did not intend his death; because such cruelty indicates a malignity of heart.

Implied malice, is where a man wilfully poisons another. The law presumes that such a deliberate act could arise only from malice, although no particular enmity can be proved. So also if one, knowing the authority of an officer of justice, kill him in the execution of his office, the law will imply malice, and consider the slayer guilty of murder.

With respect to the punishment of murder: the law directs, that immediately upon conviction, the judge shall pronounce judgment, unless he see cause to defer it. In passing sentence, he is to direct the criminal to be executed on the next day but one (unless the same should be Sunday, and then on the Monday following), and that his body be delivered to the surgeons, to be dissected and anatomized. The judge may also, at his discretion, direct the hanging of the body in chains, by a special order to the sheriff; but this forms no part of the sentence of the law.

After sentence, the malefactor is to be kept alone in prison; and the short remainder of his forfeited life sustained with only bread and water.

The judge, however, has the power of respiting the execution, and relaxing the other provisions of the law, upon good and sufficient grounds.

Petit-treason, is also a species of murder, and happens either when a servant kills his master; a wife, her husband; or a clergyman his bishop; to whom they respectively owe faith and obedience.

To convict any one of *petit-treason, two* witnesses are necessary; but one is sufficient to prove the murder. A person convicted of petit-treason, is sentenced to be drawn upon a hurdle, hanged, and dissected.

CHAPTER XXX.

Of COURTS of CRIMINAL JURISDICTION.

The criminal law of England, we have observed, is not *vindictive,* but merciful. It acts, indeed, with a promptness, upon conviction, that is calculated to exhibit an awful example; but it also manifests great tenderness and compassion by providing for the prevention of crimes. Like a kind parent, it has more pleasure in warning its

children against offences, than in punishing them for their transgressions.

Preventive justice consists in obliging those persons whom there is good ground for suspecting of future misconduct, to give, by finding pledges or sureties for keeping the peace, or for their good behaviour, full assurance to the public that they will not offend against the laws. Any justice of the peace may demand such security according to his discretion; or it may be granted at the request of any subject, upon cause being shewn.

When, however, a person has actually offended against the law, he is liable to its penalties; but not until his conduct has been inquired into before the proper tribunal.

The laws of England have not only enacted what punishment shall be inflicted for this or that offence, but several courts are likewise instituted, in which offenders are to be tried by learned judges, appointed by the king, to expound the law and pronounce its sentence.

The courts of *criminal* jurisdiction are those of a *public* and *general* authority throughout the kingdom: and such as are *private* and *special*, being confined to particular parts of the realm.

The highest criminal court in the kingdom is the *hight court of parliament*. This court is supreme, not only in making but also in executing

laws. In it the greatest offenders, whether peers or commoners, may and frequently are prosecuted and punished by trial on *impeachment*.

An impeachment is a presentment to the house of lords, by the commons of Great-Britain, in parliament assembled; the most solemn *grand jury* in the kingdom.

A peer of the realm may be impeached for any crime; and a commoner may be impeached before the lords for a capital offence, as well as for high misdemeanors

The responsibility of the king's ministers to the parliament, certainly exposes them to the caprice and revenge of party; and renders them liable to be harrassed with expensive and vexatious impeachments. On the other hand, there would be great danger of their screening themselves from a just prosecution and merited punishment, by pleading a pardon under the great seal, did not the law wisely prevent such an abuse of the royal prerogative.

The king, therefore, cannot put a stop to the lords proceeding to try the articles of impeachment exhibited by the commons; it being enacted by statute 12 and 13 W. III. ch. 2, that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great-Britain in parliament.

This *inquisitorial* power of the commons is undoubtedly one of the best securities the people have of their liberties, and is obviously conducive to the permanency of the various blessings of the English constitution. For it is absolutely impossible that gross abuses in any department of the government, can long exist without exciting the attention of the representatives of the people; and the dread of enquiry by such a powerful body must necessarily render all public men, whether ecclesiastical or civil, military or naval, extremely cautious how they abuse their trust.

The next public criminal court to be noticed, is the court of *the lord high steward* of Great-Britain, instituted for the trial of peers indicted for treason or felony, or for misprision of either. The office of this great magistrate is very ancient; and was formerly hereditary, or at least, held for life, or during good behaviour: but it is now granted only for the occasion; and it is necessary to bestow it upon a lord of parliament, else he is incapable to try such delinquent peer.

When an indictment is found by a grand jury of freeholders at the assizes against a peer for treason, felony, or misprision, the king creates a lord high steward *pro hâc vice* by commission, under the great seal; which recites the indictment so found, and gives his grace power to

receive and try it according to the laws and customs of England.

The lord high steward then directs a precept to a serjeant at arms, to summon the lords to attend and try the indicted peer. Every lord present shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery. But a majority cannot convict, unless it consists of *twelve* or more.

It is disputed, whether the bishops have a right to sit in this court and try indictments for treason, &c. and there is no instance of their sitting on trials for capital offences. However, they usually withdraw voluntarily; first entering a protest, asserting their right to stay. But even in the high courts of parliament they cannot vote in capital cases.

There is a material difference between the trial of a peer, before the high court of parliament and one before the court of the lord high steward. In the former, the collective body of the peers are the judges both of law and fact; and the lord high steward sits merely as chairman of the court, but has a vote in virtue of his peerage. But in the court of the lord high steward, which is held during the recess of parliament, he is the sole judge of matter of law, as

lords triors are of the matter of fact; but he cannot vote with the rest of the lords.

Another public criminal court is the *court of king's bench;* which, on the crown side, takes cognizance of all criminal causes, from high treason down to the most trivial breach of the peace. Into this court, also, indictments from all inferior courts may be removed by writ of *certiorari,* and tried either at bar or at *nisi prius,* by a jury of the county out of which the indictment is brought.

Again, there is the *high court of admiralty,* held before the lord high admiral of England, or his agents, called the judge of the admiralty. This court takes cognizance of all crimes and offences committed either upon the sea or upon the coasts, out of the body or extent of any English county. All proceedings in it must be determined by a jury, agreeably to the laws of the land.

These four courts may be held in any part of the kingdom; and their jurisdiction extends over crimes committed throughout the whole realm.

But there are criminal courts of *local* jurisdiction.

Such are the courts of *oyer* and *terminer* and general *gaol delivery,* which are held before the king's commissioners; among whom are usually

two judges of the courts at Westminster. These courts are holden twice a year in every county of the kingdom; except the four northern counties, where they sit only once a year. But in London and Middlesex they are open *eight* times a year. In common language, the holding of these courts is emphatically called the *assizes;* the judges sitting by virtue of five distinct authorities. That is, by commission of *assize;* of *nisi prius;* by commission of the *peace;* of *oyer* and *terminer;* and of *general gaol delivery.*

The justices of the peace of the county wherein the assizes are holden, are all bound by law to attend them, on pain of being fined; in order to return recognizances, and to assist the judges in such matters as lie within their knowledge and jurisdiction.

The commission of *oyer* and *terminer,* is directed to the judges and several others, or any two of them; but the judges or serjeants at law only are of the *quorum;* so that the rest cannot act without the presence of one of them. They are to inquire, hear, and determine all treasons, felonies, and misdemeanors.

The commission of *gaol delivery,* empowers the judge to try and deliver every prisoner who shall be in the gaol when the judges arrive at the circuit town; whenever or before whomsoever indicted, or for whatever crime committed.

Upon urgent occasions, the king sometimes grants a special or extraordinary commission of *oyer* and *terminer* and *gaol delivery*; confining it to those offences which stand in need of immediate inquiry and punishment.

No man can sit as a judge of *assize* in his native county; although he may act therein as a commissioner of *oyer* and *terminer* and *gaol delivery*.

The general *quarter sessions* of the peace is another court of local jurisdiction. It must be holden in every county once in every quarter of a year. It is holden before two or more justices of the peace, one of whom must be of the *quorum*.

The jurisdiction of this court extends to the trying and determining of all felonies and trespasses whatever. The justices, however, seldom, if ever, try any greater offences than larcenies within the benefit of clergy; and therefore murders and other capital felonies are usually referred, for a more solemn trial, to the assizes.

In courts of justice there is no casting voice. At the sessions, in case of an equality, the justices ought to respite the matter till the next sessions. In the upper courts there is no decision

till a majority of the judges concur in their opinion.

The rolls or records of the quarter sessions are committed to the custody of a special officer, called the *custos rotulorum*, who is always a justice of the *quorum*. The king nominates this officer by his sign manual. To him belongs the appointment of the clerk of the peace; which office he is prohibited from selling for money.

In most corporation towns, also, there are quarter sessions holden before their own magistrates within their respective jurisdictions. And besides these, there are occasional *petty sessions* holden both in towns and counties, between the times of the quarter sessions, for the dispatch of business of inferior moment; such as the licensing of alehouses and the like.

The next court to be mentioned is the *court-leet*, or *view* of *frankpledge*; which is a court of record held once a year, and not oftener, within a particular hundred, lordship, or manor, before the steward of the leet. It is the king's court granted by charter to the lords of those hundreds or manors. The original object of the court-leet was the preservation of the peace, and the chastisement of those who disturbed it. All the freeholders of the district are obliged to

attend this court, if required; being considered by the wise system of king Alfred, as pledges for each other's good behaviour. But this court has gradually degenerated into little more than a name.

The *coroner's court*, is likewise a court of record, to inquire, when any one dies in prison or comes to a violent and sudden death, by what means he lost his life.

The court of the *clerk of the market*, is incident to every fair and market in the kingdom, to punish misdemeanors therein. The object of this jurisdiction is principally the superintendance of the weights and measures. Formerly the standard was committed to the care of the bishop, who usually appointed one of his *clerks* to inspect all abuses of it. And hence this officer has obtained the appellation of *clerk* of the market.

But there are, besides these several courts, others of a private or special criminal jurisdiction; such as,

The *court of the lord steward*, treasurer, or comptroller of the king's household, instituted 3 Hen. VII. ch. 14, to inquire of felony by any of the king's sworn servants under the degree of a lord. The inquiry must be by a

jury of twelve sober men and discreet persons of the king's household.

The court of the steward of *the marshalsea*, which inquires into and determines all treasons, bloodshed, &c. &c. within the limits, that is, within two hundred feet from the gate of any of the palaces where the king shall abide.

Lastly, there are the criminal courts of the *lord high stewards of the two Universities of Oxford and Cambridge*, which have jurisdiction over their respective members, under a trial by jury. A bill of indictment must first be found by the grand jury at the assizes; and then the vice-chancellor may claim the cognizance of it, which must be allowed by the judges. The jury who tries the privileged person must consist half of freeholders and half of members of the University.

CHAPTER XXXI.

Of the PROCEEDINGS *in* CRIMINAL CASES.

The proceedings in the courts of criminal jurisdiction are two-fold; summary and regular.

By a *summary* proceeding, is meant, the condemning or acquitting of an accused person, by judges appointed by statute, who are thereby empowered to inflict certain penalties on the offender without the intervention of a jury. Thus all trials of offences against the *excise* laws are to be determined by the commissioners of excise, or by justices of the peace. Again, the magistrates have the power to punish in a summary way according to act of parliament, all persons guilty of swearing, drunkenness, &c. &c. To avoid, however, the abuse of this authority as much as possible, the law has made it indispensably necessary that the party concerned should be *summoned* to appear before the magistrate previously to any trial of the fact, in order that he may be heard in his own defence.

Lastly, if a *contempt* be committed in any of the courts, the offender may instantly be apprehended and imprisoned at the discretion of the judges, without any further proof or examination.

But the *regular* and ordinary method of proceeding against a criminal, is, in the first place, by arrest.

An arrest, is the apprehending of one's person, that it may be forthcoming to answer an alleged or suspected crime. But no one is to be apprehended unless charged with such a crime as will at least justify the holding of him to bail, when taken. An arrest may be made by a *warrant*. This is to be granted when the party requiring it makes oath concerning the crime committed. The warrant ought to be under the hand and seal of the justice who grants it; setting forth the time and place of making and the cause for which it is made; and should be directed to the constable, or any private person *named*, requiring him to bring the party either generally before *any* justice for the county, or before him by whom it is granted. In the latter case it is called a *special* warrant.

The issuing of *general warrants* to apprehend all persons suspected of being guilty of the crime specified therein, without specially naming such persons, was declared *illegal* by a vote of the

house of commons, on the 22d of April, 1766. Before that period, it had been the uniform practice of the secretaries of state from the time of the revolution, to adopt this method on particular occasions, without having in any instance been censured, until Mr. John Wilkes was apprehended by this authority, on the 30th of April, 1763.* Mr. Wilkes commenced an action in the court of common pleas, against Robert Wood, Esq. under-secretary of state, for seizing his papers under a general warrant; and after a hearing of nearly fifteen hours before lord chief justice Pratt and a special jury, he obtained a verdict. His lordship pronounced the warrant under which Mr. Wilkes had been arrested, to be *unconstitutional*, *illegal*, and *absolutely void*. A decision so in unison with the general spirit of the British constitution, and so favorable to the liberties of the subject, could not fail to render his lordship extremely popular throughout the realm. He consequently not only received marks of the public gratitude from various parts of the kingdom; but his Majesty, who has in various instances been the protector and promoter of civil and religious liberty, signified his royal approbation of his conduct, by creating him a

* See page 153.

peer of Great-Britain, by the title of earl Camden.

It is very remarkable, that, whilst in other countries disputes with the government have generally ended in the increasing of tyranny; almost every political struggle has in England terminated in the extension of rational liberty. Is it possible for the reflecting mind to contemplate this fact without acknowledging the overruling providence of God, who has in such numberless instances turned those evils which he has permitted into the general good of this nation? No one can imagine that Mr. Wilkes, by publishing "a false, scandalous and seditious libel, "containing expressions of the most unexampled "insolence and contumely towards his Majesty, "&c. &c." intended to promote the public *liberty*; or that his character and conduct ever justified the associating of the sacred name of *liberty* with his own. Yet had so shameless a paper as No. 45 of the North Briton never appeared, so dangerous an instrument as a *general warrant* might at this day have been in the hands of a secretary of state, who might have abused it to the oppression of the subject.

A justice of one county cannot issue a warrant to apprehend a person in another; but the warrant of a justice of the peace in one county,

as *Worcestershire*, must be *backed*, that is, signed by a justice of the peace in another, as *Norfolk*, before it can be executed there. The warrant, however, of any of the justices of the court of king's bench, extends all over the kingdom, and is dated *England*, and not *Berkshire*, or any other particular county.

But arrests may be executed by *officers without warrant*. A justice of the peace may apprehend any one committing a breach of the peace in his presence. The sheriff, too, and the coroner, may apprehend any felon within the county without warrant. So, likewise, the constable has great original authority; and may without a warrant arrest any person for a breach of the peace: and in cases of felony *actually* committed, may break open doors to arrest the felon; and even kill him if he cannot be otherwise taken. And should the constable be killed in such attempts to arrest a felon, it is murder in all concerned. Yet, if an officer arrest under a warrant, it is necessary that the warrant be in all respects *good*; otherwise it is not murder in those who kill the officer in executing it. Thus in the case of Sir Henry Ferrers' servant, who was charged with murder and manslaughter, for having killed the officer who attempted to arrest his master: the warrant terming Sir Henry a

knight, whereas he was a *baronet*, it was decided in court not to be a good warrant, and the prisoner was acquitted accordingly.* Lastly, Watchmen may by virtue of their office arrest all offenders, and especially night-walkers, and commit them to custody until the morning.

As an encouragement to all persons to exert themselves in the apprehending of criminals, it is enacted by law, that any person taking and prosecuting a felon to conviction, shall receive from the sheriff a reward of £.40; and shall be intitled to the horses, furniture, arms, money, and other goods taken upon the person of the robber; with a reservation, however, of the right of any person from whom the same may have been stolen. And by various statutes, such persons as apprehend and convict felons guilty of burglary, housebreaking, horsestealing, and those who are found at large during the term for which they were ordered to be transported, shall be exempted from serving all parish offices; and shall receive different specific sums of money, from £.10 to £.40, according to circumstances.

When an offender is arrested, he is taken before a magistrate, who takes down in writing the examination of the prisoner, and the infor-

* De Lolme.

mation of those who bring him. If the suspicion entertained against the prisoner be groundless, he must be immediately discharged: but if otherwise, he must either be committed to prison or admitted to *bail;* that is, he must put in sureties for his appearance to answer the charge brought against him.

The party accused ought to be admitted to bail in all offences against the common law or any acts of parliament that are below felony; unless the bail be prohibited by some special statute. But no justice of the peace may admit to bail upon an accusation of treason, nor of murder;—nor in cases where bills of indictment are found for manslaughter;—nor may he bail such as having been committed for felony, have broken prison;—nor persons outlawed;—nor such as have abjured the realm;—nor persons taken in the act of felony; nor persons charged with *arson;*—nor excommunicated persons;—nor in many other cases of a more doubtful nature.

If the case be not bailable, or the party cannot find sufficient security, he is to be committed to the county gaol, by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment. There he is to be kept in safe custody until delivered by due course of law.

This commitment is not intended as a *punishment,* but only as an indispensable mode of securing the person of the offender against the day of trial. During his confinement he ought to be treated with all possible humanity, consistently with the responsibility of the gaoler. He should not be unnecessarily loaded with irons; nor suffer any other hardship but what is absolutely inseparable from such a loss of personal liberty.

The law considers every man as innocent until a jury of his countrymen have declared him to be guilty. A humane and conscientious gaoler, therefore, will guard against having his feelings hardened by the constant witnessing of so many objects of misery; and whilst he diligently attends to the charge given him to keep his prisoners safely, he will bear in mind that they may possibly be clear from the crimes with which they are charged. He will not *needlessly* thrust them into the inner prison, nor make their feet fast in the stocks; but will shew a compassionate regard to their persons. Where he observes any mental wounds inflicted either by the strokes of a guilty conscience, or by the violence of oppression, he will tenderly wash their stripes with the tears of sympathy and kindness: and when the magistrates send to let the

prisoners go, he will suffer them to depart and go in peace, without exacting from them any more fees than what are just and equitable.

If a magistrate should refuse or without cause delay to bail a person who is bailable, he breaks the law; and greatly offends against the liberty of the subject. For both the common law and various acts of parliament require him to admit to bail all persons whose offences are within the bounds prescribed. Yet, to prevent any magistrate from taking excessive bail on the one hand, or insufficient bail on the other, he is liable in either case to be fined, whenever, forgetting the duties of his office, he is influenced by his own feelings instead of being guided by the principles of reason, justice, and humanity.

CHAPTER XXXII.

The same Subject continued.

After the commitment of an offender, follows his prosecution, or formal accusation. This is either upon a previous finding of the fact by an inquest or grand jury, or without such previous

finding. The former way is either by presentment or indictment.

A *presentment*, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury.

A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel, and the like.

An *indictment*, is a written accusation of one or more persons of a crime or misdemeanor preferred to, and presented upon oath by, a grand jury.

The trial by jury is not only the privilege most valued by, but also the best safeguard of every thing dear to, Englishmen. This invaluable blessing is very ancient; and certainly derived from those northern tribes, who extended it to the people whom they subdued. Such, at least, has been the enviable condition of this country. For the best writers on the English constitution trace the origin of juries to the Saxons, who established themselves in this island after the final retreat of the Romans. But whilst other conquered nations gradually lost the advantages of a

trial by jury, England improved upon and brought the original institution to much greater perfection.

The English *grand jury* is the only institution of the kind in Europe; and when duly executed, the best calculated for preventing the abuses of power in the prosecution of criminals, that was ever known in the annals of the world.

The division of the one original jury, into *grand* and *petty*, seems to have taken place in the interval between the establishment of itinerary judges in the twenty-second year of the reign of Henry II. and the magna charta of king John.

The great men of the county at first bribed the sheriff to omit them, and to return others of inferior note to serve on the jury; and thus withdrawing from an honourable office, its duties devolved upon the smaller proprietors. At length, a sense of dignity tended to perpetuate an alteration which probably began in pride and sloth.* For the tenants in capite, and great landholders, gradually declined if not disdained to mix in juries with their inferiors in rank:

* For much information on the subject of juries, the Author is indebted to "The Security of Englishmen's Lives" (supposed to have been written by lord chancellor Somers), "to which "is prefixed, A Sketch of the History of Juries, by a Barrister." —Wilkie.

who, nevertheless, in all legal arrangements, were reckoned as their peers. To this distinction of rank, it is probable we owe an apparently accidental separation of the primary jury, into those two important branches which so eminently enhance the value of this admirable mode of trial.

So little, however, seems to be ascertained by antiquarians respecting the introduction of the trial in criminal cases by *two juries*, that, although it is one of the most beneficial, yet its origin is certainly one of the most obscure and inexplicable parts of the law of England. But the pride and sloth of the richer orders appear to have been the hinges upon which these folding doors, that now render our persons and property so secure against the hands of violence and injustice, originally turned.

The *grand jury*, then, is constituted of freeholders and gentlemen of the first figure in the county, whom the sheriff is bound to return to every *session of the peace*, and to every commission of *oyer and terminer* and of general *gaol delivery*. It consists of twenty-four good and lawful men of the county, some out of every hundred; and not less than twelve, nor more than twenty-three, are to be sworn, to inquire, present, do, and execute all those things which on the part of our lord the king shall be then and there commanded of them.

The duty of the grand jury is not only to indict all who shall appear to them to be criminal, but also to protect every innocent person from that vexation and danger which might be the effect of malice and tyranny combined. In order to oblige these important juries to a more conscientious discharge of this two-fold duty, our ancestors appointed the following oath to be taken, both by the foreman and every other member of the grand inquest: "You shall "diligently inquire, and true presentment make, "of all such articles, matters, and things, as "shall be given you in charge. And of all "other matters and things as shall come to your "own knowledge touching this present service. "The king's council, your fellows', and your "own, you shall keep secret. You shall present "no person for hatred or malice; neither shall "you leave any one unpresented for favour or "affection, for love or gain, or any hopes thereof; "but in all things you shall present the truth, "the whole truth, and nothing but the truth, "to the best of your knowledge. So help you "God."

There is a common, but erroneous notion, concerning the duty of grand juries; which, if acted upon, will in time destroy all the benefit we can expect from so wise an institution. Some

have affirmed it for law, that the grand jury is neither to make so strict an inquiry into matters before them, nor to look for so clear an evidence of the crime as the petit jury; but as their presentments are to pass a second examination, they ought to present an indictment upon bare probabilities; whereas, when a prosecutor suggests that any man is criminal, and ought to be indicted, it belongs to the grand jury to hear all the *proofs* he can offer, and to use *all other means* in their power to ascertain the *truth* of such a suggestion: and surely a grand juryman who swears to present nothing but the truth, ought not to be satisfied with any thing short of it. Therefore, the grand jury must have as clear a proof to justify them in finding a true bill of indictment, as the petit jury require to find a verdict of *guilty*. For the real difference between the two juries is this, that the one hears only the evidence on the part of the prosecution; whereas the other hears the *prisoner's defence and witnesses also*, which may very much weaken, or totally destroy, the validity of the prosecutor's accusation.

The grand jury being sworn, the judge delivers to them his charge, remarking on the different subjects of their inquiry, reminding them of the true nature of their office, and exhorting them

faithfully to discharge their duty, both on the part of the public, and of the individuals whose cases shall be brought before them. They then retire into what is called the grand jury chamber, to sit and receive indictments, which are preferred to them in the name of the king, at the suit of a private prosecution; on whose behalf only they are to hear any evidence.

The finding of an indictment is nothing more than the opinion of the grand jury that the facts charged have been sufficiently *proved* before them to justify their calling upon the party to *answer* the accusation.

The grand jury being sworn to enquire for the body of the county, cannot regularly take cognizance of any thing done out of it, unless specially authorized by an act of parliament. And in general, all offences must not only be enquired into, but tried also in the county in which they were committed. Bigamy, however, may be tried either in the county where the offence was committed, or where the offender is apprehended.

If the grand jury, after having heard the evidence, are of opinion that the accusation is groundless, they indorse the bill with the words "*not a true bill*, or *not found*;" and the party is discharged accordingly. But a new indictment may be preferred afterwards to a subsequent

grand inquest. But supposing the grand jury be satisfied of the truth of the accusation, they indorse upon it *a true bill;* the indictment is then said to be *found,* and the party stands indicted.

The law of England, however, is so tender of the lives of its favoured inhabitants, that no man can be convicted at the suit of the king of any capital offence, but by the unanimous voice of *twenty-four* of his equals, who must also be his neighbours. For twelve at least of the grand jury, must in the first place assent to the accusation of the party; and afterwards upon his trial, the whole petit jury must agree in finding him guilty.

How necessary grand juries are in the due administration of impartial justice, may be learned from the vile policy of Empson and Dudley, the two wicked ministers of Henry VII. who craftily contrived to abolish them. These corrupt statesmen by their evil practices prevailing upon the parliament to sanction their iniquity by a law, became the hateful instruments of the most cruel oppressions. But for this and other malpractices, they afterwards fell the victims of popular resentment, being deservedly beheaded August 28th, 1510.

The indictment being found, is delivered publicly into court, and the clerk of the assize reads

aloud, " A true bill against A. B. for felony, &c. " &c." and *vice versa* if the grand jury should not find the bill.

An indictment must have a precise and sufficient certainty, specifying the christian name, surname, and addition of the state and degree, mystery, town or place, and the county of the offender, in order to *identify* his person. And to ascertain clearly the *time* and *place* of the offence, the day and township must be named wherein the fact was committed. The *offence* itself also must be stated with clearness; and in some crimes, particular words of art must be introduced, to express the exact idea which the law entertains of the offence. Thus in treason, the facts must be laid to be done " treasonably " and against his allegiance," otherwise the indictment is void. So, also, in indictments for murder, it is necessary to say, that the party " *murdered*," not " *killed*," the deceased. And so of other specific crimes.

Lastly, it is sometimes essential to a good indictment, that the *value* of the thing which is the subject or instrument of the offence be expressed. This is necessary in larcenies, to ascertain whether it were grand or petit larceny; and whether the criminal be entitled or not to the benefit of clergy. In homicides of all sorts,

it is likewise requisite, because the weapon of destruction is forfeited to the king, as a deodand.

But there is a method of proceeding at the suit of the king, without a previous indictment or presentment by the grand jury; and that is, by way of information.

Informations are of two sorts; first, such as are partly at the suit of the king, and partly of the subject; and secondly, those that are in the name of the king alone. The former are usually brought upon penal statutes; which inflict a penalty upon conviction of the offender; one part to the use of the king, and another to the use of the informer.

The informations exhibited in the name of the king alone, are also of two kinds; first, those that are truly and properly his own suits, and filed *ex officio*, by the attorney-general; secondly, those in which he is the nominal prosecutor, yet it is on the accusation of some private person or common informer. These informations are filed by the king's coroner and attorney in the court of king's bench.

The objects of the king's own prosecutions, are properly such enormous misdemeanors as directly tend to disturb and endanger his government; or to molest and affront him in the discharge of the regular duties of his royal station.

In such cases, the law has wisely given the power to the crown, of immediate prosecution, to avoid the danger that would accrue from the delay of applying first of all to a grand jury to find a bill of indictment.

The objects of those informations that are filed by the master of the crown office, upon the complaint or relation of a private person, are any gross misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government, but which, on account of their enormity or dangerous example, deserve the most public censure.

When an information is filed in either of these ways, it must be tried by a petit jury of the county where the transaction took place. And if the defendant be found guilty, the court of king's bench must be resorted to for his punishment.

A writ of *quo warranto,* is another species of information, usually made use of to try the civil rights of such as have intruded into any office or franchise. But an information in the nature of *quo warranto* being merely a civil proceeding, the court of king's bench will grant a new trial, although the verdict be given for the defendant.

The bill of indictment being found, the offender is immediately arraigned thereon, if he have been previously in safe custody. But should he be at

large, having *fled for it,* or by any means secreted himself, then *process* is to be issued out against him.

The regular process for any petty misdemeanor or on a penal statute, is a writ of *venire facias;* which is a summons to cause the party to appear, as the indictment cannot be tried if the offender be not personally present in court.

If it appear by the return to the writ of *venire,* that the party has lands in the county, then a *distress infinite* shall be issued from time to time till he make his appearance. But if he have no lands, the sheriff shall be commanded by writ of *capias,* to take his body, and have him at the next assizes. And if he cannot be taken upon the first *capias,* a second and a third shall issue, called an *alias* and a *pluries capias.* But on indictments for treason or felony, a writ of *capias* is the first process.

Should the offender, after the several writs have issued in a regular number, abscond, he may be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus,* and do not appear at the fifth exaction, then he is to be adjudged *outlawed,* or put out of the protection of the law. He then becomes incapable of taking any of its benefits, either by bringing actions or otherwise.

Outlawries upon indictments for misdemeanors, are punished like outlawries upon civil actions, with forfeiture of goods and chattels. But an outlawry in treason or felony, amounts to a conviction and attainder of the offence charged in the indictment, as much as if the criminal had been found guilty by a petit jury.

Formerly, it was no crime to kill an outlawed felon, as he might be knocked on the head by any person who met him. But now, with much more humanity, it is holden, that if any man wilfully and wantonly kill an outlaw, he is guilty of *murder*, unless it happen in an attempt to apprehend him. It is, therefore, a vulgar error that any one is at liberty to put an outlawed person to death.

An outlawry may be reversed by a writ of error; for if a single point be omitted or misconducted, the whole outlawry is illegal. Upon a reversal, the party accused is allowed to plead to and defend himself against the indictment.

Writs of *certiorari facias*, are writs usually had before trial, after the indictment is found, to certify and remove it, with all the proceedings thereon, from any inferior court of criminal jurisdiction, into the court of king's bench; which is the sovereign ordinary court of justice

in criminal causes. And this may be done where it is surmised that a partial or insufficient trial will probably be had in the court below, &c.

Indictments found by the grand jury against a peer, or privileged person of the Universities, must in consequence of a writ of *certiorari*, be certified and transmitted into the court of parliament, or to the courts established by law in the Universities, as the case may be, to be there respectively tried and determined.

Upon the appearance of the offender in court, he is immediately to be *arraigned* on the indictment; or, in other words, the prisoner is to be called to the bar of the court, to answer to the charge brought against him. He is to be called to the bar by his christian and surnames; and the court has no authority to order his irons to be taken off till he has pleaded, and the jury are charged to try him.

The prisoner appearing at the bar, is called upon by his name to hold up his right hand, in order that he may own himself by this act to be of that name by which he is called, and thus indentify his person from the crowd around him. But if he confess that he is the person named, it is sufficient.

The significant act of holding up the right hand, was also originally intended to answer

another very important purpose. It will be hereafter seen, that there are what are called clergyable offences; that is, such as would be punished with death upon conviction, if the prisoner were not privileged to beg his clergy. Laymen, however, can avail themselves of the benefit of clergy only once, and formerly they were used to be burned on the brawn of the thumb of the right hand, instead of suffering a capital punishment for the first offence. The culprit, therefore, was desired to hold up his hand, in order that the court might know whether he had ever been convicted before of any clergyable crime. This reason, however, is now done away, by a statute of the king, which commutes the burning on the hand for whipping, imprisonment, transportation, or the like, at the discretion of the court.

The indictment is then to be distinctly read to him in the English tongue, that he may fully understand the charge that is brought against him. He is then asked, whether he be guilty of the crime whereof he stands *indicted*, or not guilty.

A criminal when he is arraigned, either stands *mute*, or *confesses* the fact, or *pleads* to the indictment. And he is understood in law, to stand *mute* when he either makes no answer at all, or answers foreign to the purpose; or having

pleaded guilty, refuses to put himself upon his country. If he say nothing, a jury is to enquire whether he be obstinately silent, or dumb by the visitation of God. If the latter should appear to be the case, the court shall proceed to trial; but it has never yet been decided, whether sentence of death can be passed against such a person. But if he be found *obstinately* mute, it has long been held that this is equivalent to conviction. And the prisoner shall receive the same judgment and execution in all such cases, as if he had been convicted by a verdict or confession of the crime. Two instances occurred in the last century, of persons who refusing to plead, were in consequence condemned and executed, agreeably to the statute 12 Geo. III. ch. 20. One was at the Old Bailey, for a murder, in 1777; the other was for burglary, at the summer assizes at Wells, in 1792.

If the prisoner *confess* the crime charged in the indictment, the court has nothing to do but to award judgment. That it was customary among the Romans to punish a criminal upon his own confession, may be inferred from the conclusion of Cato's celebrated speech which decided the Catalinian conspirators.* But such are the tender-

* "—De confessis, sicuti de manifestis rerum capitalium, more "majorum supplicium sumendum."

Sallust. Bell. Catil.

ness and compassion of a British judge, that he is always very unwilling to receive and record the confession of the prisoner; and therefore generally advises him to plead to the indictment, and avail himself of the forms of the *law*, which deems every man innocent until he is *proved* to be guilty. But when a prisoner is conscious of his guilt and is brought to real contrition of heart, he will probably be fearful of adding to his sin by telling a known falsehood in pleading *not guilty*. In all events, after conviction a true penitent, if he be really guilty of the crime charged, will certainly make an unreserved confession of the truth both to God and man, by an acknowledgment of the *justice* of his punishment.

It may not be amiss in this place, to correct a popular error respecting what is called, *turning king's evidence*, by an accomplice in any crime. It is too generally believed, that an accomplice who voluntarily offers to give evidence against his companions in guilt, is *entitled* to a pardon. This is a great mistake. It is true, that justices of the peace have usually encouraged an accomplice to make a full discovery, and to give his evidence without prevarication or fraud; by intimating, at least, that he himself shall not be prosecuted. But in the case of Mrs. Rudd, lord Mansfield clearly laid it down, that no authority

is given to a justice of the peace to pardon an offender, and to tell him he shall be a witness at all events against others. A magistrate may encourage the hope that such a witness may escape punishment; but the judge has a discretionary power to exempt a *king's evidence* from prosecution or not, as he sees fit. And, in fact, upon a trial some years ago at York, before judge Buller, the accomplice, who was admitted an evidence, denying in court all he had before confessed, occasioned the prisoner to be acquitted: whereupon the judge ordered an indictment to be preferred against this accomplice, for the same crime: and upon his own previous confession and other circumstances, he was convicted and executed.*

With respect, however, to those persons to whom the king, by special proclamation, in the gazette or otherwise, has promised his pardon, lord Mansfield says, that they have a *right* to it.

When the prisoner neither stands mute nor confesses the fact, he is then said to *plead*, or make his defence on the arraignment. This is done either by a plea to the jurisdiction, or a demurrer, or a plea in abatement, or a special plea in bar, or by the general issue.

* Professor Christian.

A plea to the *jurisdiction,* is where an indictment is taken before a court that can take no cognizance of the offence. As if a man be indicted for treason at the quarter sessions: in this and similar cases he may except to the jurisdiction of the court without answering at all to the crime alleged.

A *demurrer* to the indictment, is when the crime charged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he asserts that the fact as stated is no felony, treason, or whatever the crime is said to be. But this plea is not often used, because the same advantages may be taken in arrest of judgment upon conviction.

A plea *in abatement,* is principally for a *misnomer,* a wrong name, or a false addition to the prisoner: as, if John Jones, gentleman, is indicted by the name of Thomas Jones, esquire, he may plead that he has the name of John, and not of Thomas; and that he is not an esquire, but a gentleman. But this is a mere delay, which avails the prisoner but little, as a new bill of indictment may be framed, corresponding with the name and degree which he has avowed belong to him. But a far more substantial kind of plea, is a special plea *in bar,* which affects the merits of the indictment, and gives a reason

why the prisoner ought not to put himself upon his trial for the crime with which he is charged.

Special pleas in *bar*, are of four kinds.

The plea of a *former acquittal*. It being a universal maxim in the English law, that no man shall be brought into jeopardy of his life more than once for the same crime.

A second plea *in bar*, is a former *conviction* for the same identical crime; although no judgment was ever given, or perhaps ever will be. And this is a good plea in bar to an indictment. But it must be observed, that both these pleas in bar must be upon a prosecution for the same identical act and crime.

Again, a *former attainder*, is a good plea in *bar*, whether it be for the same or another felony. For wherever a man is attainted of felony by judgment of death, either upon a verdict or confession by outlawry, he may plead such attainder in bar to any subsequent indictment or appeal, for the same or any other felony. And this, because the prisoner is dead in law by the first attainder, his blood is already attainted, and he has forfeited all that he had. But there are exceptions to this general rule, which can here be only thus hinted at.

The last plea in *bar* to be mentioned, is a *pardon*; which at once destroys the end and

purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict. It is of great importance to plead a pardon in bar, or in arrest of judgment, *before* rather than *after* sentence is past; because, by stopping the judgment, it prevents the corruption of blood by the attainder. For the blood once corrupted by an attainder, cannot be again restored but by an act of parliament.

But the only plea upon which the prisoner can receive his final judgment of death, is the general issue, or plea of *not guilty*. In indictments of felony and treason, the prisoner must plead the general issue of not guilty, as he cannot put in any special matter by way of plea, but only give it in evidence; of which the jury will take notice, and give a verdict accordingly.

The prisoner having pleaded *not guilty*, the clerk of the arraigns on behalf of the crown, replies, that the prisoner is guilty, and that he is ready to prove him so. And thus the king and prisoner are *at issue*. The prisoner is then asked how he will be tried; who answers, "By God "and the country;" to which the clerk replies, "God send thee a good deliverance:" a petition very expressive of the compassion of the law, which had rather the innocence of the prisoner

should appear, than that his conviction and punishment should be the event of his trial.

But if the prisoner refuse to put himself upon his trial in the usual form, his obstinacy is considered as a *confession* of his *guilt*, and he is convicted of the felony, &c. accordingly.

CHAPTER XXXIII.

The same Subject continued.

The prisoner having been arraigned, and no other plea in bar of further proceedings established, he must take his trial on the general issue, or plea of "*not guilty.*" In other words, the facts charged in the indictment must be submitted to the impartial examination and decision of a jury. We are now, then, advanced to a very important and interesting stage of the business. To behold a fellow-subject standing in open court accused by twelve of the first men in the county of a crime, which, if proved in his presence, will deprive him of his property, or his liberty, or his life, or all; to see the king in the person of the judge arrayed in the robes and

surrounded with the insignia of his office, sitting to distribute justice with an impartial hand; to mark the alternating forebodings of the countenances of a crowded audience, arising from the accusation of the counsel and the testimony of the witnesses; to notice the patient attention of the jury to all the evidence *for*, as well as against, the prisoner; how eagerly they drink in every syllable of his *defence*, and with what caution and tenderness they return their verdict; to observe the trembling anxiety with which the unhappy prisoner waits for the dreadful or elating words that are to decide his doom, is a scene so solemn and affecting, that no feeling person can survey it without the most lively emotions!

We shall now enter more fully into the consideration of the *trial by jury*.

In the superstitious age of our Saxon ancestors, several very exceptionable modes of trial were ignorantly had recourse to in order to ascertain the guilt or innocence of the accused; it being a general opinion at that time, that God would always miraculously interpose to save the innocent. This absurd and presumptuous notion, however, of the immediate interference of Divine Providence in deciding the guilt or innocence of any one by *ordeals*, or the trials by *fire*

and water, and afterwards by the trial of *battle*, was at length expelled from the minds of our forefathers; who, as they became more enlightened, adopted the superior mode of trial by jury.

The origin of this essential part of our constitution, is unquestionably very ancient, and derived, according to some authors, from those barbarous tribes which every where invaded the Roman provinces, and carried with them their natural love of freedom. Mr. Hume, however, is of opinion, that the first lineaments of the English jury, originated in the inventive mind of the sagacious king Alfred. The division of all England by this extraordinary prince into counties, hundreds, and tithings, was an institution admirably calculated for restraining a licentious people, and administering impartial justice amongst all ranks throughout the kingdom. This wise system made every man a surety for the good behaviour of his neighbour; and the method which it adopted for the decision of all causes, "deserves," says Mr. Hume, "to "be noted as being the origin of juries." It is impossible, however, to fix the precise time at which this palladium of English liberty originated, or to state the exact circumstance from which it at first sprang. To find out its real

source seems almost as hopeless an undertaking as the attempt to discover the head of the Nile. Probably, the trial by jury arose, as the famous Egyptian river most likely does, from several inconsiderable springs. Certain it is, that in flowing down to us it met with many checks and interruptions. But it is generally allowed, that it brake through all impediments, and that its channel was widened and deepened after the conquest; that it ran in a stronger current from the reign of the second to that of the third Henry, gradually swelling from that period to its present height; and by overflowing our country, has rendered it the fertile, the happy, the envied land of freedom.

Since the abolition of the superstitious modes of decision, the only forms of trial in criminal cases amongst us, have been that by the peers of England, in the high court of parliament; and the trial of commoners, by jury. Thi latter form of trial, indeed, is extended even to the nobility, in all criminal cases; treason, felony, and misprision of these, only excepted.

There is a very important advantage in the English trial by jury in criminal cases. For, as in times of violence, the subject may justly apprehend more danger in suits between the king

and him, than in disputes between one subject and another; the law has wisely placed the strong and two-fold barrier of a previous presentment and a subsequent trial by jury between the liberty of the subject and the prerogative of the crown. In short, no man can be tried, even by a jury of his equals, for any crime, until twelve of his fellow-subjects have first of all agreed, upon oath, that he ought to be called upon to answer the matter charged against him in the indictment; and even then he is shielded from the arm of vengeance, till the petit jury pronounce him *guilty*. Thus is the subject, as it were, hermetically sealed and guarded against the "insolence of office" on the one hand, and the insidious machinations of private revenge on the other.

But it is time to take a view of the proceedings in a criminal trial by jury.

When the prisoner has pleaded *not guilty*, and put himself upon his country for trial, the sheriff of the county is to return a panel of jurors, who must be freeholders, indiscriminately taken, of the county in which the crime was committed.

But persons indicted for smaller misdemeanors, after having pleaded *not guilty*, may *traverse* the indictment. In that case they usually give security to appear at the next session or assize, and

then and there to try the traverse, giving notice to the prosecutor of the same.

All persons, however, indicted for high treason and misprision of treason, shall have not only a copy of the indictment, but a list of all the witnesses to be produced against them, and of the jurors impanelled, with their professions and places of abode, delivered to them ten days before the trial, and in the presence of two witnesses; that they may be the better prepared to make their challenges and defence; and to bring forward any thing which they may know of the witnesses that is likely to destroy the credibility of their testimony. A striking instance, that shews with what care the law has guarded the life and liberty of the subject against the power of the crown.

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, if they are not challenged by the parties.

Challenges may be made either by the king or the prisoner; and either against the whole array or against any individual juror, for the very same reasons as in civil causes. And it will here be seen, that it is not without reason that our English laws are so celebrated for their tenderness and compassion to all who stand arraigned at the bar of justice. For the prisoner is allowed

in all capital cases, peremptorily to challenge a certain number of jurors, without assigning any cause whatever. He is permitted to do this, that he may not be tried by any one man against whom he may have conceived a prejudice; besides, if he were obliged to state the cause of his challenge, the juror objected to might feel a resentment against the prisoner, should the court not allow him to be set aside. And as a further proof that the law is guided by humanity to the prisoner in this provision, it enjoins that the king shall challenge no juror without assigning a reason, to be allowed by the court.

It is evident, however, that this great indulgence affords the prisoner an opportunity of challenging every juror, till it were impossible to try him. To remedy this inconvenience, therefore, the law has fixed a reasonable boundary; so that if a prisoner persist in challenging peremptorily more than *thirty-five* (that is one short of three juries), or in felonies more than *twenty* jurors, the law concludes that he has no intention to be tried at all. In which case, the prisoner is considered as standing mute, and sentenced as one convicted on his own confession. If from any cause a sufficient number of jurors cannot be had from the original panel, a *tales* may be awarded as in civil cases, till the number of

twelve is sworn "well and truly to try, and true "deliverance make, between our sovereign lord "the king and the prisoner whom they have in "charge, and a true verdict to give, according "*to their evidence*." Before, however, a juryman is sworn, he is desired to "look at the "prisoner;" not that he may gratify a wanton curiosity, but that the unhappy situation of the culprit may so far excite his compassion, as shall induce him not only to do justice between him and the king, but to lean to the side of mercy as far as he can consistently with his solemn oath, if any doubt of his guilt arise in his mind.

The jury being sworn, the indictment is generally opened by the counsel for the crown or prosecution; who having stated the leading facts to the jury, endeavours to substantiate them by the witnesses, whom he calls upon to give their evidence upon oath.

In a trial for any capital crime, upon the general issue, a prisoner is not allowed any counsel to *plead* for him; and the reason assigned, is, that to convict a prisoner, the evidence ought to be so clear, as not to be capable of being controverted. In matters of *law*, however, arising on the trial, the prisoner is *entitled* to the assistance

of counsel; and the court never scruples to allow him one to instruct him what questions to ask, or even to ask questions for him relative to matters of fact. In short, the learned judge himself is counsel for the prisoner, as the law and his oath oblige him to see that the proceedings against him are legal and strictly regular.

It is obvious that the assistance of counsel might be withheld by superior influence in the case of state criminals: the legislature, therefore, has wisely enacted, that persons *indicted* for such high treason or misprision thereof as works a corruption of blood (except for treason in counterfeiting the king's coin or seals) may make their full defence by counsel, not exceeding two, to be named by the prisoner and asssigned by the court or judges. And the same indulgence is extended to parliamentary *impeachments* for high treason.

There are a few leading points wherein a difference is made between civil and criminal evidence; but for the most part, the doctrine of evidence is in both cases the same.

In cases of high treason, petit treason, and misprision of treason, *two* lawful witnesses are in general required to convict a prisoner; unless he shall willingly and without violence *confess* the same. In prosecutions for high treason, the

law requires that the overt act or acts be proved to have been committed at the place specified in the indictment. With respect to *two* witnesses being necessary in most cases to prove the same overt act, it may be observed, that if one witness prove one overt act, and another witness prove another overt act of the same species of treason, that is sufficient proof of the crime charged, according to the requisition of the statute.* In almost every other accusation, *one* positive witness is sufficient.

In consequence, however, of the king's life having been brought into imminent danger by a maniac shooting at him in the theatre, it was very properly enacted, 39 and 40 Geo. III. ch. 93, "that in all cases of high treason where "the overt act or acts shall be assassination or "killing of the king, or any direct attempt "against his life, &c. the person or persons "charged with such offence, shall and may be "indicted, arraigned, tried and attainted in the "same manner, and according to the same course "and order of trial in every respect, and upon "the like evidence, as if such person or persons "stood charged with murder. And judgment "shall be given and execution done as in other

* See lord Ellenborough's luminous summing up upon the trial of colonel Despard.

"cases of high treason, any law, statute, or "usage, to the contrary notwithstanding."

In indictments for perjury, likewise, *two* witnesses are required to convict the accused. Again, although the mere similitude of hand-writing in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet the testimony of witnesses well acquainted with the party's hand, is evidence in all cases, to be left to a jury, if the papers were found in the custody of the prisoner.

Once more, all presumptive evidence of felony is to be admitted with caution. For the law holds, that it is better that ten guilty should escape, than that one innocent person should suffer punishment.

Lastly, respecting criminal evidence, it is declared by statute 1 Anne, ch. 9, that in all cases of treason and felony, all witnesses *for* the prisoner shall be examined upon oath, in like manner as the witnesses *against* him.

The evidence for the prosecution being gone through, the prisoner is then called upon for his defence, and permitted to bring forward such witnesses as he pleases, in his favor. The judge now sums up the whole evidence, and makes suitable remarks on it to the jury, by pointing

out the law of the case, shewing where the evidence is to the purpose, and where defective, and uniformly instructing them, that if any *doubt* of the prisoner's guilt rest upon their minds, they are bound in mercy to acquit him: it being the very essence of English liberty to protect the subject against foul charges in the criminal courts of justice.* The jury then retire to consider their verdict, which they must give in *open* court, not *privately* to the judge, as sometimes happens in civil causes.

No verdict can be given unless the whole of the jury are agreed. The unanimity of twelve men is the peculiar characteristic of the English jury. A regulation, however, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the legislature. It is probable, therefore, that as no effective verdict could originally be given by fewer than twelve jurors, although more were present, so afterwards when only twelve were sworn, their unanimity became indispensable.†

* See Mr. serjeant Best's ingenious and eloquent defence of colonel Despard.

† Professor Christian.

If the jury find the prisoner *not guilty*, he is then for ever quit and discharged of the accusation, and shall be immediately set at large, without paying any fee to the gaoler. But if they find him *guilty*, he is then said to be *convicted* of the crime whereof he stands indicted. Immediately after conviction for any grand or petit larceny or other felony, there are two collateral circumstances arise.

First, it is enacted by various statutes that the reasonable expences of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time, shall be allowed him out of the county stock, if he petition the judge for that purpose. And also that all persons appearing upon recognizance or subpœna to give evidence, whether any indictment be preferred or not, and as well without conviction as with it, shall be entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loss of time.

Secondly, on conviction of larceny in particular, the prosecutor shall have restitution of goods.

It sometimes happens when the jury find the prisoner *guilty*, that they *recommend him to mercy*. But that the king may exercise this amiable part of his prerogative with the wisest

discrimination of character and circumstances, the juries have of late been required to state their reasons for such recommendation; which, however, by no means ensures to a prisoner even the mitigation of punishment, much less a pardon. For although the jury accompanied their verdict of guilty against *colonel Despard*, with the following words, "My lord, we do most earnestly "recommend the prisoner to mercy on account "of the high testimonials to his former good "character and eminent services;" yet he was executed with the accomplices of his guilt. Let not any man then take encouragement to transgress the law on the presumption that his former good conduct will extenuate his guilt or alleviate his punishment!

Such then is the trial by jury in criminal cases, so admirably calculated to protect the person, property, and life of the subject from all vexatious oppression; whilst it is fully adequate to answer all the ends of justice on behalf of the crown. Nothing can exceed this mode of trial. But excellent as it is, some imperfection attaches to it, to remind us that it is a *human* institution. In practice, it will not always be found to answer its design. The innocent will doubtless sometimes suffer wrongfully, and the guilty frequently escape deserved punishment. The latter

may be deprecated; the former will always be matter of poignant sorrow. Does any one, then lament that even the trial by an English jury will not in all cases infallibly protect the innocent, and uniformly convict the guilty? let him direct his thoughts to that "judgment-seat" to which lieth an appeal from every earthly court. There all human errors will be fully rectified, and every false judgment reversed!

Upon conviction of the prisoner, the judgment of the court immediately follows, if no intervening circumstance suspend it.

The principal intervening circumstance in arrest of judgment is the *benefit of clergy*.

As this important peculiarity of our criminal law is not generally understood, it will be needful briefly to consider it.

The *benefit of clergy* then originated from a constitution of the pope; "that no man should "accuse the priests of holy church before a "secular judge." This privilege at length was claimed by the popish clergy, as a *divine right* to which they were entitled; founding so unreasonable an exemption upon a ridiculous perversion of that text of scripture, "touch not mine "anointed, and do my prophets no harm."* The

* 1 Chron. xvi. ver. 22.

blind submission which christian princes in the dark ages paid to the authority of *the church*, only increased the monstrous pretensions of the popish clergy, who did not fail to abuse the superstitious lenity of their civil rulers. There was nothing that they did not render subservient to the interests of their order. Whatever they touched was by a sort of magic turned to gold. As their power therefore increased, they multiplied their privileges to a vast extent. But the benefit of clergy being wholly derogatory to the king and contrary to the common law of England, the clergy never could obtain in *this* country a total exemption from secular jurisdiction.

This privilege was exercised in England with great uncertainty until the reign of Henry VI. It was then finally settled, that the prisoner should be first arraigned before the secular judge, and might either *then* claim his benefit of clergy by way of declinatory plea, or *after conviction*, in arrest of judgment. But the latter mode is now usually adopted.

This privilege was originally restricted to those who wore the clerical habit, and were trimmed with the clerical tonsure. But in those days of ignorance, the ability to read being a mark of great erudition, every one thus qualified

became in time to be accounted a clerk or *clericus*, and was allowed the benefit of clergy, although not in holy orders. On account of the scarcity of the clergy in the realm, the bishop might, if he would, claim any man who was condemned to death by the civil judge, as a clerk, if he could read. But if either the bishop would not demand him, or the prisoner could not read, then was he to be put to death. At length, however, it was discovered that as many laymen as clergymen enjoyed this privilege, which could not fail to excite the jealousy of the latter, lest the sacredness of their order should be profaned by a too great assimilation of their privileges with those of the laity. A further distinction, therefore, was made in favour of the clergy by statute 4 Henry VII. ch. 13. By which it was enacted, that a laymen should not be entitled to the benefit of clergy more than *once;* whereas a clerk in holy orders might have his clergy a second time and oftener. And in order to distinguish the person of a layman from that of a clergyman, the former, when admitted to this privilege, was burned with a hot iron in the brawn of the left thumb, by the gaoler, in open court.

Formerly, the laity after burning, and the clergy without it, were discharged from the

civil courts, and given over to the bishop's jurisdiction, where he was purged with a mock trial by a jury of twelve clerks. But such shocking perjuries and abuses were for ages committed in this way, that when the reformation was fully established, so profane a ceremony was abolished by 18 Eliz. ch. 7. The wisdom of the English legislature afterwards discovered, that as learning was no extenuation of a crime, neither was ignorance any aggravation of guilt. It was therefore enacted by statute 5 Anne, ch. 6, that the benefit of clergy should be extended to all who were entitled to ask it, without requiring them to read by way of conditional merit. So that when such persons are asked by the court what they have to say why judgment of death should not be pronounced upon them, they are told to kneel down and *pray the benefit of the statute.* And the burning of the hand or cheek, has been by various later statutes, exchanged for fine, imprisonment, whipping, &c. at the discretion of the judge.

With respect to the *persons* to whom this privilege of clergy is allowed at the present day, it may be observed, that all clerks in holy orders are without any corporal punishment to be admitted to it, and immediately discharged as often as they shall offend. But although in

cases of grand larceny or any clergyable felony, clergymen are not subject to any corporal punishment; yet, on conviction for petit larceny, they are liable to be whipped or transported, like other persons. But why a *protestant* clergyman should be distinguished from a layman by the privilege of committing *any* crime whatever with impunity is hard to be understood. Surely so enlightened a body as the English clergy must consider such an exemption as very invidious. It is not likely, however, that persons of their education should often have occasion to avail themselves of this part of the criminal law.

Again, all lords of parliament and peers of the realm, having seat and voice in the senate, as well as all peeresses, shall be discharged in all clergyable felonies, in the same manner as real clerks convict, but this only for the first offence.

And, lastly, all the commoners of the realm, not in holy orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies within benefit of clergy, upon being burned in the hand, whipped, fined, or imprisoned, at the discretion of the judge; or in cases of larceny, upon being transported for seven years, if the court shall think fit. Formerly, by the common law, women were ex-

cluded from the benefit of clergy; but the statute of 3 W. and M. ch. 9, placed them in all cases on the same footing with men of the same rank.

With regard to the *crimes* for which the benefit of clergy is to be allowed, it may be remarked, that neither in high treason, nor petit larceny, nor in any mere misdemeanors, was it ever admitted at the common law. It may therefore be taken for granted, that it was allowable only in petit treasons and capital felonies. In all felonies, however, whether newly created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament.

The term *felony*, in the English law, comprises every species of crime which occasioned at common law the forfeiture of goods and lands; and to which a capital punishment is sometimes added by statute. The word is of feudal origin, being derived from fee, which means a feud; and lon, which signifies price or value. Felony then, is the consideration for which a man gives up his fief. This term, therefore, which at first imported the *consequences* of certain crimes, is now applied to the crimes themselves, which in common language are called *felonies*.

The *consequences* of the benefit of clergy to the person convicted, are, independently on the

corporal punishment, very important; for having been once a felon, but now purged from that guilt by the privilege of clergy, he receives hereby a kind of statute pardon. Hence, not only his present welfare, but his future interests are materially affected; for after burning, or its substitute, or pardon, the prisoner is discharged for ever, not only of the crime of which he is now convicted, but of all other felonies before committed, within the benefit of clergy; and is restored to all his former capacities, and to the possession of his lands, as though he had never been convicted. And this is equally applicable to peers and clergymen, who are entitled to the same privileges without burning or any other punishment in its stead.

CHAPTER XXXIV.

The same Subject continued.

After conviction by the verdict of the jury in the presence of the criminal, upon a capital charge, the judge either immediately or soon after asks the prisoner whether he has any thing to say in arrest of *judgment*; that is, whether

he can shew any cause why the sentence of the law should not be passed upon him.

Of this clemency of the law, the prisoner may now avail himself, by making exceptions to the indictment; as, for want of sufficient certainty in setting forth the person, the time, the place, or the offence. And if his objections should prove *valid*, the whole proceedings shall be set aside, but the party may be indicted again. Or, he may plead a *pardon* in arrest of judgment, which saves the attainder and corruption of blood; but this is not the case if the pardon be not pleaded till *after sentence:* and the blood being once corrupted, nothing can restore it but an act of parliament. Or, he may pray the *benefit of clergy;* which, it has been already remarked, arrests the judgment of death.

If all these resources fail, then the judge is obliged to pronounce the sentence of the law. And here it is worthy of observation, that the law is no respecter of persons; but has ordained before hand the *kind* of punishment, although not always the *degree* which shall be the consequence of every offence, by whomsoever committed. It is one of the excellencies of our constitution, that the *species* of punishment is not left in the breast of any judge, or even of a jury; who are all men subject to passions, and

might in some cases withhold deserved punishment, through a mistaken tenderness; and in others, inflict inordinate penalties, from anger or revenge. Nor are the *discretionary* fines and imprisonments which our courts in some cases are allowed to adjudge, any exceptions to the general rule: for the *nature* of the punishment is fixed and determinate, although the duration and quantity of it must frequently vary according to circumstances. The discretion of the judges, too, is regulated by law; the bill of rights declaring, that *excessive* fines ought not to be imposed; nor cruel and *unusual* punishments inflicted. And any judge who dared to disregard this charter of English liberties, would soon find reason to repent of his arbitrary conduct.

The most terrible and highest judgment of the law, is the sentence of death. When this is pronounced on a man, the inseparable consequence is *attainder*. The unhappy person is now no longer of any credit or reputation. He cannot be a witness in any court; neither is he capable of performing the functions of another man. For, by anticipation of his punishment, he is already *dead* in law. The consequences of attainder, are forfeiture and corruption of blood. *Forfeiture* is two-fold; of real and of personal estates.

As to *real* estates, a man by attainder in high treason, forfeits to the king all his lands and tenements of inheritance that he possessed at the time the treason was committed. This forfeiture destroys all intermediate sales and incumbrances, but not those contracted before the fact. And therefore a wife's jointure is not forfeited by her husband's treason. The justice of this forfeiture of property, is founded in this consideration; that he who has thus violated the fundamental principles of government, and broken his part of the original contract between the king and people, hath abandoned his connexions with society, and has no longer any right to the enjoyment of its privileges; one of which is, the right of transferring his property to others.

In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all his freehold estates, during life; and after his death, all his lands and tenements, in fee simple (but not those in tail), to the king, for a year and a day.

The forfeiture of goods and chattels is incurred in every one of the higher kinds of offence; in high treason, or misprision thereof, petit treason, felonies of all sorts, whether clergyable or not, suicide, petit larceny, standing mute, &c.

There is a difference between the forfeiture of lands and of goods and chattels. The former are

not forfeited till after attainder; whilst the latter are on conviction.

Again, the forfeiture of lands has relation to the time the fact was committed, so as to avoid all intermediate sales, &c. &c. but that of goods and chattels has not, so that a man forfeits those only which he has at the time of conviction.

Corruption of blood, the other immediate consequence of attainder, means the incapacity of an attainted person to inherit lands, &c. &c. from his ancestors, or to retain those he already possesses, or to transmit them by descent to any heir; the same being an escheat to the lord of the fee, subject to the king's superior right of forfeiture.

After judgment has been awarded, it may yet be reversed, and all its consequences set aside.

This may be effected in two ways; either by falsifying the judgment, or by reprieve or pardon.

A judgment may be falsified, in the first place, *without a writ of error*, for matters not apparent on the face of the record. Thus, if any judgment whatever be given by persons who had no good authority to proceed against the person condemned, it is void; and may be falsified by shewing the special matter, without a writ of error: as, if a commission be granted to A. and B. and twelve others, or any two of them, of

whom A. or B. shall be one, to take and try indictments, all the proceedings will be void, *ipso facto*, if any of the other twelve should act without their interposition or presence.

Again, judgment may be reversed, by *writ of error*, which lies from all inferior criminal courts to the king's bench, and from thence to the house of lords. A writ of error may be brought for gross mistakes in the judgment or other parts of the record; as if a man found guilty of perjury should receive the judgment of felony. So also, for less palpable blunders, as the want of the proper *addition* to the defendant's name in the indictment, and for any other similar cause. Which shews how extremely tender and watchful the law is over the life and liberty of the subject.

These writs of error, in case of misdemeanors, are not to be allowed of course, but only upon sufficient probable cause shewn to the attorney-general; and then they are grantable of common right. But writs of error to reverse attainders in capital cases, are allowed only *ex gratiâ*; and not without express warrant under the king's sign manual, or, at least, by the consent of the attorney-general. These writs can rarely be brought by the party himself, where he is attainted, for an offence against the state; but it is a consolation to his family, to know, that his

heir, or executor, may, in more favorable times, get the judgment reversed. And hence, it has often happened, that after sudden revolutions in government, an attainder has been reversed by an *act of parliament*, which is the easiest and most effectual way of doing it. So that although the crime was allowed by all, and the punishment that followed confessed to be just, yet the merits of the culprit's family have often been no less manifest after his death. And, on this account, the blood, honours, and estate, have frequently been restored by statute. This has been done by the 24 Geo. III. ch. 57, with respect to the forfeited estates in Scotland.

When judgment, upon conviction, is reversed, the party stands as if he had never been accused at all. Consequently remains liable to another prosecution for the same offence.

But there are still other ways of avoiding the execution of the judgment; and these are, by a reprieve or pardon. A reprieve, from *rependre*, to take back, is the withdrawing of the sentence, for a time, whereby the execution is suspended.

A reprieve may be granted at the will of the judge, either before or after judgment. This power the judge frequently exercises, whenever he is dissatisfied with the verdict, or considers

the evidence suspicious, or whenever such favorable circumstances appear in the prisoner's case and character, as induce him to apply to the king, either for an absolute or conditional pardon.

The law likewise requires a reprieve where the offender is *non compos*, between the judgment and execution. Because with its usual lenity, it argues, that *perhaps* the convict might have offered some reason to have staid the execution of the judgment, had he been in his right senses.

Or, the offender may *plead* in bar of execution, either the king's pardon, an act of grace, or diversity of person; that is, that he is not the same person who was attainted, and the like. In this last case, a jury must be impanelled to try the identity of person.

But should he not be able to advance any of these pleas, so as to stay the execution of the sentence, the offender has still another and more sure resort in the king's most gracious pardon.

The granting of a pardon is the most amiable trait in the royal prerogative. This act of the king, is that which is most personal, and most entirely his own.

The power of pardoning offences is, by the constitution, united solely to the crown of this

realm; and the exercise of this branch of his prerogative, is conformable to his Majesty's coronation oath, which *binds* him to execute justice with *mercy*.

With respect to the *objects* of pardon, the king may pardon all offences merely against the crown, or the public, with some exceptions to this general rule. As for instance, the king cannot pardon the committing of any man to prison out of the realm; for this is made an offence unpardonable; incurring a *premunire*, by the statute of *habeas corpus*, with a view to preserve the liberty of the subject. So neither can his Majesty exercise this branch of his prerogative, where *private* justice is principally concerned in the prosecution. In appeals, therefore, of all kinds, the prosecutor may *release*, but the king cannot pardon.

This delightful part of the royal prerogative was formerly liable to very great abuse, and sometimes employed to screen the ministers of the crown from punishment for their public misconduct; hereby totally invalidating the responsibility of the king's confidential servants. But in the reign of Charles II. the house of commons resolved, in the case of the earl of Danby, that the pardon he pleaded in bar of their impeachment, was illegal and void. And by the act of

settlement, 12 and 13 W. III. ch. 2, it was enacted, that no pardon under the great-seal of England shall be *pleadable* to an impeachment by the commons in parliament. Yet after a delinquent has been found guilty and received judgment upon such impeachment, the king is not restrained from pardoning him. This privilege of the crown of pardoning delinquents convicted in impeachments, is coeval with the constitution itself; as acknowledged by the commons, and asserted by the king, in a remarkable record of the 50 Edward III.*

No judgment, however can be pronounced by the lords after they have declared the delinquent guilty, unless it be demanded by the commons; who have the power of pardoning the impeached convict, by refraining to require judgment against him.

It was formerly a matter of doubt, whether a dissolution of parliament abated an impeachment or not. But after a very learned and full investigation of the question, in the impeachment of Warren Hastings, esq. it was decided by a very large majority in both houses, that the impeachment was *not* abated by the dissolution of the parliament that had preferred the charges;

* Professor Christian.

although the negative of this proposition was supported by almost all the lawyers both among the lords and commons. Indeed it is obvious, that were a dissolution of parliament to render an impeachment by the commons of England void, a corrupt minister would always resort to this measure, to shelter himself from the violence of the storm that had gathered over him, and which he plainly saw would soon break upon his head, and overwhelm him with disgrace and ruin.

A *pardon* must be under the *great* seal of England. If there be any suppression of the truth, or suggestion of falsehood, in a charter of pardon, the validity of the whole is destroyed; because it is inferred, that the king has been deceived on the subject, otherwise he would not have granted the pardon.

Again, as general records in pardons have but a very imperfect effect, it is necessary that the conviction and attainder be particularly specified. So, also, in cases of treason, or murder, &c. &c. no pardon shall be allowed unless the offence be accurately described therein. And in murder, it must be clearly expressed whether the crime was committed by lying in wait, assault, or malice prepense.

It is a general rule, that under these and a few other restrictions, a pardon shall be taken most

beneficially *for* the subject, and most strongly against the king.

A pardon may be *conditional;* that is, the king may grant it upon what terms he pleases. Hence, the daily exercise of this part of the prerogative in pardoning felons, upon condition of their being confined to hard labour, or of transportation to some foreign country for life, or for a term of years. Transportation is a punishment said to have been first inflicted on the subjects of Great-Britain by statute 39 Eliz. ch. 4.

The manner of *allowing* pardons is worthy of attention. For it may be remarked, that a pardon by act of parliament, is more beneficial than one by the royal charter; the court being obliged *ex officio* to take notice of it, whether the convict plead it or not. But the king's pardon by charter must be especially pleaded at a proper time; that is, either upon arraignment, or in arrest of judgment, or in bar of execution.

The necessary effect of the king's pardon, is the making of the offender a new man by acquitting him of all corporal penalties and forfeitures consequent upon his crime, and giving him a new credit and capacity.

If the pardon be not granted till after the attainder, which corrupts the blood, nothing can

purify the polluted stream but an act of parliament. But if the person attainted have a son, after he has received the king's pardon, that son, if he have no elder brother living born before the attainder, may be heir to his father; yet if he had been born prior to the grant of the pardon, he never could have inherited at all.

We are now called to witness a most affecting scene, the humiliating completion of the punishment of a capital offender. Surely nothing can be more shocking to the feelings of humanity, than to behold a fellow-creature cut off with the sword of justice from the face of the earth, and hurried from an earthly tribunal, into the awful presence of "God the judge of all!" It only remains, then, that we proceed to state the method of executing the sentence of the law.

Execution must be performed by the legal officer the high sheriff, or his deputy. Upon the execution of a peer, sentenced in the court of the lord high steward, the sheriff receives a warrant by precept under the hand and seal of the judge: but if the peer be condemned in the court of parliament, then the execution is warranted by a writ from the king. The only warrant, however, which the sheriff has for executing a commoner, is the judge's signature upon the calendar, or list of the prisoners' names, with their separate judg-

ments, in the margin. As for instance, in case of a capital felony, it is written opposite to the prisoner's name, "let him be hanged by the neck." Formerly, nothing more was written than "*sus per coll.*" an abbreviation for *suspendatur per collum;* but now a method is adopted more consistent with so solemn an act as the taking away of a man's life.

At the end of the assizes, the clerk of the assize writes four lists of all the prisoners, with separate columns, containing their crimes, verdicts, and sentences, leaving a blank column, which the judge fills up opposite the names of the *capital* convicts, by writing, *to be executed, respited, or reprieved.* These four calendars being first carefully compared together by the judge and the clerk of the assize, are signed by them, and one is given to the sheriff, another to the gaoler, and the judge and the clerk of the assize each keeps another. If the sheriff receive afterwards no special order from the judge, he executes the sentence of the law at the usual time and place, and in the usual manner, agreeably to the directions in the calendar.* The time that elapses between the passing and executing of the sentence of the law, is left at large in the country,

* Professor Christian.

and regulated according to the custom of each county: but in Middlesex and London it is different; for the recorder, after reporting to the king in person the case of each of the prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution upon the day and place assigned. Hence we see that the popular notion that the king always signs what is usually called the *death warrant*, is not founded in fact; except in the execution of a peer, condemned before him in parliament.

The sheriff has no discretionary power to substitute one kind of death for another, without being guilty of felony himself. Nor can even the king alter the punishment of the law; yet, when beheading is a part of the sentence he may remit all the rest.

A common opinion prevails, that if a person, after hanging the usual time, should be cut down and revive by any means, the law has no farther demand on him: but this is a great mistake; for as he was judged to be hanged by the neck *till he was dead*, the former hanging was no execution of the sentence; and therefore the sheriff, at his peril, must hang him again, till the intent of the law be fulfilled. Indeed if a mistaken compassion in such cases were connived at, it would infallibly

open a door to very frequent and dangerous collusions.

Thus have we attended the unhappy criminal from his first apprehension by the constable, through all the stages of his trial to his final execution. We have seen how happily he might have lived in society, had he not wilfully violated those wise and equitable laws which required only his obedience in return for the constant protection they afforded him against the injury of others! we have observed how closely punishment treads upon the heels of transgression! * we have discovered that the English code of criminal justice is a system not of relentless cruelty, but of wisdom and compassion! we have perceived with what care and jealousy the laws watch over the life, the liberty, the property, even of the meanest subject, and guard them against the power of the crown! we have noticed that the guilty often escape the vengeance of the law through a very trifling circumstance; and that the wise institution of a grand as well as a petit jury, secures almost to a certainty an innocent man from punishment! we have admired that clemency of the law which, even after judgment, creates a *peradventure* that the criminal may yet

* Culpam pœna premit comes.—Hor. lib. iv. carm. 5.

escape with his life! we have beheld how admirably the royal prerogative of pardon is calculated to soften the rigour of the law, where its strict execution would be too severe! and we contemplate with satisfaction and gratitude, that it cannot fail to be exercised upon all suitable occasions, whilst it is deposited in the compassionate breast of a prince of the house of Brunswick!

"*O fortunati nimium, sua si bona norint.*"*

Thrice happy Britons, did you but rightly understand your privileges, and suitably improve them!

CONCLUSION.

HAVING given a sketch of the fundamental principles and customs of the English constitution, it may be useful to the reader, if we take a retrospect of the most important changes they have undergone, from time to time; and mark their gradual advancement towards perfection.

* Virg. Georg. lib. ii.

Wherever we turn our eyes, we shall perceive that *progression* is the order of things. In the vegetable tribe we observe "first the blade, then "the ear, afterwards the full corn in the ear." The various animals, from the lowest species to man himself, have their different periods of infancy, youth, and mature age. The same order is also observed both in the natural and moral world. The light shineth more and more to the perfect day; and there are children as well as men in knowledge. And it is worthy of notice, that even creation itself begins with things inanimate, then proceeds to vegetive life, from thence to animals, and ends with man, made after the image of God.* To suppose, therefore, that the glorious privileges of Englishmen were all coeval with the British government itself, would be to imagine what is unfounded in fact, and contrary to all reason and analogy. "God has "made human society progressive, by the laws "of nature, as well as by the order of his provi- "dence." The British constitution, in particular, is evidently a fabric too magnificent and costly to have been the work of a single generation, or even of a century. Its foundations were laid by our Saxon ancestors, and the superstruc-

* Fuller, on Genesis.

ture has been gradually raised by every succeeding race. Much of its most useful and ornamental part has been the work of our own times; and much doubtless remains to be done to give a complete symmetry to the whole.

Very little is known respecting our laws under the ancient Britons, or *Aborigines* of our island. Yet, something may be gathered concerning them, from the account which Julius Cæsar has given of the ancient druids, whose customs bear a near resemblance to some of our modern usages. Our common law, handed down from one generation to another, by custom only, seems to have originated with the druids, who did not commit their laws to writing, but transmitted them to their posterity by tradition. The druids, who were the priests, possessed an absolute and uncontrouled authority over the ancient Britons. Their religion, which constituted the principal part of their government, was enveloped in great mystery, and they strictly prohibited any of its doctrines being committed to writing, lest by thus exposing their absurdity to the ridicule of the people at large, they should be exploded, and their own authority subverted. Nothing will bear the light but truth. Error is one of those deleterious herbs that court the shade. It is not certain, however, that the

druids were acquainted with letters, and therefore, their *oral* law may have been adopted even from necessity. The custom of *gavelkind*, the division of the goods of an intestate between his wife and next of kin, are, doubtless, of this ancient date. The burning likewise of a woman found guilty of killing her husband, had continued from the time of Cæsar to the present reign, until this needless barbarity was abolished by statute 30 Geo. III. ch. 48.

It is next to impossible to trace out, with precision, the respective origins of our several customs, and the exact period of those changes which have taken place in the common law. But it is naturally inferred, that the various incursions into this island by the Romans, the Picts, the Saxons, and the Danes, not only nearly extirpated the ancient Britons, but must have mutilated, if not totally destroyed their constitution. The successive predominancy of these nations, must necessarily have occasioned great confusion in the common law; and that which we now possess is doubtless a mixture of the different customs of those ancient invaders. As, some of the Mosaical laws are blended with our own system, it is probably owing to the propagation of christianity among our Saxon

ancestors. For they would easily be induced to lay aside their Pagan abominations, when they embraced the true religion; and adopt such maxims as were more agreeable to its holy nature; and could not fail to be inculcated by the christian missionaries.

After the Saxon government was settled in this island, a great variety of customs was created by the division of the kingdom into an heptarchy. But when the whole island was subdued to one government by Egbert, it was necessary to reduce the different laws of the heptarchy into one uniform code. The effecting, however, of this arduous work, was reserved for the mighty genius of the immortal king Alfred, to whom we owe that master-piece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties. The wise institutions of this politic prince, have remained unchanged nearly a thousand years.

That admirable system now known amongst us by the appellation of the *common* law of universal authority throughout the kingdom, is certainly of Saxon origin, and was probably begun by king Edgar, and afterwards completed by his grandson, Edward the Confessor. Yet this excellent body of laws was very likely only a revival of king Alfred's code.

Amongst the most remarkable of the Saxon laws, may be reckoned, the constitution of parliaments; the election of the magistrates by the people; the hereditary descent of the crown; the rare infliction of capital punishment for the first offence; the prevalence of certain customs, as *heriots*, &c. &c. the liability to forfeiture of estates for high treason; trial by jury, &c. &c. Such was the general polity of England at the Norman conquest.

That memorable event not only altered the royal dynasty, but made a considerable change in the laws, and occasioned the separation of the ecclesiastical from the civil courts; a measure which was doubtless adopted by the Conqueror, in order to ingratiate himself with the popish clergy, who were anxious to liberate themselves from all secular authority. William introduced also the forest laws; to which large districts were subjected, for the king's own diversion. These severe laws are now become obsolete; but from them have sprung the modern game laws, which, although less oppressive, are not much more reasonable.

The county courts, which had been the chief seats of Saxon judicature, were superseded by the erection of the *aula regia*; and the administration of impartial justice was greatly impeded

by the king's ordaining that all legal proceedings should be carried on in the Norman instead of the English language. But the most important alteration in our laws effected by the Conqueror, was the ingrafting of the fiction of feudal tenure upon almost all landed estates. This change gave rise to a numerous train of oppressive appendages; such as aids, reliefs, primer seisins, wardships, marriages, escheats, fines for alienation, &c. &c. At no period of our history did our forefathers groan under so complete a slavery, both of body and mind, as they experienced in consequence of those laws which were introduced by this tyrannical prince. A superstitious clergy fettered the consciences of the laity by importing for the first time all the absurd inventions of the Romish church. The public *prayers*, contrary to the apostolical directions and the plainest dictates of common sense, were now, as well as the laws, administered in an *unknown* tongue.

At the sound of the doleful *curfew* bell, the inhabitants were obliged every where to put out their *fire* and *candle* at eight o'clock. This memorial of ancient slavery continues in many parts of the kingdom to this day; and whilst it reminds us of the degraded state of our ancestors, it should excite our gratitude that we are happily delivered from so galling a yoke. Such

tyranny, however, was ill-suited to that soil which seems to have been naturally productive of civil liberty. Henry I. therefore found it expedient when he came to the throne, to restore the laws of Edward the Confessor, whereby the people regained the ancient Saxon constitution, of which their fathers had been violently deprived by the injustice and cruelty of the Normans.

In the reign of Henry II. some greater improvements in our laws were accomplished. The power of the pope and clergy was considerably checked by the constitution of the parliament at Clarendon, in 1164; although the fatal termination of the disputes between the king and archbishop Becket unfortunately put a stop at that time to a farther progress in diminishing the ecclesiastical authority. The institution of justices in eyre, *in itinere*, was a measure of great public utility as a remedy against the injustice which had crept into the county courts, as well as against the great expence which suitors incurred by taking their causes to be determined before the justiciaries in the *aula regia*. In this reign, too, the barbarous trial by battle was abolished, the trial by jury improved, and the foundation of our present land tax laid by the introduction of *escuage*, or a pecuniary commutation for personal military services.

Richard I. repealed some of the cruel penalties of the forest laws; and composed at the isle of Oleron, a code of naval laws, which is still extant.

In the reigns of John and of his son Henry III. the barons were roused to an alarming insurrection by the rigour with which these princes enforced the feudal tenures and forest laws. But as great evils usually work their own remedy, the tyranny of John and Henry at length produced the two famous charters of our liberties, *magna charta* and *charta de forestâ*. By these celebrated acts a great alteration was made in favour of the subject, and protection afforded to every individual in the free enjoyment of his life, liberty, and property, unless they were declared to be forfeited by the judgment of his peers, or by the law of the land. The hardships of the feudal system must have been severely felt by many generations of our brave ancestors, and doubtless "some of them "also murmured" against God who had permitted their country to be conquered by a foreign invader. And yet it is probable that if William had not obtained the kingdom, the liberties of England would never have been so accurately defined, nor so indiscriminately extended to all ranks of people, as they were by the great

charter and subsequent acts. For it is worthy of observation, that the feudal system, which gave such excessive power to the kings, was ultimately the means of enlarging the liberties of the subjects of England; whilst the same power made all the other European monarchs absolute, and subdued the mass of the people to a state of abject slavery. But whence this difference so greatly in favour of England? The reason seems to have been, that in France, at least, the barons were independent on the king; whereas the feudal system, introduced by the Conqueror, established here a chain of connexion, which bound the haughty barons as firmly to the king as it did the degraded vassals to them. Hence, whenever the nobles found themselves oppressed by their superior lord, they were obliged, in resisting him, to make a common cause with the people, and could secure no advantages for themselves without procuring them at the same time for their dependants. But in France, all political quarrels have ended in favour either of the ruler or the noblesse; and whether the monarchy or aristocracy prevailed, the people remained equally oppressed. Such a difference between the privileges of England and those of other nations, can be ascribed only to the sovereign will of him

" who moves in a mysterious way," and " sways the creation as he please."

But it was the opinion of Sir Matthew Hale, that more was done in perfecting our laws during the first thirteen years of king Edward I. than in all succeeding reigns put together. This high encomium was probably just at the time it was made; but cannot be admitted with regard to the many improvements in the constitution introduced from the reign of the first Charles to the present time. The regulations which were made by the illustrious Edward were so numerous and wise, that they have obtained for him the distinguished appellation of the English Justinian. He greatly promoted the equal distribution of justice throughout the kingdom; confirmed the charters of John and Henry III. and by settling the bounds of ecclesiastical jurisdiction, gave a fatal blow to the papal authority in England. He defined the limits of all the temporal courts, from those of the highest to those of the lowest jurisdiction. He abolished all taxes levied without consent of parliament; first established a repository for the public records of the kingdom; and greatly improved upon the laws of king Alfred, by that orderly method of *watch and ward*, which was enacted by the statute of Winchester. By the various statutes

of *mortmain*, he effectually prevented the whole landed property of the kingdom from falling into the hands of a rapacious clergy; who, from the ignorance and superstition of those benighted times, easily enriched themselves by imposing upon the consciences and understandings of the people. All Wales was reduced to the subjection of the crown, and in a great measure of the laws of England, under this illustrious prince; who entirely settled the very scheme and model of the administration of justice between party and party, which has continued nearly the same through all succeeding ages to the present day.

In the reigns of Edward II. and Edward III. the people were deprived of their ancient privilege of choosing their subordinate magistrates; justices of the peace were established; and the parliament is thought to have assumed about this period, its present form, by an entire division of the lords and commons into two distinct houses. It was, too, under the auspices of the third Edward, that the important statute for defining and ascertaining treasons was enacted, as well as the statute of *premunire*, which ultimately so effectually destroyed the civil power of the pope in these kingdoms. The laborious parochial clergy were first established in this

reign, by the endowment of vicarages out of the possessions of the monasteries.

The statute of *præmunire* was reenacted in the subsequent reign of the unfortunate Richard II. and thus the clergy and the court of Rome were still further checked by the legal measures of the English parliament. About this period there was a very visible decay of ecclesiastical authority; of which there cannot be a greater proof, than the *natural* death of John Wickliffe, the celebrated harbinger of the reformation. It cannot be supposed that the clergy wanted inclination to punish, with the utmost severity, a man who boldly preached against the unscriptural tenets and practices of the church of Rome; thus laying the axe at the root of its credit, possessions, and authority. But although Wickliffe escaped the vengeance of the clergy in this world, they assured the people that the palsy of which he died was a direct judgment upon him for his heresies, and that he would be eternally damned.

In the reign of this magnificent prince, the creation of peers by patent was first introduced.

The quarrels which ensued between the houses of York and Lancaster, unhappily put a stop to the further improvements of our laws. From the time therefore of Richard II. to the reign of

Henry VII. no alteration of importance took place: but these civil disputes occasioned the loss of our dominions in France, and thereby afforded the succeeding kings of England more leisure to attend better to the management of their domestic government. The wicked ministers of Henry VII. were more intent upon extorting money in virtue of old and forgotten penal laws, than upon making any new beneficial statutes. In fact, every change in the laws which was made during this rapacious reign, however salutary it might afterwards prove, had primarily no other end in view than the enriching of the king's treasury.

The reformation of religion from popery, begun by Henry VIII. eminently distinguished the reign of that capricious monarch. The manner in which that great event was brought about was so extraordinary, that the hand of God was signally displayed in its accomplishment. The conduct of Henry upon this occasion, probably arose from no higher motive than the gratification of his lust and ambition; for he was himself so bigoted a papist as to write in defence of that very corrupt church, in reforming which, divine providence designed he should be so active an instrument. And he received the title of "defender of the faith," from the pope, from

whom he was so soon to wrest his usurped authority over the English church.

Not only was Henry instrumental in effecting a reformation which he never intended, but it is well known that many other of the principal persons who contributed to its establishment, hated it in their hearts. Indeed it would be folly to ascribe this remarkable event to the wisdom and foresight of any man or set of men whatever. History affords abundant evidence that there was such a multiplicity of concurring, predisposing, and progressive causes, as to convince every unprejudiced mind, that the author of the reformation was divine, although it was perfected by the agency of man.*

The violent temper of the king rendered him very impatient and refractory, and urged him on to break in sunder the iron yoke of Rome. Thus was the power of the English clergy destroyed for ever. The crown was restored to its supremacy over spiritual men and causes; and the patronage of the bishopricks once more invested in the king. The scriptures were now read in our own tongue. "He opened the rock, and the "waters gushed out; they ran in the dry places

* Whoever wishes to take an enlarged view of this subject, should read, "Hints towards forming the character of a young "princess," vol. 2. ch. 35.

"like a river;" and knowledge and happiness gradually overspread the whole land.

The administration of Henry VIII. forms a distinct æra too in the annals of our judicial history; since he made many improvements in our *civil* polity, and redressed many of the grievances which had disgraced his father's reign.

The statutes of wills and of uses, which made a great alteration with regard to property, were both enacted in this reign. The former allowing the *devise* of real estates by will; the latter attempting to destroy the intricate nicety of *uses*. The bankrupt laws were now first introduced; and the incorporation of Wales with England, whilst it added to the dignity and strength of the monarchy, marked the policy of Henry's government. Towards the latter years, however, of this reign, the royal prerogative was strained to a very enormous degree. An act was passed by which the king's proclamation was made to have the force of law, through the weakness of a compliant parliament, which, "fearing the wrath of the king," consented to so scandalous an encroachment on the constitution. Yet this measure so dangerous to the subject, was overruled for the furtherance of the reformation; as upon that very act were grounded all the great changes

of religion, during the minority of Edward VI.* Treasonable offences were also greatly multiplied: in short, although by God's gracious providence, both true religion and civil liberty were ultimately promoted by Henry's quarrel with the pope; yet, it is clear that he himself had no design that such should be its effect! On the contrary, it is probable, that the government of this arbitrary prince, would have been increasingly oppressive and intolerable, had he not been seasonably removed by death. "Surely the wrath "of man shall praise thee; the remainder of "wrath shalt thou restrain."

A great part of the arbitrary laws of Henry was repealed during the short reign of his successor and son Edward VI. The administration of this pious and extraordinary prince, screened the nation from popish cruelty. The people sat under his shadow with great delight, and doubtless, hoped that now the glorious work of reformation would proceed without interruption. But God prepared a worm which smote this beautiful gourd, that it withered. Immediately a vehement wind arose, and the scorching beams of persecution beat upon the land, that it fainted; and many faithful witnesses sealed the truth with

* See Burnet's History of the Reformation, part 1. book iii.

their blood in the reign of the gloomy and bigotted queen Mary. Happily, her cruel policy was of short duration; but the tremendous thunder and lightning of this dreadful reign were accompanied with some fruitful showers, whose good effects were lasting. Many salutary civil statutes were enacted; among others, was passed the first general law relative to highways; the advantages of which are now experienced in every part of the island.

The reformation, which had suffered a temporary eclipse, emerged with a more resplendent lustre on the accession of queen Elizabeth to the throne. This propitious event was every where hailed with such excessive joy, that none expressed the least sorrow for the death of queen Mary but the priests; who, amid such universal gladness, were compelled to mourn in secret.* The cruel persecutions of the late reign had indeed swelled the ranks of the "noble army of "martyrs;" but so far were they from suppressing the reformation, as the papists intended, that they greatly promoted it: for the whole nation was hereby so convinced of the horrors of popery, that it readily and almost universally embraced the milder and more rational system of

* See Burnet's History of the Reformation, part 2. book iii.

the protestants. So true is it that the "wisdom "of this world is foolishness with God."

In the brilliant reign of Elizabeth, the foundation of religious knowledge and liberty was laid too firmly, we trust, ever to be moved; since, from that period, Jesus Christ has had not only in every city, but even in every town and village, them who preach him, both the law and the gospel being read in a *known tongue* in the churches every Lord's Day.* If we would justly appreciate this fact, we must look back to the early periods of the reformation. "In those days the "word of the Lord was precious, there was no "open vision." There were seldom; perhaps, more than *two* preachers in a county; and in very few towns was a sermon preached oftener than once a quarter. What appearance then must the face of the country have continued to exhibit, but that of a nation devoted to heathenish or papal superstition and idolatry, had not the overruling providence of God secured the public reading of the scriptures in our own tongue throughout the land!

The laws which guarded the established church in her infancy, were indeed very severe; but in proportion as the necessity that created them has

* Acts, ch. xv. ver 21.

diminished; they have been repealed or become obsolete. It must be allowed, however, that neither civil nor religious liberty was fully enjoyed till the revolution; yet before that era, the permanent establishment of the protestant church of England was unquestionably instrumental to the gradual decay of arbitrary power and religious intolerance.*

Under the administration of this wise princess, the laws were duly administered. The Saxon constitution was restored with many improvements; yet the crown was armed with a very oppressive prerogative by the continuance of military tenures, and of a few other evils. In this reign the poor's laws were first enacted; which, although they may have fallen short of the end proposed by them, were introduced with the humane design of enabling the poor to maintain themselves, and of providing for their comfortable support when grown aged and infirm. England is probably the only nation in the world that provides for its poor *by law*. How far this part of our constitution has been and still is connected with our public prosperity and happiness, it would be presumption to determine. No one,

* See "Hints," &c. &c. vol. 2, ch. 38.

however, who reflects how uniformly the sacred scriptures urge the care of the poor as an indispensable duty, and considers that "righteousness "exalteth a nation," can deny the probability that our *legal* provision for the poor has had its share in procuring for us our distinguished national blessings. Certain it is, that these have gradually been increasing more or less in every succeeding reign.

But with all human good there is a mixture of evil. The blessings of Elizabeth's reign were counterbalanced by the increased power of the star chamber, and by the erection of the high commission court. The queen exercised almost an absolute authority over both houses of parliament, which she kept in very great awe. We are not, however, to judge of her conduct in this respect by our modern privileges; for the royal prerogative was at that time much larger by common law than it now is, and it was not till this reign that the commons by acquiring commercial property began to feel their own consequence, and grow jealous of the other branches of the legislature.

James I. succeeding to the crown on the demise of Elizabeth, exerted the prerogative on trifling occasions so independently and unreasonably, that at length the people were roused to

examine into the legitimacy of such extravagant power. The leaders amongst the commons soon found out that the royal prerogative was of *human* authority, and consequently liable to be altered. In resisting it, therefore, they obtained some victories in the cases of concealments, monopolies, and the dispensing power.

To the honour, however, of king James, he patronised Sir Hugh Middleton, the celebrated projector, on whom he conferred the honour of knighthood. With Sir Hugh originated that stupendous work of the *new river*, which was begun on September 20th, 1608, and completed in 1613. He brought the water from Amwell, in Hertfordshire, to near Clerkenwell, surmounting many and great difficulties, in carrying the river through hills and over two valleys. By subsequent acts of parliament, the new river company obtained powers to avail themselves of the river *Lea*; and these two streams now united by art, supply the greater part of the vast population of London, with the indispensable article of excellent water. Sir Hugh was ruined by the execution of his project; and so little was its benefits at first understood, that for above thirty years the holders of the shares received only £.5 apiece. The shares which originally cost only £.100, are now worth more than £.15,000 each.

However inglorious, therefore, the reign of James must in general be considered, the citizens of London have abundant reason to contemplate with gratitude the period at which originated the source that supplies their daily necessities.

The abolition of the sanctuaries, was almost the only step taken in this reign towards the improvement of the administration of justice. The bankrupt laws were extended, and informations upon penal statutes regulated.

The unfortunate king Charles I. began his reign with higher notions of the prerogative than were consistent with the popular opinion, and exerted it too arbitrarily for the temper of the times; but at length consented to laws which reduced it so low, as to be incompatible even with a limited monarchy. The constitution was greatly improved during this turbulent reign, by the "petition of right," which abolished many of the encroachments of former reigns. The king also redressed, in a constitutional manner, the grievances respecting the arbitrary levies of tonnage, ship money, &c. &c. but unhappily he lost his credit for sincerity; not regarding those obligations binding upon his conscience, under which he had been brought in circumstances of great political restraint. The parliamentary leaders

fearing his resentment if he should ever regain his power, were at length driven by despair to join the military, who, inflamed with religious animosity, overturned both the established church and the monarchy; and by a mock trial murdered their king. A like fate befel the late king of France, from a similar cause. That amiable monarch had taken repeated oaths of fidelity to the new order of things; and no one can doubt that he took them under great restraint. Perhaps at that time, he intended conscientiously to keep his oaths. But it appears, that he was at length induced by the persuasions of some of his foreign allies, to quit France, or at least to repair to some frontier town, where he might be effectually assisted in recovering his former liberty and authority. By adopting this measure, so fraught with danger, the unhappy king hastened the downfal of the monarchy and his own destruction. These inevitable consequences were foreseen and pointed out by one of the king's most faithful servants; but he preferred the advice of those who encouraged him to attempt his escape. The dire event is well known.* Hence we see the danger of that loose

* For a circumstantial account of this affecting transaction, see "Memoirs relating to the French Revolution, by the marquis "de Bouillé.

morality which rests on no surer foundation than the doctrine of "*general expediency*." Perhaps it will not be universally admitted, that extorted oaths and promises are naturally binding. Yet the breach of an oath or promise, because it was made under apprehension and fear, seems to be very clearly condemned in "the scriptures of "truth."* History records a fact which remarkably illustrates the sound policy as well as morality of performing such oaths. In the reign of Henry III. a supreme council of twenty-four barons was appointed, to whom unlimited authority was granted to reform the state. They met at Oxford, where they made several regulations; and obliged the king himself to take an oath, that he would maintain whatever ordinances they should think proper to enact. These *reformers* soon abused their power, but no one was found hardy enough to resist their tyranny. Even prince Edward, the king's eldest son, after some opposition, was constrained to take an oath, which really deposed his family and subverted the constitution. Afterwards, when this magnanimous prince was applied to by the knights of the shires to interpose and destroy this

* Compare 2 Chron. ch. xxxvi. to ver. 13, with Ezek. ch. xvii. ver. 16 to 21. See also, Gisborne's Moral Philosophy, ch. xiv.

usurped authority of the barons; he answered, "that though it was from constraint he had "sworn to maintain the provisions of Oxford, "he was determined to observe his oath." 'By 'this scrupulous fidelity,' says Mr. Hume, 'the 'prince acquired the confidence of all parties, 'and was afterwards enabled to recover fully 'the royal authority.' Him, who honours God, he will honour.

There were some salutary laws made during the usurpation, which were confirmed after the restoration. Amongst these, was the act of navigation, which laid the foundation of our naval greatness, and of the extension of our commerce.

In the reign of Charles II. the doctrine and consequences of military tenures were abolished, except in the instance of corruption of blood upon attainder. The *habeas corpus* act, which so effectually secures the subject from arbitrary imprisonment; the test and corporation acts, with many other laws which have been conducive to the permanency of our civil and ecclesiastical establishments; the increase of trade and commerce; and the extension of our liberties, were passed during this king's administration. In short, our constitution attained at this period to its height of *theoretic* perfection, although it is

to be lamented that there was a grievous departure from its true spirit in the *practical* application of it during the government of this licentious monarch.

The consequences of the arbitrary proceedings of James II. clearly proved that the theory of the constitution was completely matured. For when this infatuated prince made the attempt, he found it absolutely impossible to enslave the nation. He learned by painful experience, that the people could resist and compel him to quit his inglorious enterprise and his throne together.

The conduct of James occasioned the memorable revolution which was effected in 1688 by the prince of Orange, afterwards king William III. From that important period to the present time, many wise and salutary laws have been enacted: such as, the bill of rights; the toleration act, the palladium of our religious liberty; the act of settlement; and the acts for uniting the three kingdoms of England, Scotland, and Ireland into one imperial dominion.

Other laws have been passed, asserting our liberties in more specific terms; regulating the succession of the crown; maintaining the superiority of the laws above the king, by pronouncing the dispensing power illegal; and making the judges entirely independent on the king,

his ministers, and successors. Several improvements, likewise, have taken place with regard to private justice. Amongst these may be mentioned, the solemn recognition of the law of nations, with respect to foreign ambassadors and their rights; the regulations of trial by jury; and the admission of witnesses *for prisoners upon oath*. During this period, too, the benefit of clergy has been extended; paper credit has been introduced, by indorsements upon bills and notes; courts of conscience have been enacted for the recovery of small debts; and general warrants declared illegal. Juries have been made the *judges* both of the law and fact in cases of libels, and the liberty of the press hereby made more secure. These are amongst the most important alterations in favour of the subject, during the last century. No reign, however, has been more distinguished by the increase both of civil and religious liberty, than that of his present Majesty. On ascending the throne, the king addressed the parliament in the following energetic words: "Born and educated in this "country, I glory in the name of Briton; and "the peculiar happiness of my life will ever "consist in promoting the welfare of a people, "whose loyalty and warm affection to me I

"consider as the greatest and most permanent "security of my throne." These patriotic sentiments have not been changed after a reign of forty-eight years; for on a recent occasion, his Majesty assured the corporation of London, "that it had ever been his object to secure to all "descriptions of his subjects, the benefits of "religious toleration; and it afforded him parti-"cular gratification to reflect, that *during his* "*reign* these advantages had been more gene-"rally and extensively enjoyed than at any "former period." The complete independence of the judges; the annihiliation of the severe penal laws against papists; the full toleration of religious worship to every denomination, whether christian or not; and the total abolition of the slave trade, so long the disgrace of this free and enlightened country, are sufficient to characterize the reign of George III. as the era of *practical* liberality and freedom.

The bill for abolishing the slave trade received the royal assent March 25th, 1807; and thus the independence of one quarter of the globe was at length asserted by the justice of the British parliament. And where is the disinterested Briton who does not rejoice that England has knocked off the chains, and will forge the ignominious yoke of oppression for Africa no

more! Where is the christian, believing as he does in the retribution of Divine Providence, who is not filled with astonishment and gratitude when he reflects that such an enormous mass of iniquity has fallen without burying his beloved country under its ruins!

Having completed our view of that beautiful edifice under whose peaceful roof it is our felicity to dwell; we shall only observe, that the care of it is intrusted to the king, lords, and commons, in parliament assembled. To them only it belongs to guard it against all assaults of its enemies, and to repair and strengthen it from time to time, that it may stand the bulwark of liberty and the wonder of the world, throughout all generations.

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