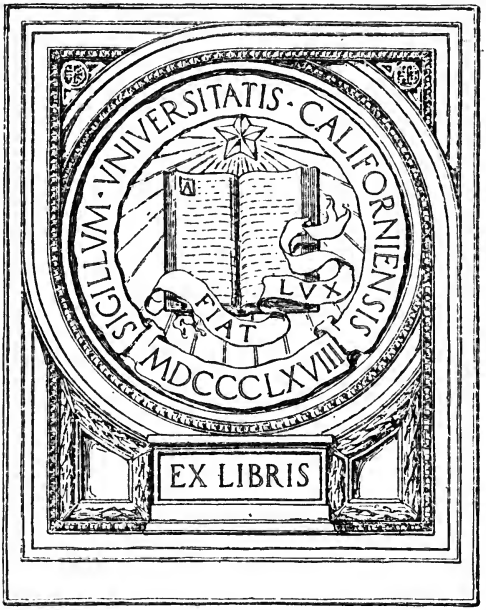
HALLAM'S ENGLAND



THE

CONSTITUTIONAL HISTORY

OF

ENGLAND,

AND THE

ENGLISH CONSTITUTION.

BY

HALLAM AND DE LOLME.

THE "CHANDOS CLASSICS."

THE

CONSTITUTIONAL HISTORY

OF

ENGLAND.

EDWARD I. TO HENRY VII.

BY

HENRY HALLAM.

THE

CONSTITUTION OF ENGLAND.

BY

J. L. DE LOLME.

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CONTENTS.

PAGE

HALLAM'S CONSTITUTIONAL HISTORY OF ENGLAND,
EDWARD I. TO HENRY VII. ..... 7—138

THE ENGLISH CONSTITUTION BY DE LOLME.

Introduction ..... 145—147

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

CHAP.
I. Causes of the Liberty of the English Nation.—Reasons of the Difference between the Government of England, and that of France.—In England, the great Power of the Crown, under the first Norman Kings, created a Union between the Nobility and the People ..... 147—153
II. A second Advantage England had over France: it formed one undivided State ..... 153—159
III. The Subject continued ..... 159—167
IV. Of the Legislative Power ..... 167—170
V. Of the Executive Power ..... 170—171
VI. The Boundaries which the Constitution has set to the Royal Prerogative ..... 171—172
VII. The same Subject continued ..... 172—174
VIII. New Restrictions ..... 174—182
IX. Of Private Liberty, or the Liberty of Individuals ..... 182—187
X. On the Law that is observed in England in regard to Civil Matters ..... 188—197
XI. The Subject continued.—The Courts of Equity ..... 197—204
XII. Of Criminal Justice ..... 204—210
XIII. The same Subject ..... 210—217
XIV. The Subject concluded.—Laws relative to Imprisonment ... 218—220

BOOK II.—A VIEW OF THE ADVANTAGES OF THE ENGLISH GOVERNMENT, AND OF THE RIGHTS AND LIBERTIES OF THE PEOPLE; AND A CONFIRMATION, BY REFERENCE TO FACTS, OF THE PRINCIPLES STATED IN THE WORK.

I. Some Advantages peculiar to the English Constitution.—1. The Unity of the Executive Power ..... 220—228
II. The Subject concluded.—The Executive Power is more easily confined when it is one ..... 229—230
III. A Second Peculiarity.—The Division of the Legislative Power ..... 230—234

CHAP.		PAGE
IV.	A Third Advantage peculiar to the English Government, the Business of proposing Laws, lodged in the hands of the People	234—238
V.	In which an inquiry is made, whether it would be an Advantage to Public Liberty, that the Laws should be enacted by the Votes of the People at large	238—244
VI.	Advantages that accrue to the People from appointing Representatives	244—245
VII.	The Subject continued.—The Advantages that accrue to the People from their appointing Representatives are very inconsiderable, unless they also entirely trust their Legislative Authority to them	245—248
VIII.	The Subject concluded.—Effects that have resulted, in the English Government, from the People's Power being completely delegated to their Representatives	248—250
IX.	A farther Disadvantage of Republican Governments.—The People are necessarily betrayed by those in whom they trust	250—253
X.	Fundamental Differences between the English Government and the governments just described.—In England, all Executive Authority is placed out of the hands of those in whom the people trust.—Usefulness of the Power of the Crown ...	253—256
XI.	The Power which the People themselves exercise.—Election of Members of Parliament	256—257
XII.	The Subject continued.—Liberty of the Press	258—263
XIII.	The Subject continued	263—267
XIV.	Right of Resistance	267—271
XV.	Proofs, drawn from Facts, of the Truth of the Principles laid down in the present Work.—1. The peculiar Manner in which Revolutions have always been concluded in England	271—278
XVI.	Second Difference.—The Manner after which the Laws for the Liberty of the Subject are executed in England	278—295
XVII.	A more inward view of the English Government than has hitherto been offered to the Reader in this Work.—Very essential Differences between the English Monarchy, as a Monarchy, and all those with which we are acquainted.....	295—307
	Second part of the Chapter	308—328
XVIII.	How far the Examples of Nations who have lost their Liberty are applicable to England	328—339
XIX.	Additional thoughts on the Attempts that may at particular Times be made to abridge the power of the Crown, and some of the Dangers by which such Attempts may be attended...	339—344
XX.	Additional Observations on the Right of Taxation, which is lodged in the Hands of the Representatives of the People.—What kind of danger this Right may be exposed to	345—350
XXI.	Conclusion.—On the Nature of the Divisions that take place in England	350—355

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BY

HENRY HALLAM,

AUTHOR OF "THE HISTORY OF THE MIDDLE AGES," ETC.

In memoriam

William Alfred

Morris 1875-1946

HENRY HALLAM

ON THE

ENGLISH CONSTITUTION.

THOUGH the undisputed accession of a prince, like Edward I., to the throne of his father, does not seem so convenient a resting-place in history, as one of those revolutions which interrupt the natural chain of events, yet the changes wrought during his reign make it an epoch in the progress of these inquiries. And, indeed, as ours is emphatically styled a government by king, lords, and commons, we cannot, perhaps, in strictness carry it farther back than the admission of the latter into parliament; so that, if the constant representation of the commons is to be referred to the age of Edward I., it will be nearer the truth to date the English constitution from that than from any earlier era.

The various statutes affecting the law of property and administration of justice, which have caused Edward I. to be named, rather hyperbolically, the English Justinian, bear no immediate relation to our present inquiries. In a constitutional point of view, the principal object is that statute, entitled the Confirmation of the Charters, which was very reluctantly conceded by the king in the twenty-fifth year of his reign. I do not know that England has ever produced any patriots to whose memory she owes more gratitude than Humphrey Bohun, earl of Hereford and Essex, and Roger Bigod, earl of Norfolk. In the Great Charter, the base spirit and deserted condition of John take off something from the glory of the triumph, though they enhance the moderation of those who pressed no farther upon an abject tyrant. But to withstand the measures of Edward, a prince unequalled by any who had reigned in England since the Conqueror for prudence, valour, and success, required a far more intrepid patriotism. Their provocations, if less outrageous than those received from John, were such as evidently manifested a disposition in Edward to reign without any control; a

constant refusal to confirm the charters, which in that age were hardly deemed to bind the king without his actual consent; heavy impositions, especially one on the export of wool, and other unwarrantable demands. He had acted with such unmeasured violence towards the clergy, on account of their refusal of further subsidies, that, although the ill-judged policy of that class kept their interests too distinct from those of the people, it was natural for all to be alarmed at the precedent of despotism. These encroachments made resistance justifiable, and the circumstances of Edward made it prudent. His ambition, luckily for the people, had involved him in foreign warfare, from which he could not recede without disappointment and dishonour. Thus was wrested from him that famous statute, inadequately denominated the Confirmation of the Charters, because it added another pillar to our constitution, not less important than the Great Charter itself.

It was enacted by the 25 E. I., that the charter of liberties, and that of the forest, besides being explicitly confirmed, should be sent to all sheriffs, justices in eyre, and other magistrates throughout the realm, in order to their publication before the people; that copies of them should be kept in cathedral churches, and publicly read twice in the year, accompanied by a solemn sentence of excommunication against all who should infringe them; that any judgment given contrary to these charters should be invalid, and holden for nought. This authentic promulgation, these awful sanctions of the Great Charter, would alone render the statute of which we are speaking illustrious. But it went a great deal farther. Hitherto, the king's prerogative of levying money, by name of tallage or prise, from his towns and tenants in demesnes, had passed unquestioned. Some impositions, that especially on the export of wool, affected all his subjects. It was now the moment to enfranchise the people, and give that security to private property which Magna Charta had given to personal liberty. By the 5th and 6th sections of this statute, "the aids, tasks, and prises," before taken are renounced as precedents; and the king "grants for him and his heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy church, as also to earls, barons, and to all commonalty of the land, that for no business from henceforth we shall take such manner of aids, tasks, nor prises, but by the common assent of the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed." The toll upon wool, so far as levied by the king's mere prerogative, is expressly released by the seventh section.

We come now to a part of our subject exceedingly important, but more intricate and controverted than any other, the constitution of parliament. I have taken no notice of this in the last section, in order to present uninterruptedly to the reader the gradual progress of our legislature down to its complete establishment under the Edwards. No excuse need be made for the dry and critical disquisition of the follow-

ing pages; but among such obscure inquiries, I cannot feel myself as secure from error, as I certainly do from partiality.

One constituent branch of the great councils, held by William the Conqueror and all his successors, was composed of the bishops, and the heads of religious houses holding their temporalities immediately of the crown. It has been frequently maintained, that these spiritual lords sat in parliament only by virtue of their baronial tenure. And certainly they did all hold baronies, which, according to the analogy of lay peerages, were sufficient to give them such a share in the legislature. Nevertheless, I think that this is rather too contracted a view of the rights of the English hierarchy, and indeed, by implication, of the peerage. For a great council of advice and assent in matters of legislation or national importance was essential to all the northern governments. And all of them, except perhaps the Lombards, invited the superior ecclesiastics to their councils; not upon any feudal notions, which at that time had hardly begun to prevail, but chiefly as representatives of the church and of religion itself; next, as more learned and enlightened counsellors than the lay nobility; and in some degree, no doubt, as rich proprietors of land. It will be remembered also, that ecclesiastical and temporal affairs were originally decided in the same assemblies, both upon the continent and in England. The Norman conquest, which destroyed the Anglo-Saxon nobility, and substituted a new race in their stead, could not affect the immortality of church possessions. The bishops of William's age were entitled to sit in his councils by the general custom of Europe, and by the common law of England, which the conquest did not overturn. Some smaller arguments might be urged against the supposition, that their legislative rights are merely baronial; such as that the guardian of the spiritualities was commonly summoned to parliament during the vacancy of a bishopric, and that the five sees created by Henry VIII. have no baronies annexed to them; but the former reasoning appears less technical and confined.

Next to these spiritual lords are the earls and barons, or lay peerage of England. The former dignity was perhaps not so merely official as in the Saxon times, although the earl was entitled to the third penny of all emoluments arising from the administration of justice in the county-courts, and might, perhaps, command the militia of his county, when it was called forth. Every earl was also a baron; and held an honour or barony of the crown, for which he paid a higher relief than an ordinary baron, probably on account of the profits of his earldom. I will not pretend to say, whether titular earldoms, absolutely distinct from the lieutenancy of a county, were as ancient as the Conquest, which Madox seems to think, or were considered as irregular, so late as Henry II., according to Lord Littleton. In Dugdale's Baronage, I find none of this description in the first Norman reigns, for even that of Clare was connected with the local earldom of Hertford.

It is universally agreed, that the only baronies known for two centuries after the Conquest were incident to the tenure of land held immediately from the crown. There are, however, material difficulties in the way of rightly understanding their nature, which ought not to be passed over, because the consideration of baronial tenures will best develop the formation of our parliamentary system. Two of our most eminent legal antiquaries, Selden and Madox, have entertained different opinions as to the characteristics and attributes of this tenure.

According to the first, every tenant in chief by knight-service was an honorary or parliamentary baron by reason of his tenure. All these were summoned to the king's councils, and were peers of his court. Their baronies, or honours, as they were frequently called, consisted of a number of knight's fees, that is, of estates, from each of which the feudal service of a knight was due; not fixed to thirteen fees and a third, as has been erroneously conceived, but varying according to the extent of the barony, and the reservation of service at the time of its creation. Were they more or fewer, however, their owner was equally a baron, and summoned to serve the king in parliament with his advice and judgment, as appears by many records and passages in history.

But about the latter end of John's reign, some only of the most eminent tenants in chief were summoned by particular writs; the rest by one general summons through the sheriffs of their several counties. This is declared in the Great Charter of that prince, wherein he promises that, whenever an aid or scutage shall be required, faciemus summoneri archiepiscopos, episcopos, abbates, comites et majores barones regni sigillatim per literas nostras. Et præterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes alios qui in capite tenent de nobis. Thus the barons are distinguished from other tenants in chief, as if the former name were only applicable to a particular number of the king's immediate vassals. But it is reasonable to think, that before this charter was made, it had been settled by the law of some other parliament, how these greater barons should be distinguished from the lesser tenants in chief; else what certainty could there be in an expression so general and indefinite? And this is likely to have proceeded from the pride with which the ancient and wealthy barons of the realm would regard those newly created by grants of escheated honours, or those decayed in estate, who yet were by their tenures on an equality with themselves. They procured, therefore, two innovations in their condition; first, that these inferior barons should be summoned generally by the sheriff, instead of receiving their particular writs, which made an honorary distinction; and next, that they should pay relief, not as for an entire barony, one hundred marks; but at the rate of five pounds for each knight's fee which they held of the crown. This changed their tenure to one by mere knight-service, and their denomination to tenants in chief. It was not difficult, afterwards, for

the greater barons to exclude any from coming to parliament as such, without particular writs directed to them, for which purpose some law was probably enacted in the reign of Henry III. If indeed we could place reliance on a nameless author whom Camden has quoted, this limitation of the peerage to such as were expressly summoned depended upon a statute made soon after the battle of Evesham. But no one has ever been able to discover Camden's authority, and the change was, probably, of a much earlier date.

Such is the theory of Selden, which, if it rested less upon conjectural alterations in the law, would undoubtedly solve some material difficulties that occur in the opposite view of the subject. According to Madox, tenure by knight's service in chief was always distinct from that by barony. It is not easy, however, to point out the characteristic differences of the two; nor has that eminent antiquary, in his large work, the Baronia Anglica, laid down any definition, or attempted to explain the real nature of a barony. The distinction could not consist in the number of knight's fees; for the barony of Hwayton consisted of only three; while John de Baliol held thirty fees by mere knight-service. Nor does it seem to have consisted in the privilege or service of attending parliament, since all tenants in chief were usually summoned. But whatever may have been the line between these modes of tenure, there seems complete proof of their separation long before the reign of John. Tenants in chief are enumerated distinctly from earls and barons in the charter of Henry I. Knights, as well as barons, are named as present in the parliament of Northampton in 1165, in that held at the same town in 1176, and upon other occasions. Several persons appear in the Liber Niger Scaccario, a roll of military tenants made in the age of Henry II., who held single knight's fees of the crown. It is, however, highly probable that, in a lax sense of the word, these knights may sometimes have been termed barons. The author of the Dialogus de Scaccario speaks of those holding greater or lesser baronies, including, as appears by the context, all tenants in chief. The former of these seem to be the majores barones of king John's Charter. And the secundæ dignitatis barones, said by a contemporary historian to have been present in the parliament of Northampton, were in all probability no other than knightly tenants of the crown. For the word baron, originally meaning only a man, was of very large significance, and is not unfrequently applied to common freeholders, as in the phrase of court-baron. It was used, too, for the magistrates or chief men of cities, as it is still for the judges of the exchequer, and the representatives of the Cinque-Ports.

The passage, however, before cited from the Great Charter of John affords one spot of firm footing in the course of our progress. Then, at least, it is evident that all tenants in chief were entitled to their summons; the greater barons by particular writs, the rest, through one

directed to their sheriff. The epoch when all, who, though tenants in chief, had not been actually summoned, were deprived of their right of attendance in parliament, is again involved in uncertainty and conjecture. The unknown writer quoted by Camden seems not sufficient authority to establish his assertion, that they were excluded by a statute made after the battle of Evesham. The principle was most likely acknowledged at an earlier time. Simon de Montfort summoned only twenty-three temporal peers to his famous parliament. In the year 1255, the barons complained, that many of their number had not received their writs, according to the tenor of the charter, and refused to grant an aid to the king till they were issued. But it would have been easy to disappoint this mode of packing a parliament, if an unsummoned baron could have sat by mere right of his tenure. The opinion of Selden, that a law of exclusion was enacted towards the beginning of Henry's reign, is not liable to so much objection. But perhaps it is unnecessary to frame an hypothesis of this nature. Writs of summons might probably be older than the time of John; and when this had become the customary and regular preliminary of a baron's coming to parliament, it was a natural transition to look upon it as an indispensable condition; in times when the prerogative was high, the law unsettled, and the service in parliament deemed by many still more burthensome than honourable. Some omissions in summoning the king's tenants to former parliaments may perhaps have produced the above-mentioned provisions of the Great Charter, which had a relation to the imposition of taxes, wherein it was deemed essential to obtain a more universal consent, than was required in councils held for state, or even for advice.

It is not easy to determine how long the inferior tenants in chief continued to sit personally in parliament. In the charters of Henry III., the clause which we have been considering is omitted; and I think there is no express proof remaining, that the sheriff was ever directed to summon the king's military tenants within his county, in the manner which the charter of John required. It appears, however, that they were in fact members of parliament on many occasions during Henry's reign, which shows that they were summoned, either by particular writs, or through the sheriff; and the latter is the more plausible conjecture. There is, indeed, great obscurity as to the constitution of parliament in this reign; and the passages which I am about to produce may lead some to conceive that the freeholders were *represented* even from its beginning. I rather incline to a different opinion.

In the Magna Charta of 1 Henry III., it is said; Pro hâc donatione et concessione . . . . archiepiscopi, episcopi, comites, barones, milites, et liberè tenentes, et omnes de regno nostro dederunt nobis quintam decimam partem omnium bonorum suorum mobilium. So in a record of 19 Henry III.: Comites, et barones, et omnes alii de toto regno

nostro Angliæ, spontaneâ voluntate suâ concesserunt nobis efficax auxilium. The largeness of these words is, however, controlled by a subsequent passage, which declares the tax to be imposed ad mandatum omnium comitum et baronum et omnium aliorum *qui de nobis tenent in capite.* And it seems to have been a general practice, to assume the common consent of all ranks, to that which had actually been agreed by the higher. In a similar writ, 21 Henry III., the ranks of men are enumerated specifically; archiepiscopi, episcopi, abbates, priores, et clerici terras habentes quæ ad ecclesias suas non pertinent, comites, barones, milites, et liberi homines, pro se et suis villanis, nobis concesserunt in auxilium tricesimam partem omnium mobilium. In the close roll of the same year, we have a writ directed to the archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders (liberi homines) of Ireland; in which an aid is desired of them, and it is urged, that one had been granted by his fideles Angliæ.

But this attendance in parliament of inferior tenants in chief, some of them too poor to have received knighthood, grew insupportably vexatious to themselves, and was not well liked by the king. He knew them to be dependent upon the barons, and dreaded the confluence of a multitude, who assumed the privilege of coming in arms to the appointed place. So inconvenient and mischievous a scheme could not long subsist among an advancing people, and fortunately the true remedy was discovered with little difficulty.

The principle of representation, in its widest sense, can hardly be unknown to any government not purely democratical. In almost every country the sense of the whole is understood to be spoken by a part, and the decisions of a part are binding upon the whole. Among our ancestors, the lord stood in the place of his vassals, and still more unquestionably, the abbot in that of his monks. The system, indeed, of ecclesiastical councils, considered as organs of the church, rested upon the principle of a virtual or an express representation, and had a tendency to render its application to national assemblies more familiar.

The first instance of actual representation which occurs in our history is only four years after the Conquest: when William, if we may rely on Hoveden, caused twelve persons skilled in the customs of England to be chosen from each county, who were sworn to inform him rightly of their laws; and these, so ascertained, were ratified by the consent of the great council. This, Sir Matthew Hale asserts to be "as sufficient and effectual a parliament as ever was held in England." But there is no appearance that these twelve deputies of each county were invested with any higher authority than that of declaring their ancient usages. No stress can be laid, at least, on this insulated and anomalous assembly, the existence of which is only learned from an historian of a century later.

We find nothing that can arrest our attention, in searching out the

origin of county representation, till we come to a writ in the fifteenth year of John, directed to all sheriffs in the following terms: Rex Vicecomiti N., salutem. Præcipimus tibi quod omnes milites ballivæ tuæ qui summoniti fuerunt esse apud Oxoniam ad Nos a die Omnium Sanctorum in quindecim dies venire facias cum armis suis: corpora vero baronum sine armis singulariter, et *quatuor discretos milites* de comitatu tuo, illuc venire facias ad eundem terminum, ad loquendum nobiscum de negotiis regni nostri. For the explanation of this obscure writ, I must refer to what Prynne has said; but it remains problematical, whether these four knights (the only clause which concerns our purpose) were to be elected by the county, or returned, in the nature of a jury, at the discretion of the sheriff. Since there is no sufficient proof whereon to decide, we can only say with hesitation, that there *may* have been an instance of county representation in the fifteenth year of John.

We may next advert to a practice, of which there is very clear proof in the reign of Henry III. Subsidies granted in parliament were assessed, not as in former times, by the justices upon their circuits, but by knights freely chosen in the county-court. This appears by two writs, one of the fourth, and one of the ninth year of Henry III. At a subsequent period, by a provision of the Oxford parliament in 1258, every county elected four knights to enquire into grievances, and deliver their inquisition into parliament.

The next writ now extant, that wears the appearance of parliamentary representation, is in the thirty-eighth of Henry III. This, after reciting that the earls, barons, and other great men (cæteri magnates) were to meet at London three weeks after Easter, with horses and arms, for the purpose of sailing into Gascony, requires the sheriff to compel all within his jurisdiction, who hold twenty pounds a year of the king in chief, or of those in ward of the king, to appear at the same time and place. And that besides those mentioned, he shall cause to come before the king's council at Westminster on the fifteenth day after Easter, two good and discreet knights of his county, whom the men of the county shall have chosen for this purpose, in the stead of all and each of them, to consider, along with the knights of other counties, what aid they will grant the king in such an emergency. In the principle of election, and in the object of the assembly, which was to grant money, this certainly resembles a summons to parliament. There are indeed anomalies, sufficiently remarkable upon the face of the writ, which distinguish this meeting from a regular parliament. But when the scheme of obtaining money from commons of shires through the consent of their representatives had once been entertained, it was easily applicable to more formal councils of the nation.

A few years later there appears another writ analogous to a sum-

mons. During the contest between Henry III. and the confederate barons in 1261, they presumed to call a sort of parliament, summoning three knights out of every county, secum tractaturos super communibus negotiis regni. This we learn only by an opposite writ issued by the king, directing the sheriff to enjoin these knights who had been convened by the earls of Leicester and Gloucester to their meeting at St. Albans, that they should repair instead to the king at Windsor, and to no other place, nobiscum super præmissis colloquium habituros. It is not absolutely certain, that these knights were elected by their respective counties. But even if they were so, this assembly has much less the appearance of a parliament, than that in the thirty-eighth of Henry III.

At length, in the year 1265, the forty-ninth of Henry III., while he was a captive in the hands of Simon de Montfort, writs were issued in his name to all the sheriffs, directing them to return two knights for the body of their county, with two citizens or burgesses for every city and borough contained within it. This, therefore, is the epoch at which the representation of the commons becomes indisputably manifest; even should we reject altogether the more equivocal instances of it which have just been enumerated.

If indeed the knights were still elected by none but the king's military tenants, if the mode of representation was merely adopted to spare them the inconvenience of personal attendance, the immediate innovation in our polity was not very extensive. This is an interesting, but very obscure topic of inquiry. Spelman and Brady, with other writers, have restrained the original right of election to tenants in chief, among whom, in process of time, those holding under mesne lords, not being readily distinguishable in the hurry of an election, contrived to slide in, till at length their encroachments were rendered legitimate by the statute 7 H. IV. c. 15, which put all suitors to the county-court on an equal footing as to the elective franchise. The argument on this side might be plausibly urged with the following reasoning.

The spirit of a feudal monarchy, which compelled every lord to act by the advice and assent of his immediate vassals, established no relation between him and those who held nothing at his hands. They were included, so far as he was concerned, in their superiors; and the feudal incidents were due to him from the whole of his vassal's fief, whatever tenants might possess it by sub-infeudation. In England, the tenants in chief alone were called to the great councils before representation was thought of, as is evident both by the charter of John, and by the language of many records; nor were any others concerned in levying aids or escuages, which were only due by virtue of their tenure. These military tenants were become in the reign of Henry III. far more numerous than they had been under the Con-

queror. If we include those who held of the king ut de honore, that is, the tenants of baronies escheated or in ward, who may probably have enjoyed the same privileges, being subject in general to the same burthens, their number will be greatly augmented and form no inconsiderable portion of the freeholders of the kingdom. After the statute commonly called Quia emptores in the eighteenth of Edward I. they were likely to increase much more, as every licensed alienation of any portion of a fief by a tenant in chief would create a new freehold immediately depending upon the crown. Many of these tenants in capite held very small fractions of knight's fees, and were consequently not called upon to receive knighthood. They were plain freeholders holding in chief, and the liberi homines or libere tenentes of those writs which have been already quoted. The common form, indeed, of writs to the sheriff directs the knights to be chosen de communitate comitatûs. But the word communitas, as in boroughs, denotes only the superior part: it is not unusual to find mention in records of communitas populi, or omnes de regno, where none are intended but the barons, or at most the tenants in chief. If we look attentively at the earliest instance of summoning knights of shires to parliament, that in 38 H. III., which has been noticed above, it will appear that they could only have been chosen by military tenants in chief. The object of calling this parliament, if parliament it were, was to obtain an aid from the military tenants, who, holding less than a knight's fee, were not required to do personal service. None then, surely, but the tenants in chief could be electors upon this occasion, which merely respected their feudal duties. Again, to come much lower down, we find a series of petitions in the reigns of Edward III. and Richard II., which seem to lead us to a conclusion, that only tenants in chief were represented by the knights of shires. The writ for ages directed the sheriff to levy them on the commons of the county, both within franchises and without, (tam intra libertates quam extra.) But the tenants of lords holding by barony endeavoured to exempt themselves from this burthen, in which they seem to have been countenanced by the king. This led to frequent remonstrances from the commons, who finally procured a statute, that all lands, not discharged by prescription, should contribute to the payment of wages. But if these mesne tenants had possessed equal rights of voting with tenants in chief, it is impossible to conceive that they would have thought of claiming so unreasonable an exemption. Yet, as it would appear harsh to make any distinction between the rights of those who sustained an equal burthen, we may perceive how the freeholders holding of mesne lords might on that account obtain after the statute a participation in the privilege of tenants in chief. And without supposing any partiality or connivance, it is easy to comprehend, that while the nature of tenures and services was so obscure, as to give rise to continual disputes, of which the ancient records of the King's Bench are full, no

sheriff could be very accurate in rejecting the votes of common freeholders, repairing to the county-court, and undistinguishable, as must be allowed, from tenants in capite upon other occasions, such as serving on juries, or voting on the elections of coroners. To all this it yields some corroboration, that a neighbouring though long hostile kingdom, who borrowed much of her law from our own, has never admitted any freeholders, except tenants in chief of the crown, to a suffrage in county elections. These attended the parliament of Scotland in person till 1428, when a law of James I. permitted them to send representatives.

Such is, I think, a fair statement of the arguments that might be alleged by those who would restrain the right of election to tenants of the crown. It may be urged on the other side that the genius of the feudal system was never completely displayed in England; much less can we make use of that policy to explain institutions that prevailed under Edward I. Instead of aids and scutages levied upon the king's military tenants, the crown found ampler resources in subsidies upon movables, from which no class of men was exempted. But the statute that abolished all unparliamentary taxation led, at least in theoretical principle, to extend the elective franchise to as large a mass of the people as could conveniently exercise it. It was even in the mouth of our kings that what concerned all should be approved by all. Nor is the language of all extant writs less adverse to the supposition that the right of suffrage in county elections was limited to tenants in chief. It seems extraordinary that such a restriction, if it existed, should never be deducible from these instruments; that their terms should invariably be large enough to comprise all freeholders. Yet no more is ever required of the sheriff than to return two knights, chosen by the body of the county. For they are not only said to be returned pro communitate, but "per communitatem," and "de assensu totius communitatis." Nor is it satisfactory to allege, without any proof, that this word should be restricted to the tenants in chief, contrary to what must appear to be its obvious meaning. Certainly if these tenants of the crown had found inferior freeholders usurping a right of suffrage, we might expect to find it the subject of some legislative provision, or at least of some petition and complaint. And, on the other hand, it would have been considered as unreasonable to levy the wages due to knights of the shire for their service in parliament on those who had no share in their election. But it appears by writs at the very beginning of Edward II.'s reign that wages were levied "de communitate comitatus." It will scarcely be contended that no one was to contribute under this writ but tenants in chief; and yet the word communitas can hardly be applied to different persons, when it occurs in the same instrument, and upon the same matter. The series of petitions above mentioned, relative to the payment of wages, rather

tends to support a conclusion that all mesne tenants had the right of suffrage, if they thought fit to exercise it, since it was earnestly contended that they were liable to contribute towards that expense. Nor does there appear any reason to doubt that all freeholders, except those within particular franchises, were suitors to the county-court; an institution of no feudal nature, and in which elections were to be made by those present. As to the meeting to which knights of shires were summoned in 38 H. III., it ought not to be reckoned a parliament, but rather one of those anomalous conventions which sometimes occurred in the unfixed state of government. It is at least the earliest known instance of representation, and leads us to no conclusion in respect of later times, when the commons had become an essential part of the legislature, and their consent was required to all public burthens.

This question, upon the whole, is certainly not free from considerable difficulty. The legal antiquaries are divided. Prynne does not seem to have doubted but that the knights were "elected in the full county, by and for the whole county," without respect to the tenure of the freeholders. But Brady and Carte are of a different opinion. Yet their disposition to narrow the basis of the constitution is so strong, that it creates a sort of prejudice against their authority. And if I might offer an opinion on so obscure a subject, I should be much inclined to believe, that even from the reign of Edward I., the election of knights by all freeholders in the county-court, without regard of tenure, was little, if at all, different from what it is at present.

The progress of towns in several continental countries from a condition bordering upon servitude to wealth and liberty has more than once attracted our attention in other parts of the present work. Their growth in England, both from general causes and imitative policy, was very similar and nearly coincident. Under the Anglo-Saxon line of sovereigns, we scarcely can discover in our scanty records the condition of their inhabitants; except retrospectively from the great survey of Domesday-book, which displays the state of England under Edward the Confessor. Some attention to commerce had been shown by Alfred and Athelstan; and a merchant who had made three voyages beyond sea was raised by a law of the latter monarch to the dignity of a thane. This privilege was not perhaps often claimed; but the burgesses of towns were already a distinct class from the ceorls or rustics, and, though hardly free according to our estimation, seem to have laid the foundation of more extensive immunities. It is probable, at least, that the English towns had made full as great advances towards emancipation as those of France. At the Conquest, we find the burgesses or inhabitants of towns living under the superiority or protection of the king, or of some other lord, to whom they paid annual rents, and determinate dues or customs. Sometimes they belonged to different

lords; and sometimes the same burgess paid custom to one master while he was under the jurisdiction of another. They frequently enjoyed special privileges as to inheritance; and in two or three instances they seem to have possessed common property, belonging to a sort of guild or corporation; but never, as far as appears by any evidence, had they a municipal administration by magistrates of their own choice. Besides the regular payments, which were in general not heavy, they were liable to tallages at the discretion of their lords. This burthen continued for two centuries, with no limitation, except that the barons were latterly forced to ask permission of the king before they set a tallage on their tenants, which was commonly done when he imposed one upon his own. Still the towns became considerably richer; for the profits of their traffic were undiminished by competition; and the consciousness that they could not be individually despoiled of their possessions, like the villeins of the country around, inspired an industry and perseverance, which all the rapacity of Norman kings and barons was unable to daunt or overcome.

One of the earliest and most important changes in the condition of the burgesses was the conversion of their individual tributes into a perpetual rent from the whole borough. The town was then said to be affermed, or let in fee-farm to the burgesses and their successors for ever. Previously to such a grant, the lord held the town in his demesne, and was the legal proprietor of the soil and tenements, though I by no means apprehend that the burgesses were destitute of a certain estate in their possessions. But of a town in fee-farm he only kept the superiority, and the inheritance of the annual rent, which he might recover by distress. The burgesses held their lands by burgage-tenure, nearly analogous to, or rather a species of, free socage. Perhaps before the grant they might correspond to modern copy-holders. It is of some importance to observe, that the lord by such a grant of the town in fee-farm, whatever we may think of its previous condition, divested himself of his property, or lucrative dominion over the soil, in return for the perpetual rent; so that tallages subsequently set at his own discretion upon the inhabitants, however common, can hardly be considered as a just exercise of the rights of proprietorship.

Under such a system of arbitrary taxation, however, it was evident to the most selfish tyrant, that the wealth of his burgesses was his wealth, and their prosperity his interest; much more were liberal and sagacious monarchs, like Henry II., inclined to encourage them by privileges. From the time of William Rufus, there was no reign in which charters were not granted to different towns, of exemption from tolls on rivers and at markets, those lighter manacles of feudal tyranny; or of commercial franchises; or of immunity from the ordinary jurisdictions; or, lastly, of internal self-regulation. Thus, the original charter of Henry I. to the city of London concedes to the citizens, in addition to

valuable commercial and fiscal immunities, the right of choosing their own sheriff and justice, to the exclusion of every foreign jurisdiction. These grants, however, were not in general so extensive till the reign of John. Before that time, the interior arrangement of towns had received a new organisation. In the Saxon period, we find voluntary associations, sometimes religious, sometimes secular; in some cases for mutual defence against injury, in others for mutual relief in poverty. These were called guilds, from the Saxon verb *gildan*, to pay or contribute, and exhibited the natural, if not the legal character of corporations. At the time of the Conquest, as has been mentioned above, such voluntary incorporations of the burgesses possessed in some towns either landed property of their own, or rights of superiority over that of others. An internal elective government seems to have been required for the administration of a common revenue and of other business incident to their association. They became more numerous, and more peculiarly commercial after that era, as well from the increase of trade, as through imitation of similar fraternities existing in many towns of France. The spirit of monopoly gave strength to those institutions, each class of traders forming itself into a body, in order to exclude competition. Thus were established the companies in corporate towns, that of the Weavers in London being perhaps the earliest, and these were successively consolidated and sanctioned by charters from the crown. In towns not large enough to admit of distinct companies, one merchant guild comprehended the traders in general, or the chief of them; and this, from the reign of Henry II. downwards, became the subject of incorporating charters. The management of their internal concerns, previously to any incorporation, fell naturally enough into a sort of oligarchy, which the tenor of the charter generally preserved. Though the immunities might be very extensive, the powers were more or less restrained to a small number. Except in a few places, the right of choosing magistrates was first given by king John; and certainly must rather be ascribed to his poverty, than to any enlarged policy, of which he was utterly incapable. A few of an earlier date may be found in the new edition of Rymer.

From the middle of the twelfth century to that of the thirteenth, the trades of England became more and more prosperous. The towns on the southern coast exported tin and other metals in exchange for the wines of France; those on the eastern sent corn to Norway; the cinque-ports bartered wool against the stuffs of Flanders. Though bearing no comparison with the cities of Italy or the empire, they increased sufficiently to acquire importance at home. That vigorous prerogative of the Norman monarchs, which kept down the feudal aristocracy, compensated for whatever inferiority there might be in the population and defensible strength of the English towns, compared with those on the continent. They had to fear no petty oppressors, no

local hostility; and if they could satisfy the rapacity of the crown, were secure from all other grievances. London, far above the rest, our ancient and noble capital, might, even in those early times, be justly termed a member of the political system. This great city, so admirably situated, was rich and populous long before the Conquest. Bede, at the beginning of the eighth century, speaks of London as a great market, which traders frequented by land and sea. It paid £15,000 out of £82,000, raised by Canute upon the kingdom. If we believe Roger Hoveden, the citizens of London, on the death of Ethelred II., joined with part of the nobility in raising Edmund Ironside to the throne. Harold I., according to better authority, the Saxon Chronicle, and William of Malmsbury, was elected by their concurrence. Descending to later history, we find them active in the civil war of Stephen and Matilda. The famous bishop of Winchester tells the Londoners, that they are almost accounted as noblemen on account of the greatness of their city; into the community of which it appears that some barons had been received. Indeed the citizens themselves, or at least the principal of them, were called barons. It was certainly by far the greatest city in England. There have been different estimates of its population, some of which are extravagant; but I think it could hardly have contained less than thirty or forty thousand souls within its walls; and the suburbs were very populous. These numbers, the enjoyment of privileges, and the consciousness of strength, infused a free and even mutinous spirit into their conduct. The Londoners were always on the barons' side in their contests with the crown. They bore a part in deposing William Longchamp, the chancellor and justiciary of Richard I. They were distinguished in the great struggle for Magna Charta; the privileges of their city are expressly confirmed in it; and the mayor of London was one of the twenty-five barons to whom the maintenance of its provisions was delegated. In the subsequent reign, the citizens of London were regarded with much dislike and jealousy by the court, and sometimes suffered pretty severely by its hands, especially after the battle of Evesham.

Notwithstanding the influence of London in these seasons of disturbance, we do not perceive that it was distinguished from the most insignificant town by greater participation in national councils. Rich, powerful, honourable, and high spirited as its citizens had become, it was very long before they found a regular place in parliament. The prerogative of imposing tallages at pleasure, unsparingly exercised by Henry III. even over London, left the crown no inducement to summon the inhabitants of cities and boroughs. As these indeed were daily growing more considerable, they were certain, in a monarchy so limited as that of England became in the thirteenth century, of attaining, sooner or later, this eminent privilege. Although, therefore, the object of Simon de Montford in calling them to his parliament after the battle

of Lewes was merely to strengthen his own faction, which prevailed among the commonalty, yet their permanent admission into the legislature may be ascribed to a more general cause. For otherwise it is not easy to see, why the innovation of an usurper should have been drawn into precedent, though it might perhaps accelerate what the course of affairs was gradually preparing.

It is well known, that the earliest writs of summons to cities and boroughs of which we can prove the existence, are those of Simon de Montfort, Earl of Leicester, bearing date 12th December, 1264, in the forty-ninth year of Henry III. After a long controversy, almost all judicious inquirers seem to have acquiesced in admitting this origin of popular representation. The argument may be very concisely stated. We find from innumerable records that the king imposed tallages upon his demesne towns at discretion. No public instrument previous to the forty-ninth of Henry III. names the citizens and burgesses as constituent parts of parliament; though prelates, barons, knights, and sometimes free-holders are enumerated; while since the undoubted admission of the commons, they are almost invariably mentioned. No historian speaks of representatives appearing for the people, or uses the word citizen or burgess in describing those present in parliament. Such convincing, though negative, evidence is not to be invalidated by some general and ambiguous phrases, whether in writs or records, or in historians. Those monkish annalists are poor authorities upon any point where their language is to be delicately measured. But it is hardly possible, that writing circumstantially, as Roger de Hoveden and Matthew Paris sometimes did, concerning proceedings in parliament, they could have failed to mention the commons in unequivocal expressions, if any representatives from that order had actually formed a part of the assembly.

Two authorities, however, which have been supposed to prove a greater antiquity than we have assigned to the representation of the commons, are deserving of particular consideration; the cases of St. Albans and Barnstaple. The burgesses of St. Albans complained to the council in the eighth year of Edward II., that, although they held of the king in capite, and ought to attend his parliaments whenever they are summoned, by two of their number, instead of all other services, as had been their custom in all past times, which services the said burgesses and their predecessors had performed as well in the time of the late king Edward and his ancestors, as in that of the present king until the parliament now sitting, the names of their deputies having been constantly enrolled in chancery, yet the sheriff of Hertfordshire, at the instigation of the abbot of St. Albans, had neglected to cause an election and return to be made; and prayed remedy. To this petition it was answered, "Let the rolls of chancery be examined, that it may appear, whether the said burgesses were accustomed to

come to parliament, or not, in the time of the king's ancestors ; and let right be done to them, vocatis evocandis, si necesse fuerit." I do not translate these words, concerning the sense of which there has been some dispute, though not, apparently, very material to the principal subject.

This is, in my opinion, by far the most plausible testimony for the early representation of boroughs. The burgesses of St. Albans claim a prescriptive right from the usage of all past times, and more especially those of the late Edward and his ancestors. Could this be alleged, it has been said, of a privilege at the utmost of fifty years' standing, once granted by an usurper, in the days of the late king's father, and afterwards discontinued till about twenty years before the date of their petition, according to those who refer the regular appearance of the commons in parliament to the twenty-third of Edward I.? Brady, who obviously felt the strength of this authority, has shown little of his usual ardour and acuteness in repelling it. It was observed, however, by Madox, that the petition of St. Albans contains two very singular allegations : it asserts that the town was part of the king's demesne, whereas it had invariably belonged to the adjoining abbey ; and that its burgesses held by the tenure of attending parliament, instead of all other services, contrary to all analogy, and without parallel in the condition of any tenant in capite throughout the kingdom. "It is no wonder, therefore," says Hume, "that a petition which advances two falsehoods, should contain one historical mistake, which, indeed, amounts only to an inaccurate expression." But it must be confessed, that we cannot so easily set aside the whole authority of this record. For whatever assurance the people of St. Albans might show in asserting what was untrue, the king's councils must have been aware how recently the deputies of any towns had been admitted into parliament. If the lawful birth of the House of Commons were in 1295, as is maintained by Brady and his disciples, is it conceivable that, in 1315, the council would have received a petition, claiming the elective franchise by prescription, and have referred to the rolls of chancery to inquire whether this had been used in the days of the king's progenitors? I confess that I see no answer which can easily be given to this objection by such as adopt the *latest* epoch of borough representation, namely, the parliament of 23 E. I. But these are by no means equally conclusive against the supposition, that the communities of cities and towns, having been first introduced into the legislature during Leicester's usurpation, in the forty-ninth year of Henry III., were summoned, not, perhaps, uniformly, but without any long intermission, to succeeding parliaments. There is a strong presumption, from the language of a contemporary historian, that they sat in the parliament of 1269, four years after that convened by Leicester. It is more unequivocally stated by another annalist, that they were present in the first parlia-

ment of Edward I., held in 1271. Nor does a similar inference want some degree of support from the preambles of the statute of Marlebridge in 51 H. III., of Westminster I., in the third, and of Gloucester, in the sixth year of Edward I: And the writs are extant, which summon every city, borough, and market town to send two deputies to a council in the eleventh year of his reign. I call this a council, for it undoubtedly was not a parliament. The sheriffs were directed to summon personally all who held more than twenty pounds a year of the crown, as well as four knights for each county, invested with full powers to act for the commons thereof. The knights and burgesses thus chosen, as well as the clergy within the province of Canterbury, met at Northampton; those within the province of York, at that city. And neither assembly was opened by the king. This anomalous convention was, nevertheless, one means of establishing the representative system, and, to an enquirer free from technical prejudice, is little less important than a regular parliament. Nor have we long to look even for this. In the same year, about eight months after the councils at Northampton and York, writs were issued summoning to a parliament at Shrewsbury two citizens from London, and as many from each of twenty other considerable towns. It is a slight cavil to object, that these were not directed as usual to the sheriff of each county, but to the magistrates of each place. Though a very imperfect, this was a regular and unequivocal representation of the commons in parliament. But their attendance seems to have intermitted from this time to the twenty-third year of Edward's reign.

Those to whom the petition of St. Albans is not satisfactory will hardly yield their conviction to that of Barnstaple. This town set forth in the eighteenth of Edward III., that among other franchises granted to them by a charter of Athelstan, they had ever since exercised the right of sending two burgesses to parliament. The said charter, indeed, was unfortunately mislaid: and the prayer of their petition was to obtain one of the like import in its stead. Barnstaple, it must be observed, was a town belonging to Lord Audley, and had actually returned members ever since the twenty-third of Edward I. Upon an inquisition directed by the king to be made into the truth of these allegations, it was found that "the burgesses of the said town were wont to send two burgesses to parliament for the commonalty of the borough; but nothing appeared as to the pretended charter of Athelstan, or the liberties which it was alleged to contain. The burgesses, dissatisfied with this inquest, prevailed that another should be taken, which certainly answered better their wishes. The second jury found that Barnstaple was a free borough, from time immemorial; that the burgesses had enjoyed under a charter of Athelstan, which had been casually lost, certain franchises by them enumerated, and particularly that they should send two burgesses to parliament; and that it would

not be to the king's prejudice if he should grant them a fresh charter in terms equally ample with that of his predecessor Athelstan. But the following year we have another writ and another inquest, the former reciting that the second return had been unduly and fraudulently made; and the latter expressly contradicting the previous inquest in many points, and especially finding no proof of Athelstan's supposed charter. Comparing the various parts of this business, we shall probably be induced to agree with Willis that it was but an attempt of the inhabitants of Barnstaple to withdraw themselves from the jurisdiction of their lord. For the right of returning burgesses, though it is the main point of our inquiries, was by no means the most prominent part of their petition, which rather went to establish some civil privileges of devising their tenements, and electing their own mayor. The first and fairest return finds only that they were accustomed to send members to parliament, which an usage of fifty years (from 23 E. I. to 18 E. III.) was fully sufficient to establish, without searching into more remote antiquity.

It has, however, probably occurred to the reader of these two cases, St. Albans and Barnstaple, that the representation of the commons in parliament was not treated as a novelty, even in times little posterior to those in which we have been supposing it to have originated. In this consists, I think, the sole strength of the opposite argument. An act in the fifth year of Richard II. declares that if any sheriff shall leave out of his returns any cities or boroughs which be bound, and of old time were wont to come to the parliament, he shall be punished as was accustomed to be done in the like case in time past. In the memorable assertion of legislative right by the commons in the second of Henry V., which will be quoted hereafter, they affirm that "the commune of the land is, *and ever has been*, a member of parliament." And the consenting suffrage of our older law-books must be placed in the same scale. The first gainsayers, I think, were Camden and Sir Henry Spelman, who upon probing the antiquities of our constitution somewhat more exactly than their predecessors, declared that they could find no signs of the commons in parliament till the forty-ninth of Henry III. Prynne, some years afterwards, with much vigour and learning, maintained the same argument, and Brady completed the victory. But the current doctrine of Westminster Hall, and still more of the two chambers of parliament, was certainly much against these antiquaries; and it passed at one time for a surrender of popular principles, and almost a breach of privilege, to dispute the lineal descent of the House of Commons from the wittenagemot.

The true ground of these pretensions to antiquity was a very well founded persuasion, that no other argument would be so conclusive to ordinary minds, or cut short so effectually all encroachments of the prerogative. The populace of every country, but none so much as the

English, easily grasp the notion of right, meaning thereby something positive and definite; while the maxims of expediency or theoretical reasoning pass slightly over their minds. Happy indeed for England that it is so! But we have here to do with the fact alone. And it may be observed that several pious frauds were practised to exalt the antiquity of our constitutional liberties. These began, perhaps, very early, when the imaginary laws of Edward the Confessor were so earnestly demanded. They were carried farther under Edward I. and his successors, when the fable of privileges granted by the Conqueror to the men of Kent was devised; when Andrew Horn filled his Mirrour of Justices with fictitious tales of Alfred; and above all, when the "method of holding parliaments in the time of Ethelred" was fabricated, about the end of Richard II.'s reign; an imposture which proved to be not too gross to deceive Sir Edward Coke.

There is no great difficulty in answering the question, why the deputies of boroughs were finally and permanently engrafted upon parliament by Edward I. The government was becoming constantly more attentive to the wealth that commerce brought into the kingdom, and the towns were becoming more flourishing and more independent. But, chiefly, there was a much stronger spirit of general liberty, and a greater discontent at violent acts of prerogative, from the era of Magna Charta; after which authentic recognition of free principles, many acts which had seemed before but the regular exercise of authority were looked upon as infringements of the subject's right. Among these the custom of setting tallages at discretion would naturally appear the most intolerable; and men were unwilling to remember that the burgesses who paid them were indebted for the rest of their possessions to the bounty of the crown. In Edward I.'s reign, even before the great act of Confirmation of the Charters had rendered arbitrary impositions absolutely unconstitutional, they might perhaps excite louder murmurs than a discreet administration would risk. Though the necessities of the king, therefore, and his imperious temper often led him to this course, it was a more prudent counsel to try the willingness of his people, before he forced their reluctance. And the success of his innovation rendered it worth repetition. Whether it were from the complacency of the commons at being thus admitted among the peers of the realm, or from a persuasion that the king would take their money, if they refused it, or from inability to withstand the plausible reasons of his ministers, or from the private influence to which the leaders of every popular assembly have been accessible, much more was granted in subsidies, after the representation of the towns commenced, than had ever been extorted in tallages.

To grant money was, therefore, the main object of their meeting, and if the exigencies of the administration could have been relieved without subsidies, the citizens and burgesses might still have sat at home, and

obeyed the laws which a council of prelates and barons enacted for their government. But it is a difficult question, whether the king and the peers designed to make room for them, as it were, in legislation; and whether the power of the purse drew after it immediately, or only by degrees, those indispensable rights of consenting to laws which they now possess. There are no sufficient means of solving this doubt during the reign of Edward I. The writ in 22 E. I. directs two knights to be chosen cum plenâ potestate pro se et totâ communitate comitatûs prædicti, ad consulendum et consentiendum pro se et communitate illâ, his quæ comites, barones, et proceres prædicti concorditer ordinaverint in præmissis. That of the next year runs, ad faciendum tunc quod de communi consilio ordinabitur in præmissis. The same words are inserted in the writ of 26 E. I. In that of 28 E. I. the knights are directed to be sent cum plenâ potestate audiendi et faciendi quæ ibidem ordinari contigerent pro communi commodo. Several others of the same reign have the words ad faciendum. The difficulty is to pronounce whether this term is to be interpreted in the sense of *performing*, or of *enacting*: whether the representatives of the commons were merely to learn from the lords, what was to be done, or to bear their part in advising upon it. The earliest writ, that of 22 E. I., certainly implies the latter; and I do not know that any of the rest are conclusive to the contrary. In the reign of Edward II., the words ad consentiendum alone, or ad faciendum et consentiendum, begin; and from that of Edward III., this form has been constantly used. It must still, however, be highly questionable, whether the commons, who had so recently taken their place in parliament, gave anything more than a constructive assent to the laws enacted during this reign. They are not even named in the preamble of any statute till the last year of Edward I. Upon more than one occasion, the sheriffs were directed to return the same members who had sat in the last parliament, unless prevented by death or infirmity.

It has been a very prevailing opinion, that parliament was not divided into two houses at the first admission of the commons. If by this is only meant that the commons did not occupy a separate chamber till some time in the reign of Edward III., the proposition, true or false, will be of little importance. They may have sat at the bottom of Westminster Hall, while the lords occupied the upper end. But that they were ever intermingled in voting, appears inconsistent with likelihood and authority. The usual object of calling a parliament was to impose taxes; and these, for many years after the introduction of the commons, were laid in different proportions upon the three estates of the realm. Thus, in the 23 E. I., the earls, barons, and knights gave the king an eleventh, the clergy a tenth, while he obtained a seventh from the citizens and burgesses; in the twenty-fourth of the same king, the two former of these orders gave a twelfth, the last an eighth; [illegible] thirty-

third year, a thirtieth was the grant of the barons and knights, and of the clergy, a twentieth of the cities and towns; in the first of Edward II., the counties paid a twentieth, the towns a fifteenth; in the sixth of Edward III., the rates were a fifteenth and a tenth. These distinct grants imply distinct grantors; for it is not to be imagined that the commons intermeddled in those affecting the lords, or the lords in those of the commons. In fact, however, there is abundant proof of their separate existence long before the seventeenth of Edward III., which is the epoch assigned by Carte, or even the sixth of that king, which has been chosen by some other writers. Thus the commons sat at Acton Burnell in the eleventh of Edward I., while the upper house was at Shrewsbury. In the eighth of Edward II., "the commons of England complain to the king and his council," &c. These must surely have been the commons assembled in parliament, for who else could thus have entitled themselves? In the nineteenth of the same king, we find several petitions, evidently proceeding from the body of the commons in parliament, and complaining of public grievances. The roll of 1 E. III., though mutilated, is conclusive to show that separate petitions were then presented by the commons, according to the regular usage of subsequent times. And, indeed, the preamble of 1 E. III., stat. 2., is apparently capable of no other inference.

As the knights of shires correspond to the lower nobility of other feudal countries, we have less cause to be surprised that they belonged originally to the same branch of parliament as the barons, than at their subsequent intermixture with men so inferior in station as the citizens and burgesses. It is by no means easy to define the point of time when this distribution was settled; but I think it may be inferred from the rolls of parliament, that the houses were divided as they are at present, in the eighth, ninth, and nineteenth years of Edward II. This appears, however, beyond doubt in the first of Edward III. Yet, in the sixth of the same prince, though the knights and burgesses are expressly mentioned to have consulted together, the former taxed themselves in a smaller rate of subsidy than the latter.

The proper business of the House of Commons was to petition for redress of grievances as much as to provide for the necessities of the crown. In the prudent fiction of English law, no wrong is supposed to proceed from the source of right. The throne is fixed upon a pinnacle, which perpetual beams of truth and justice irradiate, though corruption and partiality may occupy the middle region, and cast their chill shade upon all below. In his high court of parliament, a king of England was to learn where injustice had been unpunished, and where right had been delayed. The common courts of law, if they were sufficiently honest, were not sufficiently strong to redress the subject's injuries, where the officers of the crown, or the nobles interfered. To parliament he looked as the great remedial court for relief of private as well as

public grievances. For this cause it was ordained in the fifth of Edward II., that the king should hold a parliament once, or, if necessary, twice every year; "that the pleas which have been thus delayed, and those where the justices have differed, may be brought to a close." And a short act of 4 Edward III., which was not very strictly regarded, provides that a parliament shall be held "every year, or oftener, if need be." By what persons, and under what limitations, this jurisdiction in parliament was exercised, will come under our future consideration.

The efficacy of a king's personal character, in so imperfect a state of government, was never more strongly exemplified than in the two first Edwards. The father, a little before his death, had humbled his boldest opponents among the nobility; and as for the commons, so far from claiming a right of remonstrating, we have seen cause to doubt whether they were accounted effectual members of the legislature, for any purposes but taxation. But in the very second year of the son's reign, they granted the twenty-fifth penny of their goods, "upon this condition, that the king should take advice and grant redress upon certain articles, wherein they are aggrieved." These were answered at the ensuing parliament, and are entered, with the king's respective promises of redress, upon the roll. It will be worth while to extract part of this record, that we may see what were the complaints of the commons of England, and their notions of right in 1309. I have chosen on this as on other occasions, to translate very literally, at the expense of some stiffness, and perhaps of obscurity, in the language.

"The good people of the kingdom who are come hither to parliament, pray our lord the king that he will, if it please him, have regard to his poor subjects, who are much aggrieved by reason that they are not governed as they should be; especially as to the articles of the Great Charter; and for this, if it please him, they pray remedy. Besides which they pray their lord the king to hear what has long aggrieved his people, and still does so from day to day, on the part of those who call themselves his officers, and to amend it, if he pleases." The articles, eleven in number, are to the following purport:—1. That the king's purveyors seize great quantities of victuals without payment; 2. That new customs are set on wine, cloth and other imports; 3. That the current coin is not so good as formerly; 4, 5. That the steward and marshal enlarge their jurisdiction beyond measure to the oppression of the people: 6. That the commons find none to receive petitions addressed to the council; 7. That the collectors of the king's dues (pernours des prises) in towns and at fairs, take more than is lawful; 8. That men are delayed in their civil suits by writs of protection; 9. That felons escape punishment by procuring charters of pardon; 10. That the constables of the king's castles take cognisance of common pleas; 11. That the king's escheators oust men of lands held by good title, under a pretence of an inquest of their office.

These articles display in a short compass the nature of those grievances, which existed under almost all the princes of the Plantagenent dynasty, and are spread over the rolls of parliament for more than a century after this time. Edward gave the amplest assurances of putting an end to them all; except in one instance, the augmented customs or imports, to which he answered rather evasively, that he would take them off, till he should perceive whether himself and his people derived advantage from so doing, and act thereupon as he should be advised. Accordingly, the next year, he issued writs to collect these new customs again. But the Lords Ordainers superseded the writs, having entirely abrogated all illegal impositions. It does not appear, however, that, regard had to the times, there was anything very tyrannical in Edward's government. He set tallages sometimes, like his father, on his demesne towns without assent of parliament. In the nineteenth year of his reign, the commons show, that "whereas we and our ancestors have given many tallages to the king's ancestors to obtain the charter of the forest, which charter we have had confirmed by the present king, paying him largely on our part; yet the king's officers of the forest seize on lands, and destroy ditches, and oppress the people, for which they pray remedy, for the sake of God and his father's soul." They complain at the same time of arbitrary imprisonment, against the law of the land. To both these petitions the king returned a promise of redress; and they complete the catalogue of the customary grievances in this period of our constitution.

During the reign of Edward II. the rolls of parliament are imperfect, and we have not much assistance from other sources. The assent of the commons, which frequently is not specified in the statutes of this age, appears in two remarkable and revolutionary proceedings, the appointment of the Lords Ordainers in 1312, and that of Prince Edward as guardian of the realm in the rebellion which ended in the king's dethronement. In the former case, it indicates that the aristocratic party then combined against the crown were desirous of conciliating popularity. An historian relates, that some of the commons were consulted upon the ordinances to be made for the reformation of government. In the latter case, the deposition of Edward II., I am satisfied, that the commons' assent was pretended in order to give more speciousness to the transaction. But as this proceeding, however violent, bears evident marks of having been conducted by persons conversant in law, the mention of the commons may be deemed a testimony to their constitutional right of participation with the peers in making provision for a temporary defect of whatever nature in the executive government.

During the long and prosperous reign of Edward III., the efforts of parliament in behalf of their country were rewarded with success in establishing upon a firm footing three essential principles of our government; the illegality of raising money without consent; the

necessity that the two houses should concur for any alterations in the law; and, lastly, the right of the commons to inquire into public abuses, and to impeach public counsellors. By exhibiting proofs of each of these from parliamentary records, I shall be able to substantiate the progressive improvement of our free constitution, which was principally consolidated during the reign of Edward III. and his two next successors. Brady indeed, Carte, and the authors of the Parliamentary History, have trod already over this ground; but none of the three can be considered as familiar to the generality of readers, and I may at least take credit for a sincerer love of liberty than any of their writings display.

In the sixth year of Edward III. a parliament was called to provide for the emergency of an Irish rebellion; wherein, "because the king could not send troops and money to Ireland without the aid of his people, the prelates, earls, barons, and other great men, and the knights of shires, and all the commons, of their free will, for the said purpose, and also in order that the king might live off his own, and not vex his people by excessive prises nor in other manner, grant to him the fifteenth penny, to levy of the commons, and the tenth from the cities, towns, and royal demesnes. And the king, at the request of the same, in ease of his people, grants that the commission lately made to certain persons assigned to set tallages on cities, towns, and demesnes throughout England shall be immediately repealed; and that in time to come he will not set such tallage, except as it has been done in the time of his ancestors, and as he may reasonably do.

These concluding words are of dangerous implication, and certainly it was not the intention of Edward, inferior to none of his predecessors in the love of power, to divest himself of that eminent prerogative, which, however illegally since the Confirmatio Chartarum, had been exercised by them all. But the parliament took no notice of this reservation, and continued with unshaken perseverance to insist on this incontestable and fundamental right, which he was prone enough to violate.

In the thirteenth year of this reign, the lords gave their answer to commissioners sent to open the parliament and to treat with them on the king's part, in a sealed roll. This contained a grant of the tenth sheaf, fleece and lamb. But, before they gave it, they took care to have letters patent shown them, by which the commissioners had power "to grant some graces to the great and small of the kingdom." "And the said lords," the roll proceeds to say, "will, that the imposition (malestoste) which now again has been levied upon wool be entirely abolished, that the old customary duty be kept, and that they may have it by charter, and by enrolment in parliament, that such custom be never more levied, and that this grant now made to the king, or any other made in time past, shall not turn hereafter to their charge nor be drawn into precedent." The commons, who gave their answers in a

separate roll, declared that they could grant no subsidy without consulting their constituents; and therefore begged that another parliament might be summoned, and in the meantime they would endeavour, by using persuasion with the people of their respective counties, to procure the grant of a reasonable aid in the next parliament. They demanded also, that the imposition on wool and lead should be taken as it used to be in former times, "inasmuch as it has enhanced without assent of the commons, or of the lords, as we understand; and, if it be otherwise demanded, that any one of the commons may refuse it, (le puisse arester,) without being troubled on that account, (saunz estre chalangé.)

Wool, however, the staple export of that age, was too easy and tempting a prey to be relinquished by a prince engaged in an impoverishing war. Seven years afterwards, in 20 E. III., we find the commons praying, that the great subsidy of forty shillings upon the sack of wool be taken off; and the whole custom paid as heretofore was assented to and granted. The government spoke this time in a more authoritative tone. "As to this point, (the answer runs,) the prelates and others seeing in what need the king stood of an aid before his passage beyond sea, to recover his rights, and defend his kingdom of England, consented, with the concurrence of the merchants, that he should have in aid of his said war, and in defence of his said kingdom, forty shillings of subsidy for each sack of wool that should be exported beyond sea, for two years to come. And upon this grant divers merchants have made many advances to our lord the king, in aid of his war; for which cause this subsidy cannot be repealed without assent of the king and his lords.

It is probable, that Edward's counsellors wished to establish a distinction, long afterwards revived by those of James I., between customs levied on merchandise at the ports, and internal taxes. The statute entitled Confirmatio Chartarum had manifestly taken away the prerogative of imposing the latter, which indeed had never extended beyond the tenants of the royal demesne. But its language was not quite so explicit as to the former, although no reasonable doubt could be entertained that the intention of the legislature was to abrogate every species of imposition unauthorised by parliament. The thirtieth section of Magna Charta had provided, that foreign merchants should be free from all tributes, except the ancient customs; and it was strange to suppose, that natives were excluded from the benefit of that enactment. Yet, owing to the ambiguous and elliptical style so frequent in our older laws, this was open to dispute, and could perhaps only be explained by usage. Edward I., in despite of both these statutes, had set a duty of threepence in the pound upon goods imported by merchant strangers. This imposition was noticed as a grievance in the third year of his successor, and repealed by the Lords Ordainers. It

was revived, however, by Edward III., and continued to be levied ever afterwards.

Edward was led by the necessities of his unjust and expensive war into another arbitrary encroachment, of which we find as many complaints as of his pecuniary extortions. The commons pray, in the same parliament of 20 E. III., that commissions should not issue for the future out of chancery, to charge the people with providing men-at-arms, hobelers, (or light cavalry,) archers, victuals, or in any other manner, without consent of parliament. It is replied to this petition, that "it is notorious how in many parliaments the lords and commons had promised to aid the king in his quarrel with their bodies and goods as far as was in their power; wherefore the said lords, seeing the necessity in which the king stood of having aid of men-at-arms, hobelers, and archers, before his passage to recover his rights beyond sea, and to defend his realm of England, ordained, that such as had five pounds a year or more in land on this side of Trent should furnish men-at-arms, hobelers, and archers, according to the proportion of land they held to attend the king at his cost; and some who would neither go themselves, nor find others in their stead, were willing to give the king wherewithal he might provide himself with some in their place. And thus the thing has been done, and no otherwise. And the king wills, that henceforth what has been thus done in this necessity be not drawn into consequence or example."

The commons were not abashed by these arbitrary pretensions; they knew that by incessant remonstrances they should gain at least one essential point, that of preventing the crown from claiming these usurpations as uncontested prerogatives. The roll of parliament in the next two years, the 21st and 22d of Edward III., is full of the same complaints on one side, and the same allegations of necessity on the other. In the latter year, the commons grant a subsidy, on condition that no illegal levying of money should take place, with several other remedial provisions; "and that these conditions should be entered on the roll of parliament, as a matter of record, by which they may have remedy, if anything should be attempted to the contrary in time to come." From this year the complaints of extortion become rather less frequent; and soon afterwards a statute was passed, "That no man shall be constrained to find men-at-arms, hobelers, nor archers, other than those which hold by such services, if it be not by common assent and grant made in parliament." Yet even in the last year of Edward's reign, when the boundaries of prerogative and the rights of parliament were better ascertained, the king lays a sort of claim to impose charges upon his subjects in cases of great necessity, and for the defence of his kingdom. But this more humble language indicates a change in the spirit of government, which after long fretting impatiently at the curb, began at length to acknowledge the controlling hand of law.

These are the chief instances of a struggle between the crown and commons as to arbitrary taxation; but there are two remarkable proceedings in the 45th and 46th of Edward, which though they would not have been endured in later times, are rather anomalies arising out of the unsettled state of the constitution and the recency of parliamentary rights than mere encroachments of the prerogative. In the former year, parliament had granted a subsidy of fifty thousand pounds, to be collected by an assessment of twenty-two shillings and threepence upon every parish, on a presumption that the parishes in England amounted to forty-five thousand, whereas they were hardly a fifth of that number. This amazing mistake was not discovered till the parliament had been dissolved. Upon its detection, the king summoned a great council, consisting of one knight, citizen and burgess, named by himself, out of two that had been returned to the last parliament. To this assembly the chancellor set forth the deficiency of the last subsidy, and proved by the certificates of all the bishops in England, how strangely the parliament had miscalculated the number of parishes; whereupon they increased the parochial assessment, by their own authority, to one hundred and sixteen shillings. It is obvious, that the main intention of parliament was carried into effect by this irregularity, which seems to have been the subject of no complaint. In the next parliament, a still more objectionable measure was resorted to; after the petitions of the commons had been answered, and the knights dismissed, the citizens and burgesses were convened before the Prince of Wales and the lords in a room near the white chamber, and solicited to renew their subsidy of forty shillings upon the ton of wine, and sixpence in the pound upon other imports, for safe convoy of shipping, during one year more; to which they assented; "and so departed."

The second constitutional principle established in the reign of Edward III. was, that the king and two houses of parliament in conjunction possessed exclusively the right of legislation. Laws were now declared to be made by the king at the request of the commons, and by the assent of the lords and prelates. Such at least was the general form, though for many subsequent ages there was no invariable regularity in this respect. The commons, who till this reign were rarely mentioned, were now as rarely omitted in the enacting clause. In fact, it is evident from the rolls of parliament, that statutes were almost always founded upon their petition. These petitions, with the respective answers made to them in the king's name, were drawn up after the end of the session in the form of laws, and entered upon the statute-roll. But here it must be remarked, that the petitions were often extremely qualified and altered by the answer, insomuch that many statutes of this and some later reigns by no means express the true sense of the commons. Sometimes they contented themselves with showing their grievance, and praying remedy from the king and his

council. Of this one eminent instance is the great statute of treasons. In the petition whereon this act is founded, it is merely prayed that, "whereas the king's justices in different counties adjudge persons indicted before them to be traitors for sundry matters not known by the commons to be treason, it would please the king, by his council and by the great and wise men of the land, to declare what are treasons in this present parliament." The answer to this petition contains the existing statute, as a declaration on the king's part. But there is no appearance that it received the direct assent of the lower house. In the next reigns, we shall find more remarkable instances of assuming a consent which was never positively given.

The statute of treasons, however, was supposed to be declaratory of the ancient law; in permanent and material innovations, a more direct concurrence of all the estates was probably required. A new statute, to be perpetually incorporated with the law of England, was regarded as no light matter. It was a very common answer to a petition of the commons, in the earlier part of this reign, that it could not be granted without making a new law. After the parliament of 14 E. III., a certain number of prelates, barons, and counsellors, with twelve knights and six burgesses, were appointed to sit from day to day in order to turn such petitions and answers, as were fit to be perpetual, into a statute; but for such as were of a temporary nature, the king issued his letters patent. This reluctance to innovate without necessity, and to swell the number of laws which all were bound to know and obey with an accumulation of transitory enactments, led, apparently, to the distinction between statutes and ordinances. The latter are indeed defined by some lawyers to be regulations proceeding from the king and lords, without concurrence of the commons. But if this be applicable to some ordinances, it is certain that the word, even when opposed to statute, with which it is often synonymous, sometimes denotes an act of the whole legislature. In the 37th of Edward III., when divers sumptuary regulations against excess of apparel were made in full parliament, "it was demanded of the lords and commons, inasmuch as the matter of their petitions was novel, and unheard of before, whether they would have them granted by way of ordinance or of statute. They answered that it would be best to have them by way of ordinance and not of statute, in order that anything which should need amendment might be amended at the next parliament." So much scruple did they entertain about tampering with the statute law of the land.

Ordinances which, if it were not for their partial or temporary operation, could not well be distinguished from laws,[1] were often established in great councils. These assemblies, which frequently occurred in Edward's reign, were hardly distinguishable, except in

[1] "If there be any difference between an ordinance and a statute, as some have collected, it is but only this, that an ordinance is but temporary till confirmed and made perpetual but a statute is perpetual at first, and so have some ordinances also been."

name, from parliaments, being constituted not only of those who were regularly summoned to the House of Lords, but of deputies from counties, cities, and boroughs. Several places that never returned burgesses to parliament have sent deputies to some of these councils. The most remarkable of these was that held in the 27th of Edward III., consisting of one knight for each county, and of deputies from all the cities and boroughs, wherein the ordinances of the staple were established. These were previously agreed upon by the king and lords, and copies given, one to the knights, another to the burgesses. The roll tells us, that they gave their opinion in writing to the council, after much deliberation, and that this was read and discussed by the great men. These ordinances fix the staple of wool in particular places within England, prohibit English merchants from exporting that article under pain of death, inflict sundry other penalties, create jurisdictions, and in short, have the effect of a new and important law. After they were passed, the deputies of the commons granted a subsidy for three years, complained of grievances, and received answers, as if in a regular parliament. But they were aware that these proceedings partook of some irregularity, and endeavoured, as was their constant method, to keep up the legal forms of the constitution. In the last petition of this council, the commons pray, "because many articles touching the state of the king, and common profit of his kingdom have been agreed by him, the prelates, lords, and commons of his land, at this council, that the said articles may be recited at the next parliament, and entered upon the roll; for this cause, that ordinances and agreements made in council are not of record, as if they had been made in a general parliament." This accordingly was done at the ensuing parliament, when these ordinances were expressly confirmed, and directed to be "holden for a statute to endure always."

It must be confessed, that the distinction between ordinances and statutes is very obscure, and perhaps no precise and uniform principle can be laid down about it. But it sufficiently appears that whatever provisions altered the common law, or any former statute, and were entered upon the statute-roll, transmitted to the sheriffs, and promulgated to the people as general obligatory enactments, were holden to require the positive assent of both houses of parliament, duly and formally summoned.

Before we leave this subject, it will be proper to take notice of a remarkable stretch of prerogative, which, if drawn into precedent, would have effectually subverted this principle of parliamentary consent in legislation. In the 15th of Edward III. petitions were presented of a bolder and more enervating cast than was acceptable to the court; that no peer should be put to answer for any trespass, except before his peers; that commissioners should be assigned to examine the accounts of such as had received public monies; that the judges and ministers should be sworn to observe the Great Charter and other laws; and that they should be appointed in parliament. The last of these was

probably the most obnoxious ; but the king, unwilling to defer a supply which was granted merely upon condition that these petitions should prevail, suffered them to pass into a statute with an alteration which did not take off much from their efficacy ; namely, that these officers should indeed be appointed by the king with the advice of his council, but should surrender their charges at the next parliament, and be there responsible to any who should have cause of complaint against them. The chancellor, treasurer, and judges entered their protestation, that they had not assented to the said statutes, nor could they observe them, in case they should prove contrary to the laws and customs of the kingdom, which they were sworn to maintain. This is the first instance of a protest on the roll of parliament against the passing of an act. Nevertheless, they were compelled to swear on the Cross of Canterbury to its observance.

This excellent statute was attempted too early for complete success. Edward's ministers plainly saw that it left them at the mercy of future parliaments, who would readily learn the wholesome and constitutional principle of sparing the sovereign, while they punished his advisers. They had recourse, therefore, to a violent measure, but which was likely in those times to be endured. By a proclamation addressed to all the sheriffs, the king revokes and annuls the statute, as contrary to the laws and customs of England, and to his own just rights and prerogatives, which he had sworn to preserve ; declaring that he had never consented to its passing, but having previously protested that he would revoke it lest the parliament should have been separated in wrath, had dissembled, as was his duty, and permitted the great seal to be affixed ; and that it appeared to the earls, barons, and other learned persons of his kingdom, with whom he had consulted, that as the said statute had not proceeded from his own good will, it was null and could not have the name or force of law. This revocation of a statute, as the price o which a subsidy had been granted, was a gross infringement of law, and undoubtedly passed for such at that time ; for the right was already clear, though the remedy was not always attainable. Two years afterwards, Edward met his parliament, when that obnoxious statute was formally repealed.

Notwithstanding the king's unwillingness to permit this control of parliament over his administration, he suffered, or rather solicited, their interference in matters which have since been reckoned the exclusive province of the crown. This was an unfair trick of his policy. He was desirous, in order to prevent any murmuring about subsidies, to throw the war upon parliament as their own act, though none could have been commenced more selfishly for his own benefit, or less for the advantage of the people of England. It is called "the war which our lord the king has undertaken against his adversary of France by common assent of all the lords and commons of his realm in divers

parliaments." And he several times referred it to them to advise upon the subject of peace. But the commons showed their humility or discretion by treating this as an invitation which it would show good manners to decline, though in the 18th of the king's reign they had joined with the lords in imploring the king to make an end of the war by a battle, or by a suitable peace. "Most dreaded lord," they say upon one occasion, "as to your war and the equipment necessary for it, we are so ignorant and simple that we know not how, nor have the power to devise; wherefore we pray your grace to excuse us in this matter, and that it please you, with advice of the great and wise persons of your council, to ordain what seems best to you for the honour and profit of yourself and your kingdom; and whatever shall be thus ordained by assent and agreement for you and your lords, we readily assent to, and will hold it firmly established." At another time, after their petitions had been answered, "it was showed to the lords and commons by Bartholomew de Burghersh, the king's chamberlain, how a treaty had been set on foot between the king and his adversary of France; and how he had good hope of a final and agreeable issue with God's help; to which he would not come without assent of the lords and commons. Wherefore the said chamberlain inquired on the king's part of the said lords and commons, whether they would assent and agree to the peace, in case it might be had by treaty between the parties. To which the said commons with one voice replied, that whatever end it should please the king and lords to make of the treaty would be agreeable to them. On which answer the chamberlain said to the commons, then you will assent to a perpetual treaty of peace if it can be had. And the said commons answered at once and unanimously, yes, yes." The lords were not so diffident. Their great station as hereditary counsellors gave them weight in all deliberations of government; and they seem to have pretended to a negative voice in the question of peace. At least they answer, upon the proposals made by David, king of Scots, in 1368, which were submitted to them in parliament, that, "saving to the said David and his heirs the articles contained therein, they saw no way of making a treaty which would not openly turn to the disherison of the king and his heirs, to which they would on no account assent; and so departed for that day." A few years before, they had made a similar answer to some other propositions from Scotland. It is not improbable, that in both these cases, they acted with the concurrence and at the instigation of the king; but the precedents might have been remembered in other circumstances.

A third important acquisition of the House of Commons during this reign was the establishment of their right to investigate and chastise the abuses of administration. In the fourteenth of Edward III., a committee of the lords' house had been appointed to examine the accounts of persons responsible for the receipt of the last subsidy; but it does

not appear that the commons were concerned in this. The unfortunate statute of the next year contained a similar provision, which was annulled with the rest. Many years elapsed before the commons tried the force of their vindictive arm. We must pass onward an entire generation of man, and look at the parliament assembled in the fiftieth of Edward III. Nothing memorable as to the interference of the commons in government occurs before, unless it be their request, in the forty-fifth of the king, that no clergyman should be made chancellor, treasurer, or other great officer; to which the king answered, that he would do that which best pleased his council.

It will be remembered by every one who has read our history, that in the latter years of Edward's life his fame was tarnished by the ascendency of the duke of Lancaster and Alice Perrers. The former, a man of more ambition than his capacity seems to have warranted, even incurred the suspicion of meditating to set aside the heir of the crown, when the Black Prince should have sunk into the grave. Whether he were wronged or not by these conjectures, they certainly appear to have operated on those most concerned to take alarm at them. A parliament met in April, 1376, wherein the general unpopularity of the king's administration, or the influence of the Prince of Wales, led to very remarkable consequences. After granting a subsidy, the commons, "considering the evils of the country, through so many wars and other causes, and that the officers now in the king's service are insufficient without further assistance for so great a charge, pray that the council be strengthened by the addition of ten or twelve bishops, lords, and others, to be constantly at hand, so that no business of weight should be despatched without the consent of all; nor smaller matters without that of four or six." The king pretended to come with alacrity into this measure, which was followed by a strict restraint on them and all other officers from taking presents in the course of their duty. After this, "the said commons appeared in parliament, protesting that they had the same good-will as ever to assist the king with their lives and fortunes; but that it seemed to them if their said liege lord had always possessed about him faithful counsellors and good officers, he would have been so rich that he would have no need of charging his commons with subsidy or tallage, considering the great ransoms of the French and Scotch kings, and of so many other prisoners; and that it appeared to be for the private advantage of some near the king, and of others by their collusion, that the king and kingdom are so impoverished, and the commons so ruined. And they promised the king that if he would do speedy justice on such as should be found guilty, and take from them what law and reason permit, with what had been already granted in parliament, they will engage that he should be rich enough to maintain his wars for a long time, without much charging his people in any manner." They next proceeded to allege three par-

ticular grievances; the removal of the staple from Calais, where it had been fixed by parliament, through the procurement and advice of the said private counsellors about the king; the participation of the same persons in lending money to the king at exorbitant usury; and their purchasing at a low rate for their own benefit old debts from the crown, the whole of which they had afterwards induced the king to repay to themselves. For these and for many other misdemeanours, the commons accused and impeached the lords Latimer and Nevil, with four merchants, Lyons, Ellis, Peachey, and Bury. Latimer had been chamberlain, and Nevil held another office. The former was the friend and creature of the duke of Lancaster. Nor was this parliament at all nice in touching a point where kings least endure their interference. An ordinance was made, that "whereas many women prosecute the suits of others in courts of justice by way of maintenance, and to get profit thereby, which is displeasing to the king, he forbids any woman henceforward, and especially Alice Perrers, to do so, on pain of the said Alice forfeiting all her goods, and suffering banishment from the kingdom."

The part which the prince of Wales, who had ever been distinguished for his respectful demeanour towards Edward, bore in this unprecedented opposition, is strong evidence of the jealousy with which he regarded the duke of Lancaster; and it was led in the House of Commons by Peter de la Mare, a servant of the earl of March, who by his marriage with Philippa, heiress of Lionel, duke of Clarence, stood next after the young prince Richard in lineal succession to the crown. The proceedings of this session were indeed highly popular. But no house of commons would have gone such lengths on the mere support of popular opinion, unless instigated and encouraged by higher authority. Without this, their petitions might perhaps have obtained, for the sake of subsidy, an immediate consent; but those who took the lead in preparing them must have remained unsheltered after a dissolution, to abide the vengeance of the crown, with no assurance that another parliament would espouse their cause as its own. Such, indeed, was their fate in the present instance. Soon after the dissolution of parliament, the prince of Wales, who, long sinking by fatal decay, had rallied his expiring energies for this domestic combat, left his inheritance to a child ten years old, Richard of Bordeaux. Immediately after this event, Lancaster recovered his influence; and the former favourites returned to court. Peter de la Mare was confined at Nottingham, where he remained two years. The citizens indeed attempted an insurrection, and threatened to burn the Savoy, Lancaster's residence, if De la Mare was not released; but the bishop of London succeeded in appeasing them. A parliament met next year, which overthrew the work of its predecessor, restored those who had been impeached, and repealed the ordinance against Alice Perrers. So little security will popular assem-

blies ever afford against arbitrary power, when deprived of regular leaders, and the consciousness of mutual fidelity.

The policy adopted by the prince of Wales and earl of March, in employing the House of Commons as an engine of attack against an obnoxious ministry, was perfectly novel, and indicates a sensible change in the character of our constitution. In the reign of Edward II. parliament had little share in resisting the government; much more was effected by the barons, through risings of their feudal tenantry. Fifty years of authority better respected, of law better enforced, had rendered these more perilous, and of a more violent appearance than formerly. A surer resource presented itself in the increased weight of the lower house in parliament. And this indirect aristocratical influence gave a surprising impulse to that assembly, and particularly tended to establish beyond question its control over public abuses. Is it less just to remark, that it also tended to preserve the relation and harmony between each part and the other, and to prevent that jarring of emulation and jealousy, which, though generally found in the division of power between a noble and a popular estate, has scarcely ever caused a dissension, except in cases of little moment, between our two houses of parliament?

The commons had sustained with equal firmness and discretion a defensive war against arbitrary power under Edward III.: they advanced with very different steps towards his successor. Upon the king's death, though Richard's coronation took place without delay, and no proper regency was constituted, yet a council of twelve, whom the great officers of state were to obey, supplied its place to every effectual intent. Among these the duke of Lancaster was not numbered; and he retired from court in some disgust. In the first parliament of the young king, a large proportion of the knights who had sat in that which impeached the Lancastrian party were returned. Peter de la Mare, now released from prison, was elected Speaker; a dignity which, according to some, he had filled in the Good Parliament, as that of the fiftieth of Edward III. was popularly styled; though the rolls do not mention either him or any other as bearing that honourable name before Sir Thomas Hungerford in the parliament of the following year. The prosecution against Alice Perrers was now revived; not, as far as appears, by direct impeachment of the commons; but articles were exhibited against her in the House of Lords on the king's part, for breaking the ordinances made against her intermeddling at court; upon which she received judgment of banishment and forfeiture. At the request of the lower house, the lords in the king's name appointed nine persons of different ranks; three bishops, two earls, two bannerets, and two bachelors, to be a permanent council about the king, so that no business of importance should be transacted without their unanimous consent. The king was even compelled to consent that, during his

minority, the chancellor, treasurer, judges, and other chief officers should be made in parliament; by which provision, combined with that of the parliamentary council, the whole executive government was transferred to the two houses. A petition, that none might be employed in the king's service, nor belong to his council, who had been formerly accused upon good grounds, struck at Lord Latimer, who had retained some degree of power in the new establishment. Another, suggesting that Gascony, Ireland, Artois, and the Scottish marches were in danger of being lost for want of good officers, though it were so generally worded as to leave the means of remedy to the king's pleasure, yet shows a growing energy, and self-confidence in that assembly, which not many years before had thought the question of peace or war too high for their deliberation. Their subsidy was sufficiently liberal; but they took care to pray the king, that fit persons might be assigned for its receipt and disbursement, lest it should any way be diverted from the purposes of the war. Accordingly, Walworth and Philpot, two eminent citizens of London, were appointed to this office, and sworn in parliament to its execution.

But whether through the wastefulness of government, or rather because Edward's legacy, the French war, like a ruinous and interminable lawsuit, exhausted all public contributions, there was an equally craving demand for subsidy at the next meeting of parliament. The commons now made a more serious stand. The speaker, Sir James Pickering, after the protestation against giving offence, which has since become more matter of form than perhaps it was then considered, reminded the lords of the council of a promise made to the last parliament, that if they would help the king for once with a large subsidy, so as to enable him to undertake an expedition against the enemy, he trusted not to call on them again, but to support the war from his own revenues; in faith of which promise there had been granted the largest sum that any king of England had ever been suffered to levy within so short a time, to the utmost loss and inconvenience of the commons; part of which ought still to remain in the treasury, and render it unnecessary to burthen anew the exhausted people. To this Scrope, lord steward of the household, protesting that he knew not of any such promise, made answer by order of the king, that, saving the honour and reverence of our lord the king, and the lords there present, the commons did not speak truth in asserting that part of the last subsidy should be still in the treasury; it being notorious that every penny had gone into the hands of Walworth and Philpot, appointed and sworn treasurers in the last parliament, to receive and expend it upon the purposes of the war, for which they had in effect disbursed the whole." Not satisfied with this general justification, the commons pressed for an account of the expenditure. Scrope was again commissioned to answer, that "though it had never

been seen, that of a subsidy or other grant made to the king in parliament or out of parliament by the commons any account had afterwards been rendered to the commons, or to any other except the king and his officers, yet the king to gratify them, of his own accord, without doing it by way of right, would have Walworth along with certain persons of the council exhibit to them in writing a clear account of the receipt and expenditure, upon condition that this should never be used as a precedent, nor inferred to be done otherwise than by the king's spontaneous command." The commons were again urged to provide for the public defence, being their own concern, as much as that of the king. But they merely shifted their ground, and had recourse to other pretences. They requested that five or six peers might come to them, in order to discuss this question of subsidy. The lords entirely rejected this proposal, and affirmed that such a proceeding had never been known except in the three last parliaments; but allowed that it had been the course to elect a committee of eight or ten from each house, to confer easily and without noise together. The commons acceded to this, and a committee of conference was appointed, though no result of their discussion appears upon the roll.

Upon examining the accounts submitted to them, these sturdy commoners raised a new objection. It appeared that large sums had been expended upon garrisons in France and Ireland, and other places beyond the kingdom, of which they protested themselves not liable to bear the charge. It was answered that Gascony and the king's other dominions beyond sea were the outworks of England, nor could the people ever be secure from war at their thresholds, unless these were maintained. They lastly insisted that the king ought to be rich through the wealth that had devolved on him from his grandfather. But this was affirmed, in reply, to be merely sufficient for the payment of Edward's creditors. Thus driven from all their arguments, the commons finally consented to a moderate additional imposition upon the export of wool and leather, which were already subject to considerable duties, apologising on account of their poverty for the slenderness of their grant.

The necessities of government, however, let their cause be what it might, were by no means feigned; and a new parliament was assembled about seven months after the last, wherein the king, without waiting for a petition, informed the commons, that the treasurers were ready to exhibit their accounts before them. This was a signal victory after the reluctant and ungracious concession made to the last parliament. Nine persons of different ranks were appointed at the request of the commons to investigate the state of the revenue, and the disposition which had been made of the late king's personal estate. They ended by granting a poll-tax, which they pretended to think adequate to the supply required. But in those times no one possessed any statistical knowledge, and every calculation which required it was subject to

enormous error, of which we have already seen an eminent example. In the next parliament (3 Ric. II.) it was set forth, that only £22,000 had been collected by the poll-tax, while the pay of the king's troops hired for the expedition to Britany, the pretext of the grant, had amounted for but half a year to £50,000. The king, in short, was more straitened than ever. His distresses gave no small advantage to the commons. Their speaker was instructed to declare that, as it appeared to them, if the affairs of their liege lord had been properly conducted at home and abroad, he could not have wanted aid of his commons, who now are poorer than before. They pray that as the king was so much advanced in age and discretion, his perpetual counsel (appointed in his first parliament) might be discharged of their labours; and that instead of them, the five chief officers of state, to wit, the chancellor, treasurer, keeper of the privy seal, chamberlain, and steward of the household, might be named in parliament, and declared to the commons, as the king's sole counsellors, not removable before the next parliament. They required also a general commission to be made out, similar to that in the last session, giving powers to a certain number of peers and other distinguished persons, to inquire into the state of the household, as well as into all receipts and expenses since the king's accession. The former petition seems to have been passed over; but a commission as requested was made out to three prelates, three earls, three bannerets, three knights, and three citizens. After guarding thus, as they conceived, against malversation, but in effect rather protecting their posterity than themselves, the commons prolonged the last imposition on wool and leather for another year.

It would be but repetition to make extracts from the rolls of the two next years; we have still the same tale; demand of subsidy on one side, remonstrance and endeavours at reformation on the other. After the tremendous insurrection of the villeins, in 1382, a parliament was convened to advise about repealing the charters of general manumission, extorted from the king by the pressure of circumstances. In this measure all concurred; but the commons were not afraid to say, that the late risings had been provoked by the burthens which a prodigal court had called for in the preceding session. Their language is unusually bold. "It seemed to them after full deliberation," they said, "that unless the administration of the kingdom were speedily reformed, the kingdom itself would be utterly lost, and ruined for ever, and therein their lord the king, with all the peers and commons, which God forbid. For true it is that there are such defects in the said administration, as well about the king's person, and his household, as in his courts of justice; and by grievous oppressions in the country through maintainers of suits, who are, as it were, kings in the country, that right and law are come to nothing, and the poor commons are from time to time so pillaged and ruined partly by the king's purveyors of the household,

and others who pay nothing for what they take, partly by the subsidies and tallages raised upon them, and besides by the oppressive behaviour of the servants of the king and other lords, and especially of the foresaid maintainers of suits, that they are reduced to greater poverty and discomfort than ever they were before. And, moreover, though great sums have been continually granted by and levied upon them, for the defence of the kingdom, yet they are not the better defended against their enemies, but every year are plundered and wasted by sea and land, without any relief. Which calamities the said poor commons, who lately used to live in honour and prosperity, can no longer endure. And to speak the real truth, these injuries lately done to the poorer commons more than they ever suffered before, caused them to rise, and to commit the mischief done in their late riot; and there is still cause to fear greater evils, if sufficient remedy be not timely provided against the outrages and oppressions aforesaid. Wherefore may it please our lord the king, and the noble peers of the realm now assembled in this parliament, to provide such remedy and amendment as to the said administration, that the state and dignity of the king in the first place, and of the lords may be preserved, as the commons have always desired, and the commons may be put in peace; removing, as soon as they can be detected, evil ministers and counsellors, and putting in their stead the best and most efficient, and taking away all the bad practices which have led to the last rising, or else none can imagine that this kingdom can longer subsist without greater misfortunes than it ever endured. And for God's sake let it not be forgotten, that there be put about the king and of his council, the best lords and knights that can be found in the kingdom.

"And be it known (the entry proceeds) that after the king our lord with the peers of the realm and his council had taken advice upon these requests made to him for his good and his kingdom's as it really appeared to him, willed and granted, that certain bishops, lords and others should be appointed to survey and examine in privy council both the government of the king's person, and of his household, and to suggest proper remedies wherever necessary, and report them to the king. And it was said by the peers in parliament, that as it seemed to them, if reform of government were to take place throughout the kingdom, it should begin by the chief member, which is the king himself, and so from person to person, as well churchmen as others, and place to place, from higher to lower, without sparing any degree." A considerable number of commissioners were accordingly appointed, whether by the king alone, or in parliament, does not appear; the latter, however, is more probable. They seem to have made some progress in the work of reformation, for we find that the officers of the household were sworn to observe their regulations. But in all likelihood these were soon neglected.

It is not wonderful, that with such feelings of resentment towards the crown, the commons were backward in granting subsidies. Perhaps the king would not have obtained one at all, if he had not withheld his charter of pardon for all offences committed during the insurrection. This was absolutely necessary to restore quiet among the people; and though the members of the commons had certainly not been insurgents, yet inevitable irregularities had occurred in quelling the tumults, which would have put them too much in the power of those unworthy men who filled the benches of justice under Richard. The king declared that it was unusual to grant a pardon without a subsidy; the commons still answered that they would consider about that matter; and the king instantly rejoined, that he would consider about his pardon, (s'aviseroit de sa dite grace,) till they had done what they ought. They renewed at length the usual tax on wool and leather.

This extraordinary assumption of power by the commons was not merely owing to the king's poverty. It was encouraged by the natural feebleness of a disunited government. The high rank and ambitious spirit of Lancaster gave him no little influence, though contending with many enemies at court, as well as the ill-will of the people. Thomas of Woodstock, the king's youngest uncle, more able and turbulent than Lancaster, became, as he grew older, an eager competitor for power, which he sought through the channel of popularity. The earls of March, Arundel, and Warwick bore a considerable part, and were the favourites of parliament. Even Lancaster, after a few years, seems to have fallen into popular courses, and recovered some share of public esteem. He was at the head of the reforming commission in the fifth of Richard II., though he had been studiously excluded from those preceding. We cannot hope to disentangle the intrigues of this remote age, as to which our records are of no service, and the chroniclers are very slightly informed. So far as we may conjecture, Lancaster, finding his station insecure at court, began to solicit the favour of the commons, whose hatred of the administration abated their former hostility towards him.

The character of Richard II. was now developing itself, and the hopes excited by his remarkable presence of mind in confronting the rioters on Blackheath were rapidly destroyed. Not that he was wanting in capacity, as has been sometimes imagined. For if we measure intellectual power by the greatest exertion it ever displays, rather than by its average results, Richard II. was a man of considerable talents. He possessed, along with much dissimulation, a decisive promptitude in seizing the critical moment for action. Of this quality, besides his celebrated behaviour towards the insurgents, he gave striking evidenc in several circumstances which we shall have shortly to notice. But his ordinary conduct belied the abilities which on these rare occasions shone forth, and rendered them ineffectual for his security. Extreme pride and violence, with an inordinate partiality for the most worthless

favourites, were his predominant characteristics. In the latter quality, and in the events of his reign, he forms a pretty exact parallel to Edward II. Scrope, lord chancellor, who had been appointed in parliament, and was understood to be irremovable without its concurrence, lost the great seal for refusing to set it to some prodigal grants. Upon a slight quarrel with archbishop Courtenay, the king ordered his temporalities to be seized, the execution of which Michael de la Pole, his new chancellor, and a favourite of his own, could hardly prevent. This was accompanied with indecent and outrageous expressions of anger, unworthy of his station and of those whom he insulted.

Though no king could be less respectable than Richard, yet the constitution invested a sovereign with such ample prerogative, that it was far less easy to resist his personal exercise of power, than the unsettled councils of a minority. In the parliament 6 R. II. sess. 2. the commons pray certain lords whom they name, to be assigned as their advisers. This had been permitted in the two last sessions without exception. But the king, in granting their request, reserved his right of naming any others. Though the commons did not relax in their importunities for the redress of general grievances, they did not venture to intermeddle as before with the conduct of administration. They did not even object to the grant of the marquisate of Dublin, with almost a princely dominion over Ireland; which enormous donation was confirmed by act of parliament to Vere, a favourite of the king. A petition that the officers of state should annually visit and inquire into his household, was answered that the king would do what he pleased. Yet this was little in comparison of their former proceedings.

There is nothing, however, more deceitful to a monarch, unsupported by an armed force, and destitute of wary advisers, than this submission of his people. A single effort was enough to overturn his government. Parliament met in the tenth year of his reign, steadily determined to reform the administration, and especially to punish its chief leader, Michael de la Pole, earl of Suffolk, and lord chancellor. According to the remarkable narration of a contemporary historian, too circumstantial to be rejected, but rendered somewhat doubtful by the silence of all other writers, and of the parliamentary roll, the king was loitering at his palace of Eltham, when he received a message from the two houses requesting the dismissal of Suffolk, since they had matter to allege against him that they could not move, while he kept the office of chancellor. Richard, with his usual intemperance, answered that he would not for their request remove the meanest scullion from his kitchen. They returned a positive refusal to proceed on any public business, until the king should appear personally in parliament and displace the chancellor. The king required forty knights to be deputed from the rest, to inform him clearly of their wishes. But the commons declined a proposal, in which they feared, or affected to fear some treachery.

At length the duke of Gloucester and Arundel bishop of Ely were commissioned to speak the sense of parliament, and they delivered it, if we may still believe what we read, in very extraordinary language, asserting that there was an ancient statute, according to which, if the king absented himself from parliament without just cause during forty days, which he had now exceeded, every man might return without permission to his own country; and, moreover, there was another statute, and (as they might more truly say) a precedent of no remote date, that if a king, by bad counsel, or his own folly and obstinacy, alienated himself from his people, and would not govern according to the laws of the land, and the advice of the peers, but madly and wantonly followed his own single will, it should be lawful for them with the common assent of the people to expel him from his throne, and elevate to it some near kinsman of the royal blood. By this discourse the king was induced to meet his parliament, where Suffolk was removed from his office, and the impeachment against him commenced.

The charges against this minister without being wholly frivolous, were not so weighty as the clamour of the commons might have led us to expect. Besides forfeiting all his grants from the crown, he was committed to prison, there to remain till he should have paid such fine as the king might impose; a sentence that would have been outrageously severe in many cases, though little more than nugatory in the present.

This was the second precedent of that grand constitutional resource, parliamentary impeachment; and more remarkable, from the eminence of the person attacked, than that of Lord Latimer, in the fiftieth year of Edward III. The commons were content to waive the prosecution of any other ministers; but they rather chose a scheme of reforming the administration, which should avert both the necessity of punishment and the malversations that provoked it. They petitioned the king to ordain in parliament certain chief officers of his household, and other lords of his council, with power to reform those abuses, by which his crown was so much blemished, that the laws were not kept, and his revenues were dilapidated, confirming by a statute a commission for a year, and forbidding, under heavy penalties, any one from opposing, in private or openly, what they should advise. With this the king complied, and a commission founded upon the prayer of parliament was established by statute. It comprehended fourteen persons of the highest eminence for rank and general estimation; princes of the blood and ancient servants of the crown, by whom its prerogatives were not likely to be unnecessarily impaired. In fact, the principle of this commission, without looking back at the precedents in the reign of John, Henry III., and Edward II., which yet were not without their weight as constitutional analogies, was merely that which the commons had repeatedly maintained during the minority of the present king, and which had

produced the former commissions of reform in the third and fifth years of his reign. These were upon the whole nearly the same in their operation. It must be owned there was a more extensive sway virtually given to the lords now appointed, by the penalties imposed on any who should endeavour to obstruct what they might advise; the design as well as tendency of which was no doubt to throw the whole administration into their hands during the period of this commission.

Those who have written our history with more or less of a Tory bias exclaim against this parliamentary commission as an unwarrantable violation of the king's sovereignty, and even impartial men are struck at first sight by a measure that seems to overset the natural balance of our constitution. But it would be unfair to blame either those concerned in this commission, some of whose names at least have been handed down with unquestioned respect, or those high-spirited representatives of the people, whose patriot firmness has been hitherto commanding all our sympathy and gratitude, unless we could distinctly pronounce by what gentler means they could restrain the excesses of government. Thirteen parliaments had already met since the accession of Richard; in all the same remonstrances had been repeated, and the same promises renewed. Subsidies, more frequent than in any former reign, had been granted for the supposed exigencies of the war; but this was no longer illuminated by those dazzling victories, which give to fortune the mien of wisdom; the coasts of England were perpetually ravaged and her trade destroyed; while the administration incurred the suspicion of diverting to private uses that treasure which they so feebly and unsuccessfully applied to the public service. No voice of his people, until it spoke in thunder, would stop an intoxicated boy in the wasteful career of dissipation. He loved festivals and pageants, the prevailing folly of his time, with unusual frivolity: and his ordinary living is represented as beyond comparison more showy and sumptuous than even that of his magnificent and chivalrous predecessor. Acts of parliament were no adequate barriers to his misgovernment. "Of what avail are statutes," says Walsingham, "since the king with his privy council is wont to abolish what parliament has just enacted!" The constant prayer of the commons in every session, that former statutes might be kept in force, is no slight presumption that they were not secure of being regarded. It may be true that Edward III.'s government had been full as arbitrary, though not so unwise as his grandson's; but this is the strongest argument, that nothing less than an extraordinary remedy could preserve the still unstable liberties of England.

The best plea that could be made for Richard was his inexperience, and the misguided suggestions of favourites. This, however, made it more necessary to remove those false advisers, and to supply that inexperience. Unquestionably the choice of ministers is reposed in the sovereign; a trust, like every other attribute of legitimate power,

for the public good; not, what no legitimate power can ever be, the instrument of selfishness or caprice. There is something more sacred than the prerogative, or even than the constitution; the public weal, for which all powers are granted, and to which they must all be referred. For this public weal it is confessed to be sometimes necessary to shake the possessor of the throne out of his seat; could it never be permitted to suspend, though but indirectly and for a time, the positive exercise of misapplied prerogatives? He has learned in a very different school from myself, who denies to parliament at the present day a preventive as well as vindictive control over the administration of affairs; a right of resisting, by those means which lie within its sphere, the appointment of unfit ministers. These means are now indirect; they need not be the less effectual, and they are certainly more salutary on that account. But we must not make our notions of the constitution in its perfect symmetry of manhood, the measure of its infantine proportions, nor expect from a parliament just struggling into life, and "pawing to get free its hinder parts," the regularity of definite and habitual power.

It is assumed rather too lightly by some of those historians to whom I have alluded, that these commissioners, though but appointed for a twelvemonth, designed to retain longer, or would not in fact have surrendered their authority. There is certainly a danger in these delegations of pre-eminent trust; but I think it more formidable in a republican form, than under such a government as our own. The spirit of the people, the letter of the law, were both so decidedly monarchical, that no glaring attempt of the commissioners to keep the helm continually in their hands, though it had been in the king's name, would have had a fair probability of success. And an oligarchy of fourteen persons, different in rank and profession, even if we should impute criminal designs to all of them, was ill calculated for permanent union. Indeed, the facility with which Richard reassumed his full powers two years afterwards, when misconduct had rendered his circumstances far more unfavourable, gives the corroboration of experience to this reasoning. By yielding to the will of his parliament, and to a temporary suspension of prerogative, this unfortunate prince might probably have reigned long and peacefully; the contrary course of acting led eventually to his deposition and miserable death.

Before the dissolution of parliament, Richard made a verbal protestation, that nothing done therein should be in prejudice of his rights; a reservation not unusual when any remarkable concession was made, but which could not decently be interpreted, whatever he might mean, as a dissent from the statute just passed. Some months had intervened, when the king, who had already released Suffolk from prison and restored him to his favour, procured from the judges, whom he had summoned to Nottingham, a most convenient set of answers to questions concerning the late proceedings in parliament. Tresilian and

Belknap, chief justices of the King's Bench and Common Pleas, with several other judges, gave it under their seals, that the late statute and commission were derogatory to the prerogative; that all who procured it to be passed, or persuaded or compelled the king to consent to it, were guilty of treason; that the king's business must be proceeded upon before any other in parliament; that he may put an end to the session at his pleasure; that his ministers cannot be impeached without his consent; that any members of parliament contravening the three last articles, incur the penalties of treason, and especially he who moved for the sentence of deposition against Edward II. to be read: and that the judgment against the earl of Suffolk might be revoked as altogether erroneous.

These answers, perhaps extorted by menaces, as all the judges, except Tresilian, protested before the next parliament, were for the most part servile and unconstitutional. The indignation which they excited, and the measures successfully taken to withstand the king's designs, belong to general history; but I shall pass slightly over that season of turbulence, which afforded no legitimate precedent to our constitutional annals. Of the five lords appellants, as they were called, Gloucester, Derby, Nottingham, Warwick, and Arundel, the three former, at least, have little claim to our esteem; but in every age, it is the sophism of malignant and peevish men to traduce the cause of freedom itself, on account of the interested motives by which its ostensible advocates have frequently been actuated. The parliament, who had the country thoroughly with them, acted no doubt honestly, but with an inattention to the rules of law, culpable indeed, yet from which the most civilised of their successors, in the heat of passion and triumph, have scarcely been exempt. Whether all with whom they dealt severely, some of them apparently of good previous reputation, merited such punishment, is more than, upon uncertain evidence, a modern writer can profess to decide.

Notwithstanding the death or exile of all Richard's favourites, and the oath taken not only by parliament, but by every class of the people, to stand by the lords appellants, we find him, after about a year, suddenly annihilating their pretensions, and snatching the reins again without obstruction. The secret cause of this event is among the many obscurities that attend the history of his reign. It was conducted with a spirit and activity which broke out two or three times in the course of his imprudent life; but we may conjecture that he had the advantage of disunion among his enemies. For some years after this, the king's administration was prudent. The great seal, which he took away from archbishop Arundel, he gave to Wykeham, bishop of Winchester, another member of the reforming commission, but a man of great moderation and political experience. Some time after, he restored the seal to Arundel, and reinstated the Duke of Gloucester in

the council. The duke of Lancaster, who had been absent during the transactions of the tenth and eleventh years of the king, in prosecution of his Castilian war, formed a link between the parties, and seems to have maintained some share of public favour.

There was now a more apparent harmony between the court and the parliament. It seems to have been tacitly agreed that they should not interfere with the king's household expenses; and they gratified him in a point where his honour had been most wounded, declaring his prerogative to be as high and unimpaired as that of his predecessors, and repealing the pretended statute by virtue of which Edward II. was said to have been deposed. They were provident enough, however, to grant conditional subsidies, to be levied only in case of a royal expedition against the enemy; and several were accordingly remitted by proclamation, this condition not being fulfilled. Richard never ventured to recall his favourites, though he testified his unabated affection for Vere by a pompous funeral. Few complaints, unequivocally affecting the ministry, were presented by the commons. In one parliament, the chancellor, treasurer, and council resigned their offices, submitting themselves to its judgment, in case any matter of accusation should be alleged against them. The commons, after a day's deliberation, probably to make their approbation appear more solemn, declared in full parliament, that nothing amiss had been found in the conduct of these ministers, and that they held them to have faithfully discharged their duties. The king reinstated them accordingly; with a protestation that this should not be made a precedent, and that it was his right to change his servants at pleasure.

But this summer season was not to last for ever. Richard had but dissembled with those concerned in the transactions of 1388, none of whom he could ever forgive. These lords in lapse of time were divided among each other. The earls of Derby and Nottingham were brought into the king's interest. The earl of Arundel came to an open breach with the duke of Lancaster, whose pardon he was compelled to ask for an unfounded accusation in parliament. Gloucester's ungoverned ambition, elated by popularity, could not brook the ascendency of his brother Lancaster, who was much less odious to the king. He had constantly urged and defended the concession of Guienne to this prince, to be held for life, reserving only his liege homage to Richard as king of France, a grant as unpopular among the natives of that country as it was derogatory to the crown; but Lancaster was not much indebted to his brother for assistance, which was only given in order to diminish his influence in England. The truce with France, and the king's French marriage, which Lancaster supported, were passionately opposed by Gloucester. And the latter had given keener provocation, by speaking contemptuously of that misalliance with Catherine Swineford, which contaminated the blood of Plantagenet. To the parliament summoned in the twentieth of Richard, one object of which was to legitimate the

duke of Lancaster's ante-nuptial children by this lady, neither Gloucester nor Arundel would repair. There passed in this assembly something remarkable, as it exhibits not only the arbitrary temper of the king, a point by no means doubtful, but the inefficiency of the commons to resist it, without support from political confederacies of the nobility. The circumstances are thus related in the record.

During the session, the king sent for the lords into parliament one afternoon, and told them how he had heard of certain articles of complaint made by the commons in conference with them a few days before, some of which appeared to the king against his royalty, estate, and liberty, and commanded the chancellor to inform him fully as to this. The chancellor accordingly related the whole matter, which consisted of four alleged grievances ; namely, that sheriffs and escheators, notwithstanding a statute, are continued in their offices beyond a year ; that the Scottish marches were not well kept ; that the statute against wearing great men's liveries was disregarded ; and lastly, that the excessive charges of the king's household ought to be diminished, arising from the multitude of bishops, and of ladies who are there maintained at his cost.

Upon this information the king declared to the lords, that through God's gift he is by lineal right of inheritance king of England, and will have the royalty and freedom of his crown, from which some of these articles derogate. The first petition, that sheriffs should never remain in office beyond a year, he rejected ; but, passing lightly over the rest, took most offence, that the commons, who are his lieges, should take on themselves to make any ordinance respecting his royal person or household, or those whom he might please to have about him. He enjoined therefore the lords to declare plainly to the commons his pleasure in this matter ; and especially directed the duke of Lancaster to make the speaker give up the name of the person who presented a bill for this last article in the lower house.

The commons were in no state to resist this unexpected promptitude of action in the king. They surrendered the obnoxious bill, with its proposer, one Thomas Haxey, and with great humility made excuse, that they never designed to give offence to his majesty, nor to interfere with his household or attendants, knowing well that such things do not belong to them, but to the king alone ; but merely to draw his attention, that he might act therein as should please him best. The king forgave these pitiful suppliants ; but Haxey was adjudged in parliament to suffer death as a traitor. As, however, he was a clerk, the archbishop of Canterbury, at the head of the prelates, obtained of the king that his life might be spared, and that they might have the custody of his person ; protesting that this was not claimed by way of right, but merely of the king's grace.

This was an open defiance of parliament, and a declaration of

arbitrary power. For it would be impossible to contend, that after the repeated instances of control over public expenditure by the commons since the fiftieth of Edward III., this principle was novel and unauthorised by the constitution; or that the right of free speech demanded by them in every parliament was not a real and indisputable privilege. The king, however, was completely successful, and having proved the feebleness of the commons, fell next upon those he more dreaded. By a skilful piece of treachery he seized the duke of Gloucester, and spread consternation among all his party. A parliament was summoned, in which the only struggle was to outdo the king's wishes, and thus to efface their former transgressions. Gloucester, who had been murdered at Calais, was attainted after his death; Arundel was beheaded, his brother the archbishop of Canterbury deposed and banished, Warwick and Cobham sent beyond sea. The commission of the tenth, the proceedings in parliament of the eleventh year of the king, were annulled. The answers of the judges to the questions put at Nottingham, which had been punished with death and exile, were pronounced by parliament to be just and legal. It was declared high treason to procure the repeal of any judgment against persons therein impeached. Their issue male were disabled from ever sitting in parliament, or holding place in council. These violent ordinances, as if the precedent they were then overturning had not shielded itself with the same sanction, were sworn to by parliament upon the cross of Canterbury, and confirmed by a national oath, with the penalty of excommunication denounced against its infringers. Of those recorded to have bound themselves by this adjuration to Richard, far the greater part had touched the same relics for Gloucester and Arundel ten years before, and two years after swore allegiance to Henry of Lancaster.

In the fervour of prosecution this parliament could hardly go beyond that whose acts they were annulling; and each is alike unworthy to be remembered in the way of precedent. But the leaders of the former, though vindictive and turbulent, had a concern for the public interest; and after punishing their enemies, left the government upon its right foundation. In this, all regard for liberty was extinct; and the commons set the dangerous precedent of granting the king a subsidy upon wool during his life. This remarkable act of severity was accompanied by another, less unexampled, but, as it proved, of more ruinous tendency. The petitions of the commons not having been answered during the session, which they were always anxious to conclude, a commission was granted for twelve peers and six commoners to sit after the dissolution, and "examine, answer, and fully determine as well all the said petitions, and the matters therein comprised, as all other matters and things moved in the king's presence, and all things incident thereto not yet determined, as shall seem best to them." The "other matters," mentioned above, were, I suppose, private petitions to the

king's council in parliament, which had been frequently despatched after a dissolution. For in the statute which establishes this commission, 21 R. II. c. 16., no powers are committed, but those of examining petitions: which, if it does not confirm the charge afterwards alleged against Richard of falsifying the parliament roll, must at least be considered as limiting and explaining the terms of the latter. Such a trust had been committed to some lords of the council eight years before, in very peaceful times; and it was even requested, that the same might be done in future parliaments. But it is obvious what a latitude this gave to a prevailing faction. These eighteen commissioners, or some of them, (for there were who disliked the turn of affairs,) usurped the full rights of the legislature, which undoubtedly were only delegated in respect of business already commenced. They imposed a perpetual oath on prelates and lords for all time to come, to be taken before obtaining livery of their lands, that they would maintain the statutes and ordinances made by this parliament, or "afterwards by the lords and knights having power committed to them by the same." They declared it high treason to disobey their ordinances. They annulled the patents of the dukes of Hereford and Norfolk, and adjudged Henry Bowet, the former's chaplain, who had advised him to petition for his inheritance, to the penalties of treason. And thus, having obtained a revenue for life, and the power of parliament being notoriously usurped by a knot of his creatures, the king was little likely to meet his people again, and became as truly absolute as his ambition could require.

It had been necessary for this purpose to subjugate the ancient nobility. For the English constitution gave them such paramount rights, that it was impossible either to make them surrender their country's freedom or to destroy it without their consent. But several of the chief men had fallen or were involved with the party of Gloucester. Two, who having once belonged to it, had lately plunged into the depths of infamy to ruin their former friends, were still perfectly obnoxious to the king, who never forgave their original sin. These two, Henry of Bolingbroke, earl of Derby, and Mowbray, earl of Nottingham, now dukes of Hereford and Norfolk, the most powerful of the remaining nobility, were by a singular conjunction thrown, as it were, at the king's feet. Of the political mysteries which this reign affords none is more inexplicable than the quarrel of these peers. In the parliament at Shrewsbury, in 1398, Hereford was called upon by the king to relate what had passed between the duke of Norfolk and himself, in slander of his majesty. He detailed a pretty long and not improbable conversation, in which Norfolk had asserted the king's intention of destroying them both for their old offence of impeaching his ministers. Norfolk had only to deny the charge and throw his gauntlet at the accuser. It was referred to the eighteen commissioners who sat after the dissolution, and a trial by combat was awarded. But when this

after many delays was about to take place at Coventry, Richard interfered and settled the dispute by condemning Hereford to banishment for ten years, and Norfolk for life. This strange determination, which treated both as guilty, where only one could be so, seems to admit no other solution than the king's desire to rid himself of two peers whom he feared and hated at a blow. But it is difficult to understand by what means he drew the crafty Bolingbroke into his snare. However this might have been, he now threw away all appearance of moderate government. The indignities he had suffered in the eleventh year of his reign were still at his heart, a desire to revenge which seems to have been the main-spring of his conduct. Though a general pardon of those proceedings had been granted, not only at the time, but in his own last parliament, he made use of them as a pretence to extort money from seventeen counties, to whom he imputed a share in the rebellion. He compelled men to confess under their seals that they had been guilty of treason, and to give blank obligations, which his officers filled up with large sums. Upon the death of the duke of Lancaster, who had passively complied throughout all these transactions, Richard refused livery of his inheritance to Hereford, whose exile implied no crime, and who had letters patent enabling him to make his attorney for that purpose during its continuance. In short, his government for nearly two years was altogether tyrannical; and, upon the same principles that cost James II. his throne, it was unquestionably far more necessary, unless our fathers would have abandoned all thought of liberty, to expel Richard II. Far be it from us to extenuate the treachery of the Percys towards this unhappy prince, or the cruel circumstances of his death, or in any way to extol either his successor, or the chief men of that time, most of whom were ambitious and faithless; but after such long experience of the king's arbitrary, dissembling, and revengeful temper, I see no other course in the actual state of the constitution than what the nation sincerely concurred in pursuing.

The reign of Richard II. is, in a constitutional light, the most interesting part of our earlier history; and it has been the most imperfectly written. Some have misrepresented the truth through prejudice, and others through carelessness. It is only to be understood, and indeed there are great difficulties in the way of understanding it at all, by a perusal of the rolls of parliament, with some assistance from the contemporary historians, Walsingham, Knyghton, the anonymous biographer published by Hearne, and Froissart. These, I must remark, except occasionally the last, are extremely hostile to Richard; and although we are far from being bound to acquiesce in their opinions, it is unwarrantable in modern writers to sprinkle their margins with references to such authority in support of positions decidedly opposite.

The revolution which elevated Henry IV. to the throne was certainly so far accomplished by force, that the king was in captivity, and those

who might still adhere to him in no condition to support his authority. But the sincere concurrence, which most of the prelates and nobility, with the mass of the people, gave to changes that could not have been otherwise effected by one so unprovided with foreign support as Henry, proves this revolution to have been, if not an indispensable, yet a national act, and should prevent our considering the Lancastrian kings as usurpers of the throne. Nothing indeed looks so much like usurpation in the whole transaction, as Henry's remarkable challenge of the crown, insinuating though not avowing, as Hume has justly animadverted upon it, a false and ridiculous title by right line of descent, and one equally unwarrantable by conquest. The course of proceedings is worthy of notice. As the renunciation of Richard might well pass for the effect of compulsion, there was a strong reason for propping up its instability by a solemn deposition from the throne, founded upon specific charges of misgovernment. Again, as the right of dethroning a monarch was nowhere found in the law, it was equally requisite to support this assumption of power by an actual abdication. But as neither one nor the other filled the duke of Lancaster's wishes, who was not contented with owing a crown to election, nor seemed altogether to account for the exclusion of the house of March, he devised this claim, which was preferred in the vacancy of the throne, Richard's cession having been read and approved in parliament, and the sentence of deposition, "out of abundant caution, and to remove all scruple," solemnly passed by seven commissioners appointed out of the several estates. "After which challenge and claim," says the record, "the lords spiritual and temporal, and all the estates there present, being asked separately and together, what they thought of the said challenge and claim, the said estates, with the whole people, without any difficulty or delay, consented that the said duke should reign over them." The claim of Henry as opposed to that of the earl of March, was indeed ridiculous; but it is by no means evident that, in such cases of extreme urgency as leave no security for the common weal but the deposition of a reigning prince, there rests any positive obligation upon the estates of the realm to fill his place with the nearest heir. A revolution of this kind seems rather to defeat and confound all prior titles, though in the new settlement it will commonly be prudent as well as equitable, to treat them with some regard. Were this otherwise, it would be hard to say, why William III. reigned to the exclusion of Anne, or even of the Pretender, who had surely committed no offence at that time; or why (if such indeed be the true construction of the Act of Settlement) the more distant branches of the royal stock, descendants of Henry VII. and earlier kings, have been cut off from their hope of succession by the restriction to the heirs of the princess Sophia.

In this revolution of 1399, there was as remarkable an attention shown to the formalities of the constitution, allowance made for the

men and the times, as in that of 1688. The parliament was not opened by commission; no one took the office of president; the commons did not adjourn to their own chamber; they chose no speaker; the name of parliament was not taken, but that only of estates of the realm. But as it would have been a violation of constitutional principles to assume a parliamentary character without the king's commission, though summoned by his writ, so it was still more essential to limit their exercise of power to the necessity of circumstances. Upon the cession of the king, as upon his death, the parliament was no more; its existence, as the council of the sovereign, being dependent upon his will. The actual convention, summoned by the writs of Richard, could not legally become the parliament of Henry; and the validity of a statute declaring it to be such would probably have been questionable in that age, when the power of statutes to alter the original principles of the common law was by no means so thoroughly recognised as at the Restoration and Revolution. Yet Henry was too well pleased with his friends to part with them so readily; and he had much to effect before the fervour of their spirits should abate. Hence an expedient was devised, of issuing writs for a new parliament, returnable in six days. These neither were nor could be complied with; but the same members as had deposed Richard sat in the new parliament, which was regularly opened by Henry's commissioner as if they had been duly elected. In this contrivance, more than in all the rest, we may trace the hand of lawyers.

If we look back from the accession of Henry IV. to that of his predecessor, the constitutional authority of the House of Commons will be perceived to have made surprising progress during the course of twenty-two years. Of the three capital points in contest while Edward reigned, that money could not be levied, or laws enacted, without the commons' consent, and that the administration of government was subject to their inspection and control, the first was absolutely decided in their favour, the second was at least perfectly admitted in principle, and the last was confirmed by frequent exercise. The commons had acquired two additional engines of immense efficiency; one, the right of directing the application of subsidies, and calling accountants before them; the other, that of impeaching the king's ministers for misconduct. All these vigorous shoots of liberty throve more and more under the three kings of the house of Lancaster, and drew such strength and nourishment from the generous heart of England, that in after-times and in a less prosperous season, though checked and obstructed in their growth, neither the blasts of arbitrary power could break them off, nor the mildew of servile opinion cause them to wither. I shall trace the progress of parliament till the civil wars of York and Lancaster:—1. In maintaining the exclusive right of taxation; 2. In directing and checking the public expenditure; 3. In making supplies depend on the redress of grievances; 4. In securing the people

against illegal ordinances and interpolations of the statutes ; 5. In controlling the royal administration ; 6. In punishing bad ministers ; and lastly, in establishing their own immunities and privileges.

1. The pretence of levying money without consent of parliament expired with Edward III., who had asserted it, as we have seen, in the very last year of his reign. A great council of lords and prelates, summoned in the second year of his successor, declared that they could advise no remedy for the king's necessities, without laying taxes on the people, which could only be granted in parliament. Nor was Richard ever accused of illegal tallages, the frequent theme of remonstrance under Edward, unless we may conjecture that this charge is implied in an act which annuls all impositions on wool and leather without consent of parliament, *if any there be.* Doubtless his innocence in this respect was the effect of weakness ; and if the revolution of 1399 had not put an end to his newly-acquired despotism, this, like every other right of his people, would have been swept away. A less palpable means of evading the consent of the commons was by the extortion of loans, and harassing those who refused to pay, by summonses before the council. These loans, the frequent resource of arbitrary sovereigns in later times, are first complained of in an early parliament of Richard II. ; and a petition is granted that no man shall be compelled to lend the king money. This did not find its way to the statute book. But how little this was regarded, we may infer from a writ directed in 1386, to some persons in Boston, enjoining them to assess every person who had goods and chattels to the amount of twenty pounds, in his proportion of two hundred pounds, which the town had promised to lend the king ; and giving an assurance that this shall be deducted from the next subsidy to be granted by parliament. Among other extraordinary parts of this letter is a menace of forfeiting life, limbs, and property, held out against such as should not obey these commissioners. After his triumph over the popular party towards the end of his reign, he obtained large sums in this way.

Under the Lancastrian kings, there is much less appearance of raising money in an unparliamentary course. Henry IV. obtained an aid from a great council in the year 1400 ; but they did not pretend to charge any besides themselves ; though it seems that some towns afterwards gave the king a contribution. A few years afterwards, he directs the sheriffs to call on the richest men in their counties to advance the money voted by parliament. This, if any compulsion is threatened, is an instance of overstrained prerogative, though consonant to the practice of the late reign. There is, however, an instance of very arbitrary conduct with respect to a grant of money in the minority of Henry VI. A subsidy had been granted by parliament upon goods imported, under certain restrictions in favour of the merchants, with a provision, that if these conditions be not observed on the king's part, then the grant

should be void and of no effect. But an entry is made on the roll of the next parliament, that "whereas some disputes have risen about the grant of the last subsidy, it is declared by the duke of Bedford, and other lords in parliament, with advice of the judges and others learned in the law, that the said subsidy was at all events to be collected and levied for the king's use; notwithstanding any conditions in the grant of the said subsidy contained." The commons, however, in making the grant of a fresh subsidy in this parliament, renewed their former conditions, with the addition of another, that "it ne no part thereof be beset ne dispensed to no other use, but only in and for the defense of the said roialme."

2. The right of granting supplies would have been very incomplete, had it not been accompanied with that of directing their application. This principle of appropriating public monies began, as we have seen, in the minority of Richard; and was among the best fruits of that period. It was steadily maintained under the new dynasty. The parliament of 6 H. IV. granted two-fifteenths and two-tenths, with a tax on skins and wool, on condition that it should be expended in defence of the kingdom, and not otherwise, as Thomas Lord Furnival and Sir John Pelham, ordained treasurers of war for this parliament, to receive the said subsidies, shall account and answer to the commons at the next parliament. These treasurers were sworn in parliament to execute their trust. A similar precaution was adopted in the next session.

3. The commons made a bold attempt in the second year of Henry IV. to give the strongest security to their claims of redress, by inverting the usual course of parliamentary proceedings. It was usual to answer their petitions on the last day of the session, which put an end to all further discussion upon them, and prevented their making the redress of grievances a necessary condition of supply. They now requested that an answer might be given before they made their grant of subsidy. This was one of the articles which Richard II.'s judges had declared it high treason to attempt. Henry was not inclined to make a concession which would virtually have removed the chief impediment to the ascendency of parliament. He first said, that he would consult with the lords, and answer according to their advice. On the last day of the sessions, the commons were informed that "it had never been known in the time of his ancestors, that they should have their petitions answered before they had done all their business in parliament, whether of granting money, or any other concern; wherefore the king will not alter the good customs and usages of ancient times."

Notwithstanding the just views these parliaments appear generally to have entertained of their power over the public purse, that of the third of Henry V. followed a precedent from the worst times of Richard II., by granting the king a subsidy on wool and leather during his life. This, an historian tell us, Henry IV. had vainly laboured to

obtain, but the taking of Harfleur intoxicated the English with new dreams of conquest in France, which their good sense and constitutional jealousy were not firm enough to resist. The continued expenses of the war, however, prevented this grant from becoming so dangerous as it might have been in a season of tranquillity. Henry V., like his father, convoked parliament almost in every year of his reign.

4. It had long been out of all question that the legislature consisted of the king, lords, and commons; or, in stricter language, that the king could not make or repeal statutes without the consent of parliament. But this fundamental maxim was still frequently defeated by various acts of evasion or violence; which, though protested against as illegal, it was a difficult task to prevent. The king sometimes exerted a power of suspending the observance of statutes; as in the ninth of Richard II., when a petition that all statutes might be confirmed is granted with an exception as to one passed in the last parliament, forbidding the judges to take fees, or give counsel in cases where the king was a party; which, "because it was too severe, and needs declaration, the king would have of no effect till it should be declared in parliament." The apprehension of this dispensing prerogative and sense of its illegality, are manifested by the wary terms wherein the commons, in one of Richard's parliaments, "assent that the king make such sufferance respecting the statute of provisors, as shall seem reasonable to him, so that the said statute be not repealed; and moreover, that the commons may disagree thereto at the next parliament, and resort to the statute;" with a protestation that this assent, which is a novelty, and never done before, shall not be drawn into precedent; praying the king that this protestation may be entered on the roll of parliament. A petition in one of Henry IV.'s parliaments, to limit the number of attorneys, and forbid filazers and prothonotaries from practising, having been answered favourably as to the first point, we find a marginal entry in the roll, that the prince and council had respited the execution of this act.

The dispensing power, as exercised in favour of individuals, is quite of a different character from this general suspension of statutes, but indirectly weakens the sovereignty of the legislature. This power was exerted, and even recognised, throughout all the reigns of the Plantagenets. In the first of Henry V. the commons pray that the statute for driving aliens out of the kingdom be executed. The king assents, saving his prerogative, and his right of dispensing with it when he pleased. To which the commons replied, that their intention was never otherwise, nor, by God's help, ever should be. At the same time one Rees ap Thomas petitions the king to modify or dispense with the statute prohibiting Welshmen from purchasing lands in England, or the English towns in Wales; which the king grants. In the same parliament the commons pray that no grant or protection be made to

any one in contravention of the statute of provisors, saving the king's prerogative. He merely answers, "Let the statutes be observed:" evading any allusion to his dispensing power.

It has been observed under the reign of Edward III. that the practice of leaving statutes to be drawn up by the judges, from the petition and answer jointly, after a dissolution of parliament, presented an opportunity of falsifying the intention of the legislature, whereof advantage was often taken. Some very remarkable instances of this fraud occurred in the succeeding reigns.

An ordinance was put upon the roll of parliament, in the fifth of Richard II., empowering sheriffs of counties to arrest preachers of heresy, and their abettors, and detain them in prison till they should justify themselves before the church. This was introduced into the statutes of the year; but the assent of lords and commons is not expressed. In the next parliament, the commons, reciting this ordinance, declare that it was never assented to or granted by them, but what had been proposed in this matter was without their concurrence, (that is, as I conceive, had been rejected by them,) and pray that this statute be annulled, for it was never their intent to bind themselves or their descendants to the bishops more than their ancestors had been bound in times past. The king returned an answer, agreeing to this petition. Nevertheless, the pretended statute was untouched, and remains still among our laws, unrepealed, except by desuetude, and by inference from the acts of much later times.

This commendable reluctance of the commons to let the clergy forge chains for them produced, as there is much appearance, a similar violation of their legislative rights in the next reign. The statute against heresy in the second of Henry IV. is not grounded upon any petition of the commons, but only upon one of the clergy. It is said to be enacted by consent of the lords, but no notice is taken of the lower house in the parliament roll, though the statute reciting the petition asserts the commons to have joined in it. The petition and the statute are both in Latin, which is unusual in the laws of this time. In a subsequent petition of the commons, this act is styled "the statute made in the second year of your majesty's reign, at the request of the prelates and clergy of your kingdom;" which affords a presumption, that it had no regular assent of parliament. And the spirit of the commons during this whole reign being remarkably hostile to the church, it would have been hardly possible to obtain their consent to so penal a law against heresy. Several of their petitions seem designed indirectly to weaken its efficacy.

These infringements of their most essential right were resisted by the commons in various ways, according to the measure of their power. In the fifth of Richard II., they request the lords to let them see a certain ordinance before it is ingrossed. At another time they procured

some of their own members, as well as peers, to be present at ingrossing the roll. At length they spoke out unequivocally in a memorable petition, which, besides its intrinsic importance, is deserving of notice as the earliest instance in which the House of Commons adopted the English language. I shall present its venerable orthography without change.

"Oure soverain lord, youre humble and trewe lieges that ben come for the comune of youre lond bysechyn unto youre rizt riztwesnesse, That so as hit hath ever be thair libte and fredom, that thar sholde no statut no lawe be made offlasse than they yaf therto their assent: consideringe that the comune of youre lond, the whiche that is, and ever hath be, a membre of youre parlemente, ben as well assenters as peticioners, that fro this tyme foreward, by compleynte of the comune, of any myschief axknyge remedie by mouthe of their speker for the comune, other ellys by petition writen, that ther never be no lawe made theruppon, and engrossed as statut and lawe, nother by addicions, nother by diminucions, by no manner of terme ne termes, the whiche that sholde chaunge the sentence, and the entente axked by the speker mouthe, or the petitions beforesaid yeven up yn writyng by the manere foresaid, withoute assent of the forsaid comune. Consideringe oure soverain lord, that it is not in no wyse the entente of youre comunes, zif yet be so that they aske you by spekyng, or by writyng, two thynges or three, or as manye as theym lust: But that ever it stande in the fredom of youre hie regalie, to graunte whiche of thoo that you lust, and to werune the remanent."

"The kyng of his grace especial graunteth that fro hensforth nothyng be enacted to the peticions of his comune, that be contrarie of hir askyng, wharby they shuld be bounde withoute their assent. Savyng alwey to our liege lord his real prerogatif, to graunte and denye what him lust of their petitions and askynges aforesaide."

Notwithstanding the fulness of this assent to so important a petition, we find no vestige of either among the statutes, and the whole transaction is unnoticed by those historians, who have not looked into our original records. If the compilers of the statute-roll were able to keep out of it the very provision that was intended to check their fraudulent machinations, it was in vain to hope for redress without altering the established practice in this respect; and indeed where there was no design to falsify the roll, it was impossible to draw up statutes which should be in truth the acts of the whole legislature, so long as the king continued to grant petitions in part, and to engraft new matters upon them. Such was still the case, till the commons hit upon an effectual expedient, for screening themselves against these encroachments, which has lasted without alteration to the present day. This was the introduction of complete statutes, under the name of bills, instead of the old petitions; and these containing the royal assent, and the whole

form of a law, it became, though not quite immediately, a constant principle, that the king must admit or reject them without qualification. This alteration, which wrought an extraordinary effect upon the character of our constitution, was gradually introduced in the reign of Henry VI.

From the first years of Henry V., though not, I think, earlier, the commons began to concern themselves with the petitions of individuals to the lords or council. The nature of the jurisdiction exercised by the latter will be treated more fully hereafter; it is only necessary to mention in this place, that many of the requests preferred to them were such as could not be granted without transcending the boundaries of law. A just inquietude as to the encroachments of the king's council had long been manifested by the commons; and finding remonstrances ineffectual, they took measures for preventing such usurpations of legislative power, by introducing their own consent to private petitions. These were now presented by the hands of the commons, and in very many instances passed in the form of statutes, with the express assent of all parts of the legislature. Such was the origin of private bills, which occupy the greater part of the rolls in Henry V. and VI.'s parliament. The commons once made an ineffectual endeavour to have their consent to all petitions presented to the council in parliament rendered necessary by law; if I rightly apprehend the meaning of the roll in this place, which seems obscure or corrupt.

5. If the strength of the commons had lain merely in the weakness of the crown, it might be inferred, that such harassing interference with the administration of affairs as the youthful and frivolous Richard was compelled to endure would have been sternly repelled by his experienced successor. But, on the contrary, the spirit of Richard might have rejoiced to see that his mortal enemy suffered as hard usage at the hands of parliament as himself. After a few years, the government of Henry became extremely unpopular. Perhaps his dissension with the great family of Percy, which had placed him on the throne, and was regarded with partiality by the people, chiefly contributed to this alienation of their attachment. The commons requested, in the fifth of his reign, that certain persons might be removed from the court; the lords concurred in displacing four of these, one being the king's confessor. Henry came down to parliament and excused these four persons, as knowing no special cause why they should be removed; yet, well understanding, that what the lords and commons should ordain would be for his and his kingdom's interest, and therefore anxious to conform himself to their wishes, consented to the said ordinance, and charged the persons in question to leave his palace; adding that he would do as much by any other about his person, whom he should find to have incurred the ill affection of his people. It was in the same session that the archbishop of Canterbury was commanded to declare before the

lords the king's intention respecting his administration ; allowing that some things had been done amiss in his court and household ; and therefore, wishing to conform to the will of God and laws of the land, protested that he would let in future no letters of signet or privy seal go in disturbance of law, beseeched the lords to put his household in order, so that every one might be paid, and declared that the money granted by the commons for the war should be received by treasurers appointed in parliament, and disbursed by them for no other purpose, unless in case of rebellion. At the request of the commons, he named the members of his privy council ; and did the same, with some variation of persons, two years afterwards. These, though not nominated with the express consent, seem to have had the approbation of the commons ; for a subsidy is granted, in 7 H. IV., among other causes, for the great trust that the commons have in the lords lately chosen, and ordained to be of the king's continual council, that there shall be better management than heretofore.

In the sixth year of Henry, the parliament, which Sir E. Coke derides as unlearned, because lawyers were excluded from it, proceeded to a resumption of grants, and a prohibition of alienating the ancient inheritance of the crown without consent of parliament ; in order to ease the commons of taxes, and that the king might live on his own. This was a favourite, though rather chimerical project. In a later parliament, it was requested that the king would take his council's advice how to keep within his own revenue. He answered, that he would willingly comply, as soon as it should be in his power.

But no parliament came near, in the number and boldness of its demands, to that held in the eighth year of Henry IV. The commons presented thirty-one articles, none of which the king ventured to refuse, though pressing very severely upon his prerogative. He was to name sixteen counsellors, by whose advice he was solely to be guided, none of them to be dismissed without conviction of misdemeanour. The chancellor and privy seal to pass no grants or other matter, contrary to law. Any persons about the court stirring up the king or queen's minds against their subjects, and duly convicted thereof, to lose their offices, and be fined. The king's ordinary revenue was wholly appropriated to his household and the payment of his debts ; no grant of wardship or other profit to be made thereout, nor any forfeiture to be pardoned. The king, "considering the wise government of other Christian princes, and conforming himself thereto," was to assign two days in the week for petitions, "it being an honourable and necessary thing that his lieges who desired to petition him should be heard." No judicial officer, nor any in the revenue or household to enjoy his place for life or term of years. No petition to be presented to the king by any of his household, at times when the council were not sitting. The council to determine nothing cognisable at common law, unless for a

reasonable cause and with consent of the judges. The statutes regulating purveyance were affirmed; abuses of various kinds in the council and in courts of justice enumerated and forbidden; elections of knights for counties put under regulation. The council and officers of state were sworn to observe the common law, and all statutes, those especially just enacted.

It must strike every reader, that these provisions were of themselves a noble fabric of constitutional liberty, and hardly, perhaps, inferior to the petition of right under Charles I. We cannot account for the submission of Henry to conditions far more derogatory than ever were imposed on Richard, because the secret politics of his reign are very imperfectly understood. Towards its close he manifested more vigour. The speaker, Sir Thomas Chaucer, having made the usual petition for liberty of speech, the king answered that he might speak as others had done in the time of his (Henry's) ancestors, and his own, but not otherwise; for he would by no means have any innovation, but be as much at his liberty as any of his ancestors had ever been. Some time after he sent a message to the commons, complaining of a law passed at the last parliament, infringing his liberty and prerogative, which he requested their consent to repeal. To this the commons agreed, and received the king's thanks, who declared at the same time that he would keep as much freedom and prerogative as any of his ancestors. It does not appear what was the particular subject of complaint; but there had been much of the same remonstrating spirit in the last parliament, that was manifested on preceding occasions. The commons, however, for reasons we cannot explain, were rather dismayed. Before their dissolution, they petition the king, that, whereas he was reported to be offended at some of his subjects in this and in the preceding parment, he would openly declare, that he held them all for loyal subjects. Henry granted this, "of his special grace;" and thus concluded his reign more triumphantly with respect to his domestic battles than he had gone through it.

Power deemed to be ill-gotten is naturally precarious; and the instance of Henry IV. has been well quoted to prove that public liberty flourishes with a bad title in the sovereign. None of our kings seem to have been less beloved; and indeed he had little claim to affection. But what men denied to the reigning king, they poured in full measure upon the heir of his throne. The virtues of the prince of Wales are almost invidiously eulogised by those parliaments who treat harshly his father, and these records afford a strong presumption, that some early petulance or riot has been much exaggerated by the vulgar minds of our chroniclers. One can scarcely understand at least, that a prince, who was three years engaged in quelling the dangerous insurrection of Glendour, and who in the latter part of his father's reign presided at the council, was so lost in a cloud of low debauchery as common fame

represents. Loved he certainly was throughout his life, as so intrepid, affable, and generous a temper well deserved; and this sentiment was heightened to admiration by successes still more rapid and dazzling than those of Edward III. During his reign, there scarcely appears any vestige of dissatisfaction in parliament; a circumstance very honourable, whether we ascribe it to the justice of his administration, or to the affection of his people. Perhaps two exceptions, though they are rather one in spirit, might be made: the first, a petition to the duke of Gloucester, then holding parliament as guardian of England, that he would move the king and queen to return, as speedily as might please them, in relief and comfort of the commons; the second, a request that their petitions might not be sent to the king beyond the sea, but altogether determined "within this kingdom of England, during this parliament;" and that this ordinance might be of force in all future parliaments to be held in England. This prayer, to which the guardian declined to accede, evidently sprang from the apprehensions, excited in their minds by the treaty of Troyes, that England might become a province of the French crown, which led them to obtain a renewal of the statute of Edward III., declaring the independence of this kingdom.

It has been seen already, that even Edward III. consulted his parliament upon the expediency of negociations for peace; though at that time the commons had not acquired boldness enough to tender their advice. In Richard II.'s reign they answered to a similar proposition with a little more confidence, that the dangers each way were so considerable they dared not decide, though an honourable peace would be the greatest comfort they could have; and concluded by hoping that the king would not engage to do homage for Calais or the conquered country. The parliament of the tenth of his reign was expressly summoned in order to advise concerning the king's intended expedition beyond the sea; a great council, which had previously been assembled at Oxford, having declared their incompetence to consent to this measure without the advice of the parliament. Yet a few years afterwards, on a similar reference, the commons rather declined to give any opinion. They confirmed the league of Henry V. with the emperor Sigismund. And the treaty of Troyes, which was so fundamentally to change the situation of Henry and his successors, obtained, as it evidently required, the sanction of both houses of parliament. These precedents, conspiring with the weakness of the executive government, in the minority of Henry VI., to fling an increase of influence into the scale of the commons, they made their concurrence necessary to all important business, both of a foreign and domestic nature. Thus commissioners were appointed to treat of the deliverance of the king of Scots, the duchesses of Bedford and Gloucester were made denizens, and mediators were appointed to reconcile the dukes of Gloucester and Burgundy, by authority of the three estates assembled in parliament.

Leave was given to the dukes of Bedford and Gloucester, and others in the king's behalf, to treat of peace with France, by both houses of parliament, in pursuance of an article in the treaty of Troyes, that no treaty should be set on foot with the dauphin without consent of the three estates of both realms. This article was afterwards repealed.

Some complaints are made by the commons, even during the first years of Henry's minority, that the king's subjects underwent arbitrary imprisonment, and were vexed by summonses before the council, and by the newly invented writ of subpœna out of chancery. But these are not so common as formerly; and so far as the rolls lead us to any inference, there was less injustice committed by the government under Henry VI. and his father, than at any former period. Wastefulness indeed might justly be imputed to the regency, who had scandalously lavished the king's revenue. This ultimately led to an act for resuming all grants since his accession, founded upon a public declaration of the great officers of the crown, that his debts amounted to £372,000, and the annual expense of the household to £24,000, while the ordinary revenue was not more than £5000.

6. But before this time the sky had begun to darken, and discontent with the actual administration pervaded every rank. The causes of this are familiar; the unpopularity of the king's marriage with Margaret of Anjou, and her impolitic violence in the conduct of affairs, particularly the imputed murder of the people's favourite, the duke of Gloucester. This provoked an attack upon her own creature, the duke of Suffolk. Impeachment had lain still, like a sword in the scabbard, since the accession of Henry IV.; when the commons, though not preferring formal articles of accusation, had petitioned the king that justice Rickhill, who had been employed to take the duke of Gloucester's confession at Calais, and the lords appellants of Richard II.'s last parliament, should be put on their defence before the lords. In Suffolk's case, the commons seem to have proceeded by bill of attainder, or at least to have designed the judgment against that minister to be the act of the whole legislature. For they delivered a bill containing articles against him to the lords, with a request that they would pray the king's majesty to enact that bill in parliament, and that the said duke might be proceeded against upon the said articles in parliament according to the law and custom of England. These articles contained charges of high treason; chiefly relating to his conduct in France, which, whether treasonable or not, seems to have been grossly against the honour and advantage of the crown. At a later day, the commons presented many other articles of misdemeanour. To the former he made a defence, in presence of the king as well as the lords both spiritual and temporal; and indeed the articles of impeachment were directly addressed to the king, which gave him a reasonable pretext to interfere in the judgment. But, from apprehension, as it is said, that Suffolk could not escape

conviction upon at least some part of these charges, Henry anticipated with no slight irregularity the course of legal trial; and summoning the peers into a private chamber, informed the duke of Suffolk, by mouth of his chancellor, that, inasmuch as he had not put himself upon his peerage, but submitted wholly to the royal pleasure, the king, acquitting him of the first articles containing matter of treason, by his own advice, and not that of the lords, nor by way of judgment, not being in a place where judgment could be delivered, banished him for five years from his dominions. The lords then present besought the king to let their protest appear on record, that neither they nor their posterity might lose their right of peerage by this precedent. It was justly considered as an arbitrary stretch of prerogative, in order to defeat the privileges of parliament, and screen a favourite minister from punishment. But the course of proceeding by bill of attainder, instead of regular impeachment, was not judiciously chosen by the commons.

7. Privilege of parliament, an extensive and singular branch of our constitutional law, begins to attract attention under the Lancastrian princes. It is true, indeed, that we can trace long before by records, and may infer with probability as to times whose records have not survived, one considerable immunity, a freedom from arrest for persons transacting the king's business in his national council. Several authorities may be found in Mr. Hatsell's precedents; of which one, in the ninth of Edward II., is conclusive. But in those rude times, members of parliament were not always respected by the officers executing legal process, and still less by the violators of law. After several remonstrances, which the crown had evaded, the commons obtained the statute 11 H. VI. c. 11. for the punishment of such as assault any on their way to the parliament, giving double damages to the party. They had more difficulty in establishing, notwithstanding the old precedents in their favour, an immunity from all criminal process, except in charges of treason, felony, and breach of the peace, which is their present measure of privilege. The truth was, that with a right pretty clearly recognised, as is admitted by the judges in Thorp's case, the House of Commons had no regular compulsory process at their command. In the cases of Lark, servant of a member, in the eighth of Henry VI., and of Clerke, himself a burgess, in the thirty-ninth of the same king, it was thought necessary to effect their release from a civil execution by special acts of parliament. The commons, in a former instance, endeavoured to make the law general, that no members nor their servants might be taken, except for treason, felony, and breach of peace; but the king put a negative upon this part of their petition.

The most celebrated, however, of these early cases of privilege is that of Thomas Thorp, speaker of the commons in 31 H. VI. This person, who was moreover a baron of the exchequer, had been imprisoned on an execution at suit of the duke of York. The commons sent some of their

members to complain of a violation of privilege to the king and lords in parliament, and to demand Thorp's release. It was alleged by the duke of York's counsel, that the trespass done by Thorp was since the beginning of parliament, and the judgment thereon given in time of vacation, and not during the sitting. The lords referred the question to the judges, who said, after deliberation, that "they ought not to answer to that question, for it hath not been used aforetime, that the judges should in any wise determine the privileges of this high court of parliament; for it is so high and so mighty in its nature, that it may make law, and that that is law it may make no law; and the determination and knowledge of that privilege belongeth to the lords of the parliament, and not to the justices." They went on, however, after observing that a general writ of supersedeas of all processes upon ground of privilege had not been known, to say, that, "if any person that is a member of this high court of parliament be arrested in such cases as be not for treason or felony, or surety of the peace, or for a condemnation, had before the parliament, it is used that all such persons should be released of such arrests and make an attorney, so that they may have their freedom and liberty, freely to intend upon the parliament."

Notwithstanding this answer of the judges, it was concluded by the lords, that Thorp should remain in prison, without regarding the alleged privilege; and the commons were directed in the king's name to proceed "with all goodly haste and speed" to the election of a new speaker. It is curious to observe, that the commons, forgetting their grievances, or content to drop them, made such haste and speed according to this command, that they presented a new speaker for approbation the next day. (Hatsell's Precedents, p. 49).

This case, as has been strongly said, was begotten by the iniquity of the times. The state was verging fast towards civil war; and Thorp, who afterwards distinguished himself for the Lancastrian cause, was an inveterate enemy of the duke of York. That prince seems to have been swayed a little from his usual temper, in procuring so unwarrantable a determination. In the reign of Edward IV., the commons claimed privilege against any civil suit during the time of their session; but they had recourse, as before, to a particular act of parliament to obtain a writ of supersedeas in favour of one Atwell, a member, who had been sued. The present law of privilege seems not to have been fully established, or at least effectually maintained, before the reign of Henry VIII.

No privilege of the commons can be so fundamental as liberty of speech. This is claimed at the opening of every parliament by their speaker, and could never be infringed without shaking the ramparts of the constitution. Richard II.'s attack upon Haxey has been already mentioned as a flagrant evidence of his despotic intentions. No other

case occurs until the thirty-third year of Henry VI., when Thomas Young, member for Bristol, complained to the commons, that, "for matters by him showed in the house accustomed for the commons in the said parliaments, he was therefore taken, arrested, and rigorously in open wise led to the Tower of London, and there grievously in great duress long time imprisoned against the said freedom and liberty," with much more to the like effect. The commons transmitted this petition to the lords, and the king "willed that the lords of his council do and provide for the said suppliant, as in their discretions shall be thought convenient and reasonable." This imprisonment of Young, however, had happened six years before, in consequence of a motion made by him, that the king then having no issue, the duke of York might be declared heir apparent of the crown. In the present session, when the duke was protector, he thought it well-timed to prefer his claim to remuneration.

There is a remarkable precedent in the ninth of Henry IV., and perhaps the earliest authority for two eminent maxims of parliamentary law, that the commons possess an exclusive right of originating money-bills, and that the king ought not to take notice of matters pending in parliament. A quarrel broke out between the two houses upon this ground; and as we have not before seen the commons venture to clash openly with their superiors, the circumstance is for this additional reason worthy of attention. As it has been little noticed, I shall translate the whole record.

"Friday, the second day of December, which was the last day of the parliament, the commons came before the king and the lords in parliament, and there by command of the king, a schedule of indemnity touching a certain altercation moved between the lords and commons was read; and on this it was commanded by our said lord the king, that the said schedule should be entered of record in the roll of parliament; of which schedule the tenor is as follows: be it remembered, that on Monday the 21st day of November, the king, our sovereign lord, being in the council-chamber in the abbey of Gloucester, (this parliament sat at Gloucester,) the lords spiritual and temporal for this present parliament assembled, being then in his presence, a debate took place among them about the state of the kingdom, and its defence to resist the malice of the enemies who on every side prepare to molest the said kingdom and its faithful subjects, and how no man can resist this malice, unless, for the safeguard and defence of his said kingdom, our sovereign lord the king has some notable aid and subsidy granted to him in his present parliament. And therefore it was demanded of the said lords, by way of question, what aid would be sufficient and requisite in these circumstances? To which question it was answered by the said lords severally, that considering the necessity of the king on one side, and the poverty of his people on the other, no less aid

could be sufficient, than one-tenth and a half from cities and towns, and one-fifteenth and a half from all other lay persons; and besides, to grant a continuance of the subsidy on wool, woolfells, and leather, and of three shillings on the ton, (of wine,) and twelve pence on the pound, (of other merchandise,) from Michaelmas next ensuing for two years thenceforth. Whereupon, by command of our said lord the king, a message was sent to the commons of this parliament, to cause a certain number of their body to come before our said lord the king and the lords, in order to hear and report to their companions what they should be commanded by our said lord the king. And upon this the said commons sent into the presence of our said lord the king and the said lords twelve of their companions; to whom, by command of our said lord the king, the said question was declared, with the answer by the said lords severally given to it. Which answer it was the pleasure of our said lord the king, that they should report to the rest of their fellows, to the end that they might take the shortest course to comply with the intention of the said lords. Which report being thus made to the said commons, they were greatly disturbed at it, saying and asserting it to be much to the prejudice and derogation of their liberties. And after that our said lord the king had heard this, not willing that anything should be done at present, or in time to come, that might anywise turn against the liberty of the estate, for which they are come to parliament, nor against the liberties of the said lords, wills, and grants, and declares, by the advice and consent of the said lords, as follows. to wit, that it shall be lawful for the lords to debate together in this present parliament, and in every other for time to come, in the king's absence, concerning the condition of the kingdom, and the remedies necessary for it. And in like manner it shall be lawful for the commons, on their part, to debate together concerning the said condition and remedies. Provided always that neither the lords on their part, nor the commons on theirs, do make any report to our said lord the king of any grant granted by the commons, and agreed to by the lords, nor of the communications of the said grant, before that the said lords and commons are of one accord and agreement in this matter, and then in manner and form accustomed, that is to say, by the mouth of the speaker of the said commons for the time being, to the end that the said lords and commons may have what they desire (avoir puissent leur gree) of our said lord the king. Our said lord the king willingly, moreover, by the consent of the said lords, that the communication had in this present parliament as above be not drawn into precedent in time to come, nor be turned to the prejudice or derogation of the liberty of the estate, for which the said commons are now come, neither in this present parliament nor in any other time to come. But wills that himself, and all the other estates, should be as free as they were before. Also, the said last day of parliament, the said speaker prayed our said

lord the king, on the part of the said commons, that he would grant the said commons that they should depart in as great liberty as other commons had done before. To which the king answered, that this pleased him well, and that at all times it had been his desire."

Every attentive reader will discover this remarkable passage to illustrate several points of constitutional law. For hence it may be perceived: first, That the king was used in those times to be present at debates of the lords, personally advising with them upon the public business; which also appears by many other passages on record; and this practice, I conceive, is not abolished by the king's present declaration, save as to grants of money, which ought to be of the freewill of parliament, and without that fear or influence, which the presence of so high a person might create: secondly, That it was already the established law of parliament, that the lords should consent to the commons' grant, and not the commons to the lords; since it is the inversion of this order whereof the commons complain, and it is said expressly that grants are made by the commons, and agreed by the lords; thirdly, That the lower house of parliament is not, in proper language, an estate of the realm, but rather the image and representative of the commons of England; who, being the third estate, with the nobility and clergy, make up and constitute the people of this kingdom and liege subjects of the crown.[1]

At the next meeting of parliament, in allusion probably to this disagreement between the houses, the king told them, that the states of parliament were come together for the common profit of the king and kingdom, and for unanimity's sake and general consent; and therefore he was sure the commons would not attempt nor say anything, but what should be fitting and conducive to unanimity; commanding them to meet together, and communicate for the public service.

It was not only in money bills that the originating power was supposed to reside in the commons. The course of proceedings in parliament, as has been seen, from the commencement at least of Edward III.'s reign, was that the commons presented petitions, which the lords by themselves, or with the assistance of the council, having duly considered, the sanction of the king was notified or withheld. This was so much according to usage, that, on one occasion, when the commons requested the advice of the other house on a matter before them, it was answered, that the ancient custom and form of parliament had ever been for the commons to report their own opinion to the king and

[1] A notion is entertained by many people, and not without the authority of some very respectable names, that the king is one of the three estates of the realm, the lords spiritual and temporal forming together the second, as the commons in parliament do the third. This is contradicted by the general tenor of our ancient records and law books; and indeed the analogy of other governments ought to have the greatest weight, even if more reason for doubt appeared upon the face of our own authorities. But the instances where the three estates are declared or implied to be the nobility, clergy, and commons, or at least their representatives in parliament, are too numerous for insertion.

lords, and not to the contrary; and the king would have the ancient and laudable usages of parliament maintained. It is singular that in the terror of innovation, the lords did not discover how materially this usage of parliament took off from their own legislative influence. The rule, however, was not observed in succeeding times; bills originated indiscriminately in either house; and indeed some acts of Henry V., which do not appear to be grounded on any petition, may be suspected, from the manner of their insertion in the rolls of parliament, to have been proposed on the king's part to the commons. But there is one manifest instance in the eighteenth of Henry VI., where the king requested the commons to give their authority to such regulations as his council might provide for redressing the abuse of purveyance; to which they assented.

If we are to choose constitutional precedents from seasons of tranquillity rather than disturbance, which surely is the only means of preserving justice or consistency, but little intrinsic authority can be given to the following declaration of parliamentary law in the eleventh of Richard II. "In this parliament (the roll says) all the lords, as well spiritual and temporal, there present, claimed as their liberty and privilege, that the great matters moved in this parliament, and to be moved in other parliaments for time to come, touching the peers of the land, should be treated, adjudged, and debated according to the course of parliament, and not by the civil law, nor the common law of the land, used in the other lower courts of the kingdom; which claim, liberty, and privileges, the king graciously allowed and granted them in full parliament." It should be remembered that this assertion of paramount privilege was made in very irregular times, when the king was at the mercy of the duke of Gloucester and his associates, and that it had a view to the immediate object of justifying their violent proceedings against the opposite party, and taking away the restraint of the common law. It stands as a dangerous rock to be avoided, not a light-house to guide us along the channel. The law of parliament, as determined by regular custom, is incorporated into our constitution; but not so as to warrant an indefinite, uncontrollable assumption of power in any case, least of all in judicial procedure, where the form and the essence of justice are inseparable from each other. And, in fact, this claim of the lords, whatever gloss Sir E. Coke may put upon it, was never intended to bear any relation to the privileges of the lower house. I should not, perhaps, have noticed this passage so strongly, if it had not been made the basis of extravagant assertions as to the privileges of parliament, the spirit of which exaggerations might not be ill adapted to the times wherein Sir E. Coke lived, though I think they produced at several later periods no slight mischief, some consequences of which we may still have to experience.

The want of all judicial authority, either to issue process or to examine

witnesses, together with the usual shortness of sessions, deprived the House of Commons of what is now considered one of its most fundamental privileges, the cognisance of disputed elections. Upon a false return by the sheriff, there was no remedy but through the king or his council. Six instances only, I believe, occur during the reigns of the Plantagenet family, wherein the misconduct or mistake of the sheriff is recorded to have called for a specific animadversion, though it was frequently the ground of general complaint, and even of some statutes. The first is in the twelfth of Edward II., when a petition was presented to the council against a false return for the county of Devon, the petitioner having been duly elected. It was referred to the Court of Exchequer to summon the sheriff before them. The next occurs in the thirty-sixth of Edward III., when a writ was directed to the sheriff of Lancashire, after the dissolution of parliament, to inquire at the county-court into the validity of the election; and upon his neglect, a second writ issued to the justices of the peace, to satisfy themselves about this in the best manner they could, and report the truth into chancery. This inquiry after the dissolution was on account of the wages for attendance, to which the knights unduly returned could have no pretence. We find a third case in the seventh of Richard II., when the king took notice that Thomas de Camoys, who was summoned by writ to the House of Peers, had been elected knight for Surrey, and directed the sheriff to return another. In the same year, the town of Shaftesbury petitioned the king, lords, and commons, against a false return of the sheriff of Dorset, and prayed them to order remedy. Nothing further appears respecting this petition. This is the first instance of the commons being noticed in matters of election. But the next case is more material: in the fifth of Henry IV., the commons prayed the king and lords in parliament, that because the writ of summons to parliament was not sufficiently returned by the sheriff of Rutland, this matter might be examined in parliament, and in case of default found therein, an exemplary punishment might be inflicted; whereupon the lords sent for the sheriff and Oneby, the knight returned, as well as for Thorp, who had been duly elected, and having examined into the facts of the case, directed the return to be amended, by the insertion of Thorp's name, and committed the sheriff to the Fleet, till he should pay a fine at the king's pleasure. The last passage that I can produce is from the roll of 18 H. VI., where "it is considered by the king with the advice and assent of the lords spiritual and temporal," that whereas no knights have been returned for Cambridgeshire, the sheriff shall be directed, by another writ, to hold a court, and to proceed to an election, proclaiming that no person shall come armed, nor any tumultuous proceeding take place; something of which sort appears to have obstructed the execution of the first writ. It is to be noticed, that the commons are not so much as named in this entry. But several

provisions were made by statute under the Lancastrian kings, when seats in parliament became much more an object of competition than before, to check the partiality of the sheriffs in making undue returns. One act (11 H. IV., c. 1) gives the justices of assize power to inquire into this matter, and inflicts a penalty of one hundred pounds on the sheriff. Another (6 H. VI., c. 4) mitigates the rigour of the former, so far as to permit the sheriff, or the knights returned by him, to traverse the inquests before the justices; that is, to be heard in their own defence, which, it seems, had not been permitted to them. Another (23 H. VI., c. 14) gives an additional penalty upon false returns to the party aggrieved. These statutes conspire, with many other testimonies, to manifest the rising importance of the House of Commons, and the eagerness with which gentlemen of landed estates (whatever might be the case in petty boroughs) now sought for a share in the national representation.

Whoever may have been the original voters for county representatives, the first statute that regulates their election, so far from limiting the privilege to tenants in capite, appears to place it upon a very large and democratical foundation. For, (as I rather conceive, though not without much hesitation,) not only all freeholders, but all persons whatever present at the county court, were declared, or rendered, capable of voting for the knight of their shire. Such at least seems to be the inference from the expressions of 7 H. IV., c. 15, "all who are there present, as well suitors duly summoned for that cause as others." And this acquires some degree of confirmation from the later statute, 8 H. VI., c. 7, which, reciting that "elections of knights of shires have now of late been made by very great, outrageous, and excessive number of people dwelling within the same counties, of the which most part was people of small substance and of no value," confines the elective franchise to freeholders of lands or tenements to the value of forty shillings.

The representation of towns in parliament was founded upon two principles; of consent to public burthens, and of advice in public measures, especially such as related to trade and shipping. Upon both these accounts it was natural for the kings who first summoned them to parliament, little foreseeing that such half-emancipated burghers would ever clip the loftiest plumes of their prerogative, to make these assemblies numerous, and summon members from every town of consideration in the kingdom. Thus the writ of 23 E. I. directs the sheriffs to cause deputies to be elected to a general council from every city, borough, and trading town. And although the last words are omitted in subsequent writs, yet their spirit was preserved; many towns having constantly returned members to parliament by regular summonses from the sheriffs, which were no chartered boroughs, nor had apparently any other claim than their populousness or commerce. These are now called boroughs by prescription.

Besides these respectable towns, there were some of a less eminent figure, which had writs directed to them, as ancient demesnes of the crown. During times of arbitrary taxation, the crown had set tallages alike upon its chartered boroughs and upon its tenants in demesne. When parliamentary consent became indispensable, the free tenants in ancient demesne, or rather such of them as inhabited some particular vills, were called to parliament among the other representatives of the commons. They are usually specified distinctly from the other classes of representatives in grants of subsidies throughout the parliaments of the two first Edwards, till, about the beginning of the Third's reign, they were confounded with ordinary burgesses. This is the foundation of that particular species of elective franchise incident to what we denominate burgage tenure; which, however, is not confined to the ancient demesne of the crown.

The proper constituents, therefore, of the citizens and burgesses in parliament appear to have been :—1. All chartered boroughs, whether they derived their privileges from the crown, or from a mesne lord, as several in Cornwall did from Richard king of the Romans. 2. All towns which were the ancient or the actual demesne of the crown. 3. All considerable places, though unincorporated, which could afford to defray the expenses of their representatives, and had a notable interest in the public welfare. But no parliament ever perfectly corresponded with this theory. The writ was addressed in general terms to the sheriff, requiring him to cause two knights to be elected out of the body of the county, two citizens from every city, and two burgesses from every borough. It rested altogether upon him to determine, what towns should exercise this franchise; and it is really incredible, with all the carelessness and ignorance of those times, what frauds the sheriffs ventured to commit in executing this trust. Though parliaments met almost every year, and there could be no mistake in so notorious a fact, it was the continual practice of sheriffs, to omit boroughs that had been in the recent habit of electing members, and to return upon the writ that there were no more within their county. Thus in the twelfth of Edward III. the sheriff of Wiltshire, after returning two citizens for Salisbury, and burgesses for two boroughs, concludes with these words: "There are no other cities, or boroughs within my bailiwick." Yet in fact eight other towns had sent members to preceding parliaments. So in the sixth of Edward II., the sheriff of Bucks declared that he had no borough within his county except Wycomb; though Wendover, Agmondesham, and Marlow had twice made returns since that king's accession. And from this cause alone it has happened, that many towns called boroughs, and having a charter and constitution as such, have never returned members to parliament; some of which are now among the most considerable in England, as Leeds, Birmingham, and Macclesfield. (Willis, Notitia Parliamentaria).

It has been suggested indeed by Brady, that these returns may not appear so false and collusive, if we suppose the sheriff to mean only that there were no resident burgesses within these boroughs fit to be returned, or that the expense of their wages would be too heavy for the place to support. And, no doubt, the latter plea, whether implied or not in the return, was very frequently an inducement to the sheriffs to spare the smaller boroughs. The wages of knights were four shillings a day, levied on all freeholders, or at least on all holding by knight-service within the county. Those of burgesses were half that sum; but even this pittance was raised with reluctance and difficulty from miserable burghers, little solicitous about political franchises. Poverty, indeed, seems to have been accepted as a legal excuse. In the sixth of E. II., the sheriff of Northumberland returns to the writ of summons, that all his knights are not sufficient to protect the county; and in the first of E. III., that they were too much ravaged by their enemies to send any members to parliament. The sheriffs of Lancashire, after several returns that they had no boroughs within their county, though Wigan, Liverpool, and Preston were such, alleged at length, that none ought to be called upon, on account of their poverty. This return was constantly made, from 36 E. III. to the reign of Henry VI.

The elective franchise was deemed by the boroughs no privilege or blessing, but rather, during the chief part of this period, an intolerable grievance. Where they could not persuade the sheriff to omit sending his writ to them, they set it at defiance by making no return. And this seldom failed to succeed, so that after one or two refusals to comply, which brought no punishment upon them, they were left in quiet enjoyment of their insignificance. The town of Torrington in Devonshire, went further, and obtained a charter of exemption from sending burgesses, grounded upon what the charter asserts to appear on the rolls of chancery, that it had never been represented before the twenty-first of E. III. This is absolutely false, and is a proof how little we can rely upon the veracity of records, Torrington having made not less than twenty-two returns before that time. It is curious, that in spite of this charter, the town sent members to the two ensuing parliaments, and then ceased for ever. Richard II. gave the inhabitants of Colchester a dispensation from returning burgesses for five years, in consideration of the expenses they had incurred in fortifying the town. But this immunity, from whatever reason, was not regarded, Colchester having continued to make returns as before.

The partiality of sheriffs in leaving out boroughs, which were accustomed in old time to come to the parliament, was repressed, as far as law could repress it, by a statute of Richard II., which imposed a fine on them for such neglect, and upon any member of parliament who should absent himself from his duty.—5 R. II., stat. ii. c. 4. But it is, I think, highly probable, that a great part of those who were elected

from the boroughs did not trouble themselves with attendance in parliament. The sheriff even found it necessary to take sureties for their execution of so burdensome a duty, whose names it was usual, down to the end of the fifteenth century, to indorse upon the writ along with those of the elected. This expedient is not likely to have been very successful; and the small number, comparatively speaking, of writs for expenses of members for boroughs, which have been published by Prynne, while those for the knights of shires are almost complete, leads to a strong presumption that their attendance was very defective. This statute of Richard II. produced no sensible effect.

By what person the election of burgesses was usually made is a question of great obscurity, which is still occasionally debated before committees of parliament. It appears to have been the common practice for a very few of the principal members of the corporation to make the election in the county-court, and their names, as actual electors, are generally returned upon the writ by the sheriff. But we cannot surely be warranted by this to infer, that they acted in any other capacity than as deputies of the whole body, and indeed it is frequently expressed that they chose such and such persons by the assent of the community; by which word, in an ancient corporate borough, it seems natural to understand the freemen participating in its general franchises, rather than the ruling body, which, in many instances at present, and always, perhaps, in the earliest age of corporations, derived its authority by delegation from the rest. The consent, however, of the inferior freemen we may easily believe to have been merely nominal; and from being nominal, it would in many places come by degrees not to be required at all; the corporation, specially so denominated, or municipal government, acquiring by length of usage an exclusive privilege in election of members of parliament, as they did in local administration. This, at least, appears to me a more probable hypothesis, than that of Dr. Brady, who limits the original right of election in all corporate boroughs to the alderman or other capital burgesses.

The members of the House of Commons, from this occasional disuse of ancient boroughs, as well as from the creation of new ones, underwent some fluctuation during the period subject to our review. Two hundred citizens and burgesses sat in the parliament held by Edward I. in his twenty-third year, the earliest epoch of acknowledged representation. But in the reigns of Edward III. and his three successors, about ninety places, on an average, returned members, so that we may reckon this part of the commons at one hundred and eighty. These, if regular in their duties, might appear an over-balance for the seventy-four knights who sat with them. But the dignity of ancient lineage, territorial wealth, and military character in times when the feudal spirit was hardly extinct, and that of chivalry at its height, made these burghers vail their heads to the landed aristocracy. It is pretty mani-

fest that the knights, though doubtless with some support from the representatives of towns, sustained the chief brunt of battle against the crown. The rule and intention of our old constitution was, that each county, city, or borough, should elect deputies out of its own body, resident among themselves, and consequently acquainted with their necessities and grievances.[1] It would be very interesting to discover at what time, and by what degrees, the practice of election swerved from this strictness. But I have not been able to trace many steps of the transition. The number of practising lawyers who sat in parliament, of which there are several complaints, seems to afford an inference that it had begun in the reign of Edward III. Besides several petitions of the commons, that none but knights or reputable squires should be returned for shires, an ordinance was made in the forty-sixth of his reign that no lawyer practising in the king's court, nor sheriff during his shrievalty, be returned knight for a county; because these lawyers put forward many petitions in the name of the commons, which only concerned their clients. This probably was truly alleged, as we may guess from the vast number of proposals for changing the course of legal process, which fill the rolls during this reign. It is not to be doubted, however, that many practising lawyers were men of landed estate in their respective counties.

An act in the first year of Henry V. directs that none be chosen knights, citizens, or burgesses, who are not resident within the place for which they are returned on the day of the writ. This statute apparently indicates a point of time, when the deviation from the line of law was frequent enough to attract notice, and yet not so established as to pass unavoidable irregularity. It proceeded, however, from great and general causes, which new laws, in this instance very fortunately, are utterly incompetent to withstand. There cannot be a more apposite proof of the inefficacy of human institutions to struggle against the steady course of human events, than this unlucky statute of Henry V., which is almost a solitary instance in the law of England, wherein the principle of desuetude has been avowedly set up against an unrepealed enactment. I am not aware, at least, of any other, which not only the House of Commons, but the Court of King's Bench has deemed itself at liberty to declare unfit to be observed. Even at the time when it was enacted, this law had probably as such very little effect. But still the plurality of elections were made, according to ancient usage as well as statute, out of the constituent body. The contrary instances were exceptions to the rule; but exceptions increasing continually, till they subverted the rule itself. Prynne has remarked, that we chiefly find Cornish surnames among the representatives of Cornwall, and those of

[1] In 19 E. II. there were twenty-eight members returned from shires who were not knights, and but twenty-seven who were such. The former had at this time only two shillings or three shillings a day for their wages, while the real knights had four shillings. But in the next reign their wages were put on a level.

northern families among the returns from the north. Nor do the members for shires and towns seem to have been much interchanged; the names of the former belonging to the most ancient families, while those of the latter have a more plebeian cast. In the reign of Edward IV., and not before, a very few of the burgesses bear the addition of esquire in the returns; which became universal in the middle of the succeeding century.

Even county elections seem in general, at least in the fourteenth century, to have been ill attended, and left to the influence of a few powerful and active persons. A petitioner against an undue return in the twelfth of Edward II. complains that, whereas he had been chosen knight for Devon, by Sir William Martin, bishop of Exeter, with the consent of the county, yet the sheriff had returned another. In several indentures of a much later date, a few persons only seem to have been concerned in the election, though the assent of the community be expressed. These irregularities, which it would be exceedingly erroneous to convert, with Hume, into lawful customs, resulted from the abuses of the sheriff's power, which, when parliament sat only for a few weeks with its hands full of business, were almost sure to escape with impunity. They were sometimes also countenanced, or rather instigated, by the crown, which, having recovered in Edward II.'s reign the prerogative of naming the sheriffs, surrendered by an act of his father, filled that office with its creatures, and constantly disregarded the statute forbidding their continuance beyond a year. Without searching for every passage that might illustrate the interference of the crown in elections, I will mention two or three leading instances. When Richard II. was meditating to overturn the famous commission of reform, he sent for some of the sheriffs, and required them to permit no knight or burgess to be elected to the next parliament, without the approbation of the king and his council. The sheriffs replied, that the commons would maintain their ancient privilege of electing their own representatives. The parliament of 1397, which attainted his enemies, and left the constitution at his mercy, was chosen, as we are told, by dint of intimidation and influence. Thus also that of Henry VI., held at Coventry in 1460, wherein the duke of York and his party were attainted, is said to have been unduly returned by the like means. This is rendered probable by a petition presented to it by the sheriffs, praying indemnity for all which they had done in relation thereto contrary to law. An act passed according to their prayer, and in confirmation of elections. A few years before, in 1455, a singular letter under the king's signet is addressed to the sheriffs, reciting that "we be enfourmed there is busy labour made in sondry wises by certaine persons for the chesyng of the said knights, ... of which labour we marvaille greatly, insomuche as it is nothing to the honour of the laborers, but ayenst their worship; it is also ayenst the lawes of the lande," with more to that

effect; and enjoining the sheriffs to let elections be free and the peace kept. There was certainly no reason to wonder that a parliament, which was to shift the virtual sovereignty of the kingdom into the hands of one whose claims were known to extend much farther, should be the object of tolerably warm contests. Thus in the Paston letters, we find several proofs of the importance attached to parliamentary elections by the highest nobility.

The House of Lords, as we left it in the reign of Henry III., was entirely composed of such persons holding lands by barony as were summoned by particular writ of parliament. Tenure and summons were both essential at this time in order to render any one a lord of parliament; the first by the ancient constitution of our feudal monarchy from the Conquest; the second by some regulation or usage of doubtful origin, which was thoroughly established before the conclusion of Henry III.'s reign. This produced of course a very marked difference between the greater, and the lesser or unparliamentary barons. The tenure of the latter, however, still subsisted, and though too inconsiderable to be members of the legislature, they paid relief as barons, they might be challenged on juries, and, as I presume, by parity of reasoning, were entitled to trial by their peerage. These lower barons, or, more commonly, tenants by parcels of baronies, may be dimly traced to the latter years of Edward III. But many of them were successively summoned to parliament, and thus recovered the former lustre of their rank; while the rest fell gradually into the station of commoners, as tenants by simple knight-service.

As tenure without summons did not entitle any one to the privileges of a lord of parliament, so no spiritual person at least ought to have been summoned without baronial tenure. The prior of St. James at Northampton, having been summoned in the twelfth of Edward II., was discharged upon his petition, because he held nothing of the king by barony, but only in frankalmoign. The prior of Bridlington, after frequent summonses, was finally left out, with an entry made in the roll, that he held nothing of the king. The abbot of Leicester had been called to fifty parliaments: yet, in the twenty-fifth of Edward III., he obtained a charter of perpetual exemption, reciting that he held no lands or tenements of the crown by barony, or any such service as bound him to attend parliaments or councils. But great irregularities prevailed in the rolls of chancery, from which the writs to spiritual and temporal peers were taken: arising in part, perhaps, from negligence, in part from wilful perversion: so that many abbots and priors, who like these had no baronial tenure, were summoned at times and subsequently omitted, of whose actual exemption we have no record. Out of one hundred and twenty-two abbots, and forty-one priors, who at some time or other sat in parliament, but twenty-five of the former, and two of the latter were constantly summoned: the

names of forty occur only once, and those of thirty-six others not more than five times. Their want of baronial tenure, in all probability, prevented the repetition of writs, which accident or occasion had caused to issue.[1]

The ancient temporal peers are supposed to have been intermingled with persons who held nothing of the crown by barony, but attended in parliament solely by virtue of the king's prerogative exercised in the writ of summons. These have been called barons by writ; and it seems to be denied by no one, that, at least under the three first Edwards, there were some of this description in parliament. But after all the labours of Dugdale and others in tracing the genealogies of our ancient aristocracy, it is a problem of much difficulty to distinguish these from the territorial barons. As the latter honours descended to female heirs, they passed into new families and new names, so that we can hardly decide of one summoned for the first time to parliament, that he did not inherit the possession of a feudal barony. Husbands of baronial heiresses were almost invariably summoned in their wives' right, though frequently by their own names. They even sat after the death of their wives, as tenants by the courtesy. Again, as lands, though not the subject of frequent transfer, were especially before the statute de donis, not inalienable, we cannot positively assume, that all the right heirs of original barons had preserved those estates upon which their barony had depended. If we judge, however, by the lists of those summoned, according to the best means in our power, it will appear that the regular barons by tenure were all along very far more numerous than those called by writ: and that from the end of Edward III.'s reign, no spiritual persons, and few if any laymen, except peers created by patent, were summoned to parliament, who did not hold territorial baronies.

With respect to those who were indebted for their seats among the lords to the king's writ, there are two material questions: whether they acquired an hereditary nobility by virtue of the writ; and if this be determined against them, whether they had a decisive, or merely a deliberative voice in the house. Now, for the first question, it seems that, if the writ of summons conferred an estate of inheritance, it must have done so either by virtue of its terms, or by established construction and precedent. But the writ contains no words by which such an estate can in law be limited; it summons the person addressed to attend in parliament in order to give his advice on the public business, but by no means implies that his advice will be required of his heirs,

[1] It is worthy of observation that the spiritual peers summoned to parliament were in general considerably more numerous than the temporal. This appears, among other causes, to have saved the church from that sweeping reformation of its wealth, and perhaps of its doctrines, which the commons were thoroughly inclined to make under Richard II. and Henry IV. Thus the reduction of the spiritual lords by the dissolution of monasteries was indispensably required to bring the ecclesiastical order into due subjection to the state.

or even of himself on any other occasion. The strongest expression is "vobiscum et *cæteris* prælatis, magnatibus et proceribus," which appears to place the party on a sort of level with the peers. But the word magnates and proceres are used very largely in ancient language, and, down to the time of Edward III., comprehend the king's ordinary council, as well as his barons. Nor can these, at any rate, be construed to pass an inheritance, which, in the grant of a private person, much more of the king, would require express words of limitation. In a single instance, the writ of summons to Sir Henry de Bromflete, (27 H. VI.) we find these remarkable words: Volumus enim vos et hæredes vestros masculos de corpore vestro legitimè exeuntes barones de Vescy existere. But this Sir Henry de Bromflete was the lineal heir of the ancient barony de Vesci. And if it were true that the writ of summons conveyed a barony of itself, there seems no occasion to have introduced these extraordinary words of creation or revival. Indeed, there is less necessity to urge these arguments from the nature of the writ, because the modern doctrine, which is entirely opposite to what has here been suggested, asserts that no one is ennobled by the mere summons, unless he has rendered it operative by taking his seat in parliament; distinguishing it in this from a patent of peerage, which requires no act of the party for its completion. But this distinction could be supported by nothing except long usage. If, however, we recur to the practice of former times, we shall find that no less than ninety-eight laymen were summoned once only to parliament, none of their names occurring afterwards; and fifty others, two, three, or four times. Some were constantly summoned during their lives, none of whose posterity ever attained that honour. The course of proceeding, therefore, previous to the accession of Henry VII., by no means warrants the doctrine which was held in the latter end of Elizabeth's reign, and has since been too fully established by repeated precedents to be shaken by any reasoning. The foregoing observations relate to the more ancient history of our constitution, and to the plain matter of fact as to those times, without considering what political cause there might be to prevent the crown from introducing occasional counsellors into the House of Lords.

It is manifest by many passages in these records that bannerets were frequently summoned to the upper house of parliament, constituting a distinct class inferior to barons, though generally named together, and ultimately confounded with them. Barons are distinguished by the appellation of Sire, bannerets have only that of Monsieur, as le Sire de Berkeley, le Sire de Fitzwalter, Monsieur Richard Scrope, Monsieur Richard Stafford. In the seventh of Richard II., Thomas Camoys having been elected knight of the shire for Surrey, the king addresses a writ to the sheriff, directing him to proceed to a new election, cum hujusmodi banneretti ante hæc tempora in milites comi-

tatus ratione alicujus parliamenti eligi minime consueverunt. Camoys was summoned by writ to the same parliament. It has been inferred from hence by Selden, that he was a baron, and that the word banneret is merely synonymous. But this is contradicted by too many passages. Bannerets had so far been considered as commoners some years before, that they could not be challenged on juries. But they seem to have been more highly esteemed at the date of this writ.

The distinction, however, between barons and bannerets died away by degrees. In the second of Henry VI., Scrope of Bolton is called le Sire de Scrope ; a proof that he was then reckoned among the barons. The bannerets do not often appear afterwards by that appellation as members of the upper house. Bannerets, or, as they are called, banrents, are enumerated among the orders of Scottish nobility in the year 1428, when the statute directing the common lairds or tenants in capite to send representatives was enacted ; and a modern historian justly calls them an intermediate order between the peers and lairds. Perhaps a consideration of these facts, which have frequently been overlooked, may tend in some measure to explain the occasional discontinuance, or sometimes the entire cessation, of writs of summons to an individual or his descendants ; since we may conceive that bannerets, being of a dignity much inferior to that of barons, had no such inheritable nobility in their blood as rendered their parliamentary privileges a matter of right. But whether all those who without any baronial tenure received their writs of summons to parliament belonged to the order of bannerets, I cannot pretend to affirm : though some passages in the rolls might rather lead to such a proposition.

The second question relates to the right of suffrage possessed by these temporary members of the upper house. It might seem plausible certainly to conceive, that the real and ancient aristocracy would not permit their powers to be impaired by numbering the votes of such as the king might please to send among them, however they might allow them to assist in their debates. But I am much more inclined to suppose that they were in all respects on an equality with other peers during their actual attendance in parliament. For, 1. They are summoned by the same writ as the rest, and their names are confused among them in the lists ; whereas the judges and ordinary counsellors are called by a separate writ, vobiscum et cæteris de consilio nostro, and their names are entered after those of the peers. 2. Some, who do not appear to have held land-baronies, were constantly summoned from father to son, and thus became hereditary lords of parliament, through a sort of prescriptive right, which probably was the foundation of extending the same privilege afterwards to the descendants of all who had once been summoned. There is no evidence that the family of Scrope, for example, which was eminent under Edward III. and subsequent kings, and gave rise to two branches, the lords of Bolton and

Masham, inherited any territorial honour. 3. It is very difficult to obtain any direct proof as to the right of voting, because the rolls of parliament do not take notice of any debates; but there happens to exist one remarkable passage, in which the suffrages of the lords are individually specified. In the first parliament of Henry IV., they were requested by the earl of Northumberland to declare what should be done with the late king Richard. The lords then present agreed that he should be detained in safe custody; and on account of the importance of this matter, it seems to have been thought necessary to enter their names upon the roll in these words: The names of the lords concurring in their answer to the said question here follow; to wit, the archbishop of Canterbury, and fourteen other bishops; seven abbots; the prince of Wales, the duke of York, and six earls; nineteen barons, styled thus; le Sire de Roos, or le Sire de Grey de Ruthyn. Thus far the entry has nothing singular; but then follow these nine names: Monsieur Henry Percy, Monsieur Richard Scrope, le Sire Fitz-hugh, le Sire de Bergeveny, le Sire de Lomley, le Baron de Greystock, le Baron de Hilton, Monsieur Thomas Erpyngham, Chamberlayn, Monsieur Mayhewe Gournay. Of these nine, five were undoubtedly barons, from whatever cause misplaced in order. Scrope was summoned by writ; but his title of Monsieur, by which he is invariably denominated, would of itself create a strong suspicion that he was no baron, and in another place, we find him reckoned among the bannerets. The other three do not appear to have been summoned, their writs probably being lost. One of them, Sir Thomas Erpyngham, a statesman well known in the history of those times, is said to have been a banneret, certainly he was not a baron. It is not unlikely that the two others, Henry Percy (Hotspur) and Gournay, an officer of the household, were also bannerets; they cannot at least be supposed to be barons, neither were they ever summoned to any subsequent parliament. Yet in the only record we possess of votes actually given in the House of Lords they appear to have been reckoned among the rest.

The next method of conferring an honour of peerage was by creation in parliament. This was adopted by Edward III. in several instances, though always, I believe, for the higher titles of duke or earl. It is laid down by lawyers, that whatever the king is said, in an ancient record, to have done in full parliament, must be taken to have proceeded from the whole legislature. As a question of fact, indeed, it might be doubted whether, in many proceedings where this expression is used, and especially in the creation of peers, the assent of the commons was specifically and deliberately given. It seems hardly consonant to the circumstances of their order under Edward III. to suppose their sanction necessary in what seemed so little to concern their interest. Yet there is an instance, in the fortieth year of that prince, where the lords individually, and the commons with one voice, are declared to have con-

sented, at the king's request, that the lord de Coucy, who had married his daughter, and was already possessed of estates in England, might be raised to the dignity of an earl, whenever the king should determine what earldom he would confer upon him. Under Richard II. the marquisite of Dublin is granted to Vere by full consent of all the estates. But this instrument, besides the unusual name of dignity, contained an extensive jurisdiction and authority over Ireland. In the same reign Lancaster was made duke of Guienne, and the duke of York's son created earl of Rutland, to hold during his father's life. The consent of the lords and commons is expressed in their patents, and they are entered upon the roll of parliament. Henry V. created his brothers dukes of Bedford and Gloucester, by request of the lords and commons. But the patent of Sir John Cornwall, in the tenth of Henry VI., declares him to be made lord Fanhope "by consent of the lords, in the presence of the three estates of parliament;" as if it were designed to show that the commons had not a legislative voice in the creation of their peers.

The mention I have made of creating peers by act of parliament has partly anticipated the modern form of letters patent, with which the other was nearly allied. The first instance of a barony conferred by patent was in the tenth year of Richard II., when Sir John Holt, a judge of the Common Pleas, was created Lord Beauchamp of Kidderminster. Holt's patent, however, passed while Richard was endeavouring to act in an arbitrary manner; and in fact, he never sat in parliament, having been attainted in that of the next year, by the name of Sir John Holt. In a number of subsequent patents down to the reign of Henry VII., the assent of parliament is expressed, though it frequently happens that no mention of it occurs in the parliamentary roll. And in some instances, the roll speaks to the consent of parliament, where the patent itself is silent.

It is now, perhaps, scarcely known by many persons not unversed in the constitution of their country, that, besides the bishops and baronial abbots, the inferior clergy were regularly summoned at every parliament. In the writ of summons to a bishop, he is still directed to cause the dean of his cathedral church, the archdeacon of his diocese, with one proctor from the chapter of the former, and two from the body of his clergy, to attend with him at the place of meeting. This might by an inobservant reader be confounded with the summons to the convocation, which is composed of the same constituent parts, and, by modern usage, is made to assemble on the same day. But it may easily be distinguished by this difference; that the convocation is provincial, and summoned by the metropolitans of Canterbury and York; whereas the clause commonly denominated præmunientes, (from its first word,) in the writ to each bishop, proceeds from the crown, and enjoins the attendance of the clergy at the national council of parliament.

The first unequivocal instance of representatives appearing for the lower clergy is in the year 1255, when they are expressly named by the author of the Annals of Burton. They preceded, therefore, by a few years, the House of Commons; but the introduction of each was founded upon the same principle. The king required the clergy's money, but dared not take it without their consent. In the double parliament, if so we may call it, summoned in the eleventh of Edward I. to meet at Northampton and York, and divided according to the two ecclesiastical provinces, the proctors of chapters for each province, but not those of the diocesan clergy, were summoned through a royal writ addressed to the archbishops. Upon account of the absence of any deputies from the lower clergy, these assemblies refused to grant a subsidy. The proctors of both descriptions appear to have been summoned by the præmunientes clause in the 22d, 23d, 24th, 28th, and 35th years of the same king; but in some other parliaments of his reign the præmunientes clause is omitted. The same irregularity continued under his successor; and the constant usage of inserting this clause in the bishop's writ is dated from the twenty-eighth of Edward III.

It is highly probable, that Edward I., whose legislative mind was engaged in modelling the constitution on a comprehensive scheme, designed to render the clergy an effective branch of parliament, however their continual resistance may have defeated the accomplishment of this intention. We find an entry upon the roll of his parliament at Carlisle, containing a list of all the proctors deputed to it by the several dioceses of the kingdom. This may be reckoned a clear proof of their parliamentary attendance during his reign under the præmunientes clause; since the province of Canterbury could not have been present in convocation at a city beyond its limits. And, indeed, if we were to found our judgment merely on the language used in these writs, it would be hard to resist a very strange paradox, that the clergy were not only one of the three estates of the realm, but as essential a member of the legislature by their representatives as the commons. They are summoned in the earliest writ extant, (23 E. I.,) ad tractandum, ordinandum et faciendum nobiscum, et cum cæteris prælatis, proceribus, ac aliis incolis regni nostri; in that of the next year, ad ordinandum de quantitate et modo subsidii; in that of the twenty-eighth, ad faciendum et consentiendum his, quæ tunc de communi consilio ordinari contigerit. In later times, it ran sometimes ad faciendum et consentiendum, sometimes only ad consentiendum; which, from the fifth of Richard II., has been the term invariably adopted. Now, as it is usual to infer from the same words when introduced into the writs for election of the commons, that they possessed an enacting power implied in the words ad faciendum, or at least to deduce the necessity of their assent from the words ad consentiendum, it should seem to follow, that the clergy were

invested, as a branch of the parliament, with rights no less extensive. It is to be considered, how we can reconcile these apparent attributes of political power with the unquestionable facts, that almost all laws, even while they continued to attend, were passed without their concurrence, and that after some time, they ceased altogether to comply with the writ.

The solution of this difficulty can only be found in that estrangement from the common law and the temporal courts, which the clergy through Europe were disposed to affect. In this country, their ambition defeated its own ends; and while they endeavoured by privileges and immunities to separate themselves from the people, they did not perceive that the line of demarcation thus strongly traced would cut them off from the sympathy of common interests. Everything which they could call of ecclesiastical cognisance was drawn into their own courts; while the administration of what they contemned as a barbarous system, the temporal law of the land, fell into the hands of lay judges. But these were men not less subtle, not less ambitious, not less attached to their profession than themselves; and wielding, as they did in the courts of Westminster, the delegated sceptre of judicial sovereignty, they soon began to control the spiritual jurisdiction, and to establish the inherent supremacy of the common law. From this time an inveterate animosity subsisted between the two courts, the vestiges of which have only been effaced by the liberal wisdom of modern ages. The general love of the common law, however, with the great weight of its professors in the king's council and in parliament, kept the clergy in surprising subjection. None of our kings after Henry III. were bigots; and the constant tone of the commons serves to show that the English nation was thoroughly averse to ecclesiastical influence, whether of their own church or the see of Rome.

It was natural, therefore, to withstand the interference of the clergy summoned to parliament in legislation, as much as that of the spiritual court in temporal jurisdiction. With the ordinary subjects, indeed, of legislation they had little concern. The oppression of the king's purveyors, or escheators, of officers of the forests, the abuses or defects of the common law, the regulations necessary for trading towns and seaports, were matters that touched them not, and to which their consent was never required. And, as they well knew there was no design in summoning their attendance but to obtain money, it was with great reluctance that they obeyed the royal writ, which was generally obliged to be enforced by an archiepiscopal mandate. Thus, instead of an assembly of deputies from an estate of the realm, they became a synod or convocation. And it seems probable that in most, if not all instances, where the clergy are said in the roll of parliament to have presented their petitions, or are otherwise mentioned as a deliberative body, we should suppose the convocation alone of the province of Canterbury

to be intended. For that of York seems to have been always considered as inferior, and even ancillary to the greater province, voting subsidies, and even assenting to canons, without deliberation, in compliance with the example of Canterbury, the convocation of which province consequently assumed the importance of a national council. But in either point of view, the proceedings of this ecclesiastical assembly, collateral in a certain sense to parliament, yet very intimately connected with it, whether sitting by virtue of the præmunientes clause or otherwise, will deserve some notice in a constitutional history.

In the sixth year of Edward III., the proctors of the clergy are specially mentioned, as present at the speech pronounced by the king's commissioner, and retired, along with the prelates, to consult together upon the business submitted to their deliberation. They proposed, accordingly, a sentence of excommunication against disturbers of the peace, which was assented to by the lords and commons. The clergy are said afterwards to have had leave, as well as the knights, citizens, and burgesses, to return to their homes; the prelates and peers continuing with the king. This appearance of the clergy in full parliament is not perhaps so decisively proved by any later record. But in the eighteenth of the same reign several petitions of the clergy are granted by the king and his council, entered on the roll of parliament, and even the statute roll, and in some respects are still part of our law. To these it seems highly probable that the commons gave no assent; and they may be reckoned among the other infringements of their legislative rights. It is remarkable that in the same parliament the commons, as if apprehensive of what was in preparation, besought the king that no petition of the clergy might be granted, till he and his council should have considered whether it would turn to the prejudice of the lords or commons.

A series of petitions from the clergy, in the twenty-fifth of Edward III., had not probably any real assent of the commons, though it is once mentioned in the enacting words, when they were drawn into a statute. —25 E. III., stat. 3. Indeed, the petitions correspond so little with the general sentiment of hostility towards ecclesiastical privileges manifested by the lower house of parliament, that they would not easily have obtained its acquiescence. The convocation of the province of Canterbury presented several petitions in the fiftieth year of the same king, to which they received an assenting answer; but they are not found in the statute-book. This, however, produced the following remonstrance from the commons at the next parliament: "Also the said commons beseech their lord the king, that no statute or ordinance be made at the petition of the clergy, unless by assent of your commons; and that your commons be not bound by any constitutions which they make for their own profit without the commons' assent. For they will

not be bound by any of your statutes or ordinances made without their assent." The king evaded a direct answer to this petition. But the province of Canterbury did not the less present their own grievances to the king in that parliament, and two among the statutes of the year seem to be founded upon no other authority.—50 Ed. III., c. 4 & 5.

In the first session of Richard II., the prelates and clergy of both provinces are said to have presented their schedule of petitions which appear upon the roll, and three of which are the foundation of statutes unassented to in all probability by the commons. If the clergy of both provinces were actually present, as is here asserted, it must of course have been as a house of parliament, and not of convocation. It rather seems, so far as we can trust to the phraseology of records, that the clergy sat also in a national assembly under the king's writ in the second year of the same king. Upon other occasions during the same reign, where the representatives of the clergy are alluded to as a deliberative body, sitting at the same time with the parliament, it is impossible to ascertain its constitution; and indeed even from those already cited, we cannot draw any positive inference. But whether in convocation or in parliament, they certainly formed a legislative council in ecclesiastical matters, by the advice and consent of which alone, without that of the commons, (I can say nothing as to the lords,) Edward III. and even Richard II. enacted laws to bind the laity. I have mentioned in a different place a still more conspicuous instance of this assumed prerogative; namely, the memorable statute against heresy in the second of Henry IV.; which can hardly be deemed anything else than an infringement of the rights of parliament, more clearly established at that time than at the accession of Richard II. Petitions of the commons relative to spiritual matters, however, frequently proposed, in few or no instances obtained the king's assent so as to pass into statutes, unless approved by the convocation. But, on the other hand, scarcely any temporal laws appear to have passed by the concurrence of the clergy. Two instances only, so far as I know, are on record: the parliament held in the eleventh of Richard II. is annulled by that in the twenty-first of his reign, "with the assent of the lords spiritual and temporal, *and the proctors of the clergy*, and the commons;" and the statute entailing the crown on the children of Henry IV. is said to be enacted on the petition of the prelates, nobles, clergy, and commons. Both these were stronger exertions of legislative authority than ordinary acts of parliament, and very likely to be questioned in succeeding times.

The supreme judicature, which had been exercised by the king's court, was diverted, about the reign of John, into three channels; the tribunals of King's Bench, Common Pleas, and the Exchequer. These became the regular fountains of justice, which soon almost absorbed the provincial jurisdictions of the sheriff and lord of manor. But the original institution, having been designed for ends of state, police and

revenue, full as much as for the determination of private suits, still preserved the most eminent parts of its authority. For the king's ordinary or privy council, which is the usual style from the reign of Edward I., seems to have been no other than the king's court (curia regis) of older times, being composed of the same persons, and having, in a principal degree, the same subjects for deliberation. It consisted of the chief ministers; as the chancellor, treasurer, lord steward, lord admiral, lord marshal, the keeper of the privy seal, the chamberlain, treasurer, and comptroller of the household, the chancellor of the exchequer, the master of the wardrobe; and of the judges, king's sergeant, and attorney-general, the master of the rolls, and justices in eyre, who at that time were not the same as the judges at Westminster. When all these were called together, it was a full council; but when the business was of a more contracted nature, those only who were fittest to advise were summoned; the chancellor and judges, for matters of law; and the officers of state, for what concerned the revenue or the household.

The business of this council, out of parliament, may be reduced to two heads; its deliberative office, as a council of advice, and its decisive power of jurisdiction. With respect to the first, it obviously comprehended all subjects of political deliberation, which were usually referred to it by the king; this being in fact the administration or governing council of state, the distinction of a cabinet being introduced in comparatively modern times. But there were likewise a vast number of petitions continually presented to the council, upon which they proceeded no farther than to sort, as it were, and forward them by indorsement to the proper courts, or advise the suitor what remedy he had to seek. Thus some petitions are answered; "this cannot be done without a new law;" some were turned over to the regular court, as the Chancery or King's Bench; some of greater moment were indorsed to be heard "before the great council;" some, concerning the king's interest were referred to the Chancery, or select persons of the council.

The coercive authority exercised by the standing council of the king was far more important. It may be divided into acts legislative and judicial. As for the first, many ordinances were made in council; sometimes upon request of the commons in parliament, who felt themselves better qualified to state a grievance than a remedy; sometimes without any pretence, unless the usage of government, in the infancy of our constitution, may be thought to afford one. These were always of a temporary or partial nature, and were considered as regulations not sufficiently important to demand a new statute. Thus in the second year of Richard II., the council, after hearing read the statute-roll of an act recently passed conferring a criminal jurisdiction in certain cases upon justices of the peace, declared that the intention of parliament, though not clearly expressed therein, had been to extend

that jurisdiction to certain other cases omitted, which accordingly they caused to be inserted in the commissions made to these justices under the great seal. But they frequently so much exceeded what the growing spirit of public liberty would permit, that it gave rise to complaint in parliament. The commons petition, in 13 R. II., that "neither the chancellor nor the king's council, after the close of parliament, may make any ordinance against the common law, or the ancient customs of the land, or the statutes made heretofore or to be made in this parliament; but that the common law have its course for all the people, and no judgment be rendered without due legal process. The king answers, "Let it be done as has been usual heretofore, saving the prerogative; and if any one is aggrieved, let him show it specially and right shall be done him." This unsatisfactory answer proves the arbitrary spirit in which Richard was determined to govern.

The judicial power of the council was in some instances founded upon particular acts of parliament, giving it power to hear and determine certain causes. Many petitions, likewise, were referred to it from parliament, especially where they were left unanswered by reason of a dissolution. But, independently of this delegated authority, it is certain that the king's council did anciently exercise, as well out of parliament as in it, a very great jurisdiction, both in causes criminal and civil. Some, however, have contended, that whatever they did in this respect was illegal, and an encroachment upon the common law, and Magna Charta. And be the common law what it may, it seems an indisputable violation of the charter, in its most admirable and essential article, to drag men in questions of their freehold or liberty before a tribunal which neither granted them a trial by their peers, nor always respected the law of the land. Against this usurpation the patriots of those times never ceased to lift their voices. A statute of the fifth year of Edward III. provides that no man shall be attached, nor his property seized into the king's hands, against the form of the great charter, and the law of the land. In the twenty-fifth of the same king it was enacted, that "none shall be taken by petition or suggestion to the king or his council, unless it be by indictment or presentment, or by writ original at the common law, nor shall be put out of his franchise or freehold, unless he be duly put to answer, and forejudged of the same by due course of law." This was repeated in a short act of the twenty-eighth of his reign, (28 E. III., c. 3;) but both, in all probability, were treated with neglect; for another was passed some years afterwards, providing, that no man shall be put to answer without presentment before justices, or matter of record, or by due process and writ original according to the old law of the land. The answer to the petition whereon this statute is grounded, in the parliament-roll, expressly declares this to be an article of the great charter. Nothing, however, would prevail on the council to surrender

so eminent a power, and, though usurped, yet of so long a continuance. Cases of arbitrary imprisonment frequently occurred, and were remonstrated against by the commons. The right of every freeman in that cardinal point was as indubitable, legally speaking, as at this day; but the courts of law were afraid to exercise their remedial functions in defiance of so powerful a tribunal. After the accession of the Lancastrian family, these, like other grievances, became rather less frequent; but the commons remonstrate several times, even in the minority of Henry VI., against the council's interference in matters cognisable at common law. In these later times, the civil jurisdiction of the council was principally exercised in conjunction with the Chancery, and accordingly they are generally named together in the complaint. The chancellor having the great seal in his custody, council usually borrowed its process from his court. This was returnable into Chancery even where the business was depending before the council. Nor were the two jurisdictions less intimately allied in their character; each being of an equitable nature; and equity, as then practised, being little else than innovation and encroachment on the course of law. This part, long since the most important, of the chancellor's judicial function, cannot be traced beyond the time of Richard II., when the practice of feoffments to uses having been introduced, without any legal remedy to secure the cestui qui use, or usufructuary, against the feoffees, the Court of Chancery undertook to enforce this species of contract by process of its own.

Such was the nature of the king's ordinary council in itself, as the organ of his executive sovereignty; and such the jurisdiction which it habitually exercised. But it is also to be considered in its relation to the parliament, during whose session, either singly, or in conjunction with the lords' house, it was particularly conspicuous. The great officers of state, whether peers or not, the judges, the king's serjeant, and attorney-general were from the earliest times, as the latter still continue to be, summoned by special writs to the upper house. But while the writ of a peer runs, ad tractandum nobiscum et cum cæteris prælatis magnatibus et proceribus; that directed to one of the judges is only, ad tractandum nobiscum et cum cæteris de concilio nostro; and the seats of the latter are upon the woolsacks at one extremity of the House of Lords.

In the reigns of Edward I. and II., the council appear to have been the regular advisers of the king in passing laws, to which the houses of parliament had assented. The preambles of most statutes during this period express their concurrence. Thus, the statute Westm. I. is said to be the act of the king, by his council, and by the assent of archbishops, bishops, abbots, priors, earls, barons, and all the commonalty of the realm being thither summoned. The statute of escheators, 29 E. I., is said to be agreed by the council, enumerating their

names, all whom appear to be judges or public officers. Still more striking conclusions are to be drawn from the petitions addressed to the councils by both houses of parliament. In the eighth of Edward II., there are four petitions from the commons to the king and his council, one from the lords alone, and one in which both appear to have joined. Later parliaments of the same reign present us with several more instances of the like nature. Thus in 18 E. II., a petition begins: "To our lord the king, and to his council, the archbishops, bishops, prelates, earls, barons, and others of the commonalty of England, show," &c.

But from the beginning of Edward III.'s reign, it seems tha the council and the lords' house in parliament were often blended together into one assembly. This was denominated the great council, being the lords spiritual and temporal, with the king's ordinary council annexed to them, as a council within a council. And even in much earlier times, the lords, as hereditary councillors, were, either when ever they thought fit to attend, or on special summonses by the king (it is hard to say which,) assistant members of this council, both for advice and for jurisdiction. This double capacity of the peerage, as members of the parliament or legislative assembly, and of the deliberative and judicial council, throws a very great obscurity over the subject. However, we find that private petitions for redress were, even under Edward I., presented to the lords in parliament, as much as to the ordinary council. The parliament was considered a high court of justice, where relief was to be given in cases where the course of law was obstructed, as well as where it was defective. Hence the intermission of parliaments was looked upon as a delay of justice, and their annual meeting is demanded upon that ground. "The king," says Fleta, "has his court in his council, in his parliaments, in the presence of bishops, earls, barons, lords, and other wise men, where the doubtful cases of judgments are resolved, and new remedies are provided against new injuries, and justice is rendered to every man according to his desert." In the third year of Edward II., receivers of petitions began to be appointed at the opening of every parliame who usually transmitted them to the ordinary, but in some instanc to the great council. These receivers were commonly three for En land, and three for Ireland, Wales, Gascony, and other foreig dominions. There were likewise two corresponding classes, o auditors, or triers of petitions. These consisted partly of bishops or peers, partly of judges and other members of the council, and the seem to have been instituted in order to disburthen the council, by giving answers to some petitions. But about the middle of Ed. III.'s time they ceased to act juridically in this respect, and confined themselves to transmitting petitions to the lords of the council.

The Great Council, according to the definition we have given, consisting of the lords spiritual and temporal, in conjunction with the

ordinary council, or, in other words, of all who were severally summoned to parliament, exercised a considerable jurisdiction, as well civil as criminal. In this jurisdiction, it is the opinion of Sir M. Hale, that the council, though not peers, had right of suffrage; an opinion very probable, when we recollect that the council, by themselves, both in and out of parliament, possessed, in fact, a judicial authority little inferior; and that the king's delegated sovereignty in the adminstration of justice, rather than any intrinsic right of the peerage, is the foundation on which the judicature of the lords must be supported. But in the time of Edward III. or Richard II., the lords, by their ascendency, threw the judges and rest of the council into shade, and took the decisive jurisdiction entirely to themselves, making use of their former colleagues but as assistants and advisers, as they still continue to be held in all the judicial proceedings of that house.

Those statutes which restrain the king's ordinary council, from disturbing men in their freehold rights, or questioning them for misdemeanours, have an equal application to the lords' house in parliament, though we do not frequently meet with complaints of the encroachments made by that assembly. There was, however, one class of cases tacitly excluded from the operation of those acts, in which the coercive jurisdiction of this high tribunal had great convenience; namely, where the ordinary course of justice was so much obstructed by the defending party, through riots, combinations of maintenance, or overawing influence, that no inferior court would find its process obeyed. Those ages, disfigured, in their quietest season, by rapine and oppression, afforded no small number of cases that called for this interposition of a paramount authority. They do not occur so frequently, however, in the rolls of parliament after the reign of Henry IV.; whether this be attributed to the gradual course of civilisation, and to the comparative prosperity which England enjoyed under the line of Lancaster, or rather to the discontinuance of the lords' jurisdiction. Another indubitable branch of this jurisdiction was in writs of error; but it may be observed, that their determination was very frequently left to a select committee of peers and counsellors. These too cease almost entirely with Henry IV.; and were scarcely revived till the accession of James I.

Some instances occur in the reign of Edward III., where records have been brought into parliament and annulled with assent of the commons as well as the rest of the legislature. But these were attainders of treason, which it seemed gracious and solemn to reverse in the most authentic manner. Certainly the commons had neither by the nature of our constitution, nor the practice of parliament, any right of intermeddling in judicature, save where something was required beyond the existing law, or where, as in the statute of treason, an authority of that kind was particularly reserved to both houses. This is

fully acknowledged by themselves in the first year of Henry IV. But their influence upon the balance of government became so commanding in a few years afterwards that they contrived, as has been mentioned already, to have petitions directed to them, rather than to the lords or council, and to transmit them either with a tacit approbation, or in the form of acts, to the upper house. Perhaps this encroachment of the commons may have contributed to the disuse of the lords' jurisdiction, who would rather relinquish their ancient and honourable but laborious function, than share it with such bold usurpers.

Although the restraining hand of parliament was continually growing more effectual, and the notions of legal right acquiring more precision from the time of Magna Charta to the civil wars under Henry VI., we may justly say, that the general tone of administration was not a little arbitrary. The whole fabric of English liberty rose step by step, through much toil, and many sacrifices; each generation adding some new security to the work, and trusting that posterity would perfect the labour as well as enjoy the reward. A time, perhaps, was even then foreseen, in the visions of generous hope, by the brave knights of parliament, and by the sober sages of justice, when the proudest ministers of the crown should recoil from those barriers, which were then daily pushed aside with impunity.

There is a material distinction to be taken between the exercise of the king's undeniable prerogative, however repugnant to our improved principles of freedom, and the abuse or extension of it to oppressive purposes. For we cannot fairly consider, as part of our ancient constitution, what the parliament was perpetually remonstrating against, and the statute-book is full of enactments to repress. Doubtless the continual acquiescence of a nation in arbitrary government may ultimately destroy all privileges of positive institution and leave them to recover, by such means as opportunity shall offer, the natural and imprescriptible rights for which human societies were established. And this may, perhaps, be the case at present with many European kingdoms. But it would be necessary to shut our eyes with deliberate prejudice against the whole tenor of the most unquestionable authorities, against the petitions of the commons, the acts of the legislature, the testimony of historians and lawyers, before we could assert that England acquiesced in those abuses and oppressions, which it must be confessed she was unable fully to prevent.

The word prerogative is of a peculiar import and scarcely understood by those who come from the studies of political philosophy. We cannot define it by any theory of executive functions. All these may be comprehended in it, but also a great deal more. It is best, perhaps, to be understood by its derivation; and has been said to be that law in case of the king, which is law in no case of the subject. Of the higher and more sovereign prerogatives, I shall here say nothing; they result from

the nature of a monarchy, and have nothing very peculiar in their character. But the smaller rights of the crown show better the origina lineaments of our constitution. It is said commonly enough, that all prerogatives are given for the subject's good. I must confess that no part of this assertion corresponds with my view of the subject. It neither appears to me that these prerogatives were ever given, nor that they necessarily redound to the subject's good. Prerogative, in its old sense, might be defined an advantage obtained by the crown over the subject, in cases where their interests came into competition, by reason of its greater strength. This sprang from the nature of the Norman government, which rather resembled a scramble of wild beasts, where the strongest takes the best share, than a system founded upon principles of common utility. And, modified as the exercise of most prerogatives has been by the more liberal tone which now pervades our course of government, whoever attends to the common practice of courts of justice, and still more, whoever consults the law-books, will not only be astonished at their extent and multiplicity, but very frequently at their injustice and severity.

The real prerogatives that might formerly be exerted were sometimes of so injurious a nature, that we can hardly separate them from their abuse. A striking instance is that of purveyance, which will at once illustrate the definition above given of a prerogative, the limits within which it was to be exercised, and its tendency to transgress them. This was a right of purchasing whatever was necessary for the king's household, at a fair price, in preference to every competitor, and without the consent of the owner. By the same prerogative, carriages and horses were impressed for the king's journeys, and lodging provided for his attendants. This was defended on a pretext of necessity, or at least of great convenience to the sovereign, and was both of high antiquity and universal practice throughout Europe. But the royal purveyors had the utmost temptation, and, doubtless, no small store of precedents, to stretch this power beyond its legal boundary; and not only to fix their own price too low, but to seize what they wanted without any payment at all, or with tallies which were carried in vain to an empty exchequer. This gave rise to a number of petitions from the commons, upon which statutes were often framed; but the evil was almost incurable in its nature, and never ceased till that prerogative was itself abolished. Purveyance, as I have already said, may serve to distinguish the defects from the abuses of our constitution. It was a reproach to the law, that men should be compelled to send their goods without their consent; it was a reproach to the administration, that they were deprived of them without payment.

The right of purchasing men's goods for the use of the king was extended by a sort of analogy to their labour. Thus Edward III. announces to all sheriffs, that William of Walsingham had a commission

to collect as many painters as might suffice for "our works in St. Stephen's chapel, Westminster, to be at our wages as long as shall be necessary;" and to arrest and keep in prison all who shall refuse or be refractory; and enjoins them to lend their assistance. Windsor Castle owes its massive magnificence to labourers impressed from every part of the kingdom. There is even a commission from Edward IV. to take as many workmen in gold as were wanting, and employ them at the king's cost upon the trappings of himself and his household.

Another class of abuses intimately connected with unquestionable, though oppressive rights of the crown, originated in the feudal tenure which bound all the lands of the kingdom. The king had indisputably a right to the wardship of his tenants in chivalry, and to the escheats or forfeitures of persons dying without heirs or attainted for treason. But his officers, under the pretence of wardship, took possession of lands not held immediately of the crown, claimed escheats where a right heir existed, and seized estates as forfeited, which were protected by the statute of entails. The real owner had no remedy against this dispossession, but to prefer his petition of right in Chancery, or, which was probably more effectual, to procure a remonstrance of the House of Commons in his favour. Even where justice was finally rendered to him, he had no recompense for his damages; and the escheators were not less likely to repeat an iniquity by which they could not personally suffer.

The charter of the forests, granted by Henry III. along with Magna Charta, had been designed to crush the flagitious system of oppression, which prevailed in those favourit haunts of the Norman kings. They had still, however, their peculiar jurisdiction, though, from the time at least of Edward III., subject in some measure to the control of the King's Bench. The foresters, I suppose, might find a compensation for their want of the common law, in that easy and licentious way of life which they affected; but the neighbouring cultivators frequently suffered from the king's officers, who attempted to recover those adjacent lands, or, as they were called, purlieus, which had been disafforested by the charter, and protected by frequent perambulations. Many petitions of the commons relate to this grievance.

The constable and marshal of England possessed a jurisdiction, the proper limits whereof were sufficiently narrow, as it seems to have extended only to appeals of treasons committed beyond sea, which were determined by combat, and to military offences within the realm. Bnt these high officers frequently took upon them to inquire of treasons and felonies cognisable at common law, and even of civil contracts or trespasses. This is no bad illustration of the state in which our constitution stood under the Plantagenets. No colour of right or of supreme prerogative was set up to justify a procedure so manifestly repugnant to the great charter. For all re-

monstrances against these encroachments, the king gave promises in return; and a statute was enacted, in the thirteenth of Richard II., declaring the bounds of the constable and marshal's jurisdiction.—13 R. II., c. 2. It could not be denied, therefore, that all infringements of these acknowledged limits were illegal, even if they had a hundredfold more actual precedents in their favour than can be supposed. But the abuse by no means ceased after the passing of this statute, as several subsequent petitions that it might be better regarded, will evince. One, as it contains a special instance, I shall insert. It is of the fifth year of Henry IV. "On several supplications and petitions made by the commons in parliaments to our lord the king for Bennet Wilman, who is accused by certain of his ill-wishers, and detained in prison, and put to answer before the constable and marshal, against the statutes and the common law of England, our said lord the king, by the advice and assent of the lords in parliament, granted that the said Bennet should be treated according to the statutes and common law of England, notwithstanding any commission to the contrary, or accusation against him made before the constable and marshal." And a writ was sent to the justices of the King's Bench with a copy of this article from the roll of parliament, directing them to proceed as they shall see fit according the laws and customs of England.

It must appear remarkable, that, in a case so manifestly within their competence, the court of King's Bench should not have issued a writ of habeas corpus, without waiting for what may be considered as a particular act of parliament. But it is a natural effect of an arbitrary adminstration of government, to intimidate courts of justice. A negative argument, founded upon the want of legal precedent, is certainly not conclusive, when it relates to a distant period, of which all the precedents have not been noted; yet it must strike us, that in the learned and zealous arguments of Sir Robert Cotton, Mr. Selden, and others, against arbitrary imprisonment, in the great case of the habeas corpus, though the statute law is full of authorities in their favour, we find no instance adduced, earlier than the reign of Henry VII., where the King's Bench has released, or even bailed, persons committed by the council, or the constable, though it is unquestionable that such committals were both frequent and illegal.

If I have faithfully represented thus far the history of our constitution, its essential character will appear to be a monarchy greatly limited by law, though retaining much power that was ill calculated to promote the public good, and swerving continually into an irregular course, which there was no restraint adequate to correct. But of all the notions that have been advanced as to the theory of this constitution, the least consonant to law and history is that which represents the king as merely an hereditary executive magistrate, the first officer

of the state. What advantages might result from such a form of government, this is not the place to discuss. But it certainly was not the ancient constitution of England. There was nothing in this, absolutely nothing, of a republican appearance. All seemed to grow out of the monarchy, and was referred to its advantage and honour. The voice of supplication, even in the stoutest disposition of the commons, was always humble ; the prerogative was always named in large and pompous expressions. Still more naturally may we expect to find in the law-books even an obsequious deference to power ; from judges who scarcely ventured to consider it as their duty to defend the subject's freedom, and who beheld the gigantic image of prerogative, in the full play of its hundred arms, constantly before their eyes. Through this monarchical tone, which certainly pervades all our legal authority, a writer like Hume, accustomed to philosophical liberality as to the principles of government, and to the democratical language which the modern aspect of the constitution and the liberty of printing have produced, fell hastily into the error of believing that all limitations of royal power during the fourteenth and fifteenth centuries were as much unsettled in law and in public opinion, as they were liable to be violated by force. Though a contrary position has been sufficiently demonstrated, I conceive, by the series of parliamentary proceedings which I have already produced, yet there is a passage in Sir John Fortescue's treatise De Laudibus Legum Angliæ, so explicit and weighty, that no writer on the English constitution can be excused from inserting it. This eminent person having been chief justice of the King's Bench under Henry VI., was governor to the young prince of Wales during his retreat in France, and received at his hands the office of chancellor. It must never be forgotten, that in a treatise purposely composed for the instruction of one who hoped to reign over England, the limitations of government are enforced as strenuously by Fortescue, as some succeeding lawyers have inculcated the doctrines of arbitrary prerogative.

"A king of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely regal, he would have a power to make what innovations and alterations he pleased in the laws of the kingdom, impose tallages and other hardships upon the people whether they would or no, without their consent, which sort of government the civil laws point out, when they declare Quod principi placuit, egis habet vigorem. But it is much otherwise with a king whose government is political, because he can neither make any alteration or change in the laws of the realm without the consent of the subjects, nor burthen them against their wills with strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely, and without the hazard of being

deprived of them, either by the king or any other. The same things may be effected under an absolute prince, provided he do not degenerate into the tyrant. Of such a prince, Aristotle, in the third of his Politics, says, 'It is better for a city to be governed by a good man, than by good laws.' But because it does not always happen, that the person presiding over a people is so qualified, St. Thomas, in the book which he writ to the king of Cyprus, De Regimine Principum, wishes, that a kingdom could be so instituted, as that the king might not be at liberty to tyrannise over his people; which only comes to pass in the present case; that is, when the sovereign power is restrained by political laws. Rejoice, therefore, my good prince, that such is the law of the kingdom to which you are to inherit, because it will afford, both to yourself and subjects, the greatest security and satisfaction."

The two great divisions of civil rule, the absolute, or regal, as he calls it, and the political, Fortescue proceeds to deduce from the several originals of conquest and compact. Concerning the latter, he declares emphatically, a truth not always palatable to princes, that such governments were instituted by the people, and for the people's good; quoting St. Augustine for a similar definition of political society. "As the head of a body natural cannot change its nerves and sinews, cannot deny to the several parts their proper energy, their due proportion and aliment of blood; neither can a king, who is the head of a body politic, change the laws thereof, nor take from the people what is theirs, by right, against their consent. Thus you have, sir, the formal institution of every political kingdom, from whence you may guess at the power which a king may exercise with respect to the laws and the subject. For he is appointed to protect his subjects in their lives, properties, and laws; for this very end and purpose he has the delegation of power from the people, and he has no just claim to any other power but this. Wherefore, to give a brief answer to that question of yours, concerning the different powers which kings claim over their subjects, I am firmly of opinion that it arises solely from the different natures of their original institution, as you may easily collect from what has been said. So the kingdom of England had its original from Brute and the Trojans, who attended him from Italy and Greece, and became a mixed kind of government, compounded of the regal and political."

It would occupy too much space to quote every other passage of the same nature in this treatise of Fortescue, and in that entitled, Of the Difference between an Absolute and Limited Monarchy, which, so far as these points are concerned, is nearly a translation from the former. But these, corroborated as they are by the statute-book and by the rolls of parliament, are surely conclusive against the notions which pervade Mr. Hume's History. I have already remarked that a

sense of the glaring prejudice by which some Whig writers had been actuated, in representitg the English constitution from the earliest times as nearly arrived at its present perfection, conspired with certain prepossessions of his own to lead this eminent historian into an equally erroneous system on the opposite side. And as he traced the stream backwards, and came last to the times of the Plantagenet dynasty, with opinions already biassed, and even pledged to the world in his volumes of earlier publication, he was prone to seize hold of, and even exaggerate, every circumstance that indicated immature civilisation, and law perverted or infringed. To this his ignorance of English jurisprudence, which certainly in some measure disqualified him from writing our history, did not a little contribute; misrepresentations frequently occurring in his work, which a moderate acquaintance with the law of the land would have prevented.

It is an honourable circumstance to England that the history of no other country presents so few instances of illegal condemnation upon political charges. The judicial torture was hardly known and never recognised by law. The sentence in capital crimes, fixed unalterably by custom, allowed nothing to vindictiveness and indignation. There hardly occurs an example of any one being notoriously put to death without form of trial, except in moments of flagrant civil war. If the right of juries were sometimes evaded by irregular jurisdictions, they were at least held sacred by the courts of law: and through all the vicissitudes of civil liberty, no one ever questioned the primary right of every freeman, handed down from his Saxon forefathers, to his trial by his peers. A just regard for public safety prescribes the necessity of severe penalties against rebellion and conspiracy; but the interpretation of these offences, when intrusted to sovereigns and their counsellors, has been the most tremendous instrument of despotic power. In rude ages, even though a general spirit of political liberty may prevail, the legal character of treason will commonly be undefined; nor is it the disposition of lawyers to give greater accuracy to this part of criminal jurisprudence. The nature of treason appears to have been subject to much uncertainty in England before the statute of Edward III. If that memorable law did not give all possible precision to the offence, which we must certainly allow, it prevented at least those stretches of vindictive tyranny which disgrace the annals of other countries. The praise, however, must be understood as comparative. Some cases of harsh, if not illegal convictions, could hardly fail to occur, in times of violence and during changes of the reigning family. Perhaps the circumstances have now and then been aggravated by historians. Nothing could be more illegal than the conviction of the earl of Cambridge and Lord Scrope in 1415, and if it be true, according to Carte and Hume, that they were not heard in their defence. But, whether this is to be absolutely inferred from the record, is perhaps open to question. There

seems at least to have been no sufficient motive for such an irregularity: their participation in a treasonable conspiracy being manifest from their own confession. The proceedings against Sir John Mortimer in the second of Henry VI., are called by Hume highly irregular and illegal. They were, however, by act of attainder, which cannot well be styled illegal. Nor are they to be considered as severe. Mortimer had broken out of the Tower, where he was confined on a charge of treason. This was a capital felony at common law; and the chief irregularity seems to have consisted in having recourse to parliament, in order to attaint him of treason, when he had already forfeited his life by another crime.

I would not willingly attribute to the prevalence of Tory dispositions, what may be explained otherwise, the progress which Mr. Hume's historical theory as to our constitution has been gradually making since its publication. The tide of opinion, which since the Revolution, and indeed since the reign of James I., had been flowing so strongly in favour of the antiquity of our liberties, now seems, among the higher and more literary classes, to set pretty decidedly the other way. Though we may still sometimes hear a demagogue chattering about the witte-nagemot, it is far more usual to find sensible and liberal men who look on Magna Charta itself as the result of an uninteresting squabble between the king and his barons. Acts of force and injustice, which strike the cursory inquirer, especially if he derives his knowledge from modern compilations, more than the average tenor of events, are selected and displayed as fair samples of the law and of its administration. We are deceived by the comparatively perfect state of our present liberties, and forget that our superior security is far less owing to positive law, than to the control which is exercised over government by public opinion through the general use of printing, and to the diffusion of liberal principles in policy through the same means. Thus, disgusted at a contrast which it was hardly candid to institute, we turn away from the records that attest the real, though imperfect, freedom of our ancestors; and are willing to be persuaded, that the whole scheme of English polity, till the commons took on themselves to assert their natural rights against James I., was at best but a mockery of popular privileges, hardly recognized in theory, and never regarded in effect.

This system, when stripped of those slavish inferences that Brady and Carte attempted to build upon it, admits perhaps of no essential objection but its want of historical truth. God forbid that our rights to just and free government should be tried by a jury of antiquaries! Yet it is a generous pride that intertwines the consciousness of hereditary freedom with the memory of our ancestors; and no trifling argument against those who seem indifferent in its cause, that the character of the bravest and most virtuous among nations has not depended upon the accidents of race or climate, but been gradually wrought by the

plastic influence of civil rights, transmitted as a prescriptive inheritance through a long course of generations.

By what means the English acquired and preserved this political liberty, which, even in the fifteenth century, was the admiration of judicious foreigners, is a very rational and interesting inquiry. Their own serious and steady attachment to the laws must always be reckoned among the principal causes of this blessing. The civil equality of all freemen below the rank of peerage, and the subjection of peers themselves to the impartial arm of justice, and to a just share in contribution to public burthens, advantages unknown to other countries, tended to identify the interests, and to assimilate the feelings of the aristocracy with those of the people; classes whose dissension and jealousy has been in many instances the surest hope of sovereigns aiming at arbitrary power. This freedom from the oppressive superiority of a privileged order was peculiar to England. In many kingdoms the royal prerogative was at least equally limited. The statutes of Aragon are more full of remedial provisions. The right of opposing a tyrannical government by arms was more frequently asserted in Castile. But nowhere else did the people possess by law, and I think upon the whole, in effect, so much security for their personal freedom and property. Accordingly, the middle ranks flourished remarkably, not only in commercial towns, but among the cultivators of the soil. "There is scarce a small village," says Sir J. Fortescue, "in which you may not find a knight, an esquire, or some substantial householder, (paterfamilias,) commonly called a frankleyn,[1] possessed of considerable estate; besides others who are called freeholders, and many yeomen of estates sufficient to make a substantial jury." I would, however, point out more particularly two causes which had a very leading efficacy in the gradual development of our constitution: first, The schemes of continental ambition in which our government was long engaged; secondly, The manner in which feudal principles of insubordination and resistance were modified by the ample prerogatives of the early Norman kings.

1. At the epoch when William the Conqueror ascended the throne, hardly any other power was possessed by the king of France than what he inherited from the great fiefs of the Capetian family. War with such a potentate was not exceedingly to be dreaded, and William, besides his immense revenue, could employ the feudal services of his vassals, which were extended by him to continental expeditions. These circumstances were not essentially changed till after the loss of Nor-

[1] By a frankleyn in this place we are to understand what we call a country squire, like the frankleyn of Chaucer; for the word esquire in Fortescue's time was only used in its limited sense, for the sons of peers and knights, or such as had obtained the title by creation or some other legal means.

The mention of Chaucer leads me to add, that the prologue to his Canterbury Tales is of itself a continual testimony to the plenteous and comfortable situation of the middle ranks in England, as well as that fearless independence and frequent originality of character amongst them, which liberty and competence have conspired to produce.

mandy; for the acquisitions of Henry II. kept him fully on an equality with the French crown, and the dilapidation which had taken place in the royal demesnes was compensated by several arbitrary resources that filled the exchequer of these monarchs. But in the reigns of John and Henry III., the position of England, or rather of its sovereign with respect to France, underwent a very disadvantageous change. The loss of Normandy severed the connexion between the English nobility and the continent; they had no longer estates to defend, and took not sufficient interest in the concerns of Guienne, to fight for that province at their own cost. Their feudal service was now commuted for an escuage, which fell very short of the expenses incurred in a protracted campaign. Tallages of royal towns and demesne lands, extortion of money from the Jews, every feudal abuse and oppression were tried in vain to replenish the treasury, which the defence of Eleanor's inheritance against the increased energy of France was constantly exhausting. Even in the most arbitrary reigns, a general tax upon landholders, in any cases but those prescribed by the feudal law, had not been ventured; and the standing bulwark of Magna Charta, as well as the feebleness and unpopularity of Henry III., made it more dangerous to violate an established principle. Subsidies were therefore constantly required; but for these it was necessary for the king to meet parliament, to hear their complaints, and, if he could not elude, to acquiesce in their petitions. These necessities came still more urgently upon Edward I., whose ambitious spirit could not patiently endure the encroachments of Philip the Fair, a rival not less ambitious, but certainly less distinguished by personal prowess than himself. What advantage the friends of liberty reaped from this ardour for continental warfare is strongly seen in the circumstances attending the Confirmation of the Charters.

But after this statute had rendered all tallages without consent of parliament illegal, though it did not for some time prevent their being occasionally imposed, it was still more difficult to carry on a war with France or Scotland, to keep on foot naval armaments, or even to preserve the courtly magnificence which that age of chivalry affected, without perpetual recurrence to the House of Commons. Edward III. very little consulted the interests of his prerogative when he stretched forth his hand to seize the phantom of a crown in France. It compelled him to assemble parliament almost annually, and often to hold more than one session within the year. Here the representatives of England learned the habit of remonstrance and conditional supply; and though, in the meridian of England's age and vigour, they often failed of immediate redress, yet they gradually swelled the statute-roll with provisions to secure their country's freedom; and acquiring self-confidence by mutual intercourse, and sense of the public opinion, they became able, before the end of Edward's reign, and still more in that of

his grandson, to control, prevent, and punish the abuses of administration. Of all these proud and sovereign privileges, the right of refusing supply was the key-stone. But for the long wars in which our kings were involved, at first by their possession of Guienne, and afterwards by their pretensions upon the crown of France, it would have been easy to suppress remonstrances by avoiding to assemble parliament. For it must be confessed, that an authority was given to the king's proclamation, and to ordinances of the council, which differed but little from legislative power, and would very soon have been interrupted by complaisant courts of justice to give them the full extent of statutes.

It is common indeed to assert, that the liberties of England were bought with the blood of our forefathers. This is a very magnanimous boast; and in some degree is consonant enough to the truth. But it is far more generally accurate to say that they were purchased by money. A great proportion of our best laws, including Magna Charta itself, as it now stands confirmed by Henry III., were, in the most literal sense, obtained by a pecuniary bargain with the crown. In many parliaments of Edward III. and Richard II. this sale of redress is chaffered for as distinctly, and with as little apparent sense of disgrace, as the most legitimate business between two merchants would be transacted. So little was there of voluntary benevolence in what the loyal courtesy of our constitution styles concessions from the throne; and so little title have these sovereigns, though we cannot refuse our admiration to the generous virtues of Edward III. and Henry V., to claim the gratitude of posterity as the benefactors of their people!

2. The relation established between a lord and his vassal by the feudal tenure, far from containing principles of any servile and implicit obedience, permitted the compact to be dissolved in case of its violation by either party. This extended as much to the sovereign as to inferior lords; the authority of the former in France, where the system most flourished, being for several ages rather feudal than political. If a vassal was aggrieved, and if justice was denied him, he sent a defiance, that is, a renunciation of fealty to the king, and was entitled to enforce redress at the point of his sword. It then became a contest of strength as between two independent potentates, and was terminated by treaty, advantageous or otherwise, according to the fortune of war. This privilege, suited enough to the situation of France, the great peers of which did not originally intend to admit more than a nominal supremacy in the house of Capet, was evidently less compatible with the regular monarchy of England. The stern natures of William the Conqueror and his successors kept in control the mutinous spirit of their nobles, and reaped the profit of feudal tenures, without submitting to their reciprocal obligations. They counteracted, if I may so say, the centrifugal force of that system by the application of a stronger power; by preserving order, administering justice, checking the growth of

baronial influence and riches, with habitual activity, vigilance, and severity. Still, however, there remained the original principle, that allegiance depended conditionally upon good treatment, and that an appeal might be lawfully made to arms against an oppressive government. Nor was this, we may be sure, left for extreme necessity, or thought to require a long enduring forbearance. In modern times, a king compelled by his subjects' swords to abandon any pretension would be supposed to have ceased to reign; and the express recognition of such a right as that of insurrection has been justly deemed inconsistent with the majesty of law. But ruder ages had ruder sentiments. Force was necessary to repel force; and men accustomed to see the king's authority defied by private riot were not much shocked when it was resisted in defence of public freedom.

The Great Charter of John was secured by the election of twenty-five barons, as conservators of the compact. If the king or the justiciary in his absence, should transgress any article, any four might demand reparation, and on denial carry their complaint to the rest of their body. "And those barons, with all the commons of the land, shall distrain and annoy us by every means in their power; that is, by seizing our castles, lands, and possessions, and every other mode, till the wrong shall be repaired to their satisfaction; saving our person, and our queen, and children. And when it shall be repaired, they shall obey us as before." It is amusing to see the common law of distress introduced upon this gigantic scale; and the capture of the king's castles treated as analogous to impounding a neighbour's horse for breaking fences.

A very curious illustration of this feudal principle is found in the conduct of William, earl of Pembroke, one of the greatest names in our ancient history, towards Henry III. The king had defied him, which was tantamount to a declaration of war; alleging that he had made an inroad upon the royal domains. Pembroke maintained that he was not the aggressor, that the king had denied him justice, and been the first to invade his territory; on which account he had thought himself absolved from his homage, and at liberty to use force against the malignity of the royal advisers. "Nor would it be for the king's honour," the earl adds, "that I should submit to his will against reason, whereby I should rather do wrong to him and to that justice which he is bound to administer towards his people: and I should give an ill example to all men, in deserting justice and right, in compliance with his mistaken will. For this would show that I loved my worldly wealth better than justice." These words, with whatever dignity expressed, it may be objected, prove only the disposition of an angry and revolted earl. But even Henry fully admitted the right of taking arms against himself, if he had meditated his vassal's destruction, and disputed only the application of this maxim to the earl of Pembroke.

These feudal notions, which placed the moral obligation of allegiance

very low, acting under a weighty pressure from the real strength of the crown, were favourable to constitutional liberty. The great vassals of France and Germany aimed at living independently on their fiefs, with no further concern for the rest, than as useful allies, having a common interest against the crown. But in England, as there was no prospect of throwing off subjection, the barons endeavoured only to lighten its burthen, fixing limits to prerogative by law, and securing their observation by parliamentary remonstrances, or by dint of arms. Hence, as all rebellions in England were directed only to coerce the government, or, at the utmost, to change the succession of the crown, without the smallest tendency to separation, they did not impair the national strength, nor destroy the character of the constitution. In all these contentions, it is remarkable that the people and clergy sided with the nobles against the throne. No individuals are so popular with the monkish annalists, who speak the language of the populace, as Simon, earl of Leicester, Thomas, earl of Lancaster, and Thomas, duke of Gloucester, all turbulent opposers of the royal authority, and probably little deserving of their panegyrics. Very few English historians of the middle ages are advocates of prerogative. This may be ascribed both to the equality of our laws and to the interest which the aristocracy found in courting popular favour, when committed against so formidable an adversary as the king. And even now, when the stream, that once was hurried along gullies, and dashed down precipices, hardly betrays, upon its broad and tranquil bosom, the motion that actuates it, it must still be accounted a singular happiness of our constitution, that, all ranks graduated harmoniously into one another, the interests of peers and commoners are radically interwoven; each in a certain sense distinguishable, but not balanced like opposite weights, not separated like discordant fluids, not to be secured by insolence or jealousy, but by mutual adherence and reciprocal influences.

From the time of Edward I. the feudal system and all the feelings connected with it declined very rapidly. But what the nobility lost in the number of their military tenants was in some degree compensated by the state of manners. The higher class of them, who took the chief share in public affairs, were exceedingly opulent; and their mode of life gave wealth an incredibly greater efficacy than it possesses at present. Gentlemen of large estates and good families, who had attached themselves to these great peers, who bore offices, which we should call menial, in their households, and sent their children thither for education, were of course ready to follow their banner in a rising, without much inquiry into the cause. Still less would the vast body of tenants and their retainers, who were fed at the castle in time of peace, refuse to carry their pikes and staves into the field of battle. Many devices were used to preserve this aristocratic influence, which riches and ancestry of themselves rendered so formidable. Such was the main-

tenance of suits, or confederacies for the purpose of supporting each other's claims in litigation, which was the subject of frequent complaints in parliament, and gave rise to several prohibitory statutes. By help of such confederacies, parties were enabled to make violent entries upon the lands they claimed, which the law itself could hardly be said to discourage. Even proceedings in courts of justice were often liable to intimidation and influence. A practice much allied to confederacies of maintenance, though ostensibly more harmless, was that of giving liveries to all retainers of a noble family; but it had an obvious tendency to preserve that spirit of factious attachments and animosities, which it is the general policy of a wise government to dissipate. From the first year of Richard II. we find continual mention of this custom, with many legal provisions against it, but it was never abolished till the reign of Henry VII.

These associations under powerful chiefs were only incidentally beneficial as they tended to withstand the abuses of prerogative. In their more usual course, they were designed to thwart the legitimate exercise of the king's government in the administration of the laws. All Europe was a scene of intestine anarchy during the middle ages; and though England was far less exposed to the scourge of private war than most nations on the continent, we should find, could we recover the local annals of every country, such an accumulation of petty rapine and tumult, as would almost alienate us from the liberty which served to engender it. This was the common tenor of manners, sometimes so much aggravated as to find a place in general history, more often attested by records, during the three centuries that the house of Plantagenet sat on the throne. Disseisin, or forcible dispossession of freeholds, makes one of the most considerable articles in our law books. Highway robbery was from the earliest times a sort of national crime. Capital punishments, though very frequent, made little impression on a bold and licentious crew, who had at least the sympathy of those who had nothing to lose on their side, and flattering prospects of impunity. We know how long the outlaws of Sherwood lived in tradition; men who, like some of their betters, have been permitted to redeem by a few acts of generosity the just ignominy of extensive crimes. These indeed were the heroes of vulgar applause; but when such a judge as Sir John Fortescue could exult that more Englishmen were hanged for robbery in one year, than French in seven, and that "if an Englishman be poor, and see another having riches, which may be taken from him by might, he will not spare to do so," it may be perceived how thoroughly these sentiments had pervaded the public mind.

Such robbers, I have said, had flattering prospects of impunity. Besides the general want of communication, which made one who had fled from his own neighbourhood tolerably secure, they had the

advantage of extensive forests to facilitate the depredations and prevent detection. When outlawed, or brought to trial, the worst offenders could frequently purchase charters of pardon, which defeated justice in the moment of her blow. Nor were the nobility ashamed to patronise men guilty of every crime. Several proofs of this occur in the rolls. Thus, for example, in the twenty-second of Edward III., the commons pray, that "whereas it is notorious how robbers and malefactors infest the country, the king would charge the great men of the land, that none such be maintained by them, privily or openly, but that they lend assistance to arrest and take such ill-doers."

It is perhaps the most meritorious part of Edward I.'s government, that he bent all his power to restrain these breaches of tranquillity. One of his salutary provisions is still in constant use, the statute of coroners. Another more extensive, and though partly obsolete, the foundation of modern laws, is the statute of Winton, which, reciting, that "from day to day robberies, murders, burnings, and theft be more often used than they have been heretofore, and felons cannot be attainted by the oath of jurors which had rather suffer robberies on strangers to pass without punishment, than indite the offenders, of whom great part be people of the same country, or at the least, if the offenders be of another country, the receivers be of places near," enacts that hue and cry shall be made upon the commission of a robbery, and that the hundred shall remain answerable for the damage, unless the felons be brought to justice. It may be inferred from this provision, that the ancient law of frank-pledge, though retained longer in form, had lost its efficiency. By the same act, no stranger or suspicious person was to lodge even in the suburbs of towns; the gates were to be kept locked from sunset to sunrising; every host to be answerable for his guest; the highways to be cleared of trees and underwood for two hundred feet on each side; and every man to keep arms, according to his substance, in readiness to follow the sheriff on hue and cry raised after felons. The last provision indicates that the robbers plundered the country in formidable bands. One of these, in a subsequent part of Edward's reign, burned the town of Boston during a fair, and obtained a vast booty, though their leader had the ill-fortune not to escape the gallows.

The preservation of order throughout the country was originally intrusted, not only to the sheriff, coroner, and constables, but to certain magistrates, called conservators of the peace. These, in conformity to the democratic character of our Saxon government, were elected by the freeholders in their county-court. But Edward I. issued commissions to carry into effect the statute of Winton; and from the beginning of Edward III.'s reign, the appointment of conservators was vested in the crown, their authority gradually enlarged by a series of statutes, and their title changed to that of justices. They were empowered to im-

prison and punish all rioters and other offenders, and such as they should find by indictment, or suspicion, to be reputed thieves or vagabonds; and to take sureties for good behaviour from persons of evil fame. Such a jurisdiction was hardly more arbitrary than, in a free and civilised age, it has been thought fit to vest in magistrates; but it was ill endured by a people who placed their notions of liberty in personal exemption from restraint, rather than any political theory. An act having been passed (2 R. II., stat. 2, c. 6) in consequence of unusual riots and outrages, enabling magistrates to commit the ringleaders of tumultuary assemblies without waiting for legal process till the next arrival of justices of gaol delivery, the commons petitioned next year against this "horrible grievous ordinance," by which "every freeman in the kingdom would be in bondage to these justices," contrary to the great charter, and to many statutes, which forbid any man to be taken without due course of law. So sensitive was their jealousy of arbitrary imprisonment, that they preferred enduring riot and robbery to chastising them by any means that might afford a precedent to oppression or weaken men's reverence for Magna Charta.

There are two subjects remaining, to which this retrospect of the state of manners naturally leads us, and which I would not pass unnoticed, though not perhaps absolutely essential to a constitutional history; because they tend in a very material degree to illustrate the progress of society, with which civil liberty and regular government are closely connected. These are first, The servitude or villenage of the peasantry, and their gradual emancipation from that condition; and secondly, The continual increase of commercial intercourse with foreign countries. But as the latter topic will fall more conveniently into the next part of this work, I postpone its consideration for the present.

In a former passage I have remarked of the Anglo-Saxon ceorls, that neither their situation nor that of their descendants for the earlier reigns after the Conquest appears to have been mere servitude. But from the time of Henry II., as we learn from Glanvil, the villein so called was absolutely dependent upon his lord's will, compelled to unlimited services, and destitute of property, not only in the land he held for his maintenance, but in his own acquisitions. If a villein purchased or inherited land, the lord might seize it; if he accumulated stock, its possession was equally precarious. Against his lord he had no right of action; because his indemnity in damages, if he could have recovered any, might have been immediately taken away. If he fled from his lord's service, or from the land which he held, a writ issued de nativitate probandâ, and the master recovered his fugitive by law. His children were born to the same state of servitude; and contrary to the rule of the civil law, where one parent was free, and the other in villenage, the offspring followed their father's condition.

This was certainly a severe lot; yet there are circumstances which

materially distinguish it from slavery. The condition of villenage, at least in later times, was perfectly relative; it formed no distinct order in the political economy. No man was a villein in the eye of law, unless his master claimed him: to all others he was a freeman, and might acquire, dispose of, or sue for property without impediment. Hence Sir E. Coke argues, that villeins are included in the 29th article of Magna Charta: "No freeman shall be disseised nor imprisoned." For murder, rape, or mutilation of his villein, the lord was indictable at the king's suit; though not for assault or imprisonment, which were within the sphere of his seignorial authority.

This class was distinguished into villeins regardant, who had been attached from time immemorial to a certain manor, and villeins in gross, where such territorial prescription had never existed, or had been broken. In the condition of these, whatever has been said by some writers, I can find no manner of difference; the distinction was merely technical and affected only the mode of pleading. The term in gross is appropriated in our legal language to property held absolutely, and without reference to any other. Thus it is applied to rights of advowson or of common, when possessed simply, and not as incident to any particular lands. And there can be no doubt, that it was used in the same sense for the possession of a villein. But there was a class of persons, sometimes inaccurately confounded with villeins, whom it is more important to separate. Villenage had a double sense, as it related to persons, or to lands. As all men were free or villeins, so all lands were held by a free or villein tenure. This great division of tenures was probably derived from the bocland and folkland of Saxon times. As a villein might be enfeoffed of freeholds, though they lay at the mercy of his lord, so a freeman might hold tenements in villenage. In this case his personal liberty subsisted along with the burthens of territorial servitude. He was bound to arbitrary service at the will of the lord, and he might by the same will be at any moment dispossessed; for such was the condition of his tenure. But his chattels were secure from seizure, his person from injury, and he might leave the land whenever he pleased.

From so disadvantageous a condition as this of villenage, it may cause some surprise that the peasantry of England should have ever emerged. The law incapacitating a villein from acquiring property, placed, one would imagine, an insurmountable barrier in the way of his enfranchisement. It followed from thence, and is positively said by Glanvil, that a villein could not buy his freedom, because the price he tendered would already belong to his lord. And even in the case of free tenants in villenage, it is not easy to comprehend how their uncertain and unbounded services could ever pass into slight pecuniary commutations; much less how they could come to maintain themselves in their lands, and mock the lord with a nominal tenure according to the custom of the manor.

This, like many others relating to the progress of society, is a very obscure inquiry. We can trace the pedigree of princes, fill up the catalogue of towns besieged and provinces desolated, describe even the whole pageantry of coronations and festivals, but we cannot recover the genuine history of mankind. It has passed away with slight and partial notice by contemporary writers; and our most patient industry can hardly at present put together enough of the fragments to suggest a tolerably clear representation of ancient manners and social life. I cannot profess to undertake what would require a command of books as well as leisure beyond my reach; but the following observations may tend a little to illustrate our immediate subject, the gradual extinction of villenage.

If we take what may be considered as the simplest case, that of a manor divided into demesne lands of the lord's occupation, and those in the tenure of his villeins, performing all the services of agriculture for him, it is obvious that his interest was to maintain just so many of these as his estate required for its cultivation. Land, the cheapest of articles, was the price of their labour; and though the law did not compel him to pay this or any other price, yet necessity, repairing in some degree the law's injustice, made those pretty secure of food and dwellings, who were to give the strength of their arms for his advantage. But in course of time, as alienations of small parcels of manors to free tenants came to prevail, the proprietors of land were placed in a new situation relatively to its cultivators. The tenements in villenage, whether by law or usage, were never separated from the lordship, while its domain was reduced to a smaller extent, through sub-infeudations, sales, or demises for valuable rent. The purchasers under these alienations had occasion for labourers; and these would be free servants in respect of such employers, though in villenage to their original lord. As he demanded less of their labour, through the diminution of his domain, they had more to spare for other masters; and retaining the character of villeins and the land they held by that tenure, became hired labourers in husbandry for the greater part of the year. It is true, that all their earnings were at the lord's disposal, and that he might have made a profit of their labour when he ceased to require it for his own land. But this, which the rapacity of more commercial times would have instantly suggested, might escape a feudal superior, who, wealthy beyond his wants, and guarded by the haughtiness of ancestry against the love of such pitiful gains, was better pleased to win the affection of his dependents, than to improve his fortune at their expense.

The services of villenage were gradually rendered less onerous and uncertain. Those of husbandry indeed are naturally uniform, and might be anticipated with no small exactness. Lords of generous tempers granted indulgences, which were either intended to be, or readily

became perpetual. And thus, in the time of Edward I., we find the tenants in some manors bound only to stated services, as recorded in the lord's book. Some of these, perhaps, might be villeins by blood; but free tenants in villenage were still more likely to obtain this precision in their services; and from claiming a customary right to be entered in the court-roll upon the same terms as their predecessors, prevailed at length to get copies of it for their security. Proofs of this remarkable transformation from tenants in villenage to copyholders are found in the reign of Henry III. I do not know, however, that they were protected, at so early an epoch, in the possession of their estates. But it is said in the year-book of the forty-second of Edward III., to be "admitted for clear law, that if the customary tenant or copyholder does not perform his services, the lord may seize his land as forfeited." It seems implied herein, that so long as the copyholder did continue to perform the regular stipulations of his tenure, the lord was not at liberty to divest him of his estate; and this is said to be confirmed by a passage in Britton, which has escaped my search; though Littleton intimates that copyholders could have no remedy against their lord. However, in the reign of Edward IV., this was put out of doubt by the judges, who permitted the copyholder to bring his action of trespass against the lord for dispossession.

While some of the more fortunate villeins crept up into property as well as freedom under the name of copyholders, the greater part enfranchised themselves in a different manner. The law, which treated them so harshly, did not take away the means of escape, nor was this a matter of difficulty in such a country as England. To this indeed the unequal progression of agriculture and population in different counties would have naturally contributed. Men emigrated, as they always must, in search of cheapness or employment, according to the tide of human necessities. But the villein, who had no additional motive to urge his steps away from his native place, might well hope to be forgotten or undiscovered, when he breathed a freer air, and engaged his voluntary labour to a distant master. The lord had indeed an action against him; but there was so little communication between remote parts of the country, that it might be deemed his fault or singular ill-fortune, if he were compelled to defend himself. Even, in that case, the law inclined to favour him; and so many obstacles were thrown in the way of these suits to reclaim fugitive villeins, that they could not have operated materially to retard their general enfranchisement. In one case, indeed, that of unmolested residence for a year and a day within a walled city or borough, the villein became free, and the lord was absolutely barred of his remedy. This provision is contained even in the laws of William the Conqueror, as contained in Hoveden, and if it be not an interpolation, may be supposed to have had a view to strengthen the population of those places, which were designed for

garrisons. This law, whether of William or not, is unequivocally mentioned by Glanvil, l. v. c. 5. Nor was it a mere letter. According to a record in the sixth of Edward II., Sir John Clavering sued eighteen villeins of his manor of Cossey, for withdrawing themselves therefrom with their chattels; whereupon a writ was directed to them; but six of the number claimed to be freemen, alleging the Conqueror's charter, and offering to prove that they had lived in Norwich, paying scot and lot, about thirty years; which claim was admitted.

By such means, a large proportion of the peasantry, before the middle of the fourteenth century, had become hired labourers instead of villeins. We first hear of them, on a grand scale, in an ordinance made by Edward III., in the twenty-third year of his reign. This was just after the dreadful pestilence of 1348; and it recites that the number of workmen and servants having been greatly reduced by that calamity, the remainder demanded excessive wages from their employers. Such an enhancement in the price of labour, though founded exactly on the same principles as regulate the value of any other commodity, is too frequently treated as a sort of crime by lawgivers, who seem to grudge the poor that transient melioration of their lot, which the progress of population, or other analogous circumstances, will, without any interference, very rapidly take away. This ordinance therefore enacts, that every man in England, of whatever condition, bond or free, of able body, and within sixty years of age, not living of his own, nor by any trade, shall be obliged, when required, to serve any master who is willing to hire him at such wages as were usually paid three years since, or for some time preceding: provided, that the lords of villeins or tenants in villenage shall have the preference of their labour, so that they retain no more than shall be necessary for them. More than these old wages is strictly forbidden to be offered, as well as demanded. No one is permitted, under colour of charity, to give alms to a beggar. And, to make some compensation to the inferior classes for these severities, a clause is inserted, as wise, just, and practicable as the rest, for the sale of provisions at reasonable prices.—Stat. 23 E. III.

This ordinance met with so little regard that a statute was made in parliament two years after, fixing the wages of all artificers and husbandmen, with regard to the nature and season of their labour. From this time it became a frequent complaint of the commons, that the statute of labourers was not kept. The king had in this case, probably, no other reason for leaving their grievance unredressed, than his inability to change the order of Providence. A silent alteration had been wrought in the condition and character of the lower classes during the reign of Edward III. This was the effect of increased knowledge and refinement, which had been making a considerable progress for full half a century, though they did not readily permeate the cold region of poverty and ignorance. It was natural that the country people, or out-

landish folk, as they were called, should repine at the exclusion from that enjoyment of competence, and security for the fruits of their labour, which the inhabitants of towns so fully possessed. The fourteenth century was, in many parts of Europe, the age when a sense of political servitude was most keenly felt. Thus the insurrection of the Jacquerie in France about the year 1358 had the same character, and resulted in a great measure from the same causes as that of the English peasant in 1382. And we may account in a similar manner for the democratical tone of the French and Flemish cities, and for the prevalence of a spirit of liberty in Germany and Switzerland.

I do not know whether we should attribute part of this revolutionary concussion to the preaching of Wicliffe's disciples, or look upon both one and the other as phenomena belonging to that particular epoch in the progress of society. New principles, both as to civil rule and religion, broke suddenly upon the uneducated mind, to render it bold, presumptuous, and turbulent. But at least I make little doubt that the dislike of ecclesiastical power, which spread so rapidly among the people at this season, connected itself with a spirit of insubordination and an intolerance of political subjection. Both were nourished by the same teachers, the lower secular clergy ; and however distinct we may think a religious reformation from a civil anarchy, there was a good deal common in the language, by which the populace were inflamed to either one or the other. Even the scriptural moralities which were then exhibited, and which became the foundation of our theatre, afforded fuel to the spirit of sedition. The common original, and common destination of mankind, with every other lesson of equality which religion supplies to humble or to console, were displayed with coarse and glaring features in these representations. The familiarity of such ideas has deadened their effect upon our minds ; but when a rude peasant, surprisingly destitute of religious instruction during that corrupt age of the church, was led at once to these impressive truths, we cannot be astonished at the intoxication of mind they produced.

Though I believe that, compared at least with the aristocracy of other countries, the English lords were guilty of very little cruelty or injustice, yet there were circumstances belonging to that period which might tempt them to deal more hardly than before with their peasantry. The fourteenth century was an age of greater magnificence than those which had preceded, in dress, in ceremonies, in buildings ; foreign luxuries were known enough to excite an eager demand among the higher ranks, and yet so scarce as to yield inordinate prices ; while the land-holders were on the other hand impoverished by heavy and unceasing taxation. Hence it is probable that avarice, as commonly happens, had given birth to oppression ; and if the gentry, as I am inclined to believe, had become more attentive to agricultural improvements, it is reasonable to conjecture, that those whose tenure obliged

them to unlimited services of husbandry were more harassed, than under their wealthy and indolent masters in preceding times.

The storm that almost swept away all bulwarks of civilised and regular society seems to have been long in collecting itself. Perhaps a more sagacious legislature might have contrived to disperse it; but the commons only presented complaints of the refractoriness with which villeins and tenants in villenage received their due services, and the exigencies of government led to the fatal poll-tax of a groat, which was the proximate cause of the insurrection. By the demands of these rioters, we perceive that territorial servitude was far from extinct; but it should not be hastily concluded that they were all personal villeins, for a large proportion were Kentish-men, to whom that condition could not have applied; it being a good bar to a writ de nativitate probandâ, that the party's father was born in the county of Kent.

After this tremendous rebellion, it might be expected that the legislature would use little indulgence towards the lower commons. Such unhappy tumults are doubly mischievous, not more from the immediate calamities that attend them, than from the fear and hatred of the people which they generate in the elevated classes. The general charter of manumission extorted from the king by the rioters at Blackheath was annulled by proclamation to the sheriffs; and this revocation approved by the lords and commons in parliament; who added, as was very true, that such enfranchisement could not be made without their consent; "which they would never give to save themselves from perishing altogether in one day." Riots were turned into treason by a law of the same parliament. By a very harsh statute in the twelfth of Richard II., no servant or labourer could depart, even at the expiration of his service, from the hundred in which he lived without permission under the king's seal; nor might any who had been bred to husbandry till twelve years old exercise any other calling. A few years afterwards, the commons petitioned that villeins might not put their children to school, in order to advance them by the church; "and this for the honour of all the freemen of the kingdom." In the same parliament they complained, that villeins fly to cities and boroughs, whence their masters cannot recover them; and, if they attempt it, are hindered by the people: and prayed that the lords might seize their villeins in such places, without regard to the franchises thereof. But on both these petitions the king put in a negative.[1]

From henceforward we find little notice taken of villenage in parliamentary records, and there seems to have been rapid tendency to its entire abolition. But the fifteenth century is barren of materials; and we can only infer that as the same causes, which in Edward III.'s time

[1] The statute 7 H. IV., c. 17, enacts that no one shall put his son or daughter apprentice to any trade in a borough, unless he have land or rent to the value of twenty shillings a year, but that any one may put his children to school.

had converted a large portion of the peasantry into free labourers, still continued to operate, they must silently have extinguished the whole system of personal and territorial servitude. The latter indeed was essentially changed by the establishment of the law of copyhold.

I cannot presume to conjecture in what degree voluntary manumission is to be reckoned among the means that contributed to the abolition of villenage. Charters of enfranchisement were very common upon the continent. They may perhaps have been less so in England. Indeed the statute de donis must have operated very injuriously to prevent the enfranchisement of villeins regardant, who were entailed along with the land. Instances, however, occur from time to time; and we cannot expect to discover many. One appears as early as the fifteenth year of Henry III., who grants to all persons born or to be born within his village of Contishall, that they shall be free from all villenage in body and blood, paying an aid of twenty shillings to knight the king's eldest son, and six shillings a year as a quit rent. So, in the twelfth of Edward III., certain of the king's villeins are enfranchised on payment of a fine. In strictness of law, a fine from the villein for the sake of enfranchisement was nugatory, since all he could possess was already at his lord's disposal. But custom and equity might easily introduce different maxims; and it was plainly for the lord's interest to encourage his tenants in the acquisition of money to redeem themselves rather than to quench the exertions of their industry by availing himself of an extreme right. Deeds of enfranchisement occur in the reigns of Mary and Elizabeth; and perhaps a commission of the latter princess in 1574, directing the enfranchisement of her bondmen and bondwomen on certain manors upon payment of a fine, is the last unequivocal testimony to the existence of villenage, though it is highly probable that it existed in remote parts of the country some time longer.

From this general view of the English constitution, as it stood about the time of Henry VI., we must turn our eyes to the political revolutions which clouded the latter years of his reign. The minority of this prince, notwithstanding the vices and dissensions of his court, and the inglorious discomfiture of our arms in France, was not, perhaps, a calamitous period. The country grew more wealthy; the law was, on the whole, better observed; the power of parliament more complete and effectual than in preceding times. But Henry's weakness of understanding, becoming evident as he reached manhood, rendered his reign a perpetual minority. His marriage with a princess of strong mind, but ambitious and vindictive, rather tended to weaken the government, and to accelerate his downfall; a certain reverence that had been paid to the gentleness of the king's disposition being overcome by her unpopularity. By degrees, Henry's natural feebleness degenerated almost into fatuity; and this unhappy condition seems to have overtaken him, nearly about the time when it became an arduous

task to withstand the assault in preparation against his government. This may properly introduce a great constitutional subject, to which some peculiar circumstances of our own age have imperiously directed the consideration of parliament. Though the proceedings of 1788 and 1810 are undoubtedly precedents of far more authority than any that can be derived from our ancient history, yet as the seal of the legislature has not yet been set upon this controversy, it is not, perhaps, altogether beyond the possibility of future discussion ; and, at least, it cannot be uninteresting to look back on those parallel or analogous cases, by which the deliberations of parliament upon the question of regency were guided.

While the kings of England retained their continental dominions, and were engaged in the wars to which those gave birth, they were, of course, frequently absent from this country. Upon such occasions, the administration seems at first to have devolved officially on the justiciary, as chief servant of the crown. But Henry III. began the practice of appointing lieutenants, or guardians of the realm, (custodes regni,) as they were more usually termed, by way of temporary substitutes. They were usually nominated by the king without the consent of parliament ; and their office carried with it the right of exercising all the prerogatives of the crown. It was, of course, determined by the king's return ; and a distinct statute was necessary in the reign of Henry V., to provide that a parliament called by the guardian of the realm, during the king's absence, should not be dissolved by that event.—8 H. V., c. 1. The most remarkable circumstance attending those lieutenancies was that they were sometimes conferred on the heir-apparent during his infancy. The Black Prince, then duke of Cornwall, was left guardian of the realm in 1339, when he was but ten years old ; and Richard, his son, when still younger, in 1372, during Edward III.'s last expedition into France.

These do not, however, bear a very close analogy to regencies in the stricter sense, or substitutions during the natural incapacity of the sovereign. Of such there had been several instances, before it became necessary to supply the deficiency arising from Henry's derangement. 1. At the death of John, William earl of Pembroke assumed the title of rector regis et regni, with the consent of the loyal barons who had just proclaimed the young king, and probably conducted the government in a great measure by their advice. But the circumstances were too critical, and the time is too remote, to give this precedent any material weight. 2. Edward I. being in Sicily at his father's death, the nobility met at the Temple church, as we are informed by a contemporary writer, and after making a new great seal, appointed the archbishop of York, Edward earl of Cornwall, and the earl of Gloucester, to be ministers and guardians of the realm ; who accordingly conducted the administration in the

king's name until his return. It is here observable, that the earl of Cornwall, though nearest prince of the blood, was not supposed to enjoy any superior title to the regency, wherein he was associated with two other nobles. But while the crown itself was hardly acknowledged to be unquestionably hereditary, it would be strange if any notion of such a right to the regency had been entertained. 3. At the accession of Edward III., then fourteen years old, the parliament, which was immediately summoned, nominated four bishops, four earls, and six barons as a standing council, at the head of which the earl of Lancaster seems to have been placed, to advise the king in all business of government. It was an article in the charge of treason, or, as it was then styled, of accroaching royal power, against Mortimer, that he intermeddled in the king's household without the assent of this council. They may be deemed therefore a sort of parliamentary regency, though the duration of their functions does not seem to be defined. 4. The proceedings at the commencement of the next reign are more worthy of attention. Edward III. dying June 21, 1377, the keepers of the great seal next day, in absence of the chancellor beyond sea, gave it into the young king's hand before his council. He immediately delivered it to the duke of Lancaster, and the duke to Sir Nicholas Bonde for safe custody. Four days afterwards, the king in council delivered the seal to the bishop of St. Davids, who affixed it the same day to divers letters patent. Richard was at this time ten years and six months old; an age certainly very unfit for the personal execution of sovereign authority. Yet he was supposed capable of reigning without the aid of a regency. This might be in virtue of a sort of magic ascribed by lawyers to the great seal, the possession of which bars all further inquiry, and renders any government legal. The practice of modern times, requiring the constant exercise of the sign-manual, has made a public confession of incapacity necessary in many cases, where it might have been concealed or overlooked in earlier periods of the constitution. But, though no one was invested with the office of regent, a council of twelve was named by the prelates and peers at the king's coronation, July 16, 1377, without whose concurrence no public measure was to be carried into effect. I have mentioned in another place the modifications introduced from time to time by parliament, which might itself be deemed a great council of regency during the first year of Richard. 5. The next instance is at the accession of Henry VI. This prince was but nine months old at his father's death; and whether from a more evident incapacity for the conduct of government in his case than in that of Richard II., or from the progress of constitutional principles in the forty years elapsed since the latter's accession, far more regularity and deliberation were shown in supplying the defect in the executive authority. Upon the

news arriving that Henry V. was dead, several lords, spiritual and temporal, assembled, on account of the imminent necessity, in order to preserve peace, and provide for the exercise of offices appertaining to the king. These peers accordingly issued commissions to judges, sheriffs, escheators, and others for various purposes, and writs for a new parliament. This was opened by commission under the great seal directed to the duke of Gloucester, in the usual form, and with the king's teste. Some ordinances were made in this parliament by the duke of Gloucester as commissioner, and some in the king's name. The acts of the peers who had taken on themselves the administration, and summoned parliament, were confirmed. On the twenty-seventh day of its session, it is entered upon the roll, that the king, "considering his tender age, and inability to direct in person the concern of his realm, by assent of lords and commons, appoints the duke of Bedford, or, in his absence beyond sea, the duke of Gloucester, to be protector and defender of the kingdom and English church, and the king's chief counsellor." Letters patent were made out to this effect; the appointment being, however, expressly during the king's pleasure. Sixteen counsellors were named in parliament to assist the protector in his administration; and their concurrence was made necessary to the removal and appointment of officers, except some inferior patronage specifically reserved to the protector. In all important business that should pass by order of council, the whole, or major part, were to be present; "but if it were such matter that the king hath been accustomed to be counselled of, that then the said lords proceed not therein without the advice of my lords of Bedford or Gloucester." A few more counsellors were added by the next parliament, and regulations established for their observance.

This arrangement was in contravention of the late king's testament which had conferred the regency on the duke of Gloucester, in exclusion of his elder brother. But the nature and spirit of these proceedings will be better understood by a remarkable passage in a roll of a later parliament; where the House of Lords, in answer to a request of Gloucester, that he might know what authority he possessed as protector, remind him that in the first parliament of the king, "ye desired to have had ye governaunce of yis land; affermyng yat hit belonged unto you of rygzt, as well by ye mene of your birth, as by ye laste wylle of ye kyng yat was your broyer, whome God assoile; alleggyng for you such groundes and motyves as it was yought to your discretion made for your intent; whereupon, the lords spiritual and temporal assembled there in parliament, among which were there my lordes your uncles, the bishop of Winchester that now liveth, and the duke of Exeter, and your cousin the earl of March that be gone to God, and of Warwick, and other in great number that now live, had great and long deliberation and advice, searched precedents of

the governail of the land, in the time and case semblable, when kings of this land have been tender of age, took also information of the laws of the land, of such persons as be notably learned therein, and finally found your said desire not cause nor grounded in precedent, nor in the law of the land; the which the king that dead is, in his life nor might by his last will nor otherwise altre, change, nor abroge, without the assent of the three estates, nor commit or grant to any person governance or rule of this land longer than he lived; but on that other behalf, the said lords found your said desire not according with the laws of this land, and against the right and fredome of the estates of the same land. Howe were it, that it be not thought, that any such thing wittingly proceeded of your intent; and nevertheless to keep peace and tranquillity, and to the intent to ease and appease you, it was advised and appointed by authority of the king, assenting the three estates of this land, that ye in absence of my lord, your brother of Bedford, should be chief of the king's council, and devised unto you a name different from other counsellors, not the name of tutor, lieutenant, governor, nor of regent, nor no name that should import authority of governance of the land, but the name of protector and defensor, which importeth a personal duty of attendance to the actual defence of the land, as well against enemies outward, if case required, as against rebels inward, if any were, that God forbid; granting you therewith certain power, the which is specified and contained in an act of the said parliament, to endure as long as it liked the king. In the which if the intent of the said estate had been, that ye more power and authority should have had more should have been expressed therein; to the which appointment, ordinance, and act, ye then agreed you as for your person, making nevertheless protestation, that it was not your intent in any wise to deroge, or do prejudice unto my lord your brother of Bedford by your said agreement, as toward any right that he would pretend or claim in the governance of this land, and as toward any pre-eminence that you might have or belong unto you as chief of council, it is plainly declared in the said act and articles, subscribed by my said lord of Bedford, by yourself and the other lords of the council. But as in parliament, to which ye be called upon your faith and ligeance as duke of Gloucester, as other lords be, and not otherwise, we know no power nor authority that ye have, other than ye as duke of Gloucester should have, the king being in parliament, at years of mest discretion: We marvailing with all our hearts, that considering the open declaration of the authority and power belonging to my lord of Bedford, and to you in his absence, and also to the king's council, subscribed purely and simply by my said lord of Bedford, and by you that you should in any wise be stirred or moved not to content you therewith, or to pretend you any other: Namely

considering that the king, blessed be our lord, is sith the time of said power granted unto you, far gone and grown in person, in wit and understanding, and like with the grace of God to occupy his own royal power within few years: And forasmuch considering the things and causes abovesaid, and other many that long were to write, We lords aforesaid pray, exhort, and require you, to content you with the power abovesaid and declared, of the which my lord your brother of Bedford, the king's eldest uncle, contended him; and that ye no larger power desire, will, nor use; giving you this that is aboven writen for our answer to your foresaid demand, the which we will dwell and abide with, withouten variance or changing. Over this beseeching and praying you in our most humble and lowly wise, and also requiring you in the king's name, that ye, according to the king's commandment, contained in his writ sent unto you in that behalf, come to this his present parliament, and intend to the good effect and speed of matters to be demesned and treted in the same, like as of right ye owe to do."

It is evident that this plain, or rather rude address to the duke of Gloucester, was dictated by the prevalence of Cardinal Beaufort's party in council and parliament. But the transactions in the former parliament are not unfairly represented; and comparing them with the passage extracted above, we may perhaps be entitled to infer: 1. That the king does not possess any constitutional prerogative of appointing a regent during the minority of his successor; and 2. That neither the heir presumptive, nor any other person, is entitled to exercise the royal prerogative during the king's infancy, (or, by parity of reasoning, his infirmity,) nor to any title that conveys them; the sole right of determining the persons by whom, and fixing the limitations under which, the executive government shall be conducted in the king's name and behalf, devolving upon the great council of parliament.

The expression used in the lords' address to the duke of Gloucester, relative to the young king, that he was far gone and grown in person, wit, and understanding, was not thrown out in mere flattery. In two years the party hostile to Gloucester's influence had gained ground enough to abrogate his office of protector, leaving only the honorary title of chief counsellor.—8 H. VI. For this the king's coronation, at eight years of age, was thought a fair pretence; and undoubtedly the loss of that exceedingly limited authority, which had been delegated to the protector, could not have impaired the strength of government. This was conducted as before by a selfish and disunited council; but the king's name was sufficient to legalise their measures, nor does any objection appear to have been made in parliament to such a mockery of the name of monarchy.

In the year 1454, the thirty-second of Henry's reign, his unhappy malady, transmitted perhaps from his maternal grandfather, assumed

so decided a character of derangement or imbecility, that parliament could no longer conceal from itself the necessity of a more efficient ruler. This assembly, which had been continued by successive prorogations for nearly a year, met at Westminster on the 14th of February, when the session was opened by the duke of York, as king's commissioner. Kemp, archbishop of Canterbury and chancellor of England, dying soon afterwards, it was judged proper to acquaint the king at Windsor by a deputation of twelve lords with this and other subjects concerning his government. In fact, perhaps, this was a pretext chosen in order to ascertain his real condition. These peers reported to the lords' house, two days afterwards, that they had opened to his majesty the several articles of their message, but "could get no answer ne sign for no prayer ne desire," though they repeated their endeavours at three different interviews. This report, with the instruction on which it was founded, was, at their prayer, entered of record in parliament. Upon so authentic a testimony of their sovereign's infirmity, the peers, adjourning two days for solemnity or deliberation, "elected and nominated Richard, duke of York, to be protector and defender of the realm of England during the king's pleasure." The duke, protesting his insufficiency, requested "that in this present parliament, and by authority thereof, it be enacted, that of yourself and of your ful and mere disposition, ye desire, name, and call me to the said name and charge, and that of any presumption of myself, I take them not upon me, but only of the due and humble obeisance that I owe me to do unto the king, our most dread and sovereign lord, and to you the peerage of this land, in whom, by the occasion of the infirmity of our said sovereign lord, resteth the exercise of his authority, whose noble commandments I am as ready to perform and obey as any his liegeman alive, and that at such time as it shall please our blessed Creator to restore his most noble person to healthful disposition, it shall like you so to declare and notify to his good grace." To this protestation the lords answered, that for his and their discharge, an act of parliament should be made, conformably to that enacted in the king's infancy, since they were compelled by an equal necessity again to choose and name a protector and defender. And to the duke of York's request to be informed how far the power and authority of his charge shall extend, they replied, that he should be chief of the king's council, and "devised therefore to the said duke a name different from other counsellors, not the name of tutor, lieutenant, governor, nor of regent, nor no name that shall import authority of governance of the land, but the said name of protector and defensor;" and so forth, according to the language of their former address to the duke of Gloucester. An act was passed, accordingly, constituting the duke of York protector of the church and kingdom, and chief counsellor of the king during the latter's pleasure; or until the prince of Wales should attain years of discretion, on whom the said

dignity was immediately to devolve. The patronage of certain spiritual benefices was reserved to the protector, according to the precedent of the king's minority, which parliament was resolved to follow in every particular.

It may be conjectured, by the provision made in favour of the prince of Wales, then only two years old, that the king's condition was supposed to be beyond hope of restoration. But in about nine months, he recovered sufficient speech and recollection to supersede the duke of York's protectorate. The succeeding transactions are matter of familiar, though not, perhaps, very perspicuous history. The king was a prisoner in his enemies' hands after the affair at St. Albans, when parliament met in July, 1455. In this session little was done, except renewing the strongest oaths of allegiance to Henry and his family. But the two houses meeting again after a prorogation to November 12, during which time the duke of York had strengthened his party, and was appointed by commission the king's lieutenant to open the parliament, a proposition was made by the commons, that "whereas the king had deputed the duke of York as his commissioner to proceed in this parliament, it was thought by the commons, that if the king hereafter could not attend to the protection of the country, an able person should be appointed protector, to whom they might have recourse for redress of injuries; especially as great disturbances had lately arisen in the west through the feuds of the earl of Devonshire and lord Bonvile. The archbishop of Canterbury answered for the lords, that they would take into consideration what the commons had suggested. Two days afterwards, the latter appeared again with a request conveyed nearly in the same terms. Upon their leaving the chamber, the archbishop, who was also chancellor, moved the peers to answer what should be done in respect of the request of the commons; adding that "it is understood, that they will not further proceed in matters of parliament, to the time that they have answer to their desire and request." This naturally ended in the re-appointment of the duke of York to his charge of protector. The commons indeed were determined to bear no delay. As if ignorant of what had been resolved in consequence of their second request, they urged it a third time, on the next day of meeting; and received for answer that "the king, our said sovereign lord, by the advice and assent of his lords spiritual and temporal being in this present parliament, had named and desired the duke of York to be protector and defensor of this land." It is worthy of notice that in these words, and indeed in effect, as appears by the whole transaction, the House of Peers assumed an exclusive right of choosing the protector, though in the act passed to ratify their election, the commons' assent, as a matter of course, is introduced. The last year's precedent was followed in the present instance, excepting a remarkable deviation; instead of the words "during the king's pleasure," the duke was to hold his office "until he should be discharged of it by the lords in parliament."

This extraordinary clause, and the slight allegations on which it was thought fit to substitute a vicegerent for the reigning monarch, are sufficient to prove, even if the common historians were silent, that whatever passed as to this second protectorate of the duke of York was altogether of a revolutionary complexion. In the actual circumstances of civil blood already spilled and the king in captivity, we may justly wonder that so much regard was shown to the regular forms and precedents of the constitution. But the duke's natural moderation will account for part of this, and the temper of the lords for much more. That assembly appears for the most part to have been faithfully attached to the house of Lancaster. The partisans of Richard were found in the commons, and among the populace. Several months elapsed after the victory of St. Albans, before an attempt was thus made to set aside a sovereign, not labouring, so far as we know, under any more notorious infirmity than before. It then originated in the commons, and seems to have received but an unwilling consent from the upper house. Even in constituting the duke of York protector over the head of Henry, whom all men despaired of ever seeing in a state to face the dangers of such a season, the lords did not forget the rights of his son. By this latter instrument as well as by that of the preceding year, the duke's office was to cease upon the prince of Wales arriving at the age of discretion.

But what had been propagated in secret, soon became familiar to the public ear; that the duke of York laid claim to the throne. He was unquestionably heir general of the royal line, through his mother, Anne, daughter of Roger Mortimer, earl of March, son of Philippa, daughter of Lionel, duke of Clarence, third son of Edward III. Roger Mortimer's eldest son, Edmund, had been declared heir presumptive by Richard II.; but his infancy during the revolution that placed Henry IV. on the throne had caused his pretensions to be passed over in silence. The new king, however, was induced by a jealousy natural to his situation to detain the earl of March in custody. Henry V. restored his liberty; and, though he had certainly connived for a while at the conspiracy planned by his brother-in-law, the earl of Cambridge, and lord Scrope of Masham, to place the crown on his head, that magnanimous prince gave him a free pardon, and never testified any displeasure. The present duke of York was honoured by Henry VI. with the highest trusts in France and Ireland; such as Beaufort and Gloucester could never have dreamed of conferring on him, if his title to the crown had not been reckoned obsolete. It has been very pertinently remarked, that the crime perpetrated by Magaret and her counsellors in the death of the duke of Gloucester was the destruction of the house of Lancaster. From this time the duke of York, next heir in presumption while the

king was childless, might innocently contemplate the prospect of royalty; and when such ideas had long been passing through his mind, we may judge how reluctantly the birth of prince Edward, nine years after Henry's marriage, would be admitted to disturb them. The queen's administration unpopular, careless of national interest, and partial to his inveterate enemy, the duke of Somerset; the king incapable of exciting fear or respect; himself conscious of powerful alliances and universal favour; all these circumstances combined could hardly fail to nourish these opinions of hereditary right, which he must have imbited from his infancy.

The duke of York preserved through the critical season of rebellion such moderation and humanity, that we may pardon him that bias in favour of his own pretensions, to which he became himself a victim. Margaret, perhaps, by her sanguinary violence in the Coventry parliament of 1460, where the duke and all his adherents were attainted, left him not the choice of remaining a subject with impunity. But with us, who are to weigh these ancient factions in the balance of wisdom and justice, there should be no hesitation in deciding that the house of Lancaster were lawful sovereigns of England. I am indeed astonished, that not only such historians as Carte, who wrote undisguisedly upon a Jacobite system, but even men of juster principles, have been inadvertent enough to mention the right of the house of York. If the original consent of the nation, if three descents of the crown, if repeated acts of parliament, if oaths of allegiance from the whole kingdom, and more particularly from those who now advanced a contrary pretension, if undisturbed, unquestioned possession during sixty years, could not secure the reigning family against a mere defect in their genealogy, when were the people to expect tranquillity? Sceptres were committed, and governments were instituted, for public protection and public happiness, not certainly for the benefit of rulers, or for the security of particular dynasties. No prejudice has less in its favour, and none has been more fatal to the peace of mankind, than that which regards a nation of subjects as a family's private inheritance. For, as this opinion induces reigning princes and their courtiers to look on the people as made only to obey them, so when the tide of events has swept them from their thrones, it begets a fond hope of restoration, a sense of injury and of imprescriptible rights, which give the show of justice to fresh disturbances of public order, and rebellions against established authority. Even in cases of unjust conquest, which are far stronger than any domestic revolution, time heals the injury of wounded independence, the forced submission to a victorious enemy is changed into spontaneous allegiance to a sovereign, and the laws of God and nature enjoin the obedience that is challenged by reciprocal benefits. But far more does every national government, however violent in its origin, become

legitimate, when universally obeyed and justly exercised, the possession drawing after it the right; not certainly that success can alter the moral character of actions, or privilege usurpation before the tribunal of human opinion, or in the pages of history, but that the recognition of a government by the people is the binding pledge of their allegiance so long as its corresponding duties are fulfilled. And thus the law of England has been held to annex the subject's fidelity to the reigning monarch, by whatever title he may have ascended the throne, and whoever else may be its claimant. But the statute of 11th. of Henry VII., c. 1, has furnished an unequivocal commentary upon this principle; when, alluding to the condemnations and forfeitures by which those alternate successes of the white and red roses had almost exhausted the noble blood of England, it enacts that "no man for doing true and faithful service to the king for the time being, be convict or attaint of high treason, nor of other offences, by act of parliament or otherwise."

Though all classes of men and all parts of England were divided into factions by this unhappy contest, yet the strength of the Yorkists lay in London and the neighbouring counties, and generally among the middling and lower people. And this is what might naturally be expected. For notions of hereditary right take easy hold of the populace, who feel an honest sympathy for those whom they consider as injured; while men of noble birth and high station have a keener sense of personal duty to their sovereign, and of the baseness of deserting their allegiance. Notwithstanding the wide-spreading influence of the Nevils, most of the nobility were well affected to the reigning dynasty. We have seen how reluctantly they acquiesced in the second protectorate of the duke of York, after the battle of St. Albans. Thirty-two temporal peers took an oath of fealty to Henry and his issue in the Coventry parliament of 1460, which attainted the duke of York and the earls of Warwick and Salisbury. And, in the memorable circumstances of the duke's claim, personally made in parliament, it seems manifest, that the lords complied not only with hesitation, but unwillingness; and, in fact, testified their respect and duty for Henry by confirming the crown to him during his life. The rose of Lancaster blushed upon the banners of the Staffords, the Percies, the Veres, the Hollands, and the Courtneys. All these illustrious families lay crushed for a time under the ruins of their party. But the course of fortune, which has too great a mastery over crowns and sceptres to be controlled by men's affection, invested Edward IV. with a possession, which the general consent of the nation both sanctioned and secured. This was effected in no slight degree by the furious spirit of Margaret, who began a system of extermination by acts of attainder, and execution of prisoners, that created abhorrence, though it did not prevent imitation. And the

barbarities of her northern army, whom she led towards London after the battle of Wakefield, lost the Lancastrian cause its former friends, and might justly convince reflecting men, that it were better to risk the chances of a new dynasty, than trust the kingdom to an exasperated faction.

A period of obscurity and confusion ensues, during which we have as little insight into constitutional as general history. There are no contemporary chroniclers of any value, and the rolls of parliament, by whose light we have hitherto steered, become mere registers of private bills, or of petitions relating to commerce. The reign of Edward IV. is the first during which no statute was passed for the redress of grievances, or maintenance of the subject's liberty. Nor is there, if I am correct, a single petition of this nature upon the roll. Whether it were that the commons had lost too much of their ancient courage to present any remonstrances, or that a wilful omission has vitiated the record, is hard to determine; but we certainly must not imagine, that a government cemented with blood poured on the scaffold as well as in the field, under a passionate and unprincipled sovereign, would afford no scope for the just animadversion of parliament. The reign of Edward IV. was a reign of terror. One-half of the noble families had been thinned by prescription; and though generally restored in blood by the reversal of their attainders, a measure certainly deserving of much approbation, were still under the eyes of vigilant and inveterate enemies. The opposite faction would be cautious how they resisted a king of their own creation, while the hopes of their adversaries were only dormant. And indeed, without relying on this supposition, it is commonly seen, that when temporary circumstances have given a king the means of acting in disregard of his subjects' privileges, it is a very difficult undertaking for them to recover a liberty, which has no security so effectual as habitual possession.

Besides the severe proceedings against the Lancastrian party, which might be extenuated by the common pretences, retaliation of similar proscriptions, security for the actual government, or just punishment of rebellion against a legitimate heir, there are several reputed instances of violence and barbarity in the reign of Edward IV., which have not such plausible excuses. Every one knows the common stories of the citizen who was attainted of treason for an idle speech that he would make his son heir to the crown, the house where he dwelt: and of Thomas Burdett, who wished the horns of his stag in the belly of him who had advised the king to shoot it. Of the former I can assert nothing, though I do not believe it to be accurately reported. But certainly the accusation against Burdett, however iniquitous, was not confined to these frivolous words; which indeed do not appear in his

indictment, or in a passage relative to his conviction in the roll of parliament. Burdett was a servant and friend of the duke of Clarence, and sacrificed as a preliminary victim. It was an article of charge against Clarence that he had attempted to persuade the people that "Thomas Burdett his servant, which was lawfully and truly attainted of treason, was wrongfully put to death." There could indeed be no more oppressive usage inflicted upon meaner persons, than this attainder of the duke of Clarence, an act for which a brother could not be pardoned, had he been guilty; and which deepens the shadow of a tyrannical age, if, as it seems, his offence toward Edward was but levity and rashness.

But whatever acts of injustice we may attribute, from authority or conjecture, to Edward's government, it was very far from being unpopular. His love of pleasure, his affability, his courage, and beauty, gave him a credit with his subjects, which he had no real virtues to challenge. This restored him to the throne, even against the prodigious influence of Warwick, and compelled Henry VII. to treat his memory with respect, and acknowledge him as a lawful king.[1] The latter years of his reign were passed in repose at home after scenes of unparalleled convulsions, and in peace abroad, after more than a century of expensive warfare. His demands of subsidy were therefore moderate, and easily defrayed by a nation who were making rapid advances towards opulence. According to Sir John Fortescue, nealy one-fifth of the whole kingdom had come to the king's hand by forfeiture, at some time or other since the commencement of his reign. Many indeed of these lands had been restored, and others lavished away in grants, but the surplus revenue must still have been considerable.

[1] The rolls of Henry VII.'s first parliament are full of an absurd confusion in thought and language, which is rendered odious by the purposes to which it is applied. Both Henry VI. and Edward IV. are considered as lawful kings: except in one instance, where Alan Cotterell, petitioning for the reversal of his attainder, speaks of Edward "late called Edward IV." (vol. vi. p. 290). But this is only the language of a private Lancastrian. And Henry VI. passes for having been king during his short restoration in 1470, when Edward had been nine years upon the throne. For the earl of Oxford is said to have been attainted "for the true allegiance and service he owed and did to Henry VI., at Barnet field and otherwise," (p. 281). This might be reasonable enough on the true principle, that allegiance is due to a king *de facto;* if indeed we could determine who was the king de facto on the morning of the battle of Barnet. But this principle was not fairly recognised. Richard III. is always called, "in deed and not in right king of England." Nor was this merely founded on his usurpation as against his nephew. For that unfortunate boy is little better treated, and in the act of resumption, 1 Henry VII., while Edward IV. is styled "late king," appears only with the denomination of "Edward his son, late called Edward V.," (p. 336). Who then was king after the death of Edward IV.? And was his son really illegitimate, as an usurping uncle pretended? Or did the crime of Richard, though punished in him, inure to the benefit of Henry? These were points which, like the fate of the young princes in the Tower, he chose to wrap in discreet silence. But the first question he seems to have answered in his own favour. For Richard himself, Howard, duke of Norfolk, lord Lovel, and some others, are attainted (p. 276) for "traitorously intending, compassing, and imagining" the death of Henry; of course before or at the battle of Bosworth; and while his right, unsupported by possession, could have rested only on an hereditary title, which it was an insult to the nation to prefer. These monstrous proceedings explain the necessity of that conservative statute to which I have already alluded, which passed in the eleventh year of his reign, and afforded as much security for men following the plain line of rallying round the standard of their country as mere law can offer.

Edward IV. was the first who practised a new method of taking his subjects' money without consent of parliament, under the plausible name of benevolences. These came in place of the still more plausible loans of former monarchs, and were principally levied on the wealthy traders. Though no complaint appears in the parliamentary records of his reign, which, as has been observed, complain of nothing, the illegality was undoubtedly felt and resented. In the remarkable address to Richard by that tumultuary meeting which invited him to assume the crown, we find, among general assertions of the state's decay through misgovernment, the following strong passage: "For certainly we be determined rather to aventure and committe as to the peril of owre lyfs and jopardie of deth, than to lyve in such thraldome and bondage as we have lyved long tyme heretofore oppressed and injured by extortions and newe impositions, ayenst the lawes of God and man, and the libertie, old policie, and lawes of this realme, whereyn every Englishman is inherited." Accordingly, in Richard III.'s only parliament, an act was passed, which, after reciting in the strongest terms the grievances lately endured, abrogates and annuls for ever all exactions, under the name of benevolence. The liberties of this country were at least not directly impaired by the usurpation of Richard. But from an act so deeply tainted with moral guilt, as well as so violent in all its circumstances, no substantial benefit was likely to spring. Whatever difficulty there may be, and I confess it is not easy to be surmounted, in deciding upon the fate of Richard's nephews after they were immured in the Tower, the more public parts of the transaction bear unequivocal testimony to his ambitious usurpation. It would therefore be foreign to the purpose of this work to dwell upon his assumption of the regency, or upon the sort of election, however curious and remarkable, which gave a pretended authority to the usurpation of the throne. Neither of these has ever been alleged by any party in the way of constitutional precedent.

At this epoch I terminate these inquiries into the English constitution; a sketch very imperfect, I fear, and unsatisfactory, but which may at least answer the purpose of fixing the reader's attention on the principal objects, and of guiding him to the purest fountains of constitutional knowledge. From the accession of the house of Tudor a new period is to be dated in our history; far more prosperous in the diffusion of opulence and the preservation of general order than the preceding, but less distinguished by the spirit of freedom and jealousy of tyrannical power. We have seen, through the twilight of our Anglo-Saxon records, a form of civil polity established by our ancestors, marked, like the kindred governments of the continent, with aboriginal Teutonic features; barbarous indeed, and insufficient for the great ends of society, but capable and worthy of the improvement it has received, because actuated by a sound and vital spirit, the love of freedom and of justice. From these principles arose that venerable institution, which none but a free and

simple people could have conceived, trial by peers; an institution common in some degree to other nations, but which, more widely extended, more strictly retained, and better modified among ourselves, has become perhaps the first, certainly among the first, of our securities against arbitrary government. We have seen a foreign conqueror and his descendants trample almost alike upon the prostrate nation, and upon those who had been companions of their victory, introduce the servitudes of feudal law with more than their usual rigour, and establish a large revenue by continual precedents upon a system of universal and prescriptive extortion. But the Norman and English races, each unfit to endure oppression, forgetting their animosities in a common interest, enforce by arms the concession of a great charter of liberties. Privileges, wrested from one faithless monarch, are preserved with continual vigilance against the machinations of another; the rights of the people become more precise, and their spirit more magnanimous during the long reign of Henry III. With greater ambition and greater abilities than his father, Edward I. attempts in vain to govern in an arbitrary manner, and has the mortification of seeing his prerogative fettered by still more important limitations. The great council of the nation is opened to the representatives of the commons. They proceed by slow and cautious steps to remonstrate against public grievances, to check the abuses of administration, and sometimes to chastise public delinquency in the officers of the crown. A number of remedial provisions are added to the statutes; every Englishman learns to remember that he is the citizen of a free state, and to claim the common law as his birthright, even though the violence of power should interrupt its enjoyment. It were a strange misrepresentation of history to assert, that the constitution had attained anything like a perfect state in the fifteenth century; but I know not whether there are any essential privileges of our countrymen, any fundamental securities against arbitrary power, so far as they depend upon positive institution, which may not be traced to the time when the house of Plantagenet filled the English throne.

THE

CONSTITUTION OF ENGLAND.

BY

J. L. DE LOLME.

J. L. DE LOLME

ON THE

CONSTITUTION

OF

ENGLAND.

ADVERTISEMENT.—The Book on the English constitution, of which a new edition is here offered to the public, was first written in French and published in Holland. Several persons have asked me the question, How I came to think of treating of such a subject? One of the first things in this country, that engage the attention of a stranger who is in the habit of observing the objects before him, is the peculiarity of its government: I had moreover been lately a witness of the broils which had for some time prevailed in the republic in which I was born, and of the revolution by which they were terminated. Scenes of that kind, in a state which, though small, is independent and contains within itself the principles of its motions, had naturally given me some competent insight into the first real principles of governments: owing to this circumstance, and perhaps also to some moderate share of natural abilities, I was enabled to perform the task I had undertaken with tolerable success. I was twenty-seven years old when I came to England: after having been in it only a year I began to write my work, which I published about nine months afterwards; and have since been surprised to find that I had committed so few errors of a certain kind: I certainly was fortunate in avoiding to enter deeply into those articles with which I was not sufficiently acquainted.

The book met with rather a favourable reception on the continent; several successive editions having been made of it. And it also met here with approbation, even from men of opposite parties; which, in England, was no small luck for a book on systematical politics. Allowing that the arguments had some connection and clearness, as well as novelty, I think the work was of peculiar utility, if the epoch at which it was published is considered; which was, though without any design from me, at the time when the disputes with the colonies were beginning to take a serious turn, both here and in America.—A work which contained a specious, if not thoroughly true, confutation of those

political notions, by the help of which a disunion of the empire was endeavoured to be promoted (which confutation was moreover noticed by men in the highest places), should have procured to the author some sort of real encouragement; at least the publication of it should not have drawn him into any inconvenient situation. When my enlarged English edition was ready for the press, had I acquainted ministers that I was preparing to boil my tea-kettle with it, for want of being able conveniently to afford the expense of printing it, I do not pretend to say what their answer would have been; but I am firmly of opinion that, had the like arguments in favour of the existing government of this country, against republican principles, been shown to Charles the First, or his ministers, at a certain period of his reign, they would have very willingly defrayed the expenses of the publication. In defect of encouragement from great men (and even from booksellers) I had recourse to a subscription; and my having expected any success from such a plan, shows that my knowledge of this country was at that time very incomplete.

After mentioning the advantages with which my work has not been favoured, it is, however, just that I should give an account of those by which it has been attended. In the first place, as is above said, men of high rank have condescended to give their approbation to it; and I take this opportunity of returning them my most humble acknowledgements. In the second place, after the difficulties, by which the publication of the book had been attended and *followed*, were overcome, I began to share with booksellers in the profit arising from the sale of it. These profits I indeed thought to be but scanty and slow: but then I considered this was no more than the common complaint made by every trader in regard to his gain, as well as by every great man in regard to his emoluments and his pensions. After a course of some years, the net balance, formed by the profits in question, amounted to a certain sum, proportioned to the size of the performance. And, in fine, I must add to the account of the many favours I have received, that I was allowed to carry on the above business of selling my book, without any objection being formed against me from my not having served a regular apprenticeship, and without being molested by the inquisition. Several authors have chosen to relate, in writings published after death, the personal advantages by which their performances had been followed: as for me, I have thought otherwise; and, fearing that during the latter part of my life I may be otherwise engaged, I have preferred to write now the account of my successes in this country, and to see it printed while I am yet living.

I shall add to the above narrative (whatever the reader may be pleased to think of it) a few observations of rather a more serious kind, for the sake of those persons who, judging themselves to be possessed of abilities, find they are neglected by such as have it in their power

to do them occasional services, and suffer themselves to be mortified by it. To hope that men will in earnest assist in setting forth the mental qualification of others, is an expectation which, generally speaking, must needs be disappointed. To procure one's notions and opinions to be attended to, and approved by the circles of one's acquaintance, is the universal wish of mankind. To diffuse these notions farther, to numerous parts of the public, by means of the press or by others, becomes an object of real ambition; nor is this ambition always proportioned to the real abilities of those who feel it: very far from it. When the approbation of mankind is in question, all persons, whatever their different ranks may be, consider themselves as being engaged in the same career; they look upon themselves as being candidates for the very same kind of advantage: high and low, all are in that respect in a state of primæval equality; nor are those who are likely to obtain some prize, to expect much favour from the others.

This desire of having their ideas communicated to, and approved by, the public, was very prevalent among the great men of the Roman commonwealth, and afterwards with the Roman emperors; however imperfect the means of obtaining those ends might be in those days, compared with those which are used in ours. The same desire has been equally remarkable among modern European kings, not to speak of other parts of the world; and a long catalogue of royal authors may be produced. Ministers, especially after having lost their places, have shown no less inclination than their masters, to convince mankind of the reality of their knowledge. Noble persons of all denominations, have increased the catalogue. And, to speak of the country in which we are, there is, it seems, no good reason to make any exception in regard to it; and great men in it, or in general those who are at the head of the people, are, we find, sufficiently anxious about the success of their speeches, or of the printed performances which they sometimes condescend to lay before the public: nor has it been every great man, wishing that a compliment may be paid to his personal knowledge, that has ventured to give such lasting specimens.

Several additions were made to this work at the time I gave the first English edition of it. Besides a more accurate division of the chapters, several new notes and paragraphs were inserted in it. Three additional chapters, never having been written by me in French, were inserted in the third edition made at Amsterdam, translated by a person whom the Dutch bookseller employed for that purpose: as I never had an opportunity to peruse a copy of that edition, I cannot say how well the translator performed his task. Having now parted with the copy-right of the book, I have farther added four new chapters to it, by way of taking a final leave of it.

In one of the former additional chapters mention is made of a peculiar circumstance attending the English government, considered as a monarchy, which is the solidity of the power of the crown. As one proof of this peculiar solidity, it is remarked, in that chapter, that all the monarchs who ever existed, in any part of the world, were never able to maintain their ground against certain powerful subjects (or a combination of them) without the assistance of regular forces at their constant command; whereas it is evident that the power of the crown, in England, is not at this day supported by such means; nor even had the English kings a guard of more than a few scores of men, when their power, and the exertions they at times made of it, were equal to what has ever been related of the most absolute Roman emperors.

The cause of this peculiarity in the English government, is said, in the same chapter, to lie in the circumstance of the great or powerful men, in England, being divided into two distinct assemblies, and, at the same time, in the principles on which such a division is formed. To attempt to give a demonstration of this assertion otherwise than by facts (as is done in the chapter here alluded to) would lead into difficulties which the reader is little aware of. In general, the science of politics, considered as an *exact science*,—that is to say, as a science, capable of actual demonstration,—is infinitely deeper than the reader suspects. The knowledge of man, on which such a science, with its preliminary *axioms* and *definitions*, is to be grounded, has hitherto remained surprisingly imperfect; as one instance how little man is known to himself, it might be mentioned that no tolerable explanation of that continual human phenomenon, laughter, has been yet given; and the powerful complicate sensation which each sex produces in the other, still remains an equally inexplicable mystery.

To conclude the above digression (which may do very well for a preface), I shall only add, that those speculators who will amuse themselves in seeking for the *demonstration* of the politic theorem above expressed, will thereby be led through a field of observations, which they will at first little expect; and in their way towards attaining such demonstration, will find the science, commonly called metaphysics, to be at best but a very superficial one, and that the mathematics, or at least the mathematical reasonings hitherto used by men, are not so completely free from error as has been thought.

Out of the four chapters added to the present edition, two contain, among other things, a few strictures on the Courts of Equity; in which, I wish it may be found I have not been mistaken; of the two others, one contains a few observations on the attempts that may, in different circumstances, be made, to set new limits to the authority of the crown; and a few general thoughts are introduced on the right of taxation, and on the claims of the American colonies in that respect.

Nov. 1781.

POSTSCRIPT.—Notwithstanding the intention above expressed, of making no additions to the present work, I have found it necessary, in this new edition, to render somewhat more complete the chapter *On the peculiar foundations of the English monarchy:* as I found its tendency not to be very well understood; and, in fact, that chapter contained little more than hints on the subject mentioned in it: the task, in the course of writing, has increased beyond my expectation, and has swelled the chapter, so as almost to make it a kind of separate book by itself. The reader will now find that, in several remarkable new instances, it proves the fact of the peculiar *stability* of the executive power of the British crown, and exhibits a much more complete delineation of the advantages that result from the stability in favour of public liberty.

These advantages may be enumerated in the following order:—I. The numerous restraints the governing authority is able to bear, and the extensive freedom it can afford to allow the subject, at its own expense: II. The liberty of speaking and writing, carried to the great extent it is in England: III. The unbounded freedom of the debates in the legislature: IV. The power to bear the constant union of all orders of subjects against its prerogatives: V. The freedom allowed to all individuals to take an active part in government concerns: VI. The strict impartiality with which justice is dealt to all subjects, without any respect whatever of persons: VII. The lenity of the criminal law, both in regard to the mildness of punishments, and the frequent remission of them: VIII. The strict compliance of the governing authority with the letter of the law: IX. The needlessness of an armed force to support itself by, and, as a consequence, the singular subjection of the military to the civil power.

The above-mentioned advantages are peculiar to the English government. To attempt to imitate them, or transfer them to other countries, with that degree of extent to which they are carried in England, without at the same time transferring the whole order and conjunction of circumstances in the English government, would prove unsuccessful attempts. Several articles of English liberty already appear impracticable to be preserved in the new American commonwealths. The Irish nation have of late succeeded in imitating several very important regulations in the English government, and are very desirous to render the assimilation complete; yet, it is possible, they will find many inconveniences arise from their endeavours, which do not take place in England, notwithstanding the very great general similarity of circumstances in the two kingdoms in many respects; and even also, we might add, notwithstanding the respectable power and weight the crown derives from its British dominions, both for defending its prerogative in Ireland, and preventing anarchy; I say, the similarity in

many respects between the two kingdoms; for this resemblance may perhaps fail in regard to some important points.

The last chapter in the work, concerning the nature of the *divisions that take place in this country*, I have left in every English edition as I wrote it at first in French. With respect to the exact manner of the debates in parliament, mentioned in that chapter, I cannot well say more at present than I did at that time, as I never had an opportunity to hear the debates in either house. In regard to the divisions in general to which the spirit of party gives rise, I did perhaps the bulk of the people somewhat more honour than they really deserve, when I represented them as being free from any violent dispositions in that respect; I have since found, that, like the bulk of mankind in all countries, they suffer themselves to be influenced by vehement prepossessions for this or that side of public questions, commonly in proportion as their knowledge of the subject is imperfect. It is, however, a fact, that political prepossessions and party spirit are not productive, in this country, of those dangerous consequences which might be feared from the warmth with which they are sometimes manifested. But this subject, or in general the subjects of the political quarrels and divisions in this country, is not an article one may venture to meddle with in a single chapter; I have therefore let this subsist, without touching it.

I shall however observe, before I conclude, that an accidental circumstance in the English government prevents the party spirit, by which the public are usually influenced, from producing those lasting and rancorous divisions in the community which have pestered so many other free states, making of the same nation, as it were, two distinct people, in a kind of constant warfare with each other. The circumstance I mean is, the frequent reconciliations (commonly to quarrel again afterward) that take place between the leaders of parties, by which the most violent and ignorant class of their partisans are bewildered, and made to lose the scent. By the frequent coalitions between *whig* and *tory* leaders, even that party distinction, the most famous in the English history, has now become useless: the meaning of the words has hereby been rendered so perplexed that nobody can any longer give a tolerable definition of them; and those persons who now and then aim at gaining popularity by claiming the merit of belonging to either party, are scarcely understood. The late *coalition* between two certain leaders has done away, and prevented from settling, that violent party spirit to which the administration of lord Bute had given rise, and which the American disputes had carried still farther. Though this coalition has met with much obloquy, I take the liberty to rank myself in the number of its advocates, so far as the circumstance here mentioned.

May, 1784.

PREFACE, BY EDITOR OF EDITION. 1821.*

To say much in commendation of the Essay of De Lolme upon the Constitution of England, that has stood the test of years and obtained a standard celebrity in the political and literary world, would be as useless to the author's reputation, as it would be a vain exertion of editorial labor. Yet it may not perhaps be out of the way to observe, that what was formerly the judgment of the learned upon the subject of English history, is now their prevailing opinion in regard to the English constitution; the best treatise upon it is the production of a foreigner. Existence, thought, sensation, the faculties of the mind in general, these men are sensible they enjoy; but what they are, whence they spring, or how they act, they are incapable of giving a tolerable guess at. And Englishmen for a length of period have had a politic frame of government, a constitutional system of rights and privileges, the perception of which would seem to claim a birth within them, coeval with the primary animation of their souls; but the true principles of which, in a philosophical point, in vain have they endeavoured to search, in vain have they attempted to display. This has been a task and an honor reserved for the talents of John Louis De Lolme, the compatriot of Calvin, and Rousseau; all of whom, however distinct their powers of mind, and opposite their pursuits, are united in conferring celebrity upon their native place, Geneva.

Of the life of our admirable author but few things are related; the time of his birth is doubtful; it is to be gathered by comparison, and not to be affirmed from positive information. We suppose him to have been born in or about 1741. That his family was respectable is agreed upon by his biographers in general, and that they were of gentle descent is indicated by the form of their name. He received a liberal education, and was bred to the law. His practice in that profession was but of short continuance. For what reason he deserted it is not satisfactorily stated; but the editor has somewhere read, he was induced to this step by the distractions of his native country, in the government of which he had held an honourable station as a member of the Council of Two Hundred. Leaving Geneva he came to England. Without delay he made our language, our laws, our history, our political frame, the ardent object of his research and studies; with what success the work before us declares. His arrival in this country must have been about the year 1768. In the year 1770 his Essay was published in the French language. It was most favourably received on the Continent, and applauded by all parties here: and yet it is said the sale did not remunerate the expenses: to make up for which the next year (1771) he attempted to dispose of an English translation by

* Of which this is a reprint.—A.M.

subscription. In the year 1775, after being enlarged and improved, the translation appeared before the public, unaccompanied by the names of any subscribers ; and as the author feelingly observed in the preface, *not without being followed by difficulties.* "His fate, it has been remarked, was not happier than that of too many whose labours have delighted and illumined the world. He was extolled, and neglected ; loaded with commendation, and consigned to poverty."

Our author resided many years in London as a professed literary adventurer, dependent upon the patronage of the trade. But it is recorded, that none of his works except the Essay was productive of any considerable emolument. Of this work he sold the copyright in 1781, until which time he was accustomed to publish upon his own account.

De Lolme was a man of genius, and possessed much of the imprudent eccentricity of conduct, too generally the companion of that brilliant quality. Expensive in his habits, he was one whom no ordinary provision would satisfy. His literary labours were insufficient for his wants. These he was accustomed to aid by adventuring in the Stocks, in which he was for a time successful ; but fortune at length deserted him. He was frequently in straitened circumstances, though at times in comparative affluence ; and his appearance was as varied as his finances ; now the man of fashion, with a bag-wig and sword, the costume of the day ; now the tattered sloven, testifying confirmed indigence. Yet in his most reduced moments he never lost his native dignity of mind, and was always scrupulous to exact the mark of respect, to which as a gentleman by birth and education he was undeniably entitled.

One of his peculiarities was keeping his residence a secret from the world in general ; yet a few of the places where he has had apartments have been discovered. He once lived in Green-street, Leicester-square : then in Pimlico, and afterwards in Mary-le-bone. About the year 1780 he lodged in Back-lane, Hatton-Garden. He frequently hired rooms under a feigned name, but it has not been told what appellations he actually assumed. Dr. Wolcot once enquiring where he lived, "Why, my dear doctor," he answered, "between Westminster-Bridge and Hyde-Park-Corner."

Another of his peculiarities brings him to a similarity to Richard Savage, of unhappy celebrity. His successes in Stock-jobbing were always followed by a long and total disappearance. For many months no one could ascertain the place of his retirement, or even whether he were living or dead. Too true it is, the earnings of gambling and chance, are generally dissipated with imprudence and folly.

Mechanics and chemistry with him were favourite studies, and to them he devoted much of his time. He once presented to the Society for the Encouragement of Arts and Sciences, a sail of a new construc-

tion, which unfortunately was rejected as inadequate to the purpose intended. This excited his indignation and resentment. Upon such subjects he was impatient of contradiction, and even of a mild correction offered in the way of suggestion. Upon chemical experiments he employed much of his time, they probably swallowed up some portion of his pecuniary gains.

Among his political connections were the late Lord Lyttleton, Lord Abingdon, Lord North, Mr. Fox, Mr. Burke and Colonel Barré. At one time a knife and fork were regularly laid for him at the table of Lord George Sackville. Of Lord Abingdon he has been heard to declare, that it was of him he learned the greater part of his English.

Though during the period that he entrusted his fortunes in this country, he was accustomed to call it his *home*, yet he occasionally visited the Continent. And particularly it is known, that on publishing his "History of the Flagellants or Memorials of Human Superstition," he went to Paris for the engraving of the plates, with which the work is illustrated.

The decline of his life is said to have been attended by a general failure of his means, a circumstance hastened no doubt by a sensibility to the allurements of female beauty, with which he is rather bluntly charged by his friend Dr. Wolcot, and the consequences of which are so set down by him. The Doctor even goes so far as to say that our author in his nocturnal peregrinations was for a covering sometimes indebted to the canopy of heaven, sometimes to a casual dormitory.— And from the information of Mr. David Williams, the venerable father of the Literary Fund, we learn that he received pecuniary aid from that Institution.

Thus lived, and as a man of distinguished parts with great and marked acquirements, which he most honorably exercised in the search of useful and beneficial truth, thus flourished, for a series of years, John Louis De Lolme, the author of the elegant and philosophical Essay now republished. At length, to the disgrace of our nation, this illustrious foreigner, as Dr. Wolcot expresses it, unpatronised by our parliamentary phalanxes, who admired his talents and quoted his political lucubrations, retired in penury from this ungrateful country, where he had moved a comet amid a cluster of political stars, to part with existence amid the mountains of Switzerland.

Soon after his retirement from England our author became happily possessed of a respectable competency by the death of an uncle, upon which we may please ourselves to suppose he lived the remainder of his days in ease and comfort. Though by habit improvident, he was a man of principle. He had left this country considerably indebted for printing; but as soon as by the death of his relation, he was in a situation to discharge the obligation, he remitted the sum due. He died in 1802.

De Lolme was a scholar well-grounded in the classical and many of the modern languages of Europe. He was deeply versed in general science, and a profound politician, of which his Essay bears witness. And although the composition of a foreigner, the work is admitted to rank among the classics of any tongue. His general and now personal character has been given by those, who knew him intimately, and who were well able to give it a just estimation,—their testimony is both interesting and honourable.

From his friend Dr. Wolcot we learn, that the figure of De Lolme was neither diminutive nor gigantic—his features were animated and pleasing—his eye was replete with splendid vivacity, and emitted rays of sagacious intelligence—his observations demonstrated a felicity of thought, and a profound knowledge of men and things—his utterance clear and unembarrassed, united to its promptness, an eloquence that would have shone in our courts of judicature, or in the more important circumference of parliamentary discussion—his manners were mild: opposed in argument, he had too much politeness to exhibit displeasure at discomfiture, too much candour to be hostile to the voice of truth —when he made his secession from company, he seldom departed without leaving behind him some gem of sentiment, that, *in idea*, pleasingly prolonged his presence—his conversation was strikingly vivid. The stores of his mind were immense, and the course of his imagination was the flight of an eagle."

Dr. Coote, in giving the character of De Lolme, tells us, "his perception was acute and his mind vigorous. Not content with a hasty or superficial observation of the characters of men, and the affairs of states, he examined them with a philosophic spirit and a discerning eye. He had the art of pleasing in conversation, possessed a talent for pleasantry and humour, and has been compared to Burke for the variety of his allusions, and the felicity of his illustrations. His general temper has been praised; but his spirit was considered by many as too high for his fortune; yet in one respect his mind assimilated to the occasional penury under which he laboured; for in his mode of living he could imitate the temperance and self-denial of a philosopher."

January, 1821.

THE

CONSTITUTION OF ENGLAND.

BY

J. L. DE LOLME.

INTRODUCTION.—The spirit of philosophy which peculiarly distinguishes the present age, after having corrected a number of errors fatal to society, seems now to be directed towards the principles of society itself; and we see prejudices vanish which are difficult to overcome, in proportion as it is dangerous to attack them.* This rising freedom of sentiment, the necessary fore-runner of political freedom, led me to imagine that it would not be unacceptable to the public to be made acquainted with the principles of a constitution on which the eye of curiosity seems now to be universally turned, and which, though celebrated as a model of perfection, is yet but little known to its admirers.

I am aware that it will be deemed presumptuous in a man, who has passed the greatest part of his life out of England, to attempt a delineation of the English government; a system which is supposed to be so complicated as not to be understood or developed, but by those who have been initiated in the mysteries of it from their infancy.

But, though a foreigner in England, yet, as a native of a free country, I am no stranger to those circumstances which constitute or characterize liberty. Even the great disproportion between the republic of which I am a member (and in which I formed my principles) and the British empire, has perhaps only contributed to facilitate my political inquiries.

As the mathematician, the better to discover the proportions he investigates, begins with freeing his *equation* from *coefficients*, or such other

* As every popular notion which may contribute to the support of an arbitrary government is at all times vigilantly protected by the whole strength of it, political prejudices are last of all, if ever, shaken off by a nation subjected to such a government. A great change in this respect, however, has of late taken place in France, where this book was first published; and opinions are now discussed there, and tenets avowed, which, in the time of Louis XIV., would have appeared downright blasphemy; it is to this an allusion is made above.

quantities as only perplex without properly constituting it; so it may be advantageous, to the inquirer after the causes that produce the equilibrium of a government, to have previously studied them, disengaged from the apparatus of fleets, armies, foreign trade, distant and extensive dominions; in a word, from all those brilliant circumstances which so greatly affect the external appearance of a powerful society, but have no essential connexion with the real principles of it.

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

One other consideration I will suggest, which is, that the very circumstance of being a foreigner may of itself be attended, in this case, with a degree of advantage. The English themselves (the observation cannot give them any offence) having their eyes open, as I may say, upon their liberty, from their first entrance into life, are perhaps too much familiarised with its enjoyment, to inquire, with real concern, into its causes. Having acquired practical notions of their government long before they have meditated on it, and these notions being slowly and gradually imbibed, they at length behold it without any high degree of sensibility; and they seem to me, in this respect, to be like the recluse inhabitant of a palace, who is perhaps in the worst situation for attaining a complete idea of the whole, and never experienced the striking effect of its external structure and elevation; or, if you please, like a man who, having always had a beautiful and extensive scene before his eyes, continues for ever to review it with indifference.

But a stranger,—beholding at once the various parts of a constitution displayed before him, which, at the same time that it carries liberty to its height, has guarded against inconveniences seemingly inevitable; beholding in short those things carried into execution which he had ever regarded as more desirable than possible,—is struck with a kind of admiration; and it is necessary to be thus strongly affected by objects, to be enabled to reach the general principle which governs them.

Not that I mean to insinuate that I have penetrated with more acuteness into the constitution of England than others; my only design in the above observations was to obviate an unfavourable, though natural pre-possession; and if, either in treating the causes which originally produced the English liberty, or of those by which it continues to be maintained, my observations should be found new or singular, I hope the English reader will not condemn them, but where they shall be found inconsistent with history, or with daily experience.

Of readers in general I also request that they will not judge of the principles I shall lay down, but from their relation to those of human nature; a consideration which is almost the only one essential, and has been hitherto too much neglected by the writers on the subject of government.

BOOK I.

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

CHAPTER I.—*Causes of the Liberty of the English Nation. Reasons of the difference between the Government of England and that of France. In England, the great Power of the Crown, under the Norman Kings, created an Union between the Nobility and the People.*

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

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

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

It is at the æra of the conquest that we are to look for the real foundation of the English Constitution. From that period, says

Spelman, *novus seclorum nascitur ordo.** William of Normandy having defeated Harold and made himself master of the crown, subverted the ancient fabric of the Saxon legislation: he exterminated, or expelled, the former occupiers of lands, in order to distribute their possessions among his followers; and established the feudal system of government, as better adapted to his situation, and indeed the only one of which he possessed a competent idea.

This sort of government prevailed also in almost all the other parts of Europe. But, instead of being established by dint of arms, and all at once, as in England, it had only been established on the continent, and particularly in France, through a long series of slow successive events:—a difference of circumstances this, from which consequences were in time to arise as important as they were at first difficult to be foreseen.

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

Besides, this conquest was not the irruption of a foreign army, which only takes possession of fortified towns;—it was the general invasion

* Spelman *Of Parliaments.*—It has been a favourite thesis with many writers, to pretend that the Saxon government was, at the time of the conquest, by no means subverted;—that William of Normandy legally acceded to the throne, and consequently, to the engagements of the Saxon kings: and much argument has in particular been employed with regard to the word *conquest*, which, it has been said, in the feudal sense, only meant *acquisition*. These opinions have been particularly insisted upon in times of popular opposition: and, indeed, there was a far greater probability of success, in raising among the people the notions (familiar to them) of legal claims and long-established customs, than in arguing with them from the no less rational, but less determinate, and somewhat dangerous doctrines, concerning the original rights of mankind, and the lawfulness of at all times opposing force to an oppressive government.

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

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

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

of a whole people in search of new habitations; and, as the number of the conquerors bore a great proportion to that of the conquered, who were at the same time enervated by long peace, the expedition was no sooner completed than all danger was at an end, and of course their union also. After dividing among themselves what lands they thought proper to occupy, they separated; and though their tenure was at first only precarious, yet, in this particular, they depended not on the king, but on the general assembly of the nation.*

Under the kings of the *first race*, the fiefs, by the mutual connivance of the leaders, at first became annual; afterwards, held for life. Under the descendants of Charlemagne, they became hereditary.† And when at length Hugh Capet effected his own election, to the prejudice of Charles of Lorrain, intending to render the crown, which in fact was a fief, hereditary in his own family, ‡ he established the hereditariship of fiefs as a general principle; and from this epoch authors date the complete establishment of the feudal system in France.

On the other hand, the lords who gave their suffrages to Hugh Capet forgot not the interest of their own ambition. They completed the breach of those feeble ties which subjected them to the royal authority, and became everywhere independent. They left the king no jurisdiction, either over themselves, or their vassals; they reserved the right of waging war with each other; they even assumed the same privilege, in certain cases, with regard to the king himself;§ so that if Hugh Capet, by rendering the crown hereditary, laid the foundation of the greatness of his family, and of the crown itself, yet he added little to his own authority, and acquired scarcely anything more than a nominal superiority over the number of sovereigns who then swarmed in France.‖

But the establishment of the feudal system in England was an immediate and sudden consequence of that conquest which introduced it. Besides, this conquest was made by a prince who kept the greater part of his army in his own pay, and who was placed at the head of a

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

† *Apud Francos vero, sensim pedetentimque, jure hæreditario ad hæredes subinde transierunt feuda; quod labente seculo nono incepit.* FEUDUM, Du Cange.

‡ Hotoman has proved beyond a doubt, in his *Franco-Gallia*, that, under the two first races of kings, the crown of France was elective. The princes of the reigning family had nothing more in their favour than the custom of choosing one of that house.

§ The principal of these cases was, when the king refused to appoint judges to decide a difference between himself and one of his first barons; the latter had then a right to take up arms against the king; and the subordinate vassals were so dependent on their immediate lords, that they were obliged to follow them against the lord paramount. St. Louis, though the power of the crown was in his time much increased, was obliged to confirm both this privilege of the first barons, and this obligation of their vassals.

‖ 'The grandees of the kingdom,' says Mezeray, 'thought that Hugh Capet ought to put 'up with all their insults, because they had placed the crown on his head: nay, so great was 'their licentiousness, that, on his writing to Audebert, viscount of Perigueux, ordering him 'to raise the siege he had laid to Tours, and asking him, by way of reproach, who had made 'him a viscount? that nobleman haughtily answered, "*Not you, but those that made you a king.*"'

people over whom he was an hereditary sovereign,—circumstances which gave a totally different turn to the government of that kingdom.

Surrounded by a warlike, though a conquered nation, William kept on foot part of his army. The English, and after them the Normans themselves, having revolted, he crushed both: and the new king of England, at the head of victorious troops, having to do with two nations lying under a reciprocal check from the enmity they bore to each other, and, moreover, equally subdued by a sense of their unfortunate attempts of resistance, found himself in the most favourable circumstances for becoming an absolute monarch; and his laws, thus promulgated in the midst, as it were, of thunder and lightning, imposed the yoke of despotism both on the victors and the vanquished.

He divided England into 60,250 military fiefs, all held of the crown; the possessors of which were, on pain of forfeiture, to take up arms, and repair to his standard on the first signal: he subjected not only the common people, but even the barons, to all the rigours of the feudal government, he even imposed on them his tyrannical forest laws.*

He assumed the prerogative of imposing taxes. He invested himself with the whole executive power of government. But what was of the greatest consequence, he arrogated to himself the most extensive judicial power by the establishment of the court which was called *Aula Regis*,—a 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; and which, being wholly composed of the great officers of the crown, removable at the king's pleasure, and having the king himself for president, kept the first nobleman in the kingdom under the same control as the meanest subject.

Thus, while the kingdom of France, in consequence of the slow and gradual formation of the feudal government, found itself, in the issue, composed of a number of parts simply placed by each other, and without any reciprocal adherence, the kingdom of England on the contrary, from the sudden and violent introduction of the same system, became a compound of parts united by the strongest ties; and the regal authority, by the pressure of its immense weight, consolidated the whole into one compact indissoluble body.

To this difference in the original constitution of France and England, that is, in the original power of their kings, we are to attribute the difference, so little analogous to its original cause, of their present constitutions. This furnishes the solution of a problem which, I must confess, for a long time perplexed me, and explains the reason why, of

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

two neighbouring nations, situated almost under the same climate, and having one common origin, the one has attained the summit of liberty, the other has gradually sunk under an absolute monarchy.

In France, the royal authority was indeed inconsiderable: but this circumstance was by no means favourable to the general liberty. The lords were everything; and the bulk of the nation were accounted nothing. All those wars which were made on the king had not liberty for their object; for of this the chiefs already enjoyed too great a share: they were the mere effect of private ambition or caprice. The people did not engage in them as associates in the support of a cause common to all; they were dragged, blindfold, and like slaves, to the standard of their leaders. In the mean time, as the laws, by virtue of which their masters were considered as vassals, had no relation to those by which they were themselves bound as subjects, the resistance, of which they were made the instruments, never produced any advantageous consequence in their favour, nor did it establish any principle of freedom that was applicable to them.

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

At length, when by conquests, by escheats, or by treaties, the several provinces came to be *reunited*† to the extensive and continually increasing dominions of the monarch, they became subject to their new master, already trained to obedience. The few privileges which the cities had been able to preserve were little respected by a sovereign who had himself entered into no engagement for that purpose; and, as the *reunions* were made at different times, the king was always in a condition to overwhelm every new province that accrued to him, with the weight of all those he already possessed.

As a farther consequence of these differences between the times of

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

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

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

Thus liberty perished in France, because it wanted a favourable culture and proper situation. Planted, if I may so express myself, but just beneath the surface, it presently expanded, and sent forth some large shoots; but, having taken no root, it was soon plucked up. In England, on the contrary, the seed, lying at a great depth, and being covered with an enormous weight, seemed at first to be smothered; but it vegetated with the greater force; it imbibed a more rich and abundant nourishment; its sap and juice became better assimilated, and it penetrated and filled up with its roots the whole body of the soil. It was the excessive power of the king which made England free, because it was this very excess that gave rise to the spirit of union, and of concerted resistance. Possessed of extensive demesnes, the king found himself independent: invested with the most formidable prerogatives, he crushed at pleasure the most powerful barons in the realm. It was only by close and numerous confederacies, therefore, that these could resist his tyranny; they even were compelled to associate the people in them, and make them partners of public liberty.

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

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

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

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

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

The people on the other hand knew that the cause they were called upon to defend was a cause common to all; and they were sensible, besides, that they were the necessary supporters of it. Instructed by the example of their leaders, they spoke and stipulated conditions for themselves; they insisted that, for the future, every individual should be entitled to the protection of the law; and thus did those rights with which the lords had strengthened themselves, in order to oppose the tyranny of the crown, become a bulwark which was in time to restrain their own.

CHAPTER II.—*A second Advantage England had over France:—it formed one undivided State.*

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

* Amongst others, the law of the *Curfeu*.—It might be matter of curious discussion to

Under Henry II., liberty took a farther stride; and the ancient *trial by jury*, a mode of procedure which is at present one of the most valuable parts of the English law, made again, though imperfectly, its appearance.

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

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

No sooner was the standard set up against John, than his very courtiers forsook him. In this situation, finding no part of his kingdom less irritated against him than another, having no detached province which he could engage in his defence by promises of pardon or of peculiar concessions, the trivial though never-failing resources of government, he was compelled, with seven of his attendants, all that remained with him, to submit himself to the disposal of his subjects,—and A.D. 1215, he signed at Runing-Mead the charter of the Forest, together with that famous charter, which, from its superior and extensive importance, is denominated *Magna Charta.*

By the former the most tyrannical parts of the forest laws were abolished; and by the latter, the rigour of the feudal laws was greatly mitigated in favour of the lords. But this charter did not stop there; conditions were also stipulated in favour of the numerous body of the people who had concurred to obtain it, and who claimed, with sword in hand, a share in that security it was meant to establish. It was hence instituted by the Great Charter, that the same services which

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

were remitted in favour of the barons should be in like manner remitted in favour of their vassals. This charter moreover established an equality of weights and measures throughout England; it exempted the merchants from arbitrary imposts, and gave them liberty to enter and depart the kingdom at pleasure: it even extended to the lowest orders of the state, since it enacted, that the *villain*, or bondman, should not be subject to the forfeiture of his implements of tillage. Lastly, by the thirty-ninth article of the same charter, it was enacted, that no subject should be exiled, or in any shape whatever molested, either in his person or effects, otherwise than by judgment of his peers, and according to the law of the land;*—an article so important, that it may be said to comprehend the whole end and design of political societies:—and from that moment the English would have been a free people, if there were not an immense distance between the making of laws and the observing of them.

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

Under the long reign of Henry III., the differences which arose between the king and the nobles rendered England a scene of confu-

* 'Nullus liber homo capiatur, vel imprisonetur, vel dissesiatur de libero tenemento suo, 'vel libertatibus, vel liberis consuetudinibus suis; aut utlagetur, aut exueletur, aut aliquo 'modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium 'parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus, 'justitiam vel rectum.'—*Magna Chart.* cap. xxxix. xl.

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

sion. Amidst the vicissitudes which the fortune of war produced in their mutual conflicts, the people became still more and more sensible of their importance, and so did, in consequence, both the king and the barons also. Alternately courted by both parties, they obtained a confirmation of the Great Charter, and even the addition of new privileges, by the statutes of Merton and of Marlebridge. But I hasten to reach the grand epoch of the reign of Edward the First, a prince who, from his numerous and prudent laws, has been denominated the English Justinian.

Possessed of great natural talents, and succeeding a prince whose weakness and injustice had rendered his reign unhappy, Edward was sensible that nothing but a strict administration of justice could, on the one side, curb a nobility whom the troubles of the preceding reign had rendered turbulent, and, on the other, appease and conciliate the people, by securing the property of individuals. To this end he made jurisprudence the principal object of his attention; and so much did it improve under his care, that the mode of process became fixed and settled; Judge Hale going even so far as to affirm, that the English laws arrived at once, *et quasi per saltum*, at perfection, and that there was more improvement made in them during the *first* thirteen years of the reign of Edward, than in all ages since his time.

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

Edward, continually engaged in wars, either against Scotland or on the continent, seeing moreover his demesnes considerably diminished, was frequently reduced to the most pressing necessities. But though, in consequence of the spirit of the times, he frequently indulged himself in particular acts of injustice, yet he perceived that it was impossible to extend a general oppression over a body of nobles, and a people who so well knew how to unite in a common cause. In order to raise subsidies, therefore, he was obliged to employ a new method, and to endeavour to obtain, through the consent of the people, what his predecessors had hitherto expected from their own power. The sheriffs, A.D. 1295, were ordered to invite the towns and boroughs of the different counties to send deputies to parliament;—and it is from this æra that we are to date the origin of the house of commons.

It must be confessed, however, that these deputies of the people were not, at first, possessed of any considerable authority. They were far from enjoying these extensive privileges which, in these days, constitute the house of commons a collateral part of the government: they were in those times called up only to provide for the wants of the king, and approve the resolutions taken by him and the assembly of the

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

lords.* But it was nevertheless a great point gained, to have obtained the right of uttering their complaints, assembled in a body and in a legal way—to have acquired, instead of a dangerous resource of insurrections, a lawful and regular mean of influencing the motions of the government, and thenceforth to have become a part of it. Whatever disadvantage might attend the station at first allotted to the representatives of the people, it was soon to be compensated by the preponderance the people necessarily acquire, when they are enabled to act and move with method, and especially with concert.†

And indeed this privilege of naming representatives, insignificant as it might then appear, presently manifested itself by the most considerable effects. In spite of his reluctance, and after many evasions unworthy of so great a king, Edward was obliged to confirm the Great Charter; he even confirmed it eleven times in the course of his reign. It was moreover enacted, that whatever should be done contrary to it, should be null and void; that it should be read twice a year in all cathedrals; and that the penalty of excommunication should be denounced against any one who should presume to violate it. (*Confirmationes Chartarum*, cap. 2, 3, 4.)

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

This is the period at which we must stop, in order to take a distant

* The end mentioned in the summons sent to the lords was *de ardius negotiis regni tractatur et consilium impensuri*: the requisition sent to the commons was, *ad faciendum et consentiendum*. The power enjoyed by the latter was even inferior to what they might have expected from the summons sent to them. 'In most of the ancient statutes they are not so much 'as named; and in several, even where they are mentioned, they are distinguished as petitioners 'merely, the assent of the lords being expressed in contradistinction to the request of the 'commons.'—Preface to the Collection of the Statutes at large, by Rufihead, and the authorities quoted therein.

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

‡ 'Nullum tallagium vel auxilium. per nos, vel hæredes nostros, in regno nostro ponatur 'seu levetur, sine voluntate et assensu archiepiscoporum, episcoporum, comitum, baronum, 'militum, burgensium, et aliorum liberorum hominum de regno nostro.' Stat. an. 24 Ed. I.

view, and contemplate the different prospect which the rest of Europe then presented.

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

France, still bleeding from the extravagance of a nobility incessantly engaged in groundless wars, either with each other, or with the king, was again desolated by the tyranny of that same nobility, haughtily jealous of their liberty, or rather of their anarchy.* The people, oppressed by those who ought to have guided and protected them, loaded with insults by those who existed by their labour, revolted on all sides. But their tumultuous insurrections had scarcely any other object than that of giving vent to the anguish with which their hearts were filled. They had no thoughts of entering into a general combination; still less of changing the form of the government, and laying a regular plan of public liberty.

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

In their simplicity they saw no other remedy for the national evils than the general establishment of the regal power, that is, of the authority of one common, uncontrolled master, and only longed for that time, which, while it gratified their revenge, would mitigate their sufferings, and reduce to the same level both the oppressors and the oppressed.

The nobility, on the other hand, bent solely on the enjoyment of a momentary independence, irrecoverably lost the affection of the only men who might in time support them; and, equally regardless of the dictates of humanity and of prudence, they did not perceive the gradual and continual advances of the royal authority, which was soon to overwhelm them all. Already were Normandy, Anjou, Languedoc, and

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

Touraine, reunited to the crown; Dauphiné, Champagne, and part of Guienne, were soon to follow: France was doomed at length to see the reign of Louis XI.; to see her general estates first become useless, and be afterwards abolished.

It was the destiny of Spain also to behold her several kingdoms united under one head;—she was fated to be in time ruled by Ferdinand and Charles V.* And Germany, where an elective crown prevented the *reunions*,† was indeed to acquire a few free cities; but her people, parcelled into so many different dominions, were destined to remain subject to the arbitrary yoke of such of her different sovereigns as should be able to maintain their power and independence. In a word, the feudal tyranny which overspread the continent did not compensate, by any preparation of distant advantages, the present calamities it caused; nor was it to leave behind it, as it disappeared, anything but a more regular kind of despotism.

But in England the same feudal system, after having suddenly broke in like a flood, had deposited, and still continued to deposit, the noble seeds of the spirit of liberty, union, and sober resistance. So early as the time of Edward the tide was seen gradually to subside: the laws which protect the person and property of the individual began to make their appearance; that admirable constitution, the result of a threefold power, insensibly arose;‡ and the eye might even then discover the verdant summits of that fortunate region that was destined to be the seat of philosophy and liberty, which are inseparable companions.

CHAPTER III.—*The Subject continued.*

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

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

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

‡ 'Now, in my opinion,' says Philippe de Comines, in times not much posterior to those of Edward I., and with the simplicity of the language of his times, 'among all the sovereignties 'I know in the world, that in which the public good is best attended to, and the least violence 'exercised on the people, is that of England.' *Mémories de Comines*, livre v. chap. xviii.

Under Edward II., the commons began to annex petitions to the bills by which they granted subsidies: this was the dawn of their legislative authority.

Under Edward III., they declared they would not in future acknowledge any law to which they had not expressly assented. Soon after this, they exerted a privilege, in which consists, at this time, one of the great balances of the constitution: they impeached, and procured to be condemned, some of the first ministers of state.* Under Henry IV., they refused to grant subsidies before an answer had been given to their petitions. In a word, every event of any consequence was attended with an increase of the power of the commons;—increases indeed but slow and gradual, but which were peaceably and legally effected, and were the more fit to engage the attention of the people, and coalesce with the ancient principles of the constitution.

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

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

The commons, on the other hand, accustomed to act only a second part in public affairs, and finding themselves bereft of those who had hitherto been their leaders, were more than ever afraid to form, of themselves, an opposition. Placed immediately, as well as the lords, under the eye of the king, they beheld themselves exposed to the same dangers. Like them, therefore, they purchased their personal security at the expense of public liberty; and in reading the history of the first

* There is no formal record of any impeachment by the commons, prior to the 50th of Edward III. Lord Latimer was then impeached; and, after a regular process in the house of lords, being convicted of mal-administration, he was dismissed by the king from all ministerial employment. Lord Neville was also accused by the commons, and banished from court. The increasing influence of the lower house (for it was about this time that the peers and the commons began to deliberate in different apartments), was farther evinced in the following reign, by the irregular and arbitrary attempts of Richard II. and his ministers to influence the elections. *Ed.*

two kings of the house of Tudor, we imagine ourselves reading the relation given by Tacitus of Tiberius and the Roman senate. (*Quanto quis illustrior, tanto magis falsi ac festinantes.*)

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

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

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

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

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

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

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

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

The Star-chamber, that effectual instrument of the tyranny of the two Henries, yet continued to subsist: the inquisitorial tribunal of the high commission was even instituted; and the yoke of arbitrary power lay still heavy on the subject. But the general affection of the people for a queen, whose former misfortunes had created such general concern, the imminent dangers which England escaped, and the extreme glory attending that reign, lessened the sense of such exertions of authority as would, in these days, appear the height of tyranny, and served at that time to justify, as they still do to excuse, a princess whose great talents, though not her principles of government, render her worthy of being ranked among the greatest sovereigns.

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

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

Those principles, hitherto only silently adopted, in the cabinet, and in the courts of justice, had maintained their ground in consequence of this very obscurity. Being now announced from the throne, and resounded from the pulpit, they spread an universal alarm. Commerce, besides, with its attendant arts, and, above all, that of printing, diffused more salutary notions throughout all orders of the people; a new light began to rise upon the nation; and the spirit of opposition frequently displayed itself in this reign, to which the English monarchs had not, for a long time past, been accustomed.

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

The notions of religion, by a singular concurrence, united with the love of liberty: the same spirit which had made an attack on the

* See his declarations made in parliament, in the years 1610 and 1621.

established faith, now directed itself to politics: the royal prerogatives were brought under the same examination as the doctrines of the church of Rome had been submitted to: and as a superstitious religion had proved unable to support the test, so neither could an authority, pretended to be unlimited, be expected to bear it.

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

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

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

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

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

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

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

But Charles knew not how to survive the loss of a power he had conceived to be indisputable: he could not reconcile himself to limitations and restraints so injurious, according to his notions, to sovereign authority. His discourse and conduct betrayed his secret designs: distrust took possession of the nation; certain ambitious persons availed themselves of it to promote their own views; and the storm, which seemed to have blown over, burst forth anew. The contending fanaticism of persecuting sects joined in the conflict between regal haughtiness and the ambition of individuals; the tempest blew from every point of the compass; the constitution was rent asunder; and Charles exhibited in his fall an awful example to the universe.

The royal power being thus annihilated, the English made fruitless attempts to substitute a republican government in its stead, 'It was a curious spectacle,' says Montesquieu, 'to behold the vain efforts of 'the English to establish among themselves a democracy.' Subjected, at first, to the power of the principal leaders in the long parliament, they saw that power expire, only to pass without bounds into the hands of a protector. They saw it afterwards parcelled out among the chiefs of different bodies of soldiers; and thus shifting without end from one kind of subjection to another, they were at length convinced, that an attempt to establish liberty in a great nation, by making the people interfere in the common business of government, is, of all attempts, the most chimerical; that the authority *of all*, with which men are amused, is in reality no more than the authority of a few powerful individuals, who divide the republic among themselves; and they at last rested in the bosom of the only constitution which is fit for a great state and a free people; I mean that in which a chosen number deliberate, and a single hand executes; but in which, at the same

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

time, the public satisfaction is rendered, by the general relation and arrangement of things, a necessary condition of the duration of government.

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

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

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

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

He not only used in his declarations the alarming expressions of absolute power and unlimited obedience—he not only usurped to himself a right to dispense with the laws; but moreover sought to convert that destructive pretension to the destruction of those very laws which were held most dear by the nation, by endeavouring to abolish a religion for which they had suffered the greatest calamities, in order to establish on its ruins a mode of faith which repeated acts of the legis-

lature had proscribed,—and proscribed, not because it tended to establish in England the doctrines of transubstantiation and purgatory, doctrines in themselves of no political moment, but because the unlimited power of the sovereign had always been made one of its principal tenets.

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

But, instead of a revolution like that which dethroned Charles I., which was effected by a great effusion of blood, and threw the state into a general and terrible convulsion, the dethronement of James proved a matter of short and easy operation. In consequence of the progressive information of the people, and the certainty of the principles which now directed the nation, the whole were unanimous. All the ties by which the people were bound to the throne were broken, as it were, by one single shock; and James, who, the moment before, was a monarch surrounded by subjects, became at once a simple individual in the midst of the nation.

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

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

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

* The lords and commons, previous to the coronation of king William and queen Mary, had framed a bill which contained a declaration of the rights which they claimed in behalf of

was soon put to the arch, by the final establishment of the liberty of the press.*

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

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

CHAPTER IV.—*Of the Legislative Power.*

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

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

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

The basis of the English constitution, the capital principle on which all others depend, is, that the legislative power belongs to parliament

the people, and was in consequence called the *Bill of Rights*. This bill contained the articles above, as well as some others; and having received afterwards the royal assent, became an act of parliament, under the title of *An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown*.—A. 1 William and Mary, Sess. 2, cap. 2.

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

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

The constituent parts of parliament are, the king, the house of lords, and the house of commons.

The house of commons, otherwise the assembly of the representatives of the nation, is composed of the deputies of the different counties, each of which sends two; of the deputies of certain towns, of which London (including Westminster and Southwark) sends eight—other towns, two or one; and of the deputies of the universities of Oxford and Cambridge, each of which sends two.

Lastly, since the act of union, Scotland sends 45 deputies; who, added to those just mentioned, make up the whole number 558.* Those deputies, though separately elected, do not solely represent the town or county that sends them, as is the case with the deputies of the United Provinces of the Netherlands, or of the Swiss Cantons; but when they are once admitted, they represent the whole body of the nation.

The qualifications required for being a member of the house of commons are, for representing a county, to be born a subject of Great Britain, and to be possessed of a landed estate of 600*l.* a year; and of 300*l.* for representing a town or borough.

The qualifications required for being an elector in a county are, to be possessed, in that county, of a freehold of forty shillings a year.† With regard to electors in towns or boroughs, they must be freemen of them;—a word which now signifies certain qualifications expressed in the particular charters.

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

The principal precautions, taken by the law, to ensure the freedom of elections, are—that any candidate, who, after the date of the writ, or even after the vacancy, shall have given entertainments to the electors of a place, or to any of them, in order to his being elected, shall be incapable of serving for that place in parliament; and that if

* On the union with Ireland, in the year 1801, one hundred members were added to the lower house; so that this assembly now consists of 658 individuals. *Ed.*

† This freehold must have been possessed by the elector one whole year at least before the time of election, except it has devolved to him by inheritance, by marriage, by a last will, or by promotion to an office.

any person gives, or promises to give, any money, employment, or reward, to a voter, in order to influence his vote, he, as well as the voter himself, shall be condemned to pay a fine of 500*l.*, and for ever disqualified to vote, and hold any office in a corporation,—the faculty, however, being reserved to both, of procuring indemnity for their own offence, by discovering some other offender of the same kind.

It has been moreover established, that no lord of parliament, or lord lieutenant of a county, has any right to interfere in the elections of members; that any officer of the excise, customs, &c., who shall presume to intermeddle in elections, by influencing any voter to give or withhold his vote, shall forfeit 100*l.*, and be disabled to hold any office. Lastly, all soldiers quartered in a place where an election is to be made must move from it, at least one day before the election, to the distance of two miles or more, and return not till one day after the election is finished.

The house of peers, or lords, is composed of the lords spiritual, who are the archbishops of Canterbury and of York, and the 24 bishops; and of the lords temporal, whatever may be their respective titles, such as dukes, marquises, earls, &c.

Lastly, the king is the third constitutive part of parliament: it is even he alone who can convoke it; and he alone can dissolve or prorogue it. The effect of a dissolution is, that from that moment the parliament completely ceases to exist; the commission, given to the members by their constituents, is at an end; and, whenever a new meeting of parliament shall happen, they must be elected anew. A prorogation is an adjournment to a term appointed by the king; till which the existence of parliament is simply interrupted, and the function of the deputies suspended.

When the parliament meets, whether it be by virtue of new summons, or whether, being composed of members formerly elected, it meets again at the expiration of the term for which it had been prorogued, the king either goes to it in person, invested with the *insignia* of his dignity, or appoints proper persons to represent him on that occasion, and opens the session by laying before the parliament the state of the public affairs, and inviting it to take them into consideration. The presence of the king, either real or represented, is absolutely requisite at the first meeting; it is that which gives life to the legislative bodies, and puts them in action.

The king, having concluded his declaration, withdraws. The parliament, which is then legally intrusted with the care of the national concerns, enters upon its functions, and continues to exist till it is prorogued, or dissolved. The house of commons, and that of peers, assemble separately; the latter, under the presidence of the lord chancellor; the former, under that of their speaker; and both separately adjourn to such days as they respectively think proper to appoint.

As each of the two houses has a negative on the propositions made

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

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

This excepted, every member, in each house, may propose whatever question he thinks proper. If, after being considered, the matter is found to deserve attention, the person who made the proposition, usually with some others adjoined to him, is desired to set it down in writing. If, after more complete discussions of the subject, the proposition is carried in the affirmative, it is sent to the other house, that they may, in their turn, take it into consideration. If the other house reject the bill, it remains without any effect; if they agree to it, nothing remains wanting to its complete establishment but the royal assent.

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

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

It is, however, pretty singular, that the king of England should make use of the French language to declare his intentions to his parliament. This custom was introduced at the Conquest,* and has been continued,

* William the Conqueror added, to the other changes he introduced, the abolition of the English language in all public as well as judicial transactions, and substituted for it the French that was spoken in his time: hence the number of old French words that are met with in the style of the English laws. It was only under Edward III. that the English language began to be re-established in the courts of justice.

like other matters of form, which sometimes subsist for ages after the real substance of things has been altered: and Judge Blackstone expresses himself on this subject in the following words: 'A badge, it 'must be owned (now the only one remaining), of conquest; and which 'one would wish to see fall into total oblivion, unless it be reserved as 'a solemn memento to remind us that our liberties are mortal, having 'once been destroyed by a foreign force.'

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

CHAPTER V.—*Of the Executive Power.*

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

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

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

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

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

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

II. The second prerogative of the king is, to be the *fountain of*

honour, that is, the distributor of titles and dignities: he creates the peers of the realm, as well as bestows the different degrees of inferior nobility. He moreover disposes of the different offices, either in the courts of law, or elsewhere.

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

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

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

VI. He is, with regard to foreign nations, the representative and the depository of all the power and collective majesty of the nation; he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper.

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

CHAPTER VI.—*The Boundaries which the Constitution has set to the Royal Prerogative.*

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

But the representatives of the people still have,—and that is saying enough,—they still have in their hands, now that the constitution is

fully established, the same powerful weapon which enabled their ancestors to establish it. It is still from their liberality alone that the king can obtain subsidies; and in these days, when every thing is rated by pecuniary estimation,—when gold is become the great moving spring of affairs,—it may be safely affirmed, that he who depends on the will of other men, with regard to so important an article, is (whatever his power may be in other respects) in a state of real dependence.

This is the case of the king of England. He has, in that capacity, and without the grant of his people, scarcely any revenue. A few hereditary duties on the exportation of wool, which (since the establishment of manufactures) are become tacitly extinguished; a branch of the excise, which, under Charles II., was annexed to the crown as an indemnification for the military services it gave up, and which, under George II., was fixed at seven thousand pounds; a duty of two shillings on every ton of wine imported; the wrecks of ships of which the owners remain unknown; whales and sturgeons thrown on the coast; swans swimming on public rivers; and a few other feudal relics, now compose the whole appropriated revenue of the king, and are all that remain of the ancient inheritance of the crown.

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

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

In subsequent times we see the commons constantly successful, by their exertions of the same privileges, in their endeavours to lop off the despotic powers which still made a part of the regal prerogative.

Whenever abuses of power had taken place, which they were seriously determined to correct, they made *grievances and supplies* (to use the expression of Sir Thomas Wentworth) *go hand in hand together;* which always produced the redress of them. And in general, when a bill, in consequence of its being judged by the commons essential to the public welfare, has been joined by them to a money-bill, it has seldom failed to *pass in that agreeable company.**

CHAPTER VII.—*The same Subject continued.*

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

Indeed, this is a case which the prudence of parliament has foreseen. They have, in this respect, imposed laws upon themselves; and, without touching the prerogative itself, they have moderated the exercise of it. A custom has for a long time prevailed, at the beginning of every reign, and in the kind of overflowing of affection which takes place between a king and his first parliament, to grant the king a revenue for his life: a provision which, with respect to the great exertions of his power, does not abridge the influence of the commons, but yet puts him in a condition to support the dignity of the crown, and affords him, who is the first magistrate in the nation, that independence which the laws insure also to those magistrates who are particularly intrusted with the administration of justice.†

This conduct of the parliament provides an admirable remedy for the accidental disorders of the state. For though, by the wise distribution of the powers of government, great usurpations are become in a manner impracticable, nevertheless it is impossible but that, in

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

† The Twelve Judges.—Their commissions, which in former times were often given them *durante bene placito,* now must always 'be made *quamdiu se bene gesserint,* and their salaries 'ascertained; but, upon an address of both houses, it may be lawful to remove them.'—Stat. 13, Will. III., c. 2. In the first year of the reign of George II., it was moreover enacted, that the commissions of the judges should continue in force notwithstanding the demise of the king; which has prevented their being dependent, with regard to their continuation in office, on the heir-apparent.

consequence of the continual (though silent) efforts of the executive power to extend itself, abuses will at length slide in. But here the powers, wisely kept in reserve by the parliament, afford the means of remedying them. At the end of each reign, the civil list, and consequently that kind of independence which it procured, are at an end. The successor finds a throne, a sceptre, and a crown; but he finds neither power nor even dignity; and before a real possession of all these things be given him, the parliament have it in their power to take a thorough review of the state, as well as correct the several abuses that may have crept in during the preceding reign; and thus the constitution may be brought back to its first principles.

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

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

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

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

The truth of all these observations is remarkably confirmed by the events that followed the reign of the two last Henries. Every barrier that protected the people against the incursions of power had been broken through. The parliament, in their terror, had even

enacted that proclamations, that is, the will of the king, should have the force of laws (2 *Stat.* 31 *Hen. VIII. cap.* 8.): the constitution seemed really undone. Yet on the first opportunity afforded by a new reign, liberty began again to make its appearance.* And when the nation, at length recovered from its long supineness, had, at the accession of Charles I., another opportunity of a change of sovereign, that enormous mass of abuses, which had been accumulating, or gaining strength, during five successive reigns, was removed, and the ancient laws were restored.

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

It is true, great misfortunes followed; but they were the effects of particular circumstances. The nature and extent of regal authority not having been accurately defined during the time which preceded the reigns of the Tudors, the exorbitant power of the princes of that house had gradually introduced political prejudices, of even an extravagant kind; those prejudices, having had a hundred and fifty years to take root, could not be shaken off but by a kind of general convulsion; the agitation continued after the action, and was carried to excess by the religious quarrels that arose at that time.

CHAPTER VIII.—*New Restrictions.*

THE commons, however, have not entirely relied on the advantages of the great prerogative with which the constitution has entrusted them.

Though this prerogative is, in a manner, out of danger of an immediate attack, they have nevertheless shown at all times the greatest jealousy on its account. They never suffer, as we have observed before, a money-bill to begin any where but with themselves; and any alteration that may be made in it, in the other house, is sure to be rejected. If the commons had not most strictly reserved to themselves the exercise of a prerogative on which their very existence depends, the whole might at length have slidden into that other body, which they might have suffered to share in it equally with them. If

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

any other persons, besides the representatives of the people, had a right to make an offer of the produce of the labour of the people, the executive power would soon have forgotten that it only exists for the advantage of the public.*

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

Thus, the king is indisputably invested with the exclusive right of assembling parliaments ; yet he must assemble one, at least once in three years ; and this obligation on the king, which was insisted upon by the people in very early times,‡ has been since confirmed by an act passed in the sixteenth year of the reign of Charles II.

Moreover, as the most fatal consequences might ensue, if laws which might most materially affect public liberty, could be enacted in parliaments abruptly and imperfectly summoned, it has been established that the writs for assembling a parliament must be issued forty days at least before the first meeting of it. Upon the same principle it has also been enacted, that the king cannot abridge the term he has once fixed for a prorogation, except in the two following cases, viz. of a rebel-

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

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

[Although the commons make it a constant practice to refuse any amendments to a money-bill, and even reject the bill itself, as if infected by a deadly poison ; yet when the alterations so proposed have been felt to be really useful and proper, a new bill has been introduced, containing, in substance, the rejected amendments : and thus, as has been already remarked by a writer, the peers obtain *in effect* the participation of a privilege denied to them *in form*. —Ed.]

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

‡ By law the king is enjoined to assemble a parliament at least once in three years ; but in order to get the annual tax and army-mutiny bills renewed, without which his government cannot be supported, he is in fact compelled to call one yearly.—Ed.

lion, or of imminent danger of a foreign invasion; in both which cases a fourteen days' notice must be given.*

Again, the king is the head of the church; but he can neither alter the established religion, or call individuals to an account for their religious opinions.†—He cannot even profess the religion which the legislature has particularly forbidden; and the prince who should profess it is declared incapable of *inheriting, possessing, or enjoying, the crown of these kingdoms.* (1 *Will. & M. stat.* 2 *c.* 2.)

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

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

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

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

* Stat. 30 Geo. II. c. 25. [This was an act relating to the Militia, and stands repealed by 2 Geo. III. c. 20. The clause empowering a parliament to be assembled in certain cases on fourteen days' notice, is therefore repealed. Indeed, it seems like a similar one in the Act 16 Geo. III. c. 3, to have been intended only for a temporary purpose. *Ed.*]

† The convocation or assembly of the clergy, of which the king is the head, can only regulate such affairs as are merely ecclesiastical; they cannot touch the laws, customs, and statutes of the kingdom. Stat. 25 Hen. VIII. c. 19. [It is customary to summon a convocation with every parliament; but for a century past it has assembled merely, without entering into business.—Ed.]

‡ These principles have since been made an express article of an act of parliament; the same which abolished the star-chamber.—'Be it likewise declared and enacted, by the authority of this present parliament, that neither his majesty, nor his privy-council, have, or ought to have, any jurisdiction, power, or authority to examine or draw into question, determine, or dispose of the lands, tenements, goods, or chattels of any of the subjects of this kingdom.' Stat. 16 Ch. I. cap. 10. § 10.

§ The method of prosecution mentioned here, is called an *appeal:* it must be sued within a year and a day after the commission of the crime. [The right of appeal has been lately abrogated by act of parliament, 59 Geo. III. c. 46.—Ed.]

were declared anti-constitutional; and James's army was one of the causes of his being dethroned.*

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

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

Besides, the funds for the payment of these troops are to be paid by taxes that are not established for more than one year,† and it becomes likewise necessary, at the end of this term, again to establish them.‡ In a word, this instrument of defence, which the circumstances of modern times have caused to be judged necessary, being capable, on the other hand, of being applied to the most dangerous purposes, has been joined to the state by only a slender thread, the knot of which may be slipped on the first appearance of danger.§

But these laws, which limit the king's authority, would not, of themselves, have been sufficient. As they are, after all, only intellectual barriers, which the king might not at all times respect; as the check which the commons have on his proceedings, by a refusal of subsidies,

* A new sanction was given to the above restriction in the sixth article of the Bill of Rights. 'A standing army, without the consent of parliament, is against law.'

† The land-tax and malt-tax. [By act 39 Geo. III. c. 6, the land-tax was made perpetual, with power of redemption on the transfer of 3 per cent. stock. It appears by the accounts published to Jan., 1819, that a sum of 25,502,093*l.* 1*s.* 9*d.* 3 per cents. had been then transferred for redemption of land-tax.—ED.]

‡ It is also necessary that the parliament, when it renews the act against mutiny, should authorise the different courts-martial to punish military offences and desertion. It can therefore refuse the king even the necessary power of military discipline.

§ To these laws, or rather conventions, between king and people, I will add the oath which the king takes at his coronation; a compact which, if it cannot have the same precision as the laws above mentioned, yet, in a manner, comprehends them all, and has the farther advantage of being declared with more solemnity.

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

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

Archbishop or bishop.—'Will you, to the utmost of your power, maintain the laws of God, 'the true profession of the gospel, and the protestant reformed religion 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 privileges 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.*

affects too much the whole state to be exerted on every particular abuse of his power; and lastly, as even this check might in some degree be eluded, either by breaking the promises which have procured subsidies, or by applying them to uses different from those for which they were appointed; the constitution has besides supplied the commons with the means of immediate opposition to the misconduct of government, by giving them a right to impeach the ministers.

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

If, for example, the public money has been employed in a manner contrary to the declared intention of those who granted it, an impeachment may be brought against those who had the management of it. If any abuse of power is committed, or in general anything done contrary to the public weal, they prosecute those who have been either the instruments or the advisers of the measure.*

But who shall be the judges to decide in such a cause? What tribunal will flatter itself that it can give an impartial decision, when it shall see, appearing at its bar, the government itself as the accused, and the representatives of the people as the accusers?

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

When the impeachment is brought to the lords, they commonly order the person accused to be imprisoned. On the day appointed, the deputies of the house of commons, with the person impeached, make their appearance: the impeachment is read in his presence; counsel are allowed him, as well as time to prepare for his defence; and, at the expiration of this term, the trial goes on from day to day, with open doors, and everything is communicated in print to the public.

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

* It was upon these principles that the commons, in the beginning of the eighteenth century, impeached the earl of Orford, who had advised the treaty of partition, and the lord chancellor Somers, who had affixed the great seal to it.

† This point, in ancient times, was far from being clearly settled. In the year 1678, the commons having impeached the earl of Danby, he pleaded the king's pardon in bar to that

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

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

But all these general precautions to secure the rights of the parliament, that is, those of the nation itself, against the efforts of the executive power, would be vain, if the members themselves remained personally exposed to them. Being unable openly to attack, with any safety to itself, the two legislative bodies, and by a forcible exertion of its prerogatives, to make, as it were, a general assault, the executive power might, by subdividing the same prerogatives, gain an entrance, and, sometimes by interest, and at others by fear, guide the general will, by influencing that of individuals.

But the laws which so effectually provide for the safety of the people, provide no less for that of the members, whether of the house of peers, or that of the commons. There are not known in England either *commissaries* who are always ready to find those guilty whom the wantonness of ambition points out, or those secret imprisonments which are, in other countries, the usual expedients of government. As the forms and maxims of the courts of justice are strictly prescribed, and every individual has an invariable right to be judged according to law, he may obey without fear the dictates of public virtue. Lastly, what crowns all these precautions, is its being a fundamental maxim, 'That the freedom of speech, and debates and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.' (*Bill of Rights*, *Art.* 9.)

impeachment: great altercations ensued, which were terminated by the dissolution of that parliament. It was afterwards enacted (Stat. 12 & 13 W. III. c. 2.), 'that no pardon under the great seal should be pleaded in bar to an impeachment by the house of commons.'

I once asked a gentleman, very learned in the laws of this country, if the king could remit the punishment of a man condemned in consequence of an impeachment of the house of commons: he answered me, The tories will tell you the king can, and the whigs, he cannot. But it is not perhaps very material that the question should be decided: the great public ends are attained when a corrupt minister is removed with disgrace, and the whole system of his proceedings unveiled to the public eye.

[Whatever may be said as to the power of the king to pardon, after conviction on impeachment, the policy of its exercise can never be supported. It once was a doubt, whether an impeachment, commenced but not complete, abated with the dissolution of parliament. This was debated at great length in the celebrated case of Warren Hastings, when the commons decided, that the proceedings of an impeachment continued from one parliament to another, without any abatement.—ED.]

The legislators, on the other hand, have not forgotten that interest, as well as fear, may impose silence on duty. To prevent its effects, it has been enacted, that all persons concerned in the management of any taxes created since 1692, commissioners of prize, navy, victualling-office, &c., comptrollers of the army accounts, agents for regiments, the clerks in the different offices of the revenue, persons holding any new office under the crown (created since 1705), or having a pension under the crown during pleasure, or for any term of years, are incapable of being elected members. Besides, if any member accepts an office under the crown, except it be an officer in the army or navy accepting a new commission, his seat becomes void; though such member is capable of being re-elected.

Such are the precautions hitherto taken by the legislators, for preventing the undue influence of the great prerogative of disposing of rewards and places; precautions which have been successively taken, according as circumstances have shown them to be necessary; and which, we may thence suppose, are owing to causes powerful enough to produce the establishment of new ones, whenever circumstances shall point out the necessity of them.*

CHAP. IX.—*Of private Liberty, or the Liberty of Individuals.*

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

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

Each of these rights, say again the English lawyers, is inherent in the person of every Englishman: they are to him as an inheritance,

* Nothing can be a better proof of the efficacy of the causes that produce the liberty of the English, than those victories which the parliament from time to time gains over itself, and in which the members, forgetting all views of private ambition, only think of their interests as subjects.

Since this was first written, an excellent regulation has been made for the decision of controverted elections. Formerly the house decided them in a very summary manner, and the witnesses were not examined upon oath. But, by an act passed a few years ago [introduced in 1770 by Mr. Grenville; afterwards improved by Lord Grenville, his son—ED.], the decision is left to a jury, or committee, of fifteen members, formed in the following manner: Out of the members present, who must not be less than 100, 49 are drawn by lots: out of these, each candidate strikes off one alternately, till there remain only thirteen, who, with two others, named out of the whole house (one by each candidate), are to form the committee. In order to secure the necessary number of 100 members, all other business in the house is to be suspended, till the above operations are completed.

and he cannot be deprived of them, but by virtue of a sentence passed according to the laws of the land. And, indeed, as this right of inheritance is expressed in English by one word (*birth-right*), the same as that which expresses the king's title to the crown, it has, in times of oppression, been often opposed to him as a right, doubtless of less extent, but of a sanction equal to that of his own.

One of the principal effects of the right of property is, that the king can take from his subjects no part of what they possess; he must wait till they themselves grant it to him: and this right, which, as we have seen before, is, by its consequences, the bulwark that protects all the others, has moreover the immediate effect of preventing one of the chief causes of oppression.

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

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

Under William the Conqueror, and his immediate successor, a multitude of foreign ecclesiastics flocked to the court of England. Their influence over the mind of the sovereign, which, in the other states of Europe, as they were then constituted, might be considered as matter of little importance, was not so in a country where, the sovereign being all-powerful, to obtain influence over him was to obtain power itself. The English nobility saw, with the greatest jealousy, men of a condition so different from their own, vested with a power, to the attacks of which they were immediately exposed; and thought that they would carry that power to the height, if they should ever adopt a

* From the extensive right of challenging jurymen, which is allowed to every person brought to his trial, though not very frequently used.

system of laws which those same men sought to introduce, and of which they would necessarily become both the depositories and the interpreters.

It happened, therefore, by a somewhat singular conjunction of circumstances, that to the Roman laws, brought over to England by monks, the idea of ecclesiastical power became associated, in the same manner as the idea of regal despotism was afterwards annexed to the religion of the same monks, when favoured by kings who endeavoured to establish an arbitrary government. The nobility at all times rejected these laws, even with a degree of ill-humour ;* and the usurper Stephen, whose interest it was to conciliate their affections, went so far as to prohibit the study of them.

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

This opposition was carried so far, that Fortescue, chief justice of the King's Bench, and afterwards chancellor, under Henry VI., wrote a book entitled *De Laudibus Legum Angliæ*, in which he proposes to demonstrate the superiority of the English laws over the civil ; and that nothing might be wanting in his arguments on that subject, he gives them the advantage of superior antiquity, and traces their origin to a period much anterior to the foundation of Rome.

This spirit has been preserved even to much more modern times ;

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

Nolumus leges Angliæ mutari.—The short and pithy answer of the barons to one of our kings, will never be forgotten, when upon another occasion an attempt was made to legalize children born before marriage, provided the parents married afterwards ; a proposition borrowed from the Roman civil law.—Ed.

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

and when we peruse the many paragraphs which judge Hale has written in his history of the Common Law, to prove that, in the few cases in which the civil law is admitted in England, it can have no power by virtue of any difference due to the orders of Justinian (a truth which certainly had no need of proof), we plainly see that this chief justice, who was also a very great lawyer, had, in this respect, retained somewhat of the heat of party.

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

Of this the republic of Holland, where the civil law is adopted, would afford a proof, if there were not the still more striking one of the emperor of Germany, who, though, in the opinion of his people, he is the successor to the very throne of the *Cæsars*, has not, by a great deal so much power as a king of England; and the reading of the several treaties which deprive him of the power of nominating the principal officers of the empire, sufficiently shows that a spirit of unlimited submission to monarchical power is no necessary consequence of the admission of the Roman civil law.

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

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

The principal objects settled by the common law, are the rules of descent, the different methods of acquiring property, the various forms required for rendering contracts valid; in all which points it differs,

* What particularly frightens the English lawyers, is L. i., Lib. I., Tit. 4., Dig.—*Quod principi placuerit legis habet vigorem.*

more or less, from the civil law. Thus by the common law, lands descend to the eldest son, to the exclusion of all his brothers and sisters; whereas, by the civil law, they are equally divided among the children: by the common law property is transferred by *writing;* but by the civil law, *tradition* (or actual delivery) is moreover requisite, &c.

The source from which the decisions of the common law are drawn, is what is called *præteritorum memoria eventorum*, and is found in the collection of judgments that have been passed from time immemorial, and which, as well as the proceedings relative to them, are carefully preserved under the title of *records*. In order that the principles established by such a series of judgments may be known, extracts from them are, from time to time, published under the name of *reports;* and these reports reach, by a regular series, so far back as the reign of Edward II., inclusively.

Besides this collection, which is pretty voluminous, there are also some ancient writers of great authority among lawyers; such as *Glanvil*, who flourished in the reign of Henry II.—*Bracton*, who wrote under Henry III.—*Fleta*,* and *Lyttleton*. Among more modern authors, is Sir Edward Coke, lord chief justice of the King's Bench, under James I., who has written four books of Institutes, and is at present the oracle of the common law.

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

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

Lastly, the written law is the collection of the various acts of parliament, the originals of which are carefully preserved, especially since the reign of Edward III. Without entering into the distinctions made by lawyers with respect to them—such as *public* and *private* acts, *declaratory* acts, or such as are made to extend or restrain the common law, &c.—it will be sufficient to observe, that, being the result of the united wills of the three constituent parts of the legislature, they, in al-

* [A book so entitled, from the author's being in the Fleet prison at the time he wrote it. —Ed.]

cases, supersede both the common law and all former statutes; and the judges must take cognisance of them, and decide in conformity to them, even though they had not been alleged by the parties. *(Unless they be private acts.)*

The different courts for the administration of justice, in England, are,

I. The Court of Common Pleas. It formerly made a part of the *aula regis* (the king's hall or court); but as the latter was bound by its institution always to follow the person of the king, and private individuals experienced great difficulties in obtaining relief from a court that was ambulatory, and always in motion, it was made one of the articles of the Great Charter, that the Court of Common Pleas should thenceforward be holden in a fixed place;* and since that time it has been seated at Westminster. It is composed of a lord chief justice, and three other judges; and appeals from its judgments, usually called *writs of error*, are brought before the Court of King's Bench.

II. The Court of Exchequer. It was originally established to determine those causes in which the king, or his servants, or accomptants, were concerned, and has gradually become open to all persons. The confining the power of this court to the above class of persons is therefore now a mere fiction; only a man must, for form's sake, set forth in his declaration that he is debtor to the king, whether he be so or no. This court is composed of the chief baron of the Exchequer, and three other judges.

III. The Court of King's Bench forms that part of the *aula regis* which continued to subsist after the dismembering of the Common Pleas. This court enjoys the most extensive authority of all other courts: it has the superintendence over all corporations, and keeps the various jurisdictions in the kingdom within their respective bounds. It takes cognizance, according to the end of its original institution, of all criminal causes, and even of many causes merely civil. It is composed of the lord chief justice and three other judges. Writs of error against the judgments passed in this court in civil matters are brought before the Court of the Exchequer Chamber; or, in most cases, before the House of Peers.

IV. The Court of the Exchequer Chamber. When this Court is formed by the four barons, or judges of the Exchequer, together with the chancellor and treasurer of the same, it sits as a court of equity. When it is formed by the twelve judges, to whom sometimes the lord chancellor is joined, its office is to deliberate, when properly referred and applied to, and give an opinion on important and difficult causes, before judgments are passed upon them in those courts where the causes are depending.

* *Communia placita non sequantur curiam nostram, sed teneantur in aliquo loco certo.* Magna Charta, cap. 17.

CHAPTER X.—*On the Law that is observed in England, in regard to Civil Matters.**

CONCERNING the manner in which justice is administered in England, in civil matters, and the kind of law that obtains in that respect, the following observations may be made.

The beginning of a civil process in England, or the first step usually taken in bringing an action, is the seizing, by public authority, the person against whom that action is brought. This is done with a view to secure such person's appearance before a judge, or at least make him give sureties for that purpose. In most of the countries of Europe, where the forms, introduced into the Roman civil law in the reigns of the later emperors, have been imitated, a different method has been adopted to procure a man's appearance before a court of justice. The usual practice is to have the person sued, summoned to appear before the court, by a public officer belonging to it, a week beforehand: if no regard is paid to such summons twice repeated, the plaintiff (or his attorney) is admitted to make before the court a formal reading of his demand, which is then granted to him, and he may proceed to its execution.†

In this mode of proceeding, it is taken for granted, that a person who declines to appear before a judge, to answer the demand of another, after being properly summoned, acknowledges the justice of such demand; and this supposition is very just and rational. However, the above-mentioned practice of securing beforehand the body of a person sued, though not so mild in its execution as that just now described, nor even more effectual, appears more obvious, and is more readily adopted, in those times when courts of law begin to be formed in a nation, and rules of distributive justice to be established; and it is, very likely, followed in England as a continuation of the methods that were adopted when the English laws were yet in their infancy.

In the times we mention, when laws begin to be formed in a country, the administration of justice between individuals is commonly lodged in the same hands which are intrusted with the public and military authority of the state. Judges, invested with a power of this kind, like to carry on their operations with a high hand: they consider the refusal of a man to appear before them, not as being barely an expedient to avoid doing that which is just, but as a contempt of their authority: they of course look upon themselves as being bound to vindicate it;

* [The author's strictures on the administration of law between man and man, are in general philosophical, full of point, and deserving of notice, though frequently inaccurate; perhaps, however, it is not necessary to notice the errors; to a lawyer they are sufficiently obvious, to others they would be useless, and not interesting if understood.—ED.]

† A person against whom a judgment of this kind has been passed (which they call in France *un jugement par défaut*) may easily obtain relief; but as he now in his turn becomes in a manner the plaintiff, his deserting the cause, in this second stage of it, would leave him without remedy.

and a writ of *capias* is speedily issued to apprehend the refractory defendant. A preliminary writ or order of this kind becomes in time the first regular step of a law suit; and hence it seems to have happened, that, in the English courts of law, if I am rightly informed, a writ of *capias* is either issued before the *original* writ itself (which contains the summons of the plaintiff, and a formal delineation of his case), or is joined to such writ, by means of an *ac etiam capias*, and is served along with it.

In Rome, where the distribution of civil justice was at first lodged in the hands of the kings, and afterwards of the consuls, the method of seizing the person of a man against whom a demand of any kind was preferred, previously to any judgment being passed against him, was likewise adopted, and continued to be followed after the institution of the prætor's court, to whom the civil branch of the power of the consuls was afterwards delegated; and it lasted to very late times; that is, to the times when those capital alterations were made in the Roman civil law, during the reigns of the later emperors, which gave it the form it now has in those codes or collections of which we are in possession.

A very singular decree of violence even took place in Rome, in the method used to secure the persons of those against whom a legal demand was preferred.—In England, the way to seize a man under such circumstances, is by means of a public officer, supplied with a writ or order for that purpose, supposed to be directed to him (or to the sheriff his employer) from the king himself. But, in Rome, everyone became a kind of public officer in his own cause, to assert the prætor's prerogative; and, without any ostensible legal license or badge of public authority, had a right to seize by force the person of his opponent, wherever he met him. The practice was, that the plaintiff first summoned the person sued with a loud voice, to follow him before the court of the prætor.* When the defendant refused to obey such summons, the plaintiff, by means of the words *licet antestari?* requested the bystanders to be witnesses of the fact; as a remembrance of which, he touched the ears of each of them: and then proceeded to seize his opponent, by throwing his arms around his neck *(obtorto collo)*, thus endeavouring to drag him before the prætor. When the person sued was, through age or sickness, disabled from following the plaintiff, the latter was directed by the law of the Twelve Tables to supply him with a horse *(jumentum dato)*.

The above method of proceeding was, however, in after times, mitigated, though very late and slowly. In the first place, it became unlawful to seize a man in his own house, as it was the abode of his domestic gods. Women of good family were in time protected from the severity of the above custom, and they could no longer be dragged

* *Ad tribunal sequere, in jus ambula.*

by force before the tribunal of the prætor. The method of placing a sick or aged person by force upon a horse seems to have been abolished during the later times of the republic.—Emancipated sons, and freed slaves, were afterwards restrained from summoning their parents, or late masters, without having expressly obtained the prætor's leave, under the penalty of fifty pieces of gold. However, so late as the time of Pliny, the old mode of summoning, or carrying by force, before a judge, continued in general to subsist; though, in the time of Ulpian, the necessity of expressly obtaining the prætor's leave was extended to all cases and persons; and, in Constantine's reign, the method began to be established of having the legal summons served only by means of a public officer appointed for that purpose. After that time, other changes in the former laws were introduced, from which the mode of proceeding now used on the continent of Europe has been borrowed.

In England likewise, some changes, we may observe, have been wrought in the law and practice concerning the arrests of sued persons, though as slowly and late as those effected in the Roman republic or empire, if not more so; which evinces the great impediments of various kinds that obstruct the improvement of laws in every nation. So late as the reign of George I., an act was passed to prohibit the practice of previous personal arrest, in cases of demand under two pounds sterling; and, since that time, those courts, justly called *of Conscience*, have been established, in which such demands are to be summarily decided, and simple summons, without arrest, can only be used. A bill was afterwards enacted (on the motion of lord Beauchamp, whose name deserves to be recorded), by which the prohibition of arrest was extended to all cases of debt under ten pounds sterling; * a bill, the passing of which was of twenty, or even a hundred times more real importance than the rise and fall of a favourite, or a minister, though it has, perhaps, been honoured with a less degree of attention by the public.

Other peculiarities of the English civil law, are the great refinements, formalities, and strictness, that prevail in it. Concerning such refinements, which are rather imperfections, the same observation may be made that has been introduced above, in regard to the mode and frequency of civil arrest in England; which is, that they are continuations of methods adopted when the English law began to be formed, and are the consequences of the situation in which the English placed themselves when they rejected the ready-made code of the Roman civil law, and rather chose to become their own law-makers, and raise from the ground the structure of their own national civil code; which code, it may be observed, is as yet in the first stage of its formation, as

* The prohibition of arrest on mesne process has been since by act of Parliament extended to £15, except on bills of exchange and promissory notes, in which cases the law remains as heretofore.—Ed.

the Roman law itself was during the times of the republic, and in the reigns of the first emperors.

The time at which the power of administering justice to individuals becomes separated from the military power (an event which happens sooner or later in different countries), is the real æra of the origin of a regular system of laws in a nation. Judges being now deprived of the power of the sword, or (which amounts to the same) being obliged to borrow that power from other persons, endeavour to find their resources within their own courts, and, if possible, to obtain submission to their decrees from the great regularity of their proceedings, and the reputation of the impartiality of their decisions. At the same time also lawyers begin to crowd in numbers to courts, which it is no longer dangerous to approach, and add their refinements to the rules already set down either by the legislature or the judges. As the employing of them, especially in the beginning, is matter of choice, and they fear, that, if bare common sense were thought sufficient to conduct a lawsuit, every body might imagine he knows as much as they do, they contrive difficulties to make their assistance needful. As the true science of the law, which is no other than the knowledge of a long series of former rules and precedents, cannot as yet exist, they endeavour to create an artificial one to recommend themselves by. Formal distinctions and definitions are invented to express the different kinds of claims that men may set up against one another; in which almost the same nicety is displayed as that used by philosophers in classing different subjects, or *kingdoms*, of natural history. Settled forms of words, under the name of *writs*, or the like, are devised to set forth those claims; and, like introductory passes, serve to usher claimants into the temple of justice. For fear their clients should desert them after their first introduction, like a sick man who rests contented with a single visit of the physician, lawyers contrive other ceremonies and technical forms for the farther conduct of the process and the *pleadings*, and, in order still more safely to bind their clients to their dominion, they at length make every error relating to their professional regulations, whether it be a *misnomer*, a *mispleading*, or the like transgression, to be of as fatal a consequence as a failure against the laws of strict justice. Upon the foundation of the above-mentioned definitions and metaphysical distinctions of cases and actions, a number of strict rules of law are moreover raised, with which none can be acquainted but such as are complete masters of those distinctions and definitions.

To a person who in a posterior age observes for the first time such refinements in the distribution of justice, they appear very strange, and even ridiculous. Yet, it must be confessed, that during the times of the first institution of magistracies and courts of a civil nature, ceremonies and formalities of different kinds are very useful to procure to

such courts both the confidence of those persons who are brought before them, and the respect of the public at large; and they thereby become actual substitutes for military force, which, till then, had been the chief support of judges. Those same forms and professional regulations are moreover useful to give uniformity to the proceedings of the lawyers and of the courts of laws, and to ensure constancy and steadiness to the rules which they set down among themselves. And if the whole system of the refinements we mention continue to subsist in very remote ages, it is in a great measure owing (not to mention other causes) to their having so coalesced with the essential parts of the law as to make danger, or at least great difficulties, be apprehended from a separation; and they may, in that respect, be compared with a scaffolding used in the raising of a house, which, though only intended to set the materials and support the builders, happens to be suffered for a long time afterwards to stand, because it is thought the removal of it might endanger the building.

Very singular law formalities and refined practices, of the kind here alluded to, had been contrived by the first jurisconsults in Rome, with a view to amplify the rules set down in the laws of the Twelve Tables; which being few, and engraven on brass, every body could know as well as they: it even was a general custom to give those laws to children to learn, as we are informed by Cicero.

Very accurate definitions, as well as distinct branches of cases and actions, were contrived by the first Roman jurisconsults; and when a man had once made his election of that peculiar kind of *action* by which he chose to pursue his claim, it became out of his power to alter it. Settled forms of words, called *actiones legis*, were moreover contrived, which men must absolutely use to set forth their demands. The party himself was to recite the appointed words before the prætor; and should he unfortunately happen to miss or add a single word, so as to seem to alter his real case or demand, he lost his suit thereby. To this an allusion is made by Cicero, when he says, 'We 'have a civil law so constituted, that a man becomes non-suited, who 'has not proceeded in the manner he should have done.'* An observation of the like nature is also to be found in Quintilian, whose expressions on the subject are as follow:—'There is besides another 'danger; for if but one word has been mistaken, we are to be con-'sidered as having failed in every point of our suit.'† Similar solemnities and appropriated forms of words were moreover necessary to introduce the reciprocal answers and replies of the parties, to require and accept sureties, to produce witnesses, &c.

* *Ita jus civile habemus constitutum, ut causâ cadat is qui non quemadmodum oportet egerit.* De Invent. II. 19.

† *Est etiam periculosum, quum, si uno verbo sit erratum totâ causâ cecidisse videamur.* Inst. Orat. VII. 3.

Of the above *actiones legis*, the Roman jurisconsults and pontiffs had carefully kept the exclusive knowledge to themselves, as well as of those days on which religion did not allow courts of law to sit. *(Dies fasti et nefasti.)* Cn. Flavius, secretary to Appius Claudius, having happened to divulge the secret of those momentous forms (an act by which he was afterwards preferred by the people) jurisconsults contrived fresh ones, which they began to keep written with secret cyphers: but a member of their own body again betrayed them, and the new collection which he published was called *Jus Ælianum*, from his name (Sex Ælius), in the same manner as the former collection had been called *Jus Flavianum*. However it does not seem that the influence of lawyers became much abridged by those two collections: besides written information of that sort, practice is also necessary: and the public collections we mention, like the many books that have been published on the English law, could hardly enable a man to become a lawyer, at least sufficiently so as to conduct a law-suit.*

Modern civilians have been at uncommon pains to point out and produce the ancient *formulæ* we mention; in which they really have had great success. Old comic writers, such as Plautus and Terence, have supplied them with several; the settled words, for instance, used to claim the property of a slave, frequently occur in their works.†

Extremely like the above *actiones legis* are the *writs* used in the English courts of law. Those writs are framed for, and adapted to,

* The Roman jurisconsults had extended their skill to objects of *voluntary* jurisdiction as well as those of *contentious* jurisdiction, and had devised peculiar formalities, forms of words, distinctions, and definitions, in regard to obligations between man and man, stipulations, donations, spousals, and especially last wills, in all which they had displayed surprising nicety, refinement, accuracy, and strictness. The English lawyers have not bestowed so much pains on the objects of *voluntary* jurisdiction, nor anything like it.

† The words addressed to the plaintiff, by the person sued, when the latter made his appearance on the day for which he had been compelled to give sureties, were as follow, and are alluded to by Plaut. *Curcul.* I. 3. v. 5. 'Where art thou who hast obliged me to give 'sureties? Where art thou who summonedst me? Here I stand before thee: do thyself 'stand before me.' To which the plaintiff made answer, 'Here I am.' The defendant replied, 'What dost thou say?' The plaintiff answered, 'I say *(Aio)*'—and then followed the form of words by which he chose to express his action: *Ubi tu es, qui me vadatus es? Ubi tu es, qui me citâsti? Ecce ego me tibi sisto; tu contra et te mihi siste*, &c.

If the action, for instance, was brought on account of goods stolen, the settled penalty (or damages) for which was the restitution of twice the value, the words to be used were, AIO *decem aureos mihi furto tuo abesse, teque eo nomine viginti aureos mihi dare oportere.* For work done, such as cleaning of clothes, &c. AIO *te mihi tritici modium, de quo inter nos convenit ob polita vestimenta tua, dare oportere.* For recovering the value of a slave killed by another citizen: AIO *te hominem meum occidisse, teque mihi quantum ille hoc anno plurimi fuit dare oportere.* For damages done by a vicious animal, AIO *bovim Mævii servum meum, Stichum, cornu petiisse et occidisse, eoque nomine Mævium, aut servi æstimationem præstare, aut bovem mihi noxæ dare. oportere*; or, AIO *ursem Mævii mihi vulnus intulisse, et Mævium quantum æquius melius mihi dare oportere*, &c.

It may be observed, that the particular kind of remedy which was provided by the law for the case before the court was expressly pointed out in the formula used by a plaintiff; and in regard to this no mistake was to be made.—Thus, in the last-quoted formula the words *quantum æquius melius*, show that the prætor was to appoint inferior judges both to ascertain the damage done, and determine finally upon the case, according to the direction he previously gave them; these words being exclusively appropriated to the kind of actions called *arbitrariæ*, from the above-mentioned judges or arbitrators. In actions brought to require the execution of conventions that had no name, the convention itself was expressed in the formula; such is that which is recited above, relating to work done by the plaintiff, &c.

every branch or denomination of actions, such as *detinue*, *trespass*, *action upon the case*, *accompt*, *and covenant*, &c. ; the same strictness obtains in regard to them as did in regard to the Roman *formulæ* above-mentioned : there is the same danger in misapplying them, or in failing in any part of them ; and, to use the words of an English law-writer on the subject, 'Writs must be rightly directed, or they will be 'nought :—In all writs, care must be had that they be laid and formed 'according to their case, and so pursued in the process thereof.' *(Writ. Jacob's Law Dictionary.)*

The same formality likewise prevails in the English *pleadings* and conduct of the process as obtained in the old Roman law proceedings; and in the same manner as the Roman jurisconsults had their *actionis postulationes et editiones*, their *inficiationes*, *exceptiones*, *sponsiones*, *replicationes*, *duplicationes*, &c. so the English lawyers have their *counts*, *bars*, *replications*, *rejoinders*, *sur-rejoinders*, *rebutters*, *sur-rebutters*, &c. A scrupulous accuracy, in observing certain rules, is moreover necessary in the management of those pleadings: the following are the words of an English law-writer on the subject : 'Though 'the art of pleading was in its nature and design only to render the 'fact plain and intelligible, and to bring the matter to judgment with 'convenient certainty, it began to degenerate from its primitive sim-'plicity. Pleaders, yea and judges, have become too curious in that 'respect, pleadings at length ended in a piece of nicety and curiosity, 'by which the miscarriage of many a cause, upon small trivial objec-'tions, has been occasioned.' *(Pleadings. Cunningham's Law Dic.)*

There is, however, a difference between the Roman *actiones legis*, and the English writs, which is, that the former might be framed when new ones were necessary, by the prætor or judge of the court, or, in some cases, by the body of the jurisconsults themselves,—whereas *writs*, when wanted for such new cases as may offer, can only be devised by a distinct judge or court, exclusively invested with such powers, viz., the High Court of Chancery. The issuing of writs already existing, for the different cases to which they belong, is also expressly reserved to this court ; and so important has its office on those two points been deemed by lawyers, that it has been called, by way of eminence, the manufactory of justice *(officina justitiæ)*. Original writs, besides, when once framed, are not at any time to be altered, except by parliamentary authority.*

* Writs, legally issued, are also necessary for executing the different incidental proceedings that may take place in the course of a law-suit, such as producing witnesses, &c. The names given to the different kinds of writs are usually derived from the first Latin words by which they began when they were written in Latin, or at least from some remarkable word in them, which gives rise to expressions sufficiently uncouth and unintelligible. Thus a *pone* is a writ issued to oblige a person in certain cases to give sureties *(pone per vadium*, and *salvos plegios)*. A writ of *subpœna* is to oblige witnesses, and sometimes other classes of persons, to appear before a court. An action of *qui tam* is that which is brought to sue for a proportional share of a fine established by some penal statute, by the person who laid an information ; the words in the writ being, *Qui tam pro domino rege, quam pro seipso in hac parte sequitur*, &c.

Of so much weight in the English law are these original delineations of cases, that no cause is suffered to be proceeded upon, unless they first appear as legal introductors to it. However important or interesting the case, the judge, till he sees the writ he is used to, or at least a writ issued from the right manufactory, is both deaf and dumb. He is without eyes to see or ears to hear. And, when a case of a new kind offers, for which there is yet no writ in being, should the lord chancellor and masters in chancery disagree in creating one, or prove unequal to the arduous task, the great national council, that is, parliament itself, is, in such emergency, expressly applied to : by means of its collected wisdom, the right mystical words are brought together ; the judge is restored to the free use of his organs of hearing and of speech ; and, by the creation of a new *writ*, a new province is added to the empire of the courts of law.

In fine, those precious writs, those valuable briefs *(brevia)* as they are also called by way of eminence, which are the elixir and quintessence of the law, have been committed to the special care of officers appointed for that purpose, whose offices derive their names from the peculiar instruments they respectively use for the preservation of the deposit with which they are intrusted ; the one being called the office of the *Hanaper*, and the other of the *Small Bag*.*

To say the truth, however, the creating of a new writ, upon any new given case, is matter of greater difficulty than the generality of readers are aware of. The very importance which is thought to be in those professional forms of word, renders them really important. As every thing, without them, is illegal in a court of common law, so with them everything becomes legal ; that is to say, they empower the court legally to determine upon every kind of suit to which they are made to serve as introductors. The creating of a new writ, therefore, amounts, in its consequences, to the framing of a new law, and a law of a general nature too : now the creating of such a law, on the first appearance of a new case, which law is afterwards to be applied to all such cases as may be similar to the first, is really matter of difficulty : especially, when men are yet in the dark as to the best kind of provision to be made for the case in question, or even when it is not, perhaps, yet known whether it be proper to make any provision at all. The framing of a new writ, under such circumstances, is a measure on which lawyers or judges will not very willingly either venture of themselves, or apply to the legislature for that purpose.

From the above-mentioned real difficulty in creating new writs on one hand, and the absolute necessity of such writs in the courts of

* *Hanaperium et Parva Baga*, the Hanaper Office, and the Petty-Bag Office. The first and last of these Latin words, it may be observed, do not occur in Tully's works. To the care of the Petty-Bag Office those writs are trusted in which the king's business is concerned ; and to the Hanaper Office those which relate to the subject.

common law on the other, many new species of claims and cases (the arising of which is, from time to time, the unavoidable consequence of the progress of trade and civilisation) are left unprovided for, and remain like so many vacant spaces in the law, or rather like so many inaccessible spots, which the laws in being cannot reach: now this is a great imperfection in the distribution of justice, which should be open to every individual, and provide remedies for every kind of claim which men may set up against each other.

To remedy the above inconvenience, or rather in some degree to palliate it, law fictions have been resorted to, in the English law, by which writs, being warped from their actual meaning, are made to extend to cases to which they in no shape belong.

Law fictions of the kind we mention were not unknown to the old Roman jurisconsults; and, as an instance of their ingenuity in that respect, may be mentioned that kind of action, in which a daughter was called a son.* Several instances might also be quoted of the fictitious use of writs in the English courts of common law. A very remarkable expedient of that sort occurs in the method generally used to sue for the payment of certain kinds of debt, before the Court of Common Pleas; such (if I mistake not) as a salary for work done, indemnity for fulfilling orders received, &c. The writ issued in these cases is grounded on the supposition, that the person sued has trespassed on the ground of the plaintiff, and broken, by force of arms, through his fences and enclosures; and, under this predicament, the defendant is brought before the court: this species of writ, which lawyers have found of most convenient use, to introduce before a court of common law the kinds of claim we mention, is called in technical language a *clausum fregit*. In order to bring a person before the Court of King's Bench, to answer demands of much the same nature with those above, a writ, called a *latitat*, is issued, in which it is taken for granted that the defendant insidiously conceals himself, and is lurking in some county, different from that in which the court is sitting; the expressions used in the writ being, that 'he runs up and down and secretes himself:' though no such fact is seriously meant to be advanced either by the attorney or the party.

The same principle of strict adherence to certain forms long since established, has also caused lawyers to introduce into their proceedings fictitious names of persons, who are supposed to discharge the office of sureties; and in certain cases, it seems, the name of a fictitious person is introduced in a writ with that of the principal defendant, as being

* From the above instance it might be concluded that the Roman jurisconsults possessed still greater power than the English parliament; for it is a fundamental principle with the English lawyers, that parliament can do everything, *except* making a woman a man, or a man a woman.

[The author is playing with the boasted *Omnipotence* of parliament; a maxim, which Blackstone gravely declares to be a figure of speech rather too bold. 'From the sublime to the 'ridiculous there is but a step.'—ED.]

joined in a common cause with him. Another instance of the same high regard of lawyers, and judges too, for certain old forms, which makes them more unwilling to depart from such forms than from the truth itself of facts, occurs in the above-mentioned expedient used to bring ordinary causes before the Court of Exchequer, in order to be tried there at common law; which is, by making a declaration that the plaintiff is a king's debtor, though neither the court, nor the plaintiff's attorney, lay any serious stress on the assertion.*

CHAPTER XI.—*The Subject continued. The Courts of Equity.*

HOWEVER, there are limits to these fictions and subtilties; and the remedies of the law cannot by their means be extended to all cases that may arise, unless too many absurdities are suffered to be accumulated; nay, there have been instances in which the improper application of writs, in the courts of law, has been checked by authority. In order therefore to remedy the inconveniences we mention—that is, in order to extend the administration of distributive justice to all possible cases, by freeing it from the professional difficulties that have gradually grown up in its way—a new kind of courts has been instituted in England, called *Courts of Equity*.

The generality of people, misled by the word *equity*, have conceived false notions of the office of these courts; and it seems to be generally thought, that the judges who sit in them are only to follow the rules of natural equity; by which people seem to understand, that, in a court of equity, the judge may follow the dictates of his own private feelings, and ground his decisions, as he thinks proper, on the peculiar circumstances and situation of those persons who make their appearance before him. Nay, Johnson (in his abridged dictionary) gives the following definition of the power of the Court of Chancery, considered as a court of equity. 'The chancellor hath power to moderate and temper 'the written law, and subjecteth himself only to the law of nature and 'conscience:' for which definition, Swift, and Cowell, who was a lawyer, are quoted as authorities. Other instances might be produced of lawyers who have been inaccurate in their definitions of the true offices of the judges of equity. And Johnson himself is on no subject a despicable authority.

Certainly the power of the judges of equity cannot be to alter, by their own private power, the written law, that is, acts of parliament, and thus to control the legislature. Their office only consists, as will

* Another instance of the strict adherence of the English lawyers to their old established forms, in preference even to the truth of facts, occurs in the manner of executing the very act mentioned in this chapter, passed in the reign of George I. for preventing personal arrest for debts under forty shillings. If the defendant, after being personally served with a copy of the process, does not appear on the appointed days, the method is to suppose that he has actually made his appearance, and the cause is proceeded upon according to this supposition; fictitious names of bails are also resorted to.

be proved in the sequel, in providing remedies for those cases for which the public good requires that remedies should be provided, and in regard to which the courts of common law, shackled by their original forms and institutions, cannot procure any:—or, in other words, the courts of equity have a power to administer justice to individuals, unrestrained (not by the law, but) by the professional law difficulties which lawyers have from time to time contrived in the courts of common law, and to which the judges of those courts have given their sanction.*

An office of the kind here mentioned was soon found necessary in Rome, for reasons of the same nature with those above delineated. For it is remarkable enough, that the body of English lawyers, by refusing admittance to the code of Roman laws, as it existed in the later times of the empire, have only subjected themselves to the same difficulties under which the old Roman jurisconsults laboured, during the time they were raising the structure of those same laws. And it may also be observed, that the English lawyers, or judges, have fallen upon much the same expedients as those which the Roman jurisconsults and prætors had adopted.

This office of a judge of *equity*, was, in time, assumed by the prætor in Rome, in addition to the judicial power he before possessed.† At the beginning of the year for which he had been elected, the prætor made a declaration of those remedies for new difficult cases, which he had determined to afford during the time of his magistracy; in the choice of which he was no doubt directed, either by his own observations (while out of office) on the propriety of such remedies, or by the suggestions of experienced lawyers on the subject. This declaration *(edictum)* the prætor produced *in albo*, as the expression was. Modern civilians have made many conjectures on the real meaning of the above words; one of their suppositions, which is as likely to be true as any other, is, that the heads of new law remedies devised by the prætor, were written on a whitened wall by the side of his tribunal.

Among the provisions made by the Roman prætors in their capacity of judges of equity, may be mentioned those which they introduced in favour of emancipated sons, and of relatives by the women's side *(cognati)*, in regard to the right of inheriting. Emancipated sons were supposed, by the laws of the Twelve Tables, to have ceased to be the children of their father, and, as a consequence, a legal claim was denied them on the paternal inheritance: of the relatives by the women's side no notice was taken, in that article of the same laws which treated of the right of succession, mention being only made of relatives by the

* A finely drawn distinction this, although in early times not well observed. So late as under the Stuarts, the conscience and will of the chancellor, unguided and unfettered, were opposed to the rules of positive law, and gave rise to Selden's remark, that 'Equity was 'according to the conscience of him that was chancellor.'—ED.

† The prætor thus possessed two distinct branches of judicial authority, in the same manner as the Court of Exchequer does in England, which occasionally sits as a court of common law, and a court of equity.

men's side *(agnati)*. The former the prætor admitted, by the edict *unde liberi*, to share their father's (or grandfather's) inheritance with their brother's; and the latter he put in possession of the patrimony of a kinsman deceased, by means of the edict *unde cognati*, when there were no relatives by the men's side. These two kinds of inheritance were not, however, called *hæreditas*, but only *bonorum possessio;* these words being very accurately distinguished, though the effect was in the issue exactly the same.*

In the same manner the laws of the Twelve Tables had provided relief only for cases of theft; and no mention was made, in them, of cases of goods taken away by force (a deed which was not looked upon in so odious a light at Rome as theft, which was considered as the peculiar guilt of slaves). In process of time the prætor promised relief to such persons as might have their goods taken from them by open force, and gave them an action for the recovery of four times the value, against those who had committed the fact with an evil intention. *Si cui dolo malo bona rapta esse dicentur, et in quadruplum* JUDICIUM DABO.

Again, neither the laws of the Twelve Tables, nor the laws made afterwards in the assemblies of the people, had provided remedies except for very few cases of fraud. Here the prætor likewise interfered in his capacity of judge of equity, though so very late as the time of Cicero; and promised relief to defrauded persons, in those cases in which the laws in being afforded no action. *Quæ dolo malo facta esse dicentur, si de his rebus alia actio non erit, et justa causa esse videbitur,* JUDICIUM DABO.† By edicts of the same nature, prætors in process of time gave relief in certain cases to married women, and likewise to minors (*minoribus* XXV. *annis succurrit prætor*, &c.)‡

* As the power of fathers, at Rome, was unbounded, and lasted as long as their life, the emancipating of sons was a case that occurred frequently enough, either for the security or satisfaction of those who engaged in any undertaking with them. The power of fathers had been carried so far by the laws of Romulus, confirmed afterwards by those of the Twelve Tables, that they might sell their sons for slaves as often as three times, if, after the first or second sale, they happened to acquire their liberty; it was only after being sold for the third time, and then becoming again free, that sons could be entirely released from the paternal authority. On this law-doctrine was founded the peculiar formality of emancipating sons. A pair of scales, and some copper coin, were first brought; without the presence of these ingredients, the whole business would have been void; and the father then made a formal sale of his son to a person appointed to buy him, who was immediately to *manumit* or free him; these sales and manumissions were repeated three times. Five witnesses were to be present, besides a man to hold the scales *(libripens)*, and another *(antestatus)* occasionally to remind the witnesses to be attentive to the business before them.

† At the same time that the prætor proffered a new edict, he also made public those peculiar formulæ by which the execution of the same was afterwards to be required from him. The name of that prætor who first produced the edict above-mentioned was Aquilius, as we are informed by Cicero, in that elegant story well known to scholars, in which he relates the kind of fraud that was put upon Canius, a Roman knight, when he purchased a pleasure-house and gardens, near Syracuse in Sicily. This account Cicero concludes with observing, that Canius was left without remedy, 'as Aquilius, his colleague and friend, had not yet published his formulæ concerning fraud.'—*Quid enim faceret? nondum enim Aquilius, collega et familiaris meus, protulerat de dolo malo formulas.* Off. III. 14.

‡ The law collection, or system that was formed by the series of edicts published at different times by prætors, was called *jus prætorium*, and also *jus honorarium (not strictly binding)*. The laws of the Twelve Tables, together with all such other laws as had at any time

The courts of equity established in England have in like manner provided remedies for a very great number of cases, or species of demand, for which the courts of common law, cramped by their forms and peculiar law tenets, can afford none. Thus the courts of equity may, in certain cases, give actions for and against infants, notwithstanding their minority,—and for and against married women, notwithstanding their coverture. Married women may even, in certain cases, sue their husbands before a court of equity. Executors may be made to pay interest for money that lies long in their hands. Courts of equity may appoint commissioners to hear the evidence of absent witnesses. When other proofs fail, they may impose an oath on either of the parties; or, in the like case of a failure of proofs, they may compel a trader to produce his books of trade. They may also confirm a title to land, though one has lost his writings, &c.

The power of the courts of equity in England, of which the Court of Chancery is the principal one, no doubt owes its origin to the power possessed by the latter both of creating and issuing writs. When new complicated cases offered, for which a new kind of writ was wanted, the judges of chancery, finding that it was necessary that justice should be done, and at the same time being unwilling to make general and perpetual provisions on the cases before them by creating new writs, commanded the appearance of both parties, in order to procure as complete information as possible in regard to the circumstances attending the case before them; and then they gave a decree upon the same by way of experiment.

To beginnings and circumstances like these, the English courts of equity, it is not to be doubted, owe their present existence. In our days, when such strict notions are entertained concerning the power of magistrates and judges, it can scarcely be supposed that those courts, however useful, could gain admittance. Nor indeed, even in the times when they were instituted, were their proceedings free from opposition; and afterwards so late as the reign of queen Elizabeth, it was adjudged, in the case of *Colleston* and *Gardner*, the killing a sequestrator from the Court of Chancery, in the discharge of his business, was no murder; which judgment could only be awarded on the ground that the sequestrator's commission, and consequently the power of his employers, were illegal.* However, the authority of the courts of equity has in process

been passed in the assembly of the people, were called, by way of eminence, *jus civile*. The distinction was exactly of the same nature as that which takes place in England between the common and statute laws, and the law or practice of the courts of equity. The two branches of the prætor's judicial office were very accurately distinguished; and there was, besides, this capital difference between the remedies or actions which he gave in his capacity of judge of civil law, and those in his capacity of judge of equity, that the former, being grounded on the *jus civile*, were perpetual, and were called *actiones civiles* or *actiones perpetuæ*; the latter were obliged to be preferred within the year, and were accordingly called *actiones annuæ* or *actiones prætoriæ*.

* When Sir E. Coke was lord chief justice of the King's Bench, and lord Ellesmere lord chancellor, during the reign of James I., a very serious quarrel took plaee between the courts of law, and those of equity, which is mentioned in the fourth chapter of the third book of

of time become settled ; one of the constituent branches of the legislature even receives at present appeals from the decrees passed in those courts ; and I have no doubt that several acts of the whole legislature might be produced, in which the office of the courts of equity is openly acknowledged.

The kind of process that has in time been established in the court of Chancery is as follows : After a petition is received by the court, the person sued is served with a writ of *subpœna*, to command his appearance. If he does not appear, an attachment is issued against him : if a *non-inventus* is returned, that is, if he is not to be found, a proclamation goes forth against him ; then a commission of rebellion is issued for apprehending him, and bringing him to the Fleet prison. If the person sued stands farther into contempt, a serjeant-at-arms is to be sent out to take him ; and if he cannot be taken, a sequestration of his land may be obtained till he appears. Such is the power which the Court of Chancery, as a court of equity, hath gradually acquired to compel appearance before it. In regard to the execution of the decrees it gives, it seems that court has not been quite so successful ; at least, those law-writers whose works I have had an opportunity of seeing, hold it as a maxim, that the Court of Chancery cannot bind the estate, but only the person ; and as a consequence, a person who refuses to submit to its decree is only to be confined in the Fleet prison.*

On this occasion I shall observe, that the authority of the lord chancellor in England, in his capacity of a judge of equity, is much more narrowly limited than that which the prætors in Rome had been able to assume. The Roman prætors, we are to remark, united in themselves the double office of deciding cases according to the civil law (*jus civile*), and to the prætorian law, or law of equity ; nor did there exist any other courts beside their own, that might serve as a check upon them : hence it happened that their proceedings in the career of equity were very arbitrary. In the first place, they did not use to make it any very strict rule to adhere to the tenor of their own edicts, during the whole year which their office lasted ; and they assumed a power of altering them as they thought proper. To remedy so capital a defect in the distribution of justice, a law was passed so late as the year of Rome 687 (not long before Tully's time) which was called *Lex Cornelia*, from the name of C. Cornelius, a tribune of the people, who propounded it under the consulship of C. Piso and Man. Glabrio. By this law it was enacted, that prætors should in future constantly decree

Judge Blackstone's Commentaries : a work in which more might reasonably have been said on the subject of the courts of equity.

* The Court of Chancery was, very likely, the first instituted of the two courts of equity : as it was the highest court in the kingdom, it was best able to begin the establishment of an office or power, which naturally gave rise at first to so many objections. The Court of Exchequer, we may suppose, only followed the example of the Court of Chancery : in order the better to secure the new power it assumed, it even found it necessary to bring out the whole strength it could muster ; and both the treasurer and the chancellor of the Exchequer sit (or are supposed to sit) in the Court of Exchequer, when it is formed as a court of equity.

according to their own edicts, without altering any thing in them during the whole year of their prætorship. Some modern civilians produce a certain senatus-consult to the same effect, which, they say, had been passed a hundred years before ; while others are of opinion that the same is not genuine : however, supposing it to be really so, the passing of the law we mention shows that it had not been so well attended to as it ought to have been.

Though the above-mentioned arbitrary proceedings of prætors were thus repressed, they retained another privilege, equally hurtful ; which was that every new prætor, on his coming into office, had it in his power to retain only what part he pleased of the edicts of his predecessors, and to reject the remainder ; from which it followed that the prætorian laws or edicts, though provided for so great a number of important cases, were really in force for only one year, the time of the duration of a prætor's office. Nor was a regulation made to remedy this capital defect in the Roman jurisprudence before the time of the emperor Hadrian, which is another remarkable proof of the very great slowness with which useful public regulations take place in any nation. Under the reign of the emperor we mention, the most useful edicts of former prætors were by his order collected, or rather compiled, into one general edict, which was thenceforward to be observed by all civil judges in their decisions, and was accordingly called the perpetual edict (*perpetuum edictum*). This edict, though now lost, soon grew into great repute ; all the jurisconsults of those days vied with each other in writing commentaries upon it ; and the emperor himself thought it so glorious an act, to have caused the same to be framed, that he considered himself on that account as being another Numa.*

But the courts of equity in England, notwithstanding the extensive jurisdiction they have been able, in process of time, to assume, never superseded the other courts of law. These courts still continue to exist in the same manner as formerly, and have proved a lasting check on the innovations, and in general the proceedings of the courts of equity. And here we may remark the singular, and at the same time effectual, means of balancing each other's influence, reciprocally possessed by the courts of the two different species. By means of its exclusive privilege both of creating and issuing writs, the Court of Chancery has been able to hinder the courts of common law from arrogating to themselves the cognizance of those new cases which were not provided

* Several other more extensive law compilations were framed after the perpetual edict we mention; there having been a kind of emulation among the Roman emperors, in regard to the improvement of the law. At last, under the reign of Justinian, that celebrated compilation was published, called the code of Justinian, which, under different titles, comprises the Roman laws and the edicts of the prætors, together with the *rescripts* of the emperors; and an equal sanction was given to the whole. This was an event of much the same nature as that which will take place in England, whenever a coalition shall be effected between the courts of common law and those of equity, and both shall thenceforward be bound alike to frame their judgments from the whole mass of decided cases and precedents then existing, at least such of it as may be consistently brought together into one compilation.

for by any law in being, and thus dangerously uniting in themselves the power of judges of equity with that of judges of common law. On the other hand, the courts of common law are alone invested with the power of punishing (or allowing damages for) those cases of violence by which the proceedings of the courts of equity might be opposed; and thus they have been enabled to obstruct the enterprises of the latter, and prevent their effecting in themselves the like dangerous union of the two offices of judges of common law and of equity.

From the situation of the English courts of equity, with respect to the courts of common law, those courts have really been kept within limits that may be said to be exactly defined, if the nature of their functions be considered. In the first place, they can neither touch acts of parliament, nor the established practice of the other courts, much less reverse the judgments already passed in these latter, as the Roman prætors sometimes used to do in regard to the decisions of their predecessors in office, and sometimes also in regard to their own. The courts of equity are even restrained from taking cognizance of any case for which the other courts can possibly afford remedies. Nay, so strenuously have the courts of common law defended the verge of their frontier, that they have prevented the courts of equity from using in their proceedings the mode of trial by a jury: so that, when in a case of which the Court of Chancery has already begun to take cognizance, the parties happen to join issue on any particular fact (the truth or falsehood of which a jury is to determine) the Court of Chancery is obliged to deliver up the cause to the Court of King's Bench, there to be finally decided. In fine, the example of the regularity of the proceedings, practised in the courts of common law, has been communicated to the courts of equity; and rolls or records are carefully kept of the pleadings, determinations, and acts of these courts, to serve as rules for future decisions.*

So far, therefore, from having it in his power "*to temper and moderate*" (that is, to *alter*) the written law or statutes, a judge of equity, we find, cannot alter the unwritten law, that is to say, the established practice of the other courts, and the judgments grounded thereupon; nor can he even meddle with those cases for which either the written or unwritten law has already made general provisions, and of which there is a possibility for the ordinary courts of law to take cognizance.

From all the above observations it follows, that, of the courts of equity, as established in England, the following definition may be given, which is, that they are a kind of *inferior experimental* legislature, continually employed in finding out and providing law remedies for those new species of cases for which neither the courts of common law, nor

* The master of the rolls is the keeper of these records, as the title of the office expresses. His employment in the Court of Chancery is of great importance, as he can hear and determine causes in the absence of the lord chancellor.

the legislature, have yet found it convenient or practicable to establish any; in doing which, they are to forbear to interfere with such cases as they find already in general provided for. A judge of equity is also to adhere, in his decisions, to the system of decrees formerly passed in his own court, regular records of which are kept for that purpose.

From this latter circumstance it again follows, that a judge of equity, by the very exercise he makes of his power, is continually abridging the arbitrary part of it; as every new case he determines, every precedent he establishes, becomes a land-mark or boundary which both he and his successors in office are afterwards expected to regard.*

Here it may be added as a conclusion, that appeals from the decrees passed in the courts of equity are carried to the house of peers; which circumstance alone might suggest that a judge of equity is subjected to certain positive rules, besides those '*of nature and conscience only*,' an appeal being naturally grounded on a supposition that some rules of that kind were neglected.

The above discussion on the English law has proved much longer than I intended at first; so much as to have swelled, I find, into two additional chapters. However, I confess I have been under the greater temptation to treat at some length the subject of the courts of equity, as I have found the error (which may be called a constitutional one) concerning the arbitrary office of those courts, to be countenanced by the apparent authority of lawyers, and of men of abilities, at the same time that I have not seen in any book an attempt made professedly to confute the same, or indeed to point out the nature and true office of the courts of equity.

CHAPTER XII.—*Of Criminal Justice.*

WE are now to treat of an article, which, though it does not in England, and indeed should not in any state, make part of the powers which are properly constitutional, that is, of the reciprocal rights by means of which the powers that concur to form the government constantly balance each other, yet essentially interests the security of individuals, and, in the issue, the constitution itself; I mean to speak of criminal justice. But, previous to an exposition of the laws of England on this head, it is necessary to desire the reader's attention to certain considerations.

When a nation intrusts the power of the state to a certain number of persons, or to one, it is with a view to two points: one, to repel more effectually foreign attacks; the other, to maintain domestic tranquillity.

To accomplish the former point, each individual surrenders a share

* 'Hence,' says Mr. Millar, 'law is constantly gaining ground upon equity. Every new 'and extraordinary interposition is, by length of time, converted into an old rule. A great 'part of what is now strict law, was formerly considered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.'

of his property, and sometimes, to a certain degree, even of his liberty. But though the power of those who are the heads of the state may thereby be rendered very considerable, yet it cannot be said, that liberty is, after all, in any high degree endangered ; because, should ever the executive power turn against the nation a strength which ought to be employed solely for its defence, this nation, if it were really free (by which I mean, unrestrained by political prejudices), would be at no loss for providing the means of its security.

In regard to the latter object, that is, the maintenance of domestic tranquillity, every individual must, exclusive of new renunciations of his natural liberty, moreover surrender (which is a matter of far more dangerous consequence) a part of his personal security.

The legislative power being, from the nature of human affairs, placed in the alternative, either of exposing individuals to dangers which it is at the same time able extremely to diminish, or of delivering up the state to the boundless calamities of violence and anarchy, finds itself compelled to reduce all its members within the reach of the arm of the public power, and, by withdrawing in such cases the benefit of the social strength, to leave them exposed, bare, and defenceless, to the exertion of the comparatively immense power of the executors of the laws.

Nor is this all ; for, instead of that powerful reaction which the public authority ought in the former case to experience, here it must find none ; and the law is obliged to proscribe even the attempt of resistance. It is therefore in regulating so dangerous a power, and in guarding lest it should deviate from the real end of its institution, that legislation ought to exert all its efforts.

But here it is of great importance to observe, that the more powers a nation has reserved to itself, and the more it limits the authority of the executors of the laws, the more industriously ought its precautions to be multiplied.

In a state where, from a series of events, the will of the prince has at length attained to hold the place of law, he spreads an universal oppression, arbitrary and unresisted ; even complaint is dumb : and the individual, undistinguishable by him, finds a kind of safety in his own insignificance. With respect to the few who surround him, as they are at the same time the instruments of his greatness, they have nothing to dread but momentary caprices ; a danger, against which, if there prevails a certain general mildness of manners, they are in a great measure secured.

But in a state where the ministers of the laws meet with obstacles at every step, even their strongest passions are continually put in motion ; and that portion of public authority, deposited with them as the instrument of national tranquillity, easily becomes a most formidable weapon.

Let us begin with the most favourable supposition, and imagine a

prince whose intentions are in every case thoroughly upright; let us even suppose that he never lends an ear to the suggestions of those whose interest it is to deceive him: nevertheless, he will be subject to error; and this error, which, I will farther allow, solely proceeds from his attachment to the public welfare, yet may happen to prompt him to act as if his views were directly opposite.

When opportunities shall offer (and many such will occur) of procuring a public advantage by overleaping restraints, confident in the uprightness of his intentions, and being naturally not very earnest to discover the distant evil consequences of actions in which, from his very virtue, he feels a kind of complacency, he will not perceive, that, in aiming at a momentary advantage, he strikes on the laws themselves on which the safety of the nation rests, and that those acts, so laudable when we only consider the motive of them, make a breach at which tyranny will one day enter.

Yet farther, he will not even understand the complaints that will be made against him. To insist upon them will appear to him to the last degree injurious: pride, when perhaps he is least aware of it, will enter the lists; what he began with calmness, he will prosecute with warmth; and if the laws shall not have taken every possible precaution, he may think he is acting a very honest part, while he treats, as enemies of the state, men whose only crime will be that of being more sagacious than himself, or of being in a better situation for judging of the results of measures.

But it were to exalt human nature extravagantly, to think that this case of a prince, who never aims at augmenting his power, may, in any shape, be expected frequently to occur. Experience evinces that the happiest dispositions are not proof against the allurements of power, which has no charms but as it leads on to new advances; authority endures not the very idea of restraint; nor does it cease to struggle till it has beaten down every boundary.

Openly to level every barrier, and at once to assume the absolute master, as we said before, would be a fruitless attempt. But it is here to be remembered, that those powers of the people which are reserved as a check upon the sovereign, can only be effectual so far as they are brought into action by private individuals. Sometimes a citizen, by the force and perseverance of his complaints, opens the eyes of the nation; at other times, some member of the legislature proposes a law for the removal of some public abuse: these, therefore, will be the persons against whom the prince will direct all his efforts.*

And he will the more assuredly do so, as, from the error so usual among men in power, he will think that the opposition he meets with, however general, wholly depends on the activity of one or two leaders;

* By the word *prince*, I mean those who, under what appellation, and in whatever government it may be, are at the head of public affairs.

and amidst the calculations he will make, both of the supposed smallness of the obstacle which offers to his view, and of the decisive consequence of the single blow he thinks necessary to strike, he will be urged on by the despair of ambition on the point of being baffled, and by the most violent of all hatreds, that which is preceded by contempt.

In that case which I am still considering, of a really free nation, the sovereign must be very careful that military violence do not make the smallest part of his plan: a breach of the social compact like this, added to the horror of the expedient, would infallibly endanger his whole authority. But, on the other hand, if he be resolved to succeed, he will, in defect of other resources, try the utmost extent of the legal powers which the constitution has intrusted with him; and if the laws have not in a manner provided for every possible case, he will avail himself of the imperfect precautions themselves that have been taken, as a cover to his tyrannical proceedings; he will pursue steadily his particular object, while his professions breathe nothing but the general welfare, and destroy the assertors of the laws, under the very shelter of the forms contrived for their security.*

This is not all; independently of the immediate mischief he may do, if the legislature interpose not in time, the blows will reach the constitution itself; and, the consternation becoming general among the people, each individual will find himself enslaved, in a state which yet may exhibit all the common appearances of liberty.

Not only, therefore, the safety of the individual, but that of the nation itself, requires the utmost precautions in the establishment of that necessary but formidable prerogative of dispensing punishments.—The first to be taken, even without which it is impossible to avoid the dangers above suggested is, that it never be left at the disposal, nor, if it be possible, exposed to the influence, of the man who is the depository of the public power.

The next indispensable precaution is, that this power shall not be vested in the legislative body; and this precaution, so necessary alike under every mode of government, becomes doubly so, when only a small part of the nation has a share in the legislative power.

If the judicial authority were lodged in the legislative part of the people, not only the great inconvenience must ensue of its thus becoming independent, but also that worst of evils, the supposition of the sole circumstance that can well identify this part of the nation with the whole, which is, a common subjection to the rules which they themselves prescribe. The legislative body, which could not, without ruin to itself, establish, openly and by direct laws, distinctions in favour of

* If any person should charge me with calumniating human nature (for it is her alone I am accusing here), I would desire him to cast his eyes on the history of Louis XI.—of a *Richelieu*, and, above all, on that of England before the Revolution: he would see the arts and activity of government increase, in proportion as it gradually lost its means of oppression.

its members, would introduce them by its judgments: and the people, in electing representatives, would give themselves masters.

The judicial power ought therefore absolutely to reside in a subordinate and dependent body,—dependent, not in its particular acts, with regard to which it ought to be a sanctuary, but in its rules and in its forms, which the legislative authority must prescribe. How is this body to be composed? In this respect farther precautions must be taken.

In a state where the prince is absolute master, numerous bodies of judges are most convenient, inasmuch as they restrain, in a considerable degree, that respect of persons which is one inevitable attendant on that mode of government. Besides, those bodies, whatever their outward privileges may be, being at bottom in a state of great weakness, have no other means of acquiring the respect of the people than their integrity, and their constancy in observing certain rules and forms: nay, these circumstances, united, in some degree over-awe the sovereign himself, and discourage the thoughts he might entertain of making them the tools of his caprice.

But in a strictly limited monarchy, that is, where the prince is understood to be, and in fact is, subject to the laws, numerous bodies of judicature would be repugnant to the spirit of the constitution, which requires that all powers in the state should be as much confined as the end of their institution can allow; not to add, that, in the vicissitudes incident to such a state, they might exert a dangerous influence.

Besides, that awe which is naturally inspired by such bodies, and is so useful when it is necessary to strengthen the feebleness of the laws, would not only be superfluous in a state where the whole power of the nation is on their side, but would moreover have the mischievous tendency to introduce another sort of fear than that which men must be taught to entertain. Those mighty tribunals, I am willing to suppose, would preserve, in all situations of affairs, that integrity which distinguishes them in states of a different constitution; they would never inquire after the influence, still less the political sentiments, of those whose fate they were called to decide; but these advantages not being founded in the necessity of things, and the power of such judges seeming to exempt them from being so very virtuous, men would be in danger of taking up the fatal opinion, that the simple exact observance of the laws is not the only task of prudence: the citizen called upon to defend, in the sphere where fortune has placed him, his own rights, and those of the nation itself, would dread the consequence of even a lawful conduct, and, though encouraged by the law, might desert himself when he came to behold its ministers.

In the assembly of those who sit as his judges, the citizen might possibly descry no enemies: but neither would he see any man whom a similarity of circumstances might engage to take a concern in his

fate: and their rank, especially when joined with their numbers, would appear to him to lift them above that which over-awes injustice, where the law has been unable to secure any other check,—I mean the reproaches of the public.

And these his fears would be considerably heightened, if, by the admission of the jurisprudence received among certain nations, he beheld those tribunals, already so formidable, wrap themselves up in mystery, and be made, as it were, inaccessible.*

He could not think, without dismay, of those vast prisons within which he is one day perhaps to be immured—of those proceedings, unknown to him, through which he is to pass—of that total seclusion from the society of other men—or of those long and secret examinations, in which, abandoned wholly to himself, he will have nothing but a passive defence to oppose to the artfully varied questions of men, whose intentions he shall at least mistrust; and in which his spirits, broke down by solitude, shall receive no support, either from the counsels of his friends, or the looks of those who may offer up vows for his deliverance.

The security of the individual, and the consciousness of that security, being then equally essential to the enjoyment of liberty, and necessary for the preservation of it, these two points must never be left out of sight, in the establishment of a judicial power; and I conceive that they necessarily lead to the following maxims.

I.—I shall remind the reader of what has been laid down above, that the judicial authority ought never to reside in an independent body; still less in him who is already the trustee of the executive power.

II.—The party accused ought to be provided with all possible means of defence. Above all things the whole proceedings ought to be public. The courts and their different forms, must be such as to

* An allusion is made here to the secrecy with which the proceedings, in the administration of criminal justice, are to be carried on, according to the rules of the civil law, which in that respect are adopted over all Europe. As soon as the prisoner is committed, he is debarred of the sight of everybody, till he has gone through his several examinations. One or two judges are appointed to examine him, with a clerk to take his answers in writing; and he stands alone before them in some private room in the prison. The witnesses are to be examined apart, and he is not admitted to see them till their evidence is closed: they are then *confronted* together before all the judges, to the end that the witnesses may see if the prisoner is really the man they meant in giving their respective evidences, and that the prisoner may object to such of them as he shall think proper. This done, the depositions of those witnesses who are adjudged upon trial to be exceptionable, are set aside: the deposition of the others are to be laid before the judges, as well as the answers of the prisoner, who had been previously called upon to confirm or deny them in their presence; and a copy of the whole is delivered to him, that he may, with the assistance of a counsel, which is now granted him, prepare for his justification. The judges are, as has been said before, to decide both upon the matter of law and the matter of fact, as well as upon all incidents that may arise during the course of the proceedings, such as admitting witnesses to be heard in behalf of the prisoner, &c.

This mode of criminal judicature may be useful as to the bare discovery of truth,—a point which I do not propose to discuss here; but, at the same time, a prisoner is so completely delivered up into the hands of the judges, who even can detain him almost at pleasure by multiplying or delaying his examinations, that, whenever it is adopted, men are almost as much afraid of being accused, as of being guilty, and especially grow very cautious how they interfere in public matters. We shall see presently how the trial by jury, peculiar to the English nation, is admirably adapted to the nature of a free state.

inspire respect, but never terror; and the cases ought to be so accurately ascertained, the limits so clearly marked, that neither the executive power, nor the judges, may ever hope to transgress them with impunity.

III.—Since we must absolutely pay the price for the advantage of living in society, not only by relinquishing some share of our natural liberty (a surrender which, in a wisely framed government, a wise man will make without reluctance), but even also by resigning part of our personal security,—in a word, since all judicial power is an evil, though a necessary one, no care should be omitted to reduce as far as possible the dangers of it.

As there is, however, a period at which the prudence of man must stop, at which the safety of the individual must be given up, and the law is to resign him to the judgment of a few persons, that is (to speak plainly), to a decision in some sense arbitrary, it is necessary that the law should narrow as far as possible this sphere of peril, and so order matters, that when the subject shall happen to be summoned to the decision of his fate by the fallible conscience of a few of his fellow-creatures, he may always find in them his advocates, and never his adversaries.

CHAPTER XIII.—*The same subject*

AFTER having offered to the reader, in the preceding chapter, such general considerations as I thought necessary, in order to convey a more just idea of the spirit of the criminal judicature in England, and of the advantages peculiar to it, I now proceed to exhibit the particulars.

When a person is charged with a crime, the magistrate, who is called in England, *a justice of the peace*, issues a warrant to apprehend him; but this warrant can be no more than an order for bringing the party before him: he must then hear him, and take down in writing his answers, together with the different informations. If it appears, on this examination, either that the crime laid to the charge of the person who is brought before the justice was not committed, or that there is no just ground to suspect him of it, he must be set absolutely at liberty; if the contrary results from the examination, the party accused must give bail for his appearance to answer to the charge unless in capital cases; for then he must, for safer custody, be really committed to prison, in order to take his trial at the next sessions.

But this precaution, of requiring the examination of an accused person, previous to his imprisonment, is not the only care which the law has taken in his behalf; it has farther ordained, that the accusation against him should be again discussed, before he can be exposed to the danger of a trial. At every session the sheriff appoints what is

called the *grand jury*. This assembly must be composed of more than twelve men, and less than twenty-four; and is always formed out of the most considerable persons in the county. Its function is to examine the evidence that has been given in support of every charge; if twelve of those persons do not concur in the opinion that an accusation is well grounded, the party is immediately discharged; if, on the contrary, twelve of the grand jury find the proofs sufficient, the prisoner is said to be indicted, and is detained in order to go through the remaining process.

On the day appointed for his trial, the prisoner is brought to the bar of the court, where the judge, after causing the bill of indictment to be read in his presence, must ask him how he would be tried; to which the prisoner answers, *By God and my country*; by which he is understood to claim to be tried by a jury, and to have all the judicial means of defence to which the law entitles him. The sheriff then appoints what is called the petit jury; this must be composed of twelve men chosen out of the county where the crime was committed, and possessed of a landed income of ten pounds a year: their declaration finally decides on the truth or falsehood of the accusation.

As the fate of the prisoner thus entirely depends on the men who compose this jury, justice requires that he should have a share in the choice of them; and this he has through the extensive right which the law has granted him, of challenging, or objecting to, such of them as he may think exceptionable. These challenges are of two kinds. One, which is called the challenge to the *array*, has for its object to have the whole panel set aside; it is proposed by the prisoner when he thinks that the sheriff who formed the panel is not indifferent in the cause; for instance, if he thinks he has an interest in the prosecution, that he is related to the prosecutor, or in general to the party who pretends to be injured.

The other challenges are called to the polls (*in capita*): they are exceptions proposed against the jurors, severally, and are reduced to four heads by Sir Edward Coke.—That which he calls *propter honoris respectum*, may be proposed against a lord empannelled on a jury; or he might challenge himself. That *propter defectum* takes place when a juror is legally incapable of serving that office, as, if he is an alien; if he has not an estate sufficient to qualify him, &c. That *propter delictum* has for its object to set aside any juror convicted of such crime or misdemeanor as renders him infamous, as felony, perjury, &c. That *propter affectum* is proposed against a juror who has an interest in the conviction of the prisoner; one for instance, who has an action depending between him and the prisoner; one who is of kin to the prosecutor, or his counsel, attorney, or of the same society or corporation with him, &c.*

* When a prisoner is an alien, one half of the jurors must also be aliens; a jury thus formed is called a jury *de medietate linguæ*.

In fine, in order to relieve even the imagination of the prisoner, the law allows him, independently of the several challenges above-mentioned, to challenge peremptorily, that is to say, without showing any cause, twenty jurors successively.*

When at length the jury is formed, and they have taken their oath, the indictment is opened, and the prosecutor produces the proofs of his accusation. But unlike the rules of the civil law, the witnesses deliver their evidence in the presence of the prisoner: the latter may put questions to them; and he may also produce witnesses in his behalf, and have them examined upon oath. Lastly he is allowed to have a counsel to assist him, not only in the discussion of any point of law which may be complicated with the fact, but also in the investigation of the fact itself, and who points out to him the questions he ought to ask, or even asks them for him.†

Such are the precautions which the law has devised for cases of common prosecutions; but in those for high treason, and for misprision of treason, that is to say, for a conspiracy against the life of the king, or against the state, and for a concealment of it,‡—accusations which suppose a heat of party and powerful accusers,—the law has provided for the accused party farther safeguards.

First, no person can be questioned for any treason, except a direct attempt on the life of the king, after three years elapsed since the offence. 2. The accused party may, independently of his other legal grounds of challenging *peremptorily*, challenge thirty-five jurors. 3. He may have two counsel to assist him through the whole course of the proceedings. 4. That his witnesses may not be kept away, the judges must grant him the same compulsive process to bring them in which they issue to compel the evidences against him. 5. A copy of his indictment must be delivered to him ten days at least before the trial, in presence of two witnesses, and at the expense of five shillings; which copy must contain all the facts laid to his charge, the names, professions, and abodes of the jurors who are to be on the pannel, and of all the witnesses who are intended to be produced against him.

When, either in cases of high treason, or of inferior crimes, the prosecutor and the prisoner have closed their evidence, and the witnesses have answered to the respective questions both of the bench and of jurors, one of the judges makes a speech, in which he sums up the facts which have been advanced on both sides. He points out to the jury what more precisely constitutes the hinge of the question before them; and he gives them his opinion both with regard to the

* When these several challenges reduce too much the number of the jurors on the pannel, which is forty-eight, new ones are named on a writ of the judge, who are named the *tales*, from those words of the writ, *decem* or *octo tales*.

† This last article, however, is not established by law, except in cases of treason; it is done only through custom and the indulgence of the judges.

‡ The penalty of a misprision of treason is the forfeiture of all goods, and imprisonment for life.

evidences that have been given, and to the point of law which is to guide them in their decision. This done, the jury withdraw into an adjoining room, where they must remain without eating and drinking, and without fire, till they have agreed unanimously among themselves, unless the court gave a permission to the contrary. Their declaration or verdict (*verdictum*) must (unless they choose to give a special verdict) pronounce expressly, either that the prisoner is guilty, or that he is not guilty, of the fact laid to his charge. Lastly, the fundamental maxim of this mode of proceeding is, that the jury must be unanimous.

And as the main object of the institution of the trial by jury is to guard accused persons against all decisions whatsoever from men invested with any permanent official authority,* it is not only a settled principle that the opinion which the judge delivers has no weight but such as the jury choose to give it; but their verdict must besides comprehend the whole matter in trial, and decide as well upon the fact, as upon the point of law that may arise out of it: in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law. †

This is even so essential a point, that a bill of indictment must expressly be grounded upon those two objects. Thus an indictment for treason must charge, that the alleged facts were committed with a treasonable intent (*proditorie*). An indictment for murder must express that the fact has been committed with *malice prepense*, or afore-thought. An indictment for robbery must charge, that the things were taken with an intention to rob (*animo furandi*), &c. ‡

Juries are even so uncontrollable in their verdict,—so apprehensive has the constitution been lest precautions to restrain them in the exercise of their functions, however specious in the beginning, might in the issue be converted to the very destruction of the ends of that institution,—that it is a repeated principle that a juror, in delivering

* 'Laws,' as *Junius* says extremely well, 'are intended, not to trust to what men will do, 'but to guard against what they may do.'

† Unless they choose to give a *special* verdict'—'When the jury,' says Coke, 'doubt the 'law, and intend to do that which is just, they find the *special* matter: and the entry is, *Et 'super totâ materiâ petunt discretionem justiciorum.*' Inst. iv. These words of Coke, we may observe, confirm beyond a doubt the power of the jury to determine on the whole matter in trial; a power which in all constitutional views is necessary; and the more so, since a prisoner cannot in England challenge the judge, as he can under the civil law, and for the same causes he can a witness.

‡ The principle that a jury is to decide both on the fact and the *criminality* of it, is so well understood, that, if a verdict were so framed as only to have for its object the bare existence of the fact laid to the charge of the prisoner, no punishment could be awarded by the judge in consequence of it. Thus, in the prosecution of Woodfall, for printing Junius' Letter to the King (a supposed libel); the jury brought in the following verdict, *guilty of printing and publishing only;* the consequence of which was the discharge of the prisoner.

[But in the memorable case of the dean of St. Asaph, and we believe upon other occasions, the judges discovered still an unwillingness to allow the benefit of this principle upon libels. In consequence of which, the act of 32 Geo. III. c. 60, well known as 'Fox's Act,' was passed; whereby it was enacted, that on an indictment for libel the jury should give a verdict upon the whole matter in issue, and should not be required by the court to find guilty merely on proof of the publication, and of the sense ascribed to the libel in the record; with liberty for the court, however, to give its opinions and directions on the matter in issue, as in other criminal cases.—ED.]

his opinion, is to have no other rule than his opinion itself, that is to say, no other rule than the belief which results to his mind from the facts alleged on both sides, from their probability, from the credibility of the witnesses, and even from all such circumstances as he may have a private knowledge of. Lord chief-justice Hale expresses himself on this subject, in the following terms:

'In this recess of the jury, they are to consider the evidence, to 'weigh the credibility of the witnesses, and the force and efficacy of 'their testimonies; wherein (as I have before said) they are not 'precisely bound by the rules of the civil law, viz., to have two wit- 'nesses to prove every fact unless it be in cases of treason, nor to 'reject one witness because he is single, or always to believe two 'witnesses, if the probability of the fact does upon other circum- 'stances reasonably encounter them; for the trial is not here simply 'by witnesses, but *by jury*; nay, it may so fall out, that a jury upon 'their own knowledge may know a thing to be false, that a witness 'swore to be true, or may know a witness to be incompetent or incred- 'ible, though nothing be objected against him—and may give their 'verdict accordingly.' *

If the verdict pronounces *not guilty*, the prisoner is set at liberty, and cannot, on any pretence, be tried again for the same offence. If the verdict declares him *guilty*, then, and not till then, the judge enters upon his function as a judge, and pronounces the punishment which the law appoints.† But, even in this case, he is not to judge according to his own discretion only; he must strictly adhere to the letter of the law; no constructive attention can be admitted; and however criminal a fact might in itself be, it would pass unpunished if it were found not to be positively comprehended in some one of the cases provided for by the law. The evil that may arise from the impunity of a crime,—that is, an evil which a new law may instantly stop,—has not by the English laws been considered as of magnitude sufficient to be put in comparison with the danger of breaking through a barrier on which so materially depends the safety of the individual.‡

* History of the Common Law of England, chap. 12, sect. 11. The same principles and forms are observed in civil matters; only peremptory challenges are not allowed.

† When the party accused is one of the lords temporal, he likewise enjoys the universal privilege of being judged by his peers; though the trial then differs in several respects. In the first place, as to the number of jurors: all the peers are to perform the function of such, and they must be summoned at least twenty days before hand. 2. When the trial takes place during the session, it is said to be in the *high court of parliament;* and the peers officiate at once as jurors and judges: when the parliament is not sitting, the trial is said to be in the court of the *high steward of England:* an office which is not usually in being, but is revived on those occasions; and the high steward performs the office of judge. 3. In either of these cases, unanimity is not required; and the majority, which must consist of twelve persons at least, is to decide.

‡ I shall here give an instance of the scruple with which the English judges proceed upon occasions of this kind. Sir *Henry Ferrers* having been arrested by virtue of a warrant, in which he was termed a knight, though he was a baronet, Nightingale, his servant, took his part, and killed the officer; but it was decided, that, as the warrant 'was an ill warrant, the 'killing of an officer in executing that warrant could not be murder, because no good warrant:

To all these precautions taken by the law for the safety of the subject, one circumstance must be added, which indeed would alone justify the partiality of the English lawyers to their laws in preference to the civil law;—I mean the absolute rejection they have made of torture.* Without repeating here what has been said on the subject by the admirable author of the treatise on *Crimes* and *Punishments, (Beccaria)* I shall only observe, that the torture, in itself so horrible an expedient, would, more especially in a free state, be attended with the most fatal consequences. It was absolutely necessary to preclude, by rejecting it, all attempts to make the pursuit of guilt an instrument of vengeance against the innocent. Even the convicted criminal must be spared, and a practice at all rates exploded, which might so easily be made an instrument of endless vexation and persecution.†

For the farther prevention of abuses, it is an invariable usage that the trial be public. The prisoner neither makes his appearance nor pleads, but in places where every body may have free entrance; and the witnesses when they give their evidence, the judge, when he delivers his opinion, the jury when they give their verdict, are all under the public eye.—Lastly, the judge cannot change either the place, or the kind of punishment ordered by the law; and the sheriff who should take away the life of a man in a manner different from that which the law prescribes, would be prosecuted as guilty of murder.‡

In a word, the constitution of England, being a free constitution, demanded from that circumstance alone (as I should have already have but too often repeated if so fundamental a truth could be too often urged) extraordinary precautions to guard against the dangers which unavoidably attend the power of inflicting punishments; and it is particularly when considered in this light, that the trial by jury proves an admirable institution.

By means of it, the judicial authority is not only placed out of the hands of the man who is invested with the executive authority—it is even out of the hands of the judge himself. Not only the person who

'wherefore he was found not guilty of the murder and manslaughter.'—Croke's Rep. Part III. p. 371.

* Coke says (Inst. III. p. 35.), that when John Holland, duke of Exeter, and William de la Pole, duke of Suffolk, renewed under Henry VI. the attempts made to introduce the civil law, they exhibited the torture as a *beginning thereof.* The instrument was called the Duke of Exeter's daughter.

† Judge Foster relates, from Whitelocks, that the bishop of London having said to Felton, who had assassinated the duke of Buckingham, 'If you will not confess, you *must go to the rack*;' the man replied, 'If it must be so, I know not whom I may accuse in the extremity of 'the torture; bishop Laud, perhaps, or any lord at this board.'

'Sound sense (adds Foster) in the mouth of an enthusiast and a ruffian.'

Laud having proposed the rack, the matter was shortly debated at the board, and it ended in a reference to the judges, who unanimously resolved that the rack could not be legally used.

‡ And if any other person but the sheriff, even the judge himself, were to cause death to be inflicted upon a man, though convicted, it would be deemed homicide. Blackstone, book iv. chap. 14.

is trusted with the public power cannot exert it, till he has, as it were, received the permission to that purpose, of those who are set apart to administer the laws; but these latter are also restrained in a manner exactly alike, and cannot make the law speak, but when, in their turn, they have likewise received permission.

And those persons to whom the law has thus exclusively delegated the prerogative of deciding that a punishment is to be inflicted,—those men without whose declaration the executive and the judicial powers are both thus bound down to inaction, do not form among themselves a permanent body, who may have had time to study how their power can serve to promote their private views or interest; they are men selected at once from among the people, who perhaps never were before called to the exercise of such a function, nor foresee that they ever shall be called to it again.

As the extensive right of challenging effectually baffles, on one hand, the secret practices of such as, in the face of so many discouragements, might still endeavour to make the judicial power subservient to their own views, and on the other excludes all personal resentments, the sole affection which remains to influence the integrity of those who alone are entitled to put the public power into action, during the short period of their authority, is, that their own fate as subjects is essentially connected with that of the man whose doom they decide.

In fine, such is the happy nature of this institution, that the judicial power, a power so formidable in itself, which is to dispose, without finding any resistance, of the property, honour, and life of individuals, and which, whatever precautions may be taken to restrain it, must in a great degree remain arbitrary, may be said, in England, to exist,—to accomplish every purpose,—and to be in the hands of nobody.*

In all these observations on the advantages of the English criminal law, I have only considered it as connected with the constitution, which is a free one; and it is in this view alone that I have compared it with the jurisprudence received in other states. Yet, abstractedly from the weighty constitutional considerations which I have suggested, I think there are still other interesting grounds of pre-eminence on the side of the laws of England.

In the first place, they do not permit that a man should be made to run the risque of a trial, but upon the declaration of twelve persons at least (*the grand jury*). Whether he be in prison, or on his trial, they never for an instant refuse free access to those who have either advice or comfort to give him; they even allow him to summon all who may have anything to say in his favour. And lastly, what is of very great importance, the witnesses against him must deliver their testimony in

* The consequence of this institution is, that no man in England ever meets the man of whom he may say, 'That man has a power to decide on my death or life.' It we could for a moment forget the advantages of that institution, we ought at least to admire the ingenuity of it.

his presence; he may cross-examine them, and, by one unexpected question, confound a whole system of calumny: indulgences these, all denied by the laws of other countries.

Hence, though an accused person may be exposed to have his fate decided by persons *(the petty jury)* who possess not, perhaps, all that sagacity which in some delicate cases it is particularly advantageous to meet with in a judge, yet this inconvenience is amply compensated by the extensive means of defence with which the law, as we have seen, has provided him. If a juryman does not possess that expertness which is the result of long practice, yet neither does he bring to judgment that hardness of heart which is, more or less, also the consequence of it: and bearing about him the principles (let me say, the unimpaired instinct) of humanity, he trembles while he exercises the awful office to which he finds himself called, and in doubtful cases he always decides for mercy.

It is to be farther observed, that, in the usual course of things, juries pay great regard to the opinions delivered by the judges; that, in those cases where they are clear as to the fact, yet find themselves perplexed with regard to the degree of guilt connected with it, they leave it, as has been said before, to be ascertained by the discretion of the judge, by returning what is called a *special verdict;* that, whenever circumstances seem to alleviate the guilt of a person, against whom nevertheless the proof has been positive, they temper their verdict by recommending him to the mercy of the king (which seldom fails to produce at least a mitigation of the punishment): that, though a man once acquitted can never, under any pretence whatsoever, be again brought into peril for the same offence, yet a new trial would be granted if he had been found guilty upon evidence strongly suspected of being false. Lastly, what distinguishes the laws of England from those of other countries in a very honourable manner, is, that as the torture is unknown to them, so neither do they know any more grievous punishment than the simple deprivation of life.*

All these circumstances have combined to introduce such a mildness into the exercise of criminal justice, that the trial by jury is that point of their liberty to which the people of England are most thoroughly and universally wedded; and the only complaint I have ever heard uttered against it, has been by men who, more sensible of the necessity of public order than alive to the feelings of humanity, think that too many offenders escape with impunity.†

* Not quite accurate this; in cases of high treason, a criminal after being half-hanged, is subjected to decapitation and other offensive treatment; all of which, however, but the decapitation and proclaiming the offender a traitor, is usually remitted.—Ed.

† It has been the fashion of late to call in question existing institutions. In agreement with this it would seem to be, that a writer in a Scottish Review, has spoken disparagingly of the Trial by Jury, asserting that we pay dearly for its boasted advantages, 'In the number of 'unjust verdicts which are given by ignorant, perverse, or corrupted juries; and that this 'form of trial has been subservient to arbitrary power.' In reply we may observe, the institution in question was established by human wisdom, and is exercised by human agents, and

CHAP. XIV.—*The Subject concluded. Laws relative to Imprisonment.*

BUT what completes that sense of independence which the laws of England procure to every individual (a sense which is the noblest advantage attending liberty), is the greatness of their precautions upon the delicate point of imprisonment.

In the first place, by allowing, in most cases, enlargement upon bail, and by prescribing, on that article, express rules for the judges to follow, they have removed all pretexts, which circumstances might afford, for depriving a man of his liberty.

But it is against the executive power that the legislature has, above all, directed its efforts: nor has it been but by slow degrees that it has been successful in wresting from it a branch of power which enabled it to deprive the people of their leaders, as well as to intimidate those who might be tempted to assume the function; and which, having thus all the efficacy of more odious means without the dangers of them, was perhaps the most formidable weapon with which it might attack public liberty.

The methods originally pointed out by the laws of England for the enlargement of a person unjustly imprisoned, were the writs of *mainprise*, *de odio et atia*, and *de homine replegiando*. Those writs, which could not be denied, were an order to the sheriff of the county in which a person was confined, to inquire into the causes of his confinement; and, according to the circumstances of his case, either to discharge him completely, or upon bail.

But the most useful method, and which even, by being most general and certain, has tacitly abolished all the others, is the writ of *Habeas Corpus*, so called because it begins with the words *Habeas corpus ad subjiciendum*. This writ being a writ of high prerogative, must issue from the court of King's Bench: its effects extend equally to every county; and the king by it requires, or is understood to require, the person who holds one of his subjects in custody, to carry him before the judge, with the date of the confinement, and the cause of it, in order to discharge him, or continue to detain him, according as the judge shall decree.

But this writ, which might be a resource in cases of violent imprisonment effected by individuals, or granted at their request, was but a feeble one, or rather was no resource at all against the prerogative of the prince, especially under the sway of the Tudors, and in the beginning of that of the Stuarts. And even in the first years of Charles I., the judges of the King's Bench, who, in consequence of the spirit of the times, and of their holding their places *durante bene placito*, were constantly devoted to the court, declared 'that they could not, upon a

of course is subject to the frailties incident to man and to all his works. Abating this, it is the noblest invention for the support of justice ever produced.

'*Habeas Corpus*, either bail or deliver a prisoner, though committed 'without any cause assigned, in case he was committed by the special 'command of the king, or by the lords of the privy council.'

Those principles, and the mode of procedure which resulted from them, drew the attention of parliament; and in the bill called the Petition of Right, passed in the third year of the reign of Charles I., it was enacted, that no person should be kept in custody, in consequence of such imprisonments.

But the judges knew how to evade the intention of this act: they indeed did not refuse to discharge a man imprisoned without a cause; but they used so much delay in the examination of the causes, that they obtained the full effect of an open denial of justice.

The legislature again interposed, and in the act passed in the sixteenth year of the reign of Charles I., the same in which the Star-chamber was suppressed, it was enacted, that 'if any person be committed by the king 'himself in person, or by his privy council, or by any of the members 'thereof, he shall have granted unto him, without delay upon any pretence 'whatsoever, a writ of *Habeas Corpus*, and that the judge shall there-'upon, within three court-days after the return is made, examine and 'determine the legality of such imprisonment.'

This act seemed to preclude every possibility of future evasion: yet it was evaded still; and, by the connivance of the judges, the person who detained the prisoner could, without danger, wait for a second, and a third writ, called an *alias* and a *pluries*, before he produced him.

All these different artifices gave at length birth to the famous act of *Habeas Corpus* (passed in the thirty-first year of the reign of Charles II.), which is considered in England as a second Great Charter, and has extinguished all the resources of oppression.*

The principal articles of this act are:—

1. To fix the different terms allowed for bringing a prisoner: those terms are proportioned to the distance: and none can in any case exceed twenty days.

2. That the officer and keeper neglecting to make due returns, or not delivering to the prisoner, or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority (specified in the act); shall for the first offence forfeit one hundred pounds, and for the second two hundred to the party aggrieved, and be disabled to hold his office.

3. No person, once delivered by *Habeas Corpus*, shall be committed for the same offence, on penalty of five hundred pounds.

4. Every person committed for treason or felony, shall, if he require it, in the first week of the next term, or the first day of the next session,

* The real title of this act is, *An Act for better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas.*

be indicted in that term or session, or else admitted to bail, unless it should be proved upon oath, that the king's witnesses cannot be produced at that time: and if not indicted and tried in the second term or session, he shall be discharged of his imprisonment for such imputed offence.

5. Any of the twelve judges, or the lord-chancellor, who shall deny a writ of *Habeas Corpus*, on sight of the warrant, or on oath that the same is refused, shall forfeit severally to the party aggrieved five hundred pounds.

6. No inhabitant of England (except persons contracting, or convicts praying to be transported) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any place beyond the seas, within or without the king's dominions,—on pain, that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than five hundred pounds, to be recovered with treble costs, shall be disabled to bear any office of trust or profit—shall incur the penalties of a *præmunire*,* and be incapable of the king's pardon.

BOOK II.

A VIEW OF THE ADVANTAGES OF THE ENGLISH GOVERNMENT, AND OF THE RIGHTS AND LIBERTIES OF THE PEOPLE; AND A CONFIRMATION, BY REFERENCE TO FACTS, OF THE PRINCIPLES STATED IN THE WORK.

CHAPTER I.—*Some Advantages peculiar to the English Constitution.*

1. *The Unity of the Executive Power.*

WE have seen in former chapters the resources allotted to the different parts of the English government for balancing each other, and how their reciprocal actions and re-actions produce the freedom of the constitution, which is no more than an equilibrium between the ruling powers of the state. I now propose to show that the particular nature and functions of these same constituent parts of the government, which give it so different an appearance from that of other free states, are moreover attended with peculiar and very great advantages, which have not hitherto been sufficiently observed.

* The statutes of *præmunire*, thus called from the writ for their execution, which begins with the words *præmunire* (for *præmonere) facias*, were originally designed to oppose the usurpations of the popes. The first was passed under the reign of Edward I., and was followed by several others, which, even before the reformation, established such effectual provisions as to draw upon one of them the epithet of *execrabile statutum*. The offences against which those statutes were framed were likewise distinguished by the appellation of *præmunire*; and under that word were included all attempts to increase the power of the pope at the expense of the royal authority. The punishment decreed for such cases was also called a *præmunire*; it has since been extended to several other kinds of offence, and amounts to imprisonment at the king's pleasure, or for life, and forfeiture of all goods and rents of lands.

[Prosecutions upon a *præmunire* are now in a manner obsolete—we seldom hear of them.—ED.]

The first peculiarity of the English government, as a free government, is its having a king,—its having thrown into one place the whole mass, if I may use the expression, of the executive power, and having invariably and for ever fixed it there. By this very circumstance also has the *depositum* of it been rendered sacred and inexpugnable;—by making one great, very great man in the state, has an effectual check been put to the pretensions of those who otherwise would strive to become such; and disorders have been prevented, which, in all republics, ever brought on the ruin of liberty, and, before it was lost, obstructed the enjoyment of it.

If we cast our eyes on all the states that ever were free, we shall see that the people ever turning their jealousy, as it was natural, against the executive power, but never thinking of the means of limiting it, so happily prevalent in England,* never employed any other expedients beside the obvious one of trusting that power to magistrates whom they appointed annually; which was in great measure the same as keeping the management of it to themselves: whence it resulted, that the people, who, whatever may be the frame of the government, always possess, after all, the reality of power, thus uniting in themselves with this reality of power the actual exercise of it, in form as well as in fact, constituted the whole state. In order therefore legally to disturb the whole state, nothing more was requisite than to put in motion a certain number of individuals.

In a state which is small and poor, an arrangement of this kind is not attended with any great inconveniences, as every individual is taken up with the care of providing for his subsistence, as great objects of ambition are wanting, and as evils cannot, in such a state, ever become much complicated. In a state that strives for aggrandizement, the difficulties and danger attending the pursuit of such a plan inspire a general spirit of caution, and every individual makes a sober use of his rights as a citizen.

But when, at length, those exterior motives cease, and the passions, and even the virtues, which they excited, are thus reduced to a state of inaction, the people turn their eyes back towards the interior of the republic; and every individual, in seeking then to concern himself in all affairs, seeks for new objects that may restore him to that state of exertion which habit, he finds, has rendered necessary to him, and aims

* The rendering that power dependent on the people for its supplies.—See chap. vi. book i. [The real efficacy and usefulness, as a safeguard to the constitution, of this power to withhold supplies has been lately questioned in a well known Review. The exercise of it, he suggests, would 'operate like the dissolution of civil society.' Yes, perhaps so, were the throne to be filled by a monarch, so madly headstrong as to reject the most solemn warning the forms of the constitution could give him of the unpopularity of his rule, and the necessity of a prompt change of measures and men. But that the prince of a free state by law, incapable of acting except by the advice of responsible ministers, should form so wild a project as that of persevering against the sense of his people expressed in parliament, or be able to find men sufficiently wicked and desperate to support and second him, appears a thing on the verge of improbability.—ED.]

at the exercise of a share of power which, small as it is, yet flatters his vanity.

As the preceding events must have given an influence to a certain number of citizens, they avail themselves of the general disposition of the people, to promote their private views: the legislative power is thenceforth continually in motion; and as it is badly informed, and falsely directed, almost every exertion of it is attended with some injury to the laws, or the state.

This is not all; as those who compose the general assemblies cannot, in consequence of their numbers, entertain any hopes of gratifying their private ambition, or, in general, their private passions, they at least seek to gratify their political caprices, and they accumulate the honours and dignities of the state on some favourite whom the public voice happens to raise at that time.

But, as in such a state there can be, from the irregularity of the determination of the people, no such thing as a settled course of measures, it happens that men never can exactly tell the present state of public affairs. The power thus given away has already become very great before those for whom it was given so much as suspect it; and he himself who enjoys that power does not know its full extent; but then, on the first opportunity that offers, he suddenly pierces through the cloud which hid the summit from him, and at once seats himself upon it. The people, on the other hand, no sooner recover sight of him, than they see their favourite now become their master, and discover the evil, only to find that it is past remedy.

As this power, thus surreptitiously acquired, is destitute of the support both of the law and of the ancient course of things, and is even but indifferently respected by those who have subjected themselves to it, it cannot be maintained but by abusing it. The people at length succeed in forming somewhere a centre of union: they agree in the choice of a leader: this leader in his turn rises: in his turn also he betrays his engagements; power produces its wonted effects; and the protector becomes a tyrant.

This is not all; the same causes which have given one master to the state, give it two, give it three. All those rival powers endeavour to swallow up each other; the state becomes a scene of endless quarrels and broils, and is in a continual convulsion.

If amidst such disorders the people retained their freedom, the evil must indeed be very great to take away all the advantages of it; but they are slaves, and yet have not what in other countries makes amends for political servitude; I mean tranquillity.

In order to prove all these things, if proofs were deemed necessary, I would only refer the reader to what every one knows of Pisistratus and Megacles, of Marius and Sylla, of Cæsar and Pompey. However, I cannot avoid translating a part of the speech which a citizen of Flo-

rence addressed once to the senate: the reader will find in it a kind of abridged story of all republics; at least of those which, by the share allowed to the people in the government, deserved that name, and which, besides, attained a certain degree of extent and power.

'That nothing human may be perpetual and stable, it is the will of 'Heaven that, in all states whatsoever, there should arise certain de-'structive families, who are the bane and ruin of them. Of this our 'own republic affords as many and more deplorable examples than 'any other, as it owes its misfortunes not only to one, but to several such 'families. We had at first *Buondelmonti* and the *Huberti*. We had 'afterwards the *Donati* and the *Cerchi;* and at present (shameful and 'ridiculous conduct!) we are waging war among ourselves for the *Ricci* 'and the *Albizzi*.

'When in former times the Ghibelins were suppressed, every one 'expected that the Guelfs, being then satisfied, would have chosen to 'live in tranquillity; yet, but a little time had elapsed, when they again 'divided themselves into the factions of the *whites* and the *blacks*. 'When the whites were suppressed, new parties arose, and new troubles 'followed. Sometimes battles were fought in favour of the exiles; and, 'at other times, quarrels broke out between the nobility and the peo-'ple. And, as if resolved to give away to others what we ourselves 'neither could, nor would, peaceably enjoy, we committed the care of 'our liberty sometimes to king Robert, and at other times to his bro-'ther, and at length to the duke of Athens; never settling or resting 'in any kind of government, as not knowing either how to enjoy liberty, 'or support servitude.' (*Hist. of Florence by Machiavel, lib. iii.*)

The English constitution has prevented the possibility of misfortunes of this kind. By diminishing the power, or rather *actual exercise* of the power, of the people,* and making them share in the legislature only by their representatives, the irresistible violence has been avoided of those numerous and general assemblies, which, on whatever side they throw their weight, bear down everything. Besides, as the power of the people, when they have any kind of power, and know how to use it, is at all times really formidable, the constitution has set a counterpoise to it; and the royal authority is this counterpoise.

1. In order to render it equal to such a task, the constitution has conferred on the king, as we have seen before, the exclusive prerogative of calling and dismissing the legislative bodies, and of putting a negative on their resolutions.

2. It has also placed on the side of the king the whole executive power in the nation.

3. In order to effect still nearer an equilibrium, the constitution has

* We shall see in the sequel, that this diminution of the *exercise* of the *power* of the people has been attended with a great increase of their *liberty*.

invested the man whom it has made the sole head of the state, with all the personal privileges, all the pomp, all the majesty, of which human dignities are capable. In the language of the law, the king is sovereign lord, and the people are his subjects;—he is universal proprietor of the kingdom;—he bestows all the dignities and places; and he is not to be addressed but with the expressions and outward ceremony of almost eastern humility. Besides, his person is sacred and inviolable; and any attempt whatsoever against it is, in the eye of the law, a crime equal to that of an attack upon the whole state.

In a word, since, to have too exactly completed the equilibrium between the power of the people and that of the crown, would have been to sacrifice the end to the means, that is, to have endangered liberty with a view to strengthen the government, the deficiency which ought to remain on the side of the crown, has at least been, in appearance, made up, by conferring on the king all that sort of strength that may result from the opinion and reverence of the people; and, amidst the agitations which are the unavoidable attendants of liberty, the royal power, like an anchor that resists both by its weight and the depth of its hold, ensures a salutary steadiness to the vessel of the state.

The greatness of the prerogative of the king, by thus procuring a great degree of stability to the state in general, has much lessened the possibility of the evils we have above described; it has even, we may say, totally prevented them, by rendering it impossible for any citizen to rise to any dangerous greatness.

And to begin with an advantage by which the people easily suffer themselves to be influenced, I mean that of birth, it is impossible for it to produce in England effects in any degree dangerous; for though there are lords who, besides their wealth, may also boast of an illustrious descent, yet that advantage, being exposed to a continual comparison with the splendor of the throne, dwindles almost to nothing; and, in the gradation universally received of dignities and titles, that of sovereign prince and king places him who is invested with it out of all degree of proportion.

The ceremonial of the court of England is even formed upon that principle. Those persons who are related to the king have the title of princes of the blood, and, in that quality, an undisputed pre-eminence over all other persons.* Nay, the first men in the nation think it an honourable distinction to themselves, to hold the different menial offices, or titles, in his household. If we therefore were to set aside the extensive and real power of the king, as well as the numerous means he possesses of gratifying the ambition and hopes of individuals, and were to consider only the majesty of his title, and that kind of strength founded on public opinion which results from it, we shall find that ad-

* This, by stat. of the 31st of Hen. VIII. extends to the sons, grandsons, brothers, uncles, and nephews, of the reigning king.

vantage so considerable, that to attempt to enter into a competition with it, with the bare advantage of high birth, which itself has no other foundation than public opinion, and that too in a very subordinate degree, would be an attempt completely extravagant.

If this difference is so great as to be thoroughly submitted to, even by those persons whose situation might incline them to disown it, much more does it influence the minds of the people. And if, notwithstanding the value which every Englishman ought to set upon himself as a man, and a free man, there were any whose eyes were so very tender as to be dazzled by the appearance and the arms of a lord, they would be totally blinded when they came to turn them towards the royal majesty.

The only man, therefore, who, to persons unacquainted with the constitution of England, might at first sight appear in a condition to put the government in danger, would be one who, by the greatness of his abilities and public services, might have acquired in a high degree the love of the people, and obtained a great influence in the house of commons.

But how great soever this enthusiasm of the public may be, barren applause is the only fruit which the man whom they favour can expect from it. He can hope neither for a dictatorship, nor a consulship, nor in general for any power under the shelter of which he may at once safely unmask that ambition with which we might suppose him to be actuated, or, if we suppose him to have been hitherto free from any, grow insensibly corrupt. The only door which the constitution leaves open to his ambition, of whatever kind it may be, is a place in the administration, during the pleasure of the king. If, by the continuance of his services, and the preservation of his influence, he becomes able to aim still higher, the only door which again opens to him is that of the house of lords.

But this advance of the favourite of the people towards the establishment of his greatness is at the same time a great step towards the loss of that power which might render him formidable.

In the first place, the people seeing that he is become much less dependent on their favour, begin, from that very moment, to lessen their attachment to him. Seeing him moreover distinguished by privileges which are the objects of their jealousy, I mean their political jealousy, and member of a body whose interests are frequently opposite to theirs, they immediately concluded that this great and new dignity cannot have been acquired but through a secret agreement to betray them. Their favourite, thus suddenly transformed, is going, they make no doubt, to adopt a conduct entirely opposite to that which has till then been the cause of his advancement and high reputation, and, in the compass of a few hours, completely to renounce those principles which he has so long and so loudly professed. In this, certainly the people are mistaken; but yet neither would they be wrong, if they

feared that a zeal hitherto so warm, so constant I will even add, so sincere, when it concurred with their favourite's private interest, would, by being thenceforth often in opposition to it, become gradually much abated.

Nor is this all: the favourite of the people does not even find in his new dignity all the increase of greatness and *éclat* that might at first be imagined.

Hitherto he was, it is true, only a private individual: but then he was the object in which the whole nation interested themselves; his actions and words were set forth in the public prints; and he everywhere met with applause and acclamation.

All these tokens of public favour are, I know, sometimes acquired very lightly; but they never last long, whatever people may say, unless real services are performed; now, the title of benefactor to the nation, when deserved, and universally bestowed, is certainly a very handsome title, and which does nowise require the assistance of outward pomp to set it off. Besides, though he was only a member of the inferior body of the legislature, we must observe, he was the first; and the word *first* is always a word of very great moment.

But now that he is made a lord, all his greatness, which hitherto was indeterminate, becomes defined. By granting him privileges established and fixed by known laws, that uncertainty is taken from his lustre which is of so much importance in those things which depend on imagination; and his value is lowered, just because it is ascertained.

Besides, he is a lord; but then there are several men who possess but small abilities, and few estimable qualifications, who also are lords; his lot is, nevertheless, to be seated among them; the law places him exactly on the same level with them; and all that is real in his greatness is thus lost in a crowd of dignities, hereditary and conventional.

Nor are these the only losses which the favourite of the people is to suffer. Independently of those great changes, which he descries at a distance, he feels around him alterations no less visible, and still more painful.

Seated formerly in the assembly of the representatives of the people, his talents and continual success had soon raised him above the level of his fellow-members; and, being carried on by the vivacity and warmth of the public favour, those who might have been tempted to set up as his competitors were reduced to silence, or even became his supporters.

Admitted now into an assembly of persons invested with a perpetual and hereditary title, he finds men hitherto his superiors,—men who see with a jealous eye the shining talents of the *homo novus*, and who are

firmly resolved, that after having been the leading man in the house of commons, he shall not be the first in theirs.

In a word, the success of the favourite of the people was brilliant, and even formidable; but the constitution, in the very reward it prepares for him, makes him find a kind of ostracism. His advances were sudden, and his course rapid; he was, if you please, like a torrent ready to bear down everything before it; but this torrent is compelled, by the general arrangement of things, finally to throw itself into a vast reservoir, where it mingles, and loses its force and direction.*

I know it may be said, that, in order to avoid the fatal step which is to deprive him of so many advantages, the favourite of the people ought to refuse the new dignity which is offered to him, and wait for more important successes, from his eloquence in the house of commons, and his influence over the people.

But those who give him this counsel have not sufficiently examined it. Without doubt there are men in England, who, in their present pursuit of a project which they think essential to the public good, would be capable of refusing for a while a dignity which would deprive their virtue of opportunities of exerting itself, or might more or less endanger it: But woe to him who should persist in such a refusal, with any pernicious design! and who, in a government where liberty is established on so solid and extensive a basis, should endeavour to make the people believe that their fate depends on the persevering virtue of a single citizen. His ambitious views being at last discovered (nor could it be long before it were so), his obstinate resolution to move out of the ordinary course of things would indicate aims, on his part, of such an extraordinary nature, that all men whatever, who have any regard for their country, would instantly rise up from all parts to oppose him, and he must fall overwhelmed with so much ridicule that it would be better for him to fall from the Tarpeian rock.†

* The picture here given of the progress of a popular man in England, seems to have reference to two remarkable, and, in their days, formidable personages, Mr. Pulteney, afterwards earl of Bath, and William Pitt, the first earl of Chatham, once, by an honourable pre-eminence, styled '*the Great Commoner*.' They were both of exalted minds, surpassing talents, and commanding influence. But the latter was not more happy in his own personal greatness than in that of his son, the second William Pitt: one, of whom the time has not arrived to be enabled to speak with the impartiality of history; but of whom may perhaps be truly said, he was born to inherit his noble parent's talent and genius, though not his titles and earthly dignities; and he appeared destined to inherit also the affections and confidence of the people, had not extraordinary circumstances thrown him, in the outset of life, into the administration, where, for a course of years, he took the lead and the command, rather as the chief of a republic than as the servant of a monarch.—Ed.

† The reader will, perhaps, object, that no man in England can entertain such views as those I have suggested here: this is precisely what I intended to prove. The essential advantage of the English government above all those that have been called *free*, and which in many respects were but apparently so, is, that no person in England can entertain so much as a thought of ever rising to the level of the power charged with the execution of the laws. All men in the state, whatever may be their rank, wealth, or influence, are thoroughly convinced that they must, in reality as well as in name, continue to be *subjects;* and are thus compelled really to love, defend, and promote, those laws which secure liberty to the subject.

In fine, even though we were to suppose that the new lord might, after his exaltation, have preserved all his interest with the people, or, what would be no less difficult, that any lord whatever could, by dint of his wealth and high birth, rival the splendour of the crown itself, all these advantages, how great soever we may suppose them, as they would not of themselves be able to confer on him the least executive authority, must for ever remain mere showy unsubstantial advantages. Finding all the active powers of the state concentred in that very seat of power which we suppose him inclined to attack, and there secured by formidable provisions, his influence must always evaporate in ineffectual words; and after having advanced himself, as we suppose, to the very foot of the throne, finding no branch of independent power which he might so far appropriate to himself, as at last to give a reality to a political importance, he would soon see it, however great it might have at first appeared, decline and die away.

God forbid, however, that I should mean that the people of England are so fatally tied down to inaction, by the nature of their government, that they cannot, in times of oppression, find means of appointing a leader! No; I only meant to say that the laws of England open no door to those accumulations of power, which have been the ruin of so many republics; that they offer to the ambitious no means of taking advantage of the inadvertence or even the gratitude of the people, to make themselves their tyrants; and that the public power, of which the king has been made the exclusive depository, must remain unshaken in his hands, so long as things continue in the legal order; which, it may be observed, is a strong inducement to him constantly to endeavour to maintain them in it.*

* Several events, in the English history, put in a very strong light this idea of the stability which the power of the crown gives to the state.

One is, the facility with which the great duke of Marlborough, and his party at home, were removed from their employments.—Hannibal, in circumstances nearly similar, had continued the war against the will of the senate of Carthage: Cæsar had done the same in Gaul: and when at last he was expressly required to deliver up his commission, he marched his army to Rome, and established a military despotism. But the duke though surrounded, as well as the above-named generals, by a victorious army, and by allies, in conjunction with whom he had carried on such a successful war, did not even hesitate to surrender his commission. He knew that all his soldiers were inflexibly prepossessed in favour of that power against which he must have revolted: he knew that the same prepossessions were deeply rooted in the minds of the whole nation, and that every thing among them concurred to support the same power: he knew that the very nature of the claims he must have set up would instantly have made all his officers and captains turn themselves against him, and, in short, that, in an enterprise of this nature, the arm of the sea he had to repass was the smallest of the obstacles he would have to encounter.

The other event I shall mention here, is that of the revolution of 1689. If the long-established power of the crown had not beforehand prevented the people from accustoming themselves to fix their eyes on some particular citizens, and in general had not prevented all men in the state from attaining too considerable a degree of power and greatness, the expulsion of James II. might have been followed by events similar to those which took place at Rome after the death of Cæsar.

CHAPTER II.—*The Subject concluded.—The executive Power is more easily confined when it is* ONE.

ANOTHER great advantage, and which one would not at first expect, in this *unity* of the public power in England,—in this union, and, if I may so express myself, in this coacervation, of all the branches of the executive authority,—is the greater facility it affords of restraining it.

In those states where the execution of the laws is intrusted to several hands, and to each with different titles and prerogatives, such division, and the changeableness of measures which must be the consequence of it, constantly hide the true cause of the evils of the state: in the endless fluctuation of things, no political principles have time to fix among the people; and public misfortunes happen, without ever leaving behind them any useful lesson.

At some times military tribunes, and at others consuls, bear an absolute sway: sometimes patricians usurp every thing, and at other times those who are called nobles:* at one time the people are oppressed by decemvirs, and at another by dictators.

Tyranny, in such states, does not always beat down the fences that are set around it; but it leaps over them. When men think it confined to one place, it starts up again in another;—it mocks the efforts of the people, not because it is invincible, but because it is unknown;—seized by the arm of a Hercules, it escapes with the changes of a Proteus.

But the indivisibility of the public power in England has constantly kept the views and efforts of the people directed to one and the same object; and the permanence of that power has also given a permanence and a regularity to the precautions they have taken to restrain it.

Constantly turned towards that ancient fortress, the royal power, they have made it for seven centuries the object of their fear; with a watchful jealousy they have considered all its parts: they have observed all its outlets; they have even pierced the earth to explore its secret avenues and subterraneous works.

United in their views by the greatness of the danger, they regularly formed their attacks. They established their works, first at a distance; then brought them successively nearer; and, in short, raised none but what served afterwards as a foundation or defence to others.

After the Great Charter was established, forty successive confirmations strengthened it. The act called the *Petition of Right*, and that passed in the sixteenth year of Charles I., then followed: some years after, the *Habeas Corpus* act was established; and the Bill of Rights

* The capacity of being admitted to all places of public trust (at length gained by the plebeians) having rendered useless the old distinction between them and the patricians, a coalition was then effected between the great plebeians, or commoners, who got into these places, and the ancient patricians. Hence a new class of men arose, who were called *nobiles* and *nobilitas*. These are the words by which Livy, after that period, constantly distinguishes those men and families who were at the head of the state.

at length made its appearance. In fine, whatever the circumstances may have been, the people always had, in their efforts, that inestimable advantage of knowing with certainty the general seat of the evils they had to defend themselves against; and each calamity, each particular eruption, by pointing out some weak place, served to procure a new bulwark for public liberty.

To conclude in a few words;—the executive power in England is formidable, but then it is for ever the same; its resources are vast, but their nature is at length known; it has been made the indivisible and inalienable attribute of one person alone, but then all other persons, of whatever rank or degree, become really interested to restrain it within its proper bounds.*

CHAP. III.—*A second Peculiarity. The Division of the Legislative Power.*

THE second peculiarity which England, as an individual state and a free state, exhibits in its constitution, is the division of its legislature. That the reader may be more sensible of the advantages of this division, he is desired to attend to the following considerations.

It is, without doubt, absolutely necessary, for securing the constitution of a state, to restrain the executive power: but it is still more necessary to restrain the legislative. What the former can only do by successive steps (I mean subvert the laws), and through a longer or shorter train of enterprises, the latter can do in a moment. As its bare will can give being to the laws, so its bare will can also annihilate them; and, if I may be permitted the expression, the legislative power can change the constitution, as God created the light.

In order, therefore, to ensure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But here we must observe a difference between the legislative and the executive powers. The latter may be confined, and even is the more easily so, when undivided; the legislative, on the contrary, in order to its being restrained, should absolutely be divided. For, whatever laws it may make to restrain itself, they never can be, relatively to it, anything more than simple resolutions: as those bars which it might erect to stop its own motions must then be within it, and rest upon it, they can be no bars. In a word, the same kind of impossibility is found, to fix the legislative power when it is *one*, which Archimedes objected against his moving the earth.†

Nor does such a division of the legislature only render it possible for it to be restrained, since each of those parts into which it is divided

* This last advantage of the greatness and the indivisibility of the executive power, viz. the obligation it lays upon the greatest men in the state, sincerely to unite in a common cause with the people, will be more amply discussed hereafter, when a more particular comparison between the English government and the republican form shall be offered to the reader.

† He wanted a spot whereupon to fix his instruments.

can then serve as a bar to the motions of the others, but it even makes it to be actually so restrained. If it has been divided into only two parts, it is probable that they will not in all cases unite, either for *doing* or *undoing*:—if it has been divided into three parts, the chance that no changes will be made is greatly increased. Nay more; as a kind of point of honour will naturally take place between these different parts of the legislature, they will therefore be led to offer to each other only such propositions as will at least be plausible; and all very prejudicial changes will thus be prevented, as it were, before their birth.

If the legislative and executive powers differ so greatly with regard to the necessity of their being divided, in order to their being restrained, they differ no less with regard to the other consequences arising from such division.

The division of the executive power necessarily introduces actual oppositions, even violent ones, between the different parts into which it has been divided; and that part which in the issue succeeds so far as to absorb, and unite in itself, all the others, immediately sets itself above the laws. But those oppositions which take place, and which the public good requires should take place, between the different parts of the legislature, are never anything more than oppositions between contrary opinions and intentions: all is transacted in the regions of the understanding; and the only contention that arises is wholly carried on with those inoffensive weapons, assents and dissents, the *ayes* and the *noes*.

Besides, when one of these parts of the legislature is so successful as to engage the others to adopt its proposition, the result is, that a law takes place which has in it a great probability of being good: when it happens to be defeated, and sees its proposition rejected, the worst that can result from it is, that a law is not made at that time; and the loss which the state suffers thereby, reaches no farther than the temporary setting-aside of some more or less useful speculation.

In a word, the result of a division of the executive power is either a more or less speedy establishment of *the right of the strongest*, or a continued state of war:*—that of a division of the legislative power, is either truth, or general tranquillity.

The following maxims will therefore be admitted. That the laws of a state may be permanent, it is requisite that the legislative power should be divided;—that they may have weight, and continue in force, it is necessary that the executive power should be *one*.

If the reader should conceive any doubt as to the truth of the above observations, let him cast his eyes on the history of the proceedings of

* Everyone knows the frequent hostilities that took place between the Roman senate and the tribunes. In Sweden there have been continued contentions between the king and the senate, in which they have overpowered each other by turns. And in England, when the executive power became double, by the king allowing the parliament to have a perpetual and independent existence, a civil war almost immediately followed.

the English legislature down to our times, and he will readily find a proof of them. He would be surprised to see how little variation there has been in the political laws of this country, especially during the last hundred years: though, it is most important to observe, the legislature has been as it were in a continual state of action, and (no dispassionate man will deny) has generally promoted the public good. Nay, if we except the act passed under William III. by which it has been enacted, that parliaments should sit no longer than three years, and which was repealed by a subsequent act, under George I. which allowed them to sit for seven years, we shall not find that any law, which may really be called constitutional, and which has been enacted since the Restoration, has been changed afterwards.

Now, if we compare this steadiness of the English government with the continual subversions of the constitutional laws of some ancient republics, with the imprudence of some of the laws passed in their assemblies,* and with the still greater inconsiderateness with which they sometimes repealed the most salutary regulations, as it were, the day after they had been enacted,—if we call to mind the extraordinary means to which the legislature of those republics, at times sensible how its very power was prejudicial to itself and to the state, was obliged to have recourse, in order, if possible, to tie its own hands,† we shall remain convinced of the great advantages which attend the constitution of the English legislature.‡

Nor is this division of the English legislature accompanied (which is indeed a very fortunate circumstance) by any actual division of the nation; each constituent part of it possesses strength sufficient to ensure respect to its resolutions; yet no real division has been made of the forces of the state. Only a greater proportional share of all those distinctions which are calculated to gain the reverence of the people, has been allotted to those parts of the legislature which could not possess their confidence in so high a degree as the others; and the inequalities in point of real strength between them have been made up by the magic of dignity.

Thus, the king, who alone forms one part of the legislature, has on his side the majesty of the kingly title; the two houses are, in appearance, no more than councils entirely dependent on him; they are

* The Athenians, among other laws, had enacted one to forbid the application of a certain part of the public revenues to any other use than the expenses of the theatres and public shows.

† In some ancient republics, when the legislature wished to render a certain law permanent, and at the same time mistrusted their own future wisdom, they added a clause to it, which made it death to propose the revocation of it. Those who afterwards thought such revocation necessary to the public welfare, relying on the mercy of the people, appeared in the public assembly with a halter about their necks.

‡ We shall perhaps have occasion to observe hereafter, that the true cause of the equability of the operations of the English legislature is the opposition that happily takes place between the different views and interests of the several bodies that compose it; a consideration this, without which all political inquiries are no more than airy speculations, and the only one that can lead to useful practical conclusions.

bound to follow his person; they only meet, as it seems to advise him; and never address him but in the most solemn and respectful manner.

As the nobles, who form the second order of the legislature, bear, in point both of real weight and numbers, no proportion to the body of the people,* they have received, as a compensation, the advantage of personal honours, and of an hereditary title.

Besides, the established ceremonial gives to their assembly a great pre-eminence over that of the representatives of the people. They are the *upper* house, and the others are the *lower* house. They are in a more special manner considered as the king's council: and it is in the place where they assemble that his throne is placed.

When the king comes to the parliament, the commons are sent for, and make their appearance at the bar of the house of lords. It is moreover before the lords, as before their judges, that the commons bring their impeachments. When, after passing a bill in their own house, they send it to the lords to desire their concurrence, they always order a number of their own members to accompany it:† whereas the lords send down their bills to them, only by some of the assistants of their house.‡ When the nature of the alterations which one of the two houses may wish to make in a bill sent to it by the other, renders a conference between them necessary, the deputies of the commons to the committee, which is then formed of members of both houses, are to remain uncovered. Lastly, those bills which (in whichever of the two houses they have originated) have been agreed to by both, must be deposited in the house of lords, there to remain till the royal pleasure is signified.

Besides, the lords are members of the legislature by virtue of a right inherent in their persons; and they are supposed to sit in parliament on their own account, and for the support of their own interests. In consequence of this, they have the privilege of giving their votes by *proxy*;§ and, when any of them dissent from the resolutions of their house, they may enter a protest against them, containing the reasons of their particular opinion. In a word, as this part of the legislature is destined frequently to balance the power of the people, what it could

* It is for want of having duly considered this subject, that M. Rousseau exclaims somewhere against those who, when they speak of the general estates of France, 'dare to call the 'people the *third* estate.' At Rome, where all the order we mention was inverted,—where the *fasces* were laid at the feet of the people, and where the tribunes, whose function, like that of the king of England, was to oppose the establishment of new laws, were only a subordinate kind of magistracy,—many disorders followed. In Sweden, and in Scotland (before the union), faults of another kind prevailed: in the former kingdom, for instance, an overgrown body of two thousand nobles frequently over-ruled both king and people.

† The speaker of the house of lords must come down from the woolpack to receive the bills which the members of the commons bring to their house.

‡ The twelve judges and the masters in chancery. There is also a ceremonial established with regard to the manner and marks of respect, with which those two of them, who are sent with a bill to the commons, are to deliver it.

§ The commons have not that privilege, because they are themselves *proxies* for the people.—Coke's Inst. 4. p. 41.

not receive in real strength it has received in outward splendour and greatness; so that, when it cannot resist by its weight, it overawes by its apparent magnitude.

In fine, as these various prerogatives, by which the component parts of the legislature are thus made to balance each other, are all intimately connected with the fortune of the state, and flourish and decay according to the vicissitudes of public prosperity or adversity, it thence follows, that, though differences of opinion may sometimes take place between those parts, there can scarcely arise any when the general welfare is really in question. And when, to resolve the doubts that may arise on political speculations of this kind, we cast our eyes on the debates of the two houses for a long succession of years, and see the nature of the laws which have been proposed, of those which have passed, and of those which have been rejected, as well as of the arguments that have been urged on both sides, we shall remain convinced of the goodness of the principles on which the English legislature is formed.

CHAP. IV.—*A third Advantage peculiar to the English Government.—The Business of proposing Laws, lodged in the Hands of the People.*

A THIRD circumstance, which I propose to show to be peculiar to the English government, is the manner in which the respective offices of the three component parts of the legislature have been divided, and allotted to each of them.

In most of the ancient free states, the share of the people in the business of legislation was to approve or reject the propositions which were made to them, and to give the final sanction to the laws. The function of those persons (or in general those bodies), who were intrusted with the executive power, was to prepare and frame the laws, and then to propose them to the people: and, in a word, they possessed that branch of the legislative power which may be called the *initiative*, that is, the prerogative of putting that power in action.*

This *initiative*, or exclusive right of proposing in legislative assemblies, attributed to the magistrates, is indeed very useful, and perhaps even necessary, in states of a republican form, for giving a permanence to the laws, as well as for preventing the disorders and struggles which have been mentioned before; but, upon examination, we shall find that this expedient is attended with inconveniences of little less magnitude than the evils it is meant to remedy.

These magistrates, or bodies, at first indeed apply frequently to the

* This power of previously considering and approving such laws as were afterwards to be propounded to the people, was, in the first times of the Roman republic, constantly exercised by the senate: laws were made, *populi jussu, ex auctoritate senatûs.* Even in cases of elections, the previous approbation and *auctoritas* of the senate, with regard to those persons who were offered to the suffrages of the people, were required. *Tum enim non gerebat is magistratum qui ceperat, si patres auctores non erant facti.* Cic. pro Plancio, 3

legislature for a grant of such branches of power as they dare not of themselves assume, or for the removal of such obstacles to their growing authority as they do not yet think it safe for them peremptorily to set aside. But when their authority has at length gained a sufficient degree of extent and stability, as farther manifestations of the will of the legislature could then only create obstructions to the exercise of their power, they begin to consider the legislature as an enemy whom they must take great care never to rouse. They consequently convene the assembly of the people as seldom as they can. When they do it, they carefully avoid proposing any thing favourable to public liberty. They soon even entirely cease to convene the assembly at all; and the people, after thus losing the power of legally asserting their rights, are exposed to that which is the highest degree of political ruin, the loss of even the remembrance of them, unless some direct means are found, by which they may from time to time give life to their dormant privileges; means which may be found, and succeed pretty well in small states, where provisions can more easily be made to answer their intended ends; but, in states of considerable extent, have always been found, in the event, to give rise to disorders of the same kind with those which were at first intended to be prevented.

But as the capital principle of the English constitution totally differs from that which forms the basis of republican governments, so it is capable of procuring to the people advantages that are to be found unattainable in the latter. It is the people in England, or at least those who represent them, who possess the *initiative* in legislation, that is to say, who perform the office of framing laws, and proposing them. And among the many circumstances in the English government, which would appear entirely new to the politicians of antiquity, that of seeing the person intrusted with the executive power bear that share in legislation which they looked upon as being necessarily the lot of the people, and the people enjoy that which they thought the indispensable office of its magistrates, would not certainly be the least occasion of their surprise.

I foresee that it will be objected, that, as the king of England has the power of dissolving, and even of not calling parliaments, he is hereby possessed of a prerogative which, in fact, is the same with that which I have just now represented as being so dangerous.

To this I answer, that all circumstances ought to be combined. Doubtless, if the crown had been under no kind of dependence whatever on the people, it would long since have freed itself from the obligation of calling their representatives together; and the British parliament, like the national assemblies of several other kingdoms, would most likely have no existence now, except in history.

But, as we have above seen, the necessities of the state, and the wants of the sovereign himself, put him under the necessity of having

frequent recourse to his parliament; and then the difference may be seen between the prerogative of not calling an assembly, when powerful causes nevertheless render such a measure necessary, and the exclusive right, when an assembly is convened, of *proposing* laws to it.

In the latter case, though a prince, let us even suppose, in order to save appearances, might condescend to mention anything besides his own wants, it would be at most to propose the giving up of some branch of his prerogative upon which he set no value, or to reform such abuses as his inclination does not lead him to imitate; but he would be very careful not to touch any points which might materially affect his authority.

Besides, as all his concessions would be made, or appear to be made, of his own motion, and would in some measure seem to spring from the activity of his zeal for the public welfare, all that he might offer, though in fact ever so inconsiderable, would be represented by him as grants of the most important nature, and for which he expects the highest gratitude. Lastly, it would also be his province to make restrictions and exceptions to laws thus proposed by himself; he would also be the person who would choose the words to express them, and it would not be reasonable to expect that he would give himself any great trouble to avoid all ambiguity.*

But the parliament of England is not, as we said before, bound down to wait passively and in silence for such laws as the executive power may condescend to propose to them. At the opening of every session, they of themselves take into their hands the great book of the state; they open all the pages, and examine every article.

When they have discovered abuses, they proceed to inquire into their causes:—when these abuses arise from an open disregard of the laws, they endeavour to strengthen them; when they proceed from their insufficiency, they remedy the evil by additional provisions.†

* In the beginning of the existence of the house of commons, bills were presented to the king under the form of *petitions*. Those to which the king assented were registered among the rolls of parliament, with his answers to them; and at the end of each parliament the judges formed them into statutes. Several abuses having crept into that method of proceeding, it was ordained that the judges should in future make the statute before the end of every session. Lastly, as even that became, in process of time, insufficient, the present method of framing bills was established: that is to say, both houses now frame the statutes in the very form and words in which they are to stand when they have received the royal assent.

† No popular assembly ever enjoyed the privilege of starting, canvassing, and proposing new matter, to such a degree as the English commons. In France, when their general estates were allowed to sit, their *remonstrances* were little regarded; and still less regard could the particular estates of the provinces expect. In Sweden, the power of proposing new subjects was lodged in an assembly called the *secret committee*, composed of nobles, and a few of the clergy; and is now possessed by the king. In Scotland, until the *Union*, all propositions to be laid before the parliament were to be framed by the persons called the *lords of the articles*. In regard to Ireland, all bills must be prepared by the king in his privy council, and are to be laid before the parliament by the lord-lieutenant, for their assent or dissent: only they are allowed to discuss, among them, what they call *heads of a bill*, which the lord-lieutenant is desired afterwards to transmit to the king, who selects out of them what clauses he thinks proper, or sets the whole aside; and is not expected to give, at any time, a precise answer to them. And, in republican governments, magistrates are never at rest till they have entirely secured to themselves the important privilege of *proposing*: nor does this follow merely from their ambition; it is also the consequence of the situation they are in, from the principles of that mode of government.

Nor do they proceed with less regularity and freedom, in regard to that important object, subsidies. They are to be the sole judges of the quantity of them, as well as of the ways and means of raising them; and they need not come to any resolution with regard to them till they see the safety of the subject completely provided for. In a word, the making of laws is not, in such an arrangement of things, a *gratuitous* contract, in which the people are to take just what is given them, and as it is given them :—it is a contract, in which they *buy* and *pay*, and in which they themselves settle the different conditions, and furnish the words to express them.

The English parliament have given a still greater extent to their advantages on so important a subject. They have not only secured to themselves a right of proposing laws and remedies, but they have also prevailed on the executive power to renounce all claim to do the same. It is even a constant rule, that neither the king nor his privy council can make any amendments in the bills preferred by the two houses; but the king is merely to accept or reject them; a provision this, which, if we pay a little attention to the subject, we shall find to have been also necessary for completely securing the freedom and regularity of the parliamentary deliberations.*

I indeed confess, that it seems very natural, in the modelling of a state, to intrust this very important office of framing laws to those persons who may be supposed to have before acquired experience and wisdom in the management of public affairs. But events have unfortunately demonstrated, that public employment and power improve the understanding of men in a less degree than they pervert their views; and it has been found in the issue, that the effect of a regulation which, at first sight, seems so perfectly consonant with prudence, is to confine the people to a mere passive and defensive share in the legislation, and to deliver them up to the continual enterprises of those, who, at the same time that they are under the greatest temptations to deceive them, possess the most powerful means of effecting it.

If we cast our eyes on the history of the ancient governments, in those times when the persons intrusted with the executive power were

[During the heat of the American war of Independency, Ireland, by a timely exertion of energies, recovered her freedom from the dominion of England; and became a separate state, though the thrones of each were filled by the same monarch. From that time her parliament, until the union in 1801, was as free and enjoyed the same functions and powers as the British. —ED.]

* The king indeed, at times, sends messages to either house; and nobody, I think, can wish that no means of intercourse should exist between him and his parliament. But these messages are always expressed in very general words: they are only made to desire the house to take certain subjects into their consideration: no particular articles or clauses are expressed: the commons are not to declare, at any settled time, a solemn acceptance or rejection of the proposition made by the king; and, in short, the house follow the same mode of proceeding, with respect to such messages, as they usually do in regard to petitions presented by private individuals. Some member makes a motion upon the subject expressed in the king's message: a bill is framed in the usual way: it may be dropped at every stage of it; and it is never the proposal of the crown, but the motions of some of their own members, which the house discuss, and finally accept or reject.

still in a state of dependence on the legislature, and consequently were frequently obliged to have recourse to it, we shall see almost continual instances of selfish and insidious laws proposed by them to the assemblies of the people.

And those men, in whose wisdom the law had at first placed so much confidence, became, in the issue, so lost to all sense of shame and duty, that when arguments were found to be no longer sufficient, they had recourse to force; the legislative assemblies became so many fields of battle, and their power a real calamity.

I know very well, however, that there are other important circumstances besides those I have just mentioned, which would prevent disorders of this kind from taking place in England.* But, on the other hand, let us call to mind that the person who, in England, is invested with the executive authority, unites in himself the whole public power and majesty. Let us represent to ourselves the great and sole magistrate of the nation pressing the acceptance of those laws which he had proposed, with a vehemence suited to the usual importance of his designs, with the warmth of monarchical pride, which must meet with no refusal, and exerting for that purpose all his immense resources.

It was therefore a matter of indispensable necessity, that things should be settled in England in the manner they are. As the moving springs of the executive power are, in the hands of the king, a kind of sacred *depositum*, so are those of the legislative power in the hands of the two houses. The king must abstain from touching them, in the same manner as all the subjects of the kingdom are bound to submit to his prerogatives. When he sits in parliament, he has left, we may say, his executive power without doors, and can only assent or dissent. If the crown had been allowed to take an active part in the business of making laws, it would soon have rendered useless the other branches of the legislature.

CHAP. V.—*In which an Inquiry is made, whether it would be an Advantage to public Liberty, that the Laws should be enacted by the Votes of the People at large.*

BUT it will be said, whatever may be the wisdom of the English laws, how great soever their precautions may be with regard to the safety of the individual; the people, as they do not themselves expressly enact them, cannot be looked upon as a free people. The author of the *Social Contract* carries this opinion even farther; he says, that, 'though 'the people of England think they are free, they are much mistaken; 'they are so only during the election of members for parliament: as 'soon as these are elected, the people are slaves—they are nothing.' (*M. Rousseau's Social Contract*, ch. xv.)

* I particularly mean here the circumstance of the people having entirely delegated their power to their representatives; the consequences of which institution will be discussed in the next chapter.

Before I answer this objection, I shall observe that the word *liberty* is one of those which have been most misunderstood or misapplied.

Thus, at Rome, where that class of citizens who were really masters of the state, were sensible that a lawful regular authority, once trusted to a single ruler, would put an end to their tyranny, they taught the people to believe, that, provided those who exercised a military power over them, and overwhelmed them with insults, went by the names of *consules*, *dictatores*, *patricii*, *nobiles*, in a word, by any other appellation than that horrid one of *rex*, they were free, and that such a valuable situation must be preferred at the price of every calamity.

In the same manner, certain writers of the present age, misled by their inconsiderate admiration of the governments of ancient times, and perhaps also by a desire of presenting lively contrasts to what they call the degenerate manners of our modern times, have cried up the governments of Sparta and Rome, as the only ones fit for us to imitate. In their opinions, the only proper employment of a free citizen, is *to be either incessantly assembled in the forum, or preparing for war. Being valiant, inured to hardships, inflamed with an ardent love of one's country*, which is, after all, nothing more than an ardent desire of injuring all mankind for the sake of that society of which we are members,—*and with an ardent love of glory*, which is likewise nothing more than an ardent desire of committing slaughter, in order to make afterwards a boast of it,—have appeared to these writers to be the only social qualifications worthy of our esteem, and of the encouragement of law-givers.* And while, in order to support such opinions, they have used a profusion of exaggerated expressions without any distinct meaning, and perpetually repeated, though without defining them, the words *dastardliness*, *corruption*, *greatness of soul*, and *virtue*, they have not once thought of telling us the only thing that was worth our knowing, which is whether men were happy under those governments which they have so much exhorted us to imitate.

Nor, while they have thus misapprehended the only rational design of civil societies, have they better understood the true end of the particular institutions by which they were to be regulated. They were satisfied when they saw the few who really governed everything in the state, at times perform the illusory ceremony of assembling the body of the people, that they might appear to consult them: and the mere giving of votes, under any disadvantage in the manner of giving them, and how much soever the law might afterwards be neglected that was thus pretended to have been made in common, has appeared to them to be liberty.

But those writers are seemingly in the right; a man who contributes by his vote to the passing of a law has himself made the law: in obey-

* I have used all the above expressions in the same sense in which they were used in the ancient commonwealths, and still are by most of the writers who describe their governments.

ing it, he obeys himself ;—he therefore is free. A play on words, and nothing more. The individual who has voted in a popular legislative assembly has not made the law that has passed in it ; he has only contributed, or seemed to contribute, towards enacting it, for his thousandth, or even ten thousandth share ; he has had no opportunity of making his objections to the proposed law, or of canvassing it, or of proposing restrictions to it ; and he has only been allowed to express his assent or dissent. When a law has passed agreeably to his vote, it is not as a consequence of this his vote that his will happens to take place ; it is because a number of other men have accidently thrown themselves on the same side with him :—when a law contrary to his intentions is enacted, he must nevertheless submit to it.

This is not all ; for though we should suppose that to give a vote is the essential constituent of liberty, yet such liberty could only be said to last for a single moment, after which it becomes necessary to trust entirely to the discretion of other persons, that is, according to this doctrine, to be no longer free. It becomes necessary, for instance, for the citizen who has given his vote, to rely on the honesty of those who collect the suffrages ; and more than once have false declarations been made of them.

The citizen must also trust to other persons for the execution of those things which have been resolved upon in common ; and when the assembly shall have separated, and he shall find himself alone, in the presence of the men who are invested with the public power, of the consuls, for instance, or of the dictator, he will have but little security for the continuance of his liberty, if he has only that of having contributed by his suffrage towards enacting a law which they are determined to neglect.

What then is liberty?—Liberty, I would answer, as far as it is possible for it to exist in a society of beings whose interests are almost perpetually opposed to each other, consists in this, that *every man, while he respects the persons of others, and allows them quietly to enjoy the produce of their industry, should be certain himself likewise to enjoy the produce of his own industry, and that his person be also secure.* But to contribute by one's suffrage to procure these advantages to the community,—to have a share in establishing that order, that general arrangement of things by means of which an individual, lost as it were in the crowd, is effectually protected ;—to lay down the rules to be observed by those who, being invested with a considerable power, are charged with the defence of individuals, and provide that they should never transgress them ;—these are functions, are acts of government, but not constituent parts of liberty.

In a word : To concur by one's suffrage in enacting laws, is to enjoy a share, whatever it may be, of power : to live in a state where the laws are equal for all, and sure to be executed (whatever may be the means by which these advantages are attained), is to be free.

Be it so : we grant that to give one's suffrage is not liberty itself, but only a mean of procuring it, and a mean too which may degenerate to mere form ; we grant also, that other expedients might be found for that purpose ; and that for a man to decide that a state with whose government and interior administrations he is unacquainted, is a state in which the people *are slaves, are nothing*, merely because the *comitia* of ancient Rome are no longer to be met with in it, is a somewhat precipitate decision. Yet many, perhaps, will continue to think that liberty would be much more complete, if the people at large were expressly called upon to give their opinion concerning the particular provisions by which it is to be secured, and that the English laws, for instance, if they were made for the suffrages of all, would be wiser, more equitable, and, above all, more likely to be executed. To this objection, which is certainly specious, I shall endeavour to give an answer.

If, in the first formation of a civil society, the only care to be taken was that of establishing, once for all, the several duties which every individual owes to others and to the state ;—if those who are intrusted with the care of procuring the performance of these duties, had neither any ambition, nor any other private passions, which such employment might put in motion, and furnish the means of gratifying :—in a word, if, looking upon their function as a mere task of duty, they were never tempted to deviate from the intentions of those who had appointed them :—I confess that, in such a case, there might be no inconvenience in allowing every individual to have a share in the government of the community of which he is a member ; or rather, I ought to say, in such a society, and among such beings, there would be no occasion for any government.

But experience teaches us that many more precautions, indeed, are necessary to oblige men to be just towards each other : nay, the very first expedients that may be expected to conduce to such an end, supply the most fruitful source of the evils which are proposed to be prevented. Those laws which were intended to be equal for all, are soon warped to the private convenience of those who have been made the administrators of them : instituted at first for the protection of all, they soon are made only to defend the usurpations of a few ; and, as the people continue to respect them, while those to whose guardianship they were intrusted make little account of them, they at length have no other effect than that of supplying the want of real strength in those few who have contrived to place themselves at the head of the community, and of rendering regular and free from danger the tyranny of the smaller number over the greater.

To remedy, therefore, evils which thus have a tendency to result from the very nature of things,—to oblige those who are in a manner masters of the law, to conform themselves to it,—to render ineffectual

the silent, powerful, and ever-active conspiracy of those who govern, requires a degree of knowledge, and a spirit of perseverance, which are not to be expected from the multitude.

The greater part of those who compose this multitude, taken up with the care of providing for their subsistence, have neither sufficient leisure, nor even, in consequence of their more imperfect education, the degree of information requisite for functions of this kind. Nature, besides, who is sparing of her gifts, has bestowed upon only a few men an understanding capable of the complicated researches of legislation: and as a sick man trusts to his physician, a client to his lawyer, so the greater number of the citizens must trust to those who have more abilities than themselves for the execution of things, which, at the same time that they so materially concern them, require so many qualifications to perform them with any degree of sufficiency.

To these considerations, of themselves so material, another must be added, which is, if possible, of still greater weight. This is, that the multitude, in consequence of their being a multitude, are incapable of coming to any mature resolution.

Those who compose a popular assembly are not actuated, in the course of their deliberations, by any clear and precise views of present or positive personal interest. As they see themselves lost, as it were, in the crowd of those who are called upon to exercise the same function with themselves—as they know that their individual votes will make no change in the public resolutions, and that, to whatever side they may incline, the general result will nevertheless be the same;—they do not undertake to inquire how far the things proposed to them agree with the whole of the laws already in being, or with the present circumstances of the state, because men will not enter upon a laborious task, when they know that it can scarcely answer any purpose.

It is, however, with dispositions of this kind, and each relying on all, that the assembly of the people meet. But, as very few among them have previously considered the subjects on which they are called upon to determine, very few carry along with them any opinion or inclination, or at least any inclination of their own, and to which they are resolved to adhere. As, however, it is necessary at last to come to some resolution, the major part of them are determined by reasons which they would blush to pay any regard to on much less serious occasions. An unusual sight, a change of the ordinary place of the assembly, a sudden disturbance, a rumour, are, amidst the general want of a spirit of decision, the *sufficiens ratio* of the determination of the greatest part;* and from this assemblage of separate wills, thus formed hastily, and without reflection, a general will results, which is also void of reflection.

* Every one knows of how much importance it was, in the Roman commonwealth, to assemble the people in one place rather than another. In order to change entirely the nature of their resolutions, it was often sufficient to hide from them, or let them see, the Capitol.

If, amidst these disadvantages, the assembly were left to themselves, and nobody had an interest to lead them into error, the evil, though very great, would not however be extreme, because such an assembly never being called upon but to determine upon an affirmative or negative (that is, only having two cases to choose between), there would be an equal chance of their choosing either; and it might be hoped that at every other turn they would take the right side.

But the combination of those who share either in the actual exercise of the public power, or in its advantages, do not thus allow themselves to sit down in inaction. They wake, while the people sleep. Entirely taken up with the thoughts of their own power, they live but to increase it. Deeply versed in the management of public business, they see at once all the possible consequences of measures. And, as they have the exclusive direction of the springs of government, they give rise, at their pleasure, to every incident that may influence the minds of a multitude who are not on their guard, and who wait for some event or other that may finally determine them.

It is they who convene the assembly, and dissolve it: it is they who offer propositions, and make speeches to it. Ever active in turning to their advantage every circumstance that happens, they equally avail themselves of the tractableness of the people during public calamities, and its heedlessness in times of prosperity. When things take a different turn from what they expected, they dismiss the assembly. By presenting to it many propositions at once, and which are to be voted upon in the lump, they hide what is destined to promote their own private views, or give a colour to it, by joining it with things which they know will take hold of the mind of the people.* By presenting, in their speeches, arguments and facts which men have no time to examine, they lead the people into gross, and yet decisive errors: and the common-places of rhetoric, supported by their personal influence, ever enable them to draw to their side the majority of votes.

On the other hand, the few (for there are, after all, some) who, having meditated on the proposed question, see the consequences of the decisive step which is just going to be taken, being lost in the crowd, cannot make their feeble voices to be heard amidst the universal noise and confusion. They have it no more in their power to stop the general motion, than a man in the midst of an army, on a march, has it in his power to avoid marching. In the mean time, the people are giving the suffrages; a majority appears in favour of the proposal; it is finally proclaimed as the general will of all; and it is at bottom

* It was thus the senate at Rome assumed to itself the power of laying taxes. They promised, in the time of the war against the Veientes, to give pay to such citizens as would enlist; and to that end they established a tribute. The people, solely taken up with the idea of not going to war at their own expense, were transported with so much joy, that they crowded at the door of the senate, and laying hold of the hands of the senators, called them their fathers.—*Nihil unquam, acceptum à plebe tanto gaudio traditur: concursum itaque ad curiam esse, prehensatasque exeuntium manus, patres vere appellatos, &c.* Tit. Liv. book iv.

nothing more than the effect of the artifices of a few designing men, who are exulting among themselves.

In a word, those who are acquainted with republican governments, and, in general, who know the manner in which business is transacted in numerous assemblies, will not scruple to affirm that the few who are united, who take an active part in public affairs, and whose station makes them conspicuous, have such an advantage over the many who turn their eyes towards them, and are without union among themselves, that, even with a middling degree of skill, they can at all times direct, at their pleasure, the general resolutions; that, as a consequence of the very nature of things, there is no proposal, however absurd, to which a numerous assembly may not, at one time or other, be brought to assent,—and that laws would be wiser, and more likely to procure the advantage of all, if they were to be made by drawing lots, or casting dice, than by the suffrages of a multitude.

CHAP. VI.—*Advantages that accrue to the People from appointing Representatives.*

HOW then shall the people remedy the disadvantages that necessarily attend their situation? How shall they resist the phalanx of those who have engrossed to themselves all the honours, dignities, and power in the state?

It will be by employing for their defence the same means by which their adversaries carry on their attack:—it will be by using the same weapons as they do,—the same order,—the same kind of discipline.

They are a small number, and consequently easily united;—a small number, must therefore be opposed to them, that a like union may also be obtained. It is because they are a small number, that they can deliberate on every occurrence, and never come to any resolutions but such as are maturely weighed;—it is because they are few, that they can have forms which continually serve them for general standards to resort to, approved maxims to which they invariably adhere, and plans which they never lose sight of:—here, therefore, I repeat it, oppose to them a small number, and you will obtain the like advantages.

Besides, those who govern, as a farther consequence of their being few, have a more considerable share, consequently feel a deeper concern in the success, whatever it may be, of their enterprises. As they usually profess a contempt for their adversaries, and are at all times acting an offensive part against them, they impose on themselves an obligation of conquering. They, in short, who are all alive from the most powerful incentives, and aim at gaining new advantages, have to do with a multitude, who, wanting only to preserve what they already possess, are unavoidably liable to long intervals of inactivity and supineness. But the people, by appointing representatives, immediately

gain to their cause that advantageous activity which they before stood in need of, to put them on a par with their adversaries; and those passions become excited in their defenders, by which they themselves cannot be actuated.

Exclusively charged with the care of public liberty, the representatives of the people will be animated by a sense of the greatness of the concerns with which they are intrusted. Distinguished from the bulk of the nation, and forming among themselves a separate assembly, they will assert the rights of which they have been made the guardians, with all that warmth which the *esprit de corps* is used to inspire.* Placed on an elevated theatre, they will endeavour to render themselves still more conspicuous; and the arts and ambitious activity of those who govern will now be encountered by the vivacity and perseverance of opponents actuated by the love of glory.

Lastly, as the representatives of the people will naturally be selected from among those citizens who are most favoured by fortune, and will have consequently much to preserve, they will, even in the midst of quiet times, keep a watchful eye on the motions of power. As the advantages they possess will naturally create a kind of rivalship between them and those who govern, the jealousy which they will conceive against the latter will give them an exquisite degree of sensibility on every increase of their authority. Like those delicate instruments which discover the operations of nature, while they are yet imperceptible to our senses, they will warn the people of those things which of themselves they never see but when it is too late; and their greater proportional share, whether of real riches, or of those which lie in the opinions of men, will make them, if I may so express myself, the barometers that will discover, in its first beginning, every tendency to a change in the constitution.†

CHAP. VII.—*The Subject continued. The Advantages that accrue to the People from their appointing Representatives are very inconsiderable, unless they also entirely trust their Legislative Authority to them.*

THE observations made in the preceding chapter are so obvious, that the people themselves, in popular governments, have always been sensible of the truth of them, and never thought it possible to remedy, by themselves alone, the disadvantages necessarily attending their situation. Whenever the oppressions of their rulers have forced them to resort to some uncommon exertion of their legal powers, they have immediately put themselves under the direction of

* If it had not been for an incentive of this kind, the English commons would not have vindicated their right of taxation with so much vigilance as they have done, against all enterprises (often perhaps involuntary) of the lords.

† All the above reasoning essentially requires that the representatives of the people should be united in interests with the people. We shall soon see that this union really prevails in the English constitution, and may be called the master-piece of it.

those few men who had been instrumental in informing and encouraging them: and when the nature of the circumstances has required any degree of firmness and perseverance in their conduct, they have never been able to attain the ends they proposed to themselves, except by means of the most explicit deference to those leaders whom they had thus appointed.

But, as these leaders, thus hastily chosen, are easily intimidated by the continual display which is made before them of the terrors of power; as that unlimited confidence which the people now repose in them only takes place when public liberty is in the utmost danger, and cannot be kept up otherwise than by an extraordinary conjunction of circumstances, in which those who govern seldom suffer themselves to be caught more than once;—the people have constantly sought to avail themselves of the short intervals of superiority which the chance of events had given them, for rendering durable those advantages which they knew would, of themselves, be but transitory, and for getting some persons appointed, whose peculiar office it may be to protect them, and whom the constitution shall thenceforward recognize. Thus it was that the people of Lacedæmon obtained their *ephori* and the people of Rome their tribunes.

We grant this, will it be said; but the Roman people never allowed their tribunes to *conclude any thing definitively;* they, on the contrary, reserved to themselves the right of *ratifying* any resolutions the latter should take. This, I answer, was the very circumstance that rendered the institution of tribunes totally ineffectual in the event. The people—thus wanting to interfere, with their own opinions, in the resolutions of those on whom they had, in their wisdom, determined entirely to rely—and endeavouring to settle with a hundred thousand votes things which would have been settled equally well by the votes of their advisers,—defeated in the issue every beneficial end of their former provisions: and while they meant to preserve an appearance of their sovereignty (a chimerical appearance, since it was under the direction of others that they intended to vote), they fell back into all those inconveniences which we have before mentioned.

The senators, the consuls, the dictators, and the other great men in the republic, whom the people were prudent enough to fear, and simple enough to believe, continued still to mix with them, and play off their political artifices. They continued to make speeches to them,* and still availed themselves of their privilege of changing at their

* Valerius Maximus relates, that the tribunes of the people having offered to propose some regulations in regard to the price of corn, in a time of great scarcity, Scipio Naicta over-ruled the assembly merely by saying, 'Silence, Romans! I know better than you what is expedient for the republic.—Which words were no sooner heard by the people, than they showed by a silence full of veneration, that they were more affected by his authority, than by the necessity of providing for their own subsistence.' *Tacete, quæso, Quirites! Plus enim ego quam vos quid reipublicæ expediat intelligo.—Quâ voce auditâ, omnes, pleno venerationis silentio, majorem ejus auctoritatis quam alimentorum suorum curam egerunt.*

pleasure the place and form of the public meetings. When they did not find it possible by such means to direct the resolutions of the assemblies, they pretended that the omens were not favourable, and under this pretext, or others of the same kind, they dissolved them.*

And the tribunes, when they had succeeded so far as to effect an union among themselves, thus were obliged to submit to the pungent mortification of seeing those projects which they had pursued with infinite labour, and even through the greatest dangers, irrecoverably defeated by the most despicable artifices.

When, at other times, they saw that a confederacy was carrying on with uncommon warmth against them, and despaired of succeeding by employing expedients of the above kind, or were afraid of diminishing their efficacy by a too frequent use of them, they betook themselves to other stratagems. They then conferred on the consuls, by the means of a short form of words for the occasion,† an absolute power over the lives of the citizens, or even appointed a dictator. The people, at the sight of the state masquerade which was displayed before them, were sure to sink into a state of consternation: and the tribunes, however clearly they might see through the artifice, also trembled in their turn, when they thus beheld themselves left without defenders.‡

At other times, they brought false accusations against the tribunes before the assembly itself; or, by privately slandering them with the people, totally deprived them of their confidence. It was through artifices of this kind, that the people were brought to behold, without concern, the murder of Tiberius Gracchus, the only Roman that was really virtuous—the only one who truly loved the people. It was also in the same manner that Caius, who was not deterred by his brother's fate from pursuing the same plan of conduct, was in the end so entirely forsaken by the people, that nobody could be found among them who would even lend him a horse to fly from the fury of the nobles; and he was at last compelled to lay violent hands upon himself, while he invoked the wrath of the gods on his inconstant fellow-citizens.

At other times, they raised divisions among the people. Formidable combinations broke out suddenly on the eve of important transactions; and all moderate men avoided attending assemblies, where they saw that all was to be tumult and confusion.

* *Quid enim majus est, si de jure augurum quærimus,* (says Tully, who was himself an augur, and a senator also), *quam posse a summis imperiis et summis potestatibus comitiatus et consilia vel instituta dimittere vel habita rescindere? Quid gravius, quam rem susceptam dirimi, si unus augur* ALIUM (id est, alium diem) *dixerit?* De Legib. lib. ii. § 12.

† *Videat consul ne quid detrimenti respublica capiat.*

‡ 'The tribunes of the people,' says Livy, who was a great admirer of the aristocratical power, 'and the people themselves, durst neither lift up their eyes, nor even mutter, in the presence of the dictator.' *Nec adversus dictatoriam vim, aut tribuni plebis, aut ipsa plebs, attollere oculos, aut hiscere, audebant.* Tit. Liv. lib. vi. § 16.

In fine, that nothing might be wanting to the insolence with which they treated the assemblies of the people, they sometimes falsified the declarations of the number of the votes; and once they even went so far as to carry off the urns into which the citizens were to throw their suffrages.*

CHAP. VIII.—*The Subject concluded—Effects that have resulted in the English Government from the People's Power being completely delegated to their Representatives.*

BUT when the people have entirely trusted their power to a moderate number of persons, affairs immediately take a widely different turn. Those who govern are from that moment obliged to leave off all those stratagems which have hitherto ensured their success. Instead of those assemblies which they affected to despise, and were perpetually comparing to storms, or to the current of the *Euripus*,† and in regard to which they accordingly thought themselves at liberty to pass over the rules of justice, they now find that they have to deal with men who are their equals in point of education and knowledge, and their inferiors only in point of rank and form. They, in consequence, soon find it necessary to adopt quite different methods; and, above all, become very careful not to talk to them any more about the sacred chickens, the *white* or *black* days, and the Sibylline books.—As they see their new adversaries expect to have a proper regard paid to them, that single circumstance inspires them with it:—as they see them act in a regular manner, observe constant rules, in a word, proceed with *form*, they come to look upon them with respect, for the very same reason which makes them themselves to be reverenced by the people.

The representatives of the people, on the other hand, do not fail soon to procure for themselves every advantage that may enable them effectually to use the powers with which they have been intrusted, and to adopt every rule of proceeding that may make their resolutions to be truly the result of reflection and deliberation. Thus it was that the representatives of the English nation, soon after their first establishment, became formed into a separate assembly: they afterwards obtained the liberty of appointing a president:—soon after, they insisted upon their being consulted on the last form of the acts to which they had given rise:—lastly, they insisted on thenceforth framing them themselves.

* The reader, with respect to all the above observations, may see Plutarch's Lives, particularly the lives of the two Gracchi. I must add, that I have avoided drawing any instance from those assemblies in which one half of the people were made to arm themselves against the other. I have here only alluded to those times which immediately either preceded or followed the third Punic war, as these are commonly called the *best period* of the republic.

† Tully makes no end of his similes on this subject. *Quod enim fretum, quem Euripum, tot motus, tantas et tam varias habere putatis agitationes fluctuum, quantas perturbationes et quantos astus habet ratio comitiorum?* Orat. pro Muræná.—*Concio*, says he, in another place, *quæ ex imperitissimis constat, &c.* De Amicitiâ, § 25.

In order to prevent any possibility of surprise in the course of their proceedings, it is a settled rule with them, that every proposition, or bill, must be read three times, at different prefixed days,* before it can receive a final sanction : and before each reading of the bill, as well as at its first introduction, an express resolution must be taken to continue it under consideration. If the bill be rejected in any one of those several operations, it must be dropped, and cannot be proposed again during the same session.†

The commons have been, above all, jealous of the freedom of speech in their assembly. They have expressly stipulated, as we have mentioned above, that none of their words or speeches should be questioned in any place out of their house. In fine, in order to keep their deliberations free from every kind of influence, they have denied their president the right to give his vote, or even his opinion :—they moreover have settled it as a rule, not only that the king could not send to them any express proposal about laws, or other subjects, but even that his name should never be mentioned in the deliberations.‡

But that circumstance which, of all others, constitutes the superior excellence of a government in which the people act only through their representatives, that is, by means of an assembly formed of a moderate number of persons, and in which it is possible for every member to propose new subjects, and to argue and to canvass the questions that arise,—is, that such a constitution is the only one capable of the immense advantage (of which perhaps I did not convey an adequate idea to the reader when I mentioned it before) of putting into the hands of the people the moving springs of the legislative authority.

In a constitution where the people at large exercise the function of enacting the laws, as it is only to those persons towards whom the citizens are accustomed to turn their eyes, that is, to the very men who govern, that the assembly have either time or inclination to listen, they acquire, at length, as has constantly been the case in all republics, the exclusive right of proposing, if they please, when they please, in what manner they please : a prerogative this, of such extent, that it would suffice to put an assembly, formed of men of the greatest parts, at the mercy of a few dunces, and renders completely illusory the boasted power of the people. Nay more, as this prerogative is thus placed in

* It sometimes happens, however, to be expedient to pass a law without delay, upon which the standing orders of the house are rescinded by votes, and the bill is read three times and passed in one day.—ED.

† It is moreover a settled rule in the house of commons, that no member is to speak more than once in the same debate. When the number and nature of the clauses of a bill require that it should be discussed in a free manner, a committee is appointed for the purpose, who are to make their report afterwards to the house. When the subject is of importance, this committee is formed of the whole house, which still continues to sit in the same place, but in a less solemn manner, and under another president, who is called the chairman of the committee. In order to form the house again, the mace is replaced on the table, and the speaker goes again into his chair.

‡ If any person should mention in his speech, what the king *wishes should be, would be glad to see*, &c., he would be immediately *called to order*, for attempting to *influence the debate*.

the very hands of the adversaries of the people, it forces the people to remain exposed to their attacks, in a condition perpetually passive and takes from them the only legal means by which they might effectually oppose their usurpations.

To express the whole in a few words—A *representative* constitution places the remedy in the hands of those who feel the disorder: but a *popular* constitution places the remedy in the hands of those who cause it: and it is necessarily productive, in the event, of the misfortune—of the political calamity, of trusting the care and the means of repressing the invasions of power, to the men who have the enjoyment of power.

CHAP. IX.—*A farther Disadvantage of Republican Governments.—The People are necessarily betrayed by those in whom they trust.*

HOWEVER, those general assemblies of a people who were made to determine upon things which they neither understood nor examined,—that general confusion in which the ambitious could at all times hide their artifices, and carry on their schemes with safety—were not the only evils attending the ancient commonwealths. There was a more secret defect, and a defect that struck immediately at the very vitals of it, inherent in that kind of government.

It was impossible for the people ever to have faithful defenders. Neither those whom they had expressly chosen, nor those whom some personal advantages enabled to govern the assemblies (for the only use, I must repeat, which the people ever make of their power, is either to give it away, or allow it to be taken from them), could possibly be united to them by any common feeling of the same concerns. As their influence put them, in a great measure, upon a level with those who were invested with the executive authority, they cared little to restrain oppressions out of the reach of which they saw themselves placed. Nay, they feared they should thereby lessen a power which they knew was one day to be their own; if they had not even already an actual share in it.*

Thus, at Rome, the only end which the tribunes ever pursued with any degree of sincerity and perseverance, was to procure to the people, that is, to themselves, an admission to all the different dignities in the republic. After having obtained that a law should be enacted for admitting plebeians to the consulship, they procured for them the liberty of intermarrying with the patricians. They afterwards rendered them admissible to the dictatorship, to the office of military tribune, to the censorship: in a word, the only use they made of the power of the

* How could it be expected that men who entertained views of being prætors, would endeavour to restrain the power of the prætors,—that men who aimed at being one day consuls, would wish to limit the power of the consuls,—that men whom their influence among the people made sure of getting into the senate, would seriously endeavour to confine the authority of the senate?

people, was to increase privileges which they called the privileges of all, though they and their friends alone were ever likely to have the enjoyment of them.

We do not find that they ever employed the power of the people in things really beneficial to the people.—We do not find that they ever set bounds to the terrible power of its magistrates,—that they ever repressed that class of citizens who knew how to make their crimes pass uncensured,—in a word, that they ever endeavoured, on the one hand to regulate, and on the other to strengthen, the judicial power; precautions these, without which men might struggle to the end of time, and never attain true liberty.*

And indeed the judicial power, that sure *criterion* of the goodness of a government, was always, at Rome, a mere instrument of tyranny. The consuls were at all times invested with an absolute power over the lives of the citizens. The dictators possessed the same right; so did the prætors, the tribunes of the people, the judicial commissioners named by the senate, and so, of course, did the senate itself: and the fact of the three hundred and seventy deserters whom it commanded to be thrown at one time, as Livy relates, from the Tarpeian rock, sufficiently shows that it knew how to exert its power upon occasion.

It even may be said, that, at Rome, the power of life and death, or rather the right of killing, was annexed to every kind of authority whatever, even to that which results from mere influence, or wealth; and the only consequence of the murder of the Gracchi, which was accompanied by the slaughter of three hundred, and afterwards of four thousand unarmed citizens, whom the nobles *knocked on the head*, was to engage the senate to erect a temple to *Concord*. The *Lex Porcia de tergo civium*, which has been so much celebrated, was attended with no other effect than that of more completely securing, against the danger of a retaliation, such consuls, prætors, quæstors, &c., as, like Verres, caused the inferior citizens of Rome to be scourged with rods, and put to death upon crosses, through mere caprice and cruelty.†

In fine, nothing can more completely show to what degree the tribunes had forsaken the interests of the people, whom they were appointed to defend, than the fact of their having allowed the senate to invest itself with the power of taxation: they even suffered it to assume

* Without such precautions, laws must always be, as Pope expresses it,

'Still for the strong too weak, the weak too strong.'

† If we turn our eyes to Lacedæmon, we shall see, from several instances of the justice of the *ephori*, that matters were little better ordered there, in regard to the administration of public justice.—And in Athens itself, the only one of the ancient commonwealths in which the people seem to have enjoyed any degree of real liberty, we see the magistrates proceed nearly in the same manner as they now do among the Turks: and I think no other proof needs to be given than the story of that barber in the Piræus, who having spread about the town the news of the overthrow of the Athenians in Sicily, which he had heard from a stranger who had stopped at his shop, was put to the torture, by the command of the archons, because he could not tell the name of his author.—*Plut. Life of Nicias.*

to itself the power, not only of dispensing with the laws, but also of abrogating them.*

In a word, as the necessary consequence of the *communicability* of power, a circumstance essentially inherent in the republican form of government, it is impossible for it ever to be restrained within certain rules. Those who are in a condition to control it, from that very circumstance become its defenders.—Though they may have risen, as we may suppose, from the humblest stations, and such as seemed totally to preclude them from all ambitious views, they have no sooner reached a certain degree of eminence, than they begin to aim higher. Their endeavours had at first no other object, as they professed, and perhaps with sincerity, than to see the laws impartially executed: their only view now is to set themselves above them; and seeing themselves raised to the level of a class of men who possess all the power and enjoy all the advantages of the state, they make haste to associate themselves with them.†

Personal power and independence on the laws being, in such states, the immediate consequence of the favour of the people, they are under an unavoidable necessity of being betrayed. Corrupting, as it were, every thing they touch, they cannot show a preference to a man, but they thereby attack his virtue; they cannot raise him, without immediately losing him and weakening their own cause; nay, they inspire him with views directly opposite to their own, and send him to join and increase the number of their enemies.

Thus, at Rome, after the feeble barrier which excluded the people from offices of power and dignity had been thrown down, the great plebeians, whom the votes of the people began to raise to those offices, were immediately received into the senate, as has been just now observed. From that period, their families began to form, in conjunction with the ancient patrician families, a new combination, or political association of persons :‡ and as this combination was formed of no

* There are frequent instances of the consuls taking away from the Capitol the tables of the laws passed under their predecessors. Nor was this, as we might at first be tempted to believe, an act of violence which success alone could justify; it was a consequence of the acknowledged power enjoyed by the senate, *cujus erat gravissimum judicium de jure legum*, as we may see in several places in Tully. Nay, the augurs themselves, as this author informs us, enjoyed the same privilege. 'If laws had not been laid before the people in the legal form, they (the augurs) may set them aside; as was done with respect to the *Lex Tatia*, by the decree of the college, and to the *Leges Liviæ*, by the advice of Philip, who was consul and augur.'—*Legem si non jure rogata est, tollere possunt; ut Tatiam, decreto collegii, ut Livias, consilio Philippi, consulis et auguris.—De Legib.* lib. ii. § 12.

† Which always proves an easy thing. It is in commonwealths the particular care of that class of men who are at the head of the state, to keep a watchful eye over the people, in order to draw over to their own party any man who happens to acquire a considerable influence among them; and this they are (and indeed must be) the more attentive to do, in proportion as the nature of the government is more democratical.

The constitution of Rome had even made express provisions on that subject. Not only the censors could at once remove any citizen into what tribe they pleased, and even into the senate (and we may easily believe that they made a political use of this privilege); but it was moreover a settled rule, that all persons who had been promoted to any public office by the people, such as the consulship, the ædileship, or tribuneship, became, *ipso facto*, members of

‡ senate.—Middleton's *Dissertation on the Roman senate.*

the Called *nobiles* and *nobilitas*

particular class of citizens, but of all those who had influence enough to gain admittance into it, a single overgrown head was now to be seen in the republic, which, consisting of all who had either wealth or power of any kind, and disposing at will of the laws and the power of the people,* soon lost all regard to moderation and decency.

Every constitution, therefore, whatever may be its form, which does not provide for the inconveniences of the kind here mentioned, is a constitution essentially imperfect. It is in man himself that the source of the evils to be remedied lies; general precautions therefore can only prevent them. If it be a fatal error entirely to rely on the justice and equity of those who govern, it is an error no less dangerous to imagine that, while virtue and moderation are the constant companions of those who oppose the abuses of power, all ambition, all thirst after dominion, have retired to the other party.

Though wise men, led astray by the power of names, and the heat of political contentions, may sometimes lose sight of what ought to be their real aim, they nevertheless know that it is not against the *Appii*, the *Coruncanii*, the *Cethegi*, but against all those who can influence the execution of the laws, that precautions ought to be taken;—that it is not the consul, the prætor, the archon, the minister, the king, whom we ought to dread, nor the tribune, or the representative of the people, on whom we ought implicitly to rely: but that all those persons, without distinction, ought to be the objects of our jealousy, who, by any methods, and under any names whatsoever, have acquired the means of turning against each individual the collective strength of all, and have so ordered things around themselves, that whoever attempts to resist them, will find himself engaged alone against a thousand.†

CHAP. X.—*Fundamental Difference between the English Government, and the governments just described.—In England all Executive Authority is placed out of the hands of those in whom the people trust.—Usefulness of the Power of the Crown.*

IN what manner then has the English constitution contrived to find a remedy for evils which, from the very nature of men and things, seem to be irremediable? How has it found means to oblige those persons

* It was, in several respects, a misfortune for the people of Rome, whatever may have been said to the contrary by the writers on this subject, that the distinction between the patricians and the plebeians was ever abolished; though, to say the truth, this was an event which could not be prevented.

† The strictures contained in this chapter on democratical governments, are deep, wise, and unanswerable. How far they apply to the republic of the United States of America, time alone can prove. Fortunately for them they have a representative government, borrowed from their parent state of England, in which is retained something of the form of a limited monarchy. Whenever the time arrives, that the people of that country shall have lost their liberties, such an event will probably have been preceded by the fall of the federalists and the dominion of the democrats. The principles of the one are, to defend and preserve the government as now established; this is the party of the federalists; of the other, to reduce it more consonant to the forms of a pure democracy.—ED.

to whom the people have given up their power, to make them effectual and lasting returns of gratitude?—those who enjoy an exclusive authority, to seek the advantage of all?—those who make the laws, to make only equitable ones?—It has been by subjecting themselves to those laws, and for that purpose excluding them from all share in the execution of them.

Thus, the parliament can establish as numerous a standing army as it will; but immediately another power comes forward, which takes the absolute command of it, fills all the posts in it, and directs its motion at its pleasure. The parliament may lay new taxes; but immediately another power seizes the produce of them, and alone enjoys the advantages and glory arising from the disposal of it. The parliament may even, if you please, repeal the laws on which the safety of the subject is grounded; but it is not their own caprices and arbitrary humours, it is the caprices and passions of other men, which they will have gratified, when they shall thus have overthrown the columns of public liberty.

And the English constitution has not only excluded from any share in the execution of the laws, those in whom the people trust for the enacting them, but it has also taken from them what would have had the same pernicious influence on their deliberations—the hope of ever invading that executive authority, and transferring it to themselves.

This authority has been made in England one single, indivisible prerogative; it has been made for ever the inalienable attribute of one person, marked out and ascertained before hand by solemn laws and long-established custom; and all the active forces in the state have been left at his disposal.

In order to secure this prerogative still farther against all possibility of invasions from individuals, it has been heightened and strengthened by everything that can attract and fix the attention and reverence of the people. The power of conferring and withdrawing places and employments has also been added to it; and ambition itself has thus been interested in its defence and service.

A share in the legislative power has also been given to the man to whom this prerogative has been delegated; a passive share indeed, and the only one that can, with safety to the state, be trusted to him, but by means of which he is enabled to defeat every attempt against his constitutional authority.

Lastly, he is the only self-existing and permanent power in the state. The generals, the ministers of state, are so only by the continuance of his pleasure. He would even dismiss the parliament itself, if ever he saw it begin to entertain dangerous designs; and he needs only to say one word to disperse every power in the state that may threaten his authority. Formidable prerogatives these; but with regard to which we shall be inclined to lay aside our apprehensions, if on one hand we

consider the great privileges of the people by which they have been counter-balanced, and, on the other, the happy consequences that result from their being thus united.

From this unity, and, if I may so express myself, this total sequestration of the executive authority, this advantageous consequence in the first place results—the attention of the whole nation is directed to one and the same object. The people, besides, enjoy this most essential advantage, which they would vainly endeavour to obtain under the government of many;—they can give their confidence, without giving power over themselves, and against themselves; they can appoint trustees, and yet not give themselves masters.

Those men to whom the people have delegated the power of framing the laws, are thereby made sure to feel the whole pressure of them. They can increase the prerogatives of the executive authority, but they cannot invest themselves with it:—they have it not in their power to command its motions, they only can unbind its hands.

They are made to derive their importance from (nay, they are indebted for their existence to) the need in which that power stands of their assistance; and they know that they would no sooner have abused the trust of the people, and completed the treacherous work, than they would see themselves dissolved, spurned, like instruments now spent and become useless.

This same disposition of things also prevents in England that essential defect, inherent in the government of many, which has been described in the preceding chapter.

In that sort of government, the cause of the people, as has been observed, is continually deserted and betrayed. The arbitrary prerogatives of the governing powers are at all times either openly or secretly favoured, not only by those in whose possession they are,—not only by those who have good reason to hope that they shall at some future time share in the exercise of them,—but also by the whole crowd of those men who, in consequence of the natural disposition of mankind to over-rate their own advantages, fondly imagine, either that they shall one day enjoy some branch of this governing authority, or that they are even already, in some way or other, associated to it.

But as this authority has been made in England, the indivisible, inalienable attribute of one alone, all other persons in the state are, *ipso facto*, interested to confine it within its due bounds. Liberty is thus made the common cause of all; the laws that secure it are supported by men of every rank and order; and the *Habeas Corpus* Act, for instance, is as zealously defended by the first nobleman in the kingdom as by the meanest subject.

Even the minister himself, in consequence of this *inalienability* of the executive authority, is equally interested with his fellow-citizens to maintain the laws on which public liberty is founded. He knows, in

the midst of his schemes for enjoying or retaining his authority, that a court-intrigue or a caprice may at every instant confound him with the multitude, and the rancour of a successor, long kept out, send him to linger in the same prison which his temporary passions might tempt him to prepare for others.

In consequence of this disposition of things, great men are made to join in a common cause with the people, for restraining the excesses of the governing power ; and, which is no less essential to the public welfare, they are also, from the same cause, compelled to restrain the excess of their own private power and influence ; and a general spirit of justice becomes thus diffused through all parts of the state.

The wealthy commoner, the representative of the people, the potent peer, always having before their eyes the view of a formidable power,—of a power, from the attempts of which they have only the shield of the laws to protect them, and which would, in the issue, retaliate a hundred-fold upon them their acts of violence,—are compelled, both to wish only for equitable laws, and to observe them with scrupulous exactness.

Let then the people dread (it is necessary to the preservation of their liberty), but let them never entirely cease to love the throne, that sole and indivisible seat of all the active powers in the state.

Let them know it is that, which, by lending an immense strength to the arm of justice, has enabled her to bring to account, as well the most powerful as the meanest offender,—which has suppressed, and, if I may so express myself, weeded out all those tyrannies, sometimes confederated with, and sometimes adverse to, each other, which incessantly tend to grow up in the middle of civil societies, and which are the more terrible in proportion as they feel themselves to be less firmly established.

Let them know it is that, which, by making all honours and places depend on the will of one man, has confined within private walls those projects, the pursuit of which, in former times, shook the foundations of whole states;—has changed into intrigues the conflicts, the outrages of ambition:—and that those contentions which, in the present times, afford them only matter of amusement, are the volcanoes which set in flames the ancient commonwealths.

It is that, which, leaving to the rich no other security for his palace than that which the peasant has for his cottage, has united his cause to that of the latter;—the cause of the powerful to that of the helpless, —the cause of the man of extensive influence and connexions to that of him who is without friends.

It is the throne above all, it is this jealous power, which makes the people sure that its representatives never will be anything more than its representatives : at the same time it is the ever-subsisting Carthage, which vouches to it for the duration of their virtue.

CHAPTER XI.—*The Power which the People themselves exercise.—Election of Members of Parliament.*

THE English constitution having essentially connected the fate of the men to whom the people trust their power with that of the people themselves, really seems, by that caution alone, to have procured the latter a complete security.

However, as the vicissitudes of human affairs may, in process of time, realize events which at first had appeared most improbable, it might happen that the ministers of the executive power, notwithstanding the interest they themselves have in the preservation of public liberty, and in spite of the precautions expressly taken to prevent the effect of their influence, should at length employ such efficacious means of corruption as might bring about a surrender of some of the laws upon which this public liberty is founded. And though we should suppose that such a danger would really be chimerical, it might at last happen, that conniving at a vicious administration, and being over liberal of the produce of general labour, the representatives of the people might make them suffer many of the evils which attend worse forms of government.

Lastly, as their duty does not consist only in preserving their constituents against the calamities of an arbitrary government, but moreover in procuring them the best administration possible, it might happen that they would manifest, in this respect, an indifference which would, in its consequences, amount to a real calamity.

It was, therefore, necessary that the constitution should furnish a remedy for all the above cases: now, it is in the right of electing members of parliament, that this remedy lies.

When the time is come at which the commission given by the people to their delegates, expires, they again assemble in their several towns or counties: on these occasions they have it in their power to elect again those of their representatives whose former conduct they approve, and to reject those who have contributed to give rise to their complaints: a simple remedy this, and which only requiring, in its application, a knowledge of matters of fact, is entirely within the reach of the abilities of the people; but a remedy, at the same time, which is the most effectual that could be applied: for, as the evils complained of arise merely from the peculiar dispositions of a certain number of individuals, to set aside those individuals is to pluck up the evil by the roots.

But, I perceive, that, in order to make the reader sensible of the advantages that may accrue to the people of England from their right of election, there is another of their rights, of which it is absolutely necessary that I should first give an account.

CHAPTER XII.—*The Subject continued.—Liberty of the Press.*

As the evils that may be complained of in a state do not always arise merely from the defect of the laws, but also from the non-execution of them; and this non-execution of such a kind, that it is often impossible to subject it to any express punishment, or even to ascertain it by any previous definition; men, in several states, have been led to seek for an expedient that might supply the unavoidable deficiency of legislative provisions, and begin to operate, as it were, from the point at which the latter begins to fail; I mean here to speak of the censorial power,—a power which may produce excellent effects, but the exercise of which (contrary to that of the legislative power) must be left to the people themselves.

As the proposed end of legislation is not, according to what has been before observed, to have the particular intentions of individuals, upon every case, known and complied with, but solely to have what is most conducive to the public good, on the occasions that arise, found out and established, it is not an essential requisite in legislative operations that every individual should be called upon to deliver his opinion; and since this expedient, which at first sight appears so natural, of seeking out by the advice of all that which concerns all, is found liable, when carried into practice, to the greatest inconveniences, we must not hesitate to lay it aside entirely. But as it is the opinion of individuals alone which constitutes the check of a censorial power, this power cannot produce its intended effect any farther than this public opinion is made known and declared: the sentiments of the people are the only thing in question here: it is therefore necessary that the people should speak for themselves, and manifest those sentiments. A particular court of censure would essentially frustrate its intended purpose: it is attended, besides, with very great inconveniences.

As the use of such a court is to determine upon those cases which lie out of the reach of the laws, it cannot be tied down to any precise regulations. As a farther consequence of the arbitrary nature of its functions, it cannot even be subjected to any constitutional check: and it continually presents to the eye the view of a power entirely arbitrary, and which in its different exertions may affect, in the most cruel manner, the peace and happiness of individuals. It is attended, besides, with this very pernicious consequence, that, by dictating to the people their judgments of men or measures, it takes from them that freedom of thinking, which is the noblest privilege, as well as the firmest support of liberty.*

* M. de Montesquieu, and M. Rousseau, and indeed all the writers on this subject I have met with, bestow vast encomiums on the censorial tribunal that had been instituted at Rome:

We may therefore look upon it as a farther proof of the soundness of the principles on which the English constitution is founded, that it has allotted to the people themselves the province of openly canvassing and arraigning the conduct of those who are invested with any branch of public authority; and that it has thus delivered into the hands of the people at large the exercise of the censorial power. Every subject in England has not only a right to present petitions to the king, or to the houses of parliament, but he has a right also to lay his complaints and observations before the public, by means of an open press: a formidable right this, to those who rule mankind; and which, continually dispelling the cloud of majesty by which they are surrounded, brings them to a level with the rest of the people, and strikes at the very being of their authority.

And indeed this privilege is that which has been obtained by the English nation with the greatest difficulty, and latest in point of time, at the expense of the executive power. Freedom was in every other respect already established, when the English were still, with regard to the public expression of their sentiments, under restraints that may be called despotic. History abounds with instances of the severity of the Court of Star-chamber, against those who presumed to write on political subjects. It had fixed the number of printers and printing-presses, and appointed a *licenser*, without whose approbation no book could be published. Besides, as this tribunal decided matters by its own single authority, without the intervention of a jury, it was always ready to find those persons guilty whom the court was pleased to look upon as such: nor was it indeed without ground that the chief-justice Coke, whose notions of liberty were somewhat tainted with the prejudices of the times in which he lived, concluded the eulogiums he bestowed on this court, with saying, that, 'the right 'institution and orders thereof being observed, it doth keep all England 'in quiet.'

After the Court of Star-chamber had been abolished, the Long Parliament, whose conduct and assumed power were little better qualified to bear a scrutiny, revived the regulations against the freedom of the press. Charles II., and after him James II., procured farther renewals of them. These latter acts having expired in the year 1692, were at this æra, although posterior to the Revolution, continued for two years longer; so that it was not till the year 1694, that, in conse-

—they have not been aware that this power of censure, lodged in the hands of peculiar magistrates, with other discretionary powers annexed to it, was no other than a piece of state-craft, like those described in the preceding chapters, and had been contrived by the senate as an additional mean of securing its authority. Sir Thomas More has also adopted similar opinions on the subject: and he is so far from allowing the people to canvass the actions of their rulers, that, in his system of policy, which he calls *An Account of Utopia* (the happy region, εὖ and τοπος), he makes it death for individuals to talk about the conduct of government.

I feel a kind of pleasure, I must confess, to observe, on this occasion, that though I have been called by some an advocate for power, I have carried my ideas of liberty farther than many writers who have mentioned that word with much enthusiasm.

quence of the parliament's refusal to prolong the prohibitions, the freedom of the press (a privilege which the executive power could not, it seems, prevail upon itself to yield up to the people) was finally established.

In what, then, does this liberty of the press precisely consist? Is it a liberty left to every one to publish any thing that comes into his head? to calumniate, to blacken, whomsoever he pleases? No; the same laws that protect the person and the property of the individual, do also protect his reputation; and they decree against libels, when really so, punishments of much the same kind as are established in other countries.* But, on the other hand, they do not allow, as in other states, that a man should be deemed guilty of a crime for merely publishing something in print; and they appoint a punishment only against him who has printed things that are in their nature criminal, and who is declared guilty of so doing by twelve of his equals, appointed to determine upon his case, with the precautions we have before described.

The liberty of the press, as established in England, consists therefore (to define it more precisely) in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are printed, and must, in these cases, proceed by the trial by jury.

It is even this latter circumstance which more particularly constitutes the freedom of the press. If the magistrates, though confined in their proceedings to cases of criminal publications, were to be the sole judges of the criminal nature of the things published, it might easily happen that, with regard to a point which, like this, so highly excites the jealousy of the governing powers, they would exert themselves with so much spirit and perseverance, that they might, at length, succeed in completely striking off all the heads of the hydra.

But whether the authority of the judges be exerted at the motion of a private individual, or whether it be at the instance of the government itself, their sole office is to declare the punishment established by the law:—it is to the jury alone that it belongs to determine on the matter of law, as well as on the matter of fact; that is, to determine, not only whether the writing which is the subject of the charge has really been composed by the man charged with having done it, and whether it be really meant of the person named in the indictment,—but also whether its contents are criminal.

And though the law in England does not allow a man, prosecuted for having published a libel, to offer to support by evidence the truth

* The French of the present day accuse our law of libel as being much more severe when put in execution than their own Theirs, they say, is a preventive law, ours an avenging one.—Ed.

of the facts contained in it* (a mode of proceeding which would be attended with very mischievous consequences, and is everywhere prohibited), yet, as the indictment is to express that the facts are *false*, *malicious*, &c., and the jury, at the same time, are sole masters of their verdict,—that is, may ground it upon what considerations they please, it is very probable that they would acquit the accused party, if the fact, asserted in the writing before them, were matter of undoubted truth, and of a general evil tendency. They, at least, would certainly have it in their power.

And it is still more likely that this would be the case, if the conduct of the government itself was arraigned; because, besides this conviction which we suppose in the jury, of the certainty of the facts, they would also be influenced by their sense of a principle generally admitted in England, and which, in a late celebrated cause, was strongly insisted upon, *viz.* That 'though to speak ill of individuals deserved 'reprehension, yet the public acts of government ought to lie open to 'public examination, and that it was a service done to the state to 'canvass them freely.'†

And indeed this extreme security with which every man in England is enabled to communicate his sentiments to the public, and the general concern which matters relative to the government are always sure to create, have wonderfully multiplied all kinds of public papers. Besides those which, being published at the end of every year, month, or week, present to the reader a recapitulation of everything interesting that may have been done or said during their respective periods, there are several others, which, making their appearance every day, communicate to the public the several measures taken by the government, as well as the different causes of any importance, whether civil or criminal, that occur in the courts of justice, and sketches from the speeches either of the advocates, or the judges, concerned in the management and decision of them. During the time the parliament continues sitting, the votes or resolutions of the house of commons are daily published by authority; and the most interesting speeches in both houses are taken down in short-hand,‡ and communicated to the public in the daily papers.

Lastly, the private anecdotes in the metropolis and the country, concur also towards filling the collection; and as the several public papers circulate, or are transcribed into others, in the different country

* In actions for damages between individuals, the case, *if I mistake not*, is different, and the defendant is allowed to produce evidence of the facts asserted by him.

[This is a very timely observation, and though put with caution by the author, the thing has happened as by him suggested.—Ed.]

† Serjeant Glynn's Speech for Woodfall in the prosecution against the latter, by the attorney-general, for publishing Junius' Letter to the King.

‡ The publication of the members' speeches, and of whatever happens in the debates of parliament, is contrary to the express privileges of either house. It is done only by an implied permission; a stealth though, that has now been so long enjoyed by the people, that it would be dangerous to the public peace were it to be revoked or annulled.—Ed.

towns, and even find their way into the villages, where every man, down to the labourer, peruses them with a sort of eagerness, every individual thus becomes acquainted with the state of the nation, from one end to the other; and by these means the general intercourse is such, that the three kingdoms seem as if they were one single town.

And it is this public notoriety of all things that constitutes the supplemental power, or check, which, we have above said, is so useful to remedy the unavoidable insufficiency of the laws, and keep within their respective bounds all those persons who enjoy any share of public authority.

As they are thereby made sensible that all their actions are exposed to public view, they dare not venture upon those acts of partiality, those secret connivances at the iniquities of particular persons, or those vexatious practices which the man in office is but too apt to be guilty of, when, exercising his office at a distance from the public eye, and as it were in a corner, he is satisfied, that provided he be cautious, he may dispense with being just. Whatever may be the kind of abuse in which persons in power may, in such a state of things, be tempted to indulge themselves, they are convinced that their irregularities will be immediately divulged. The juryman, for example, knows that his verdict—the judge, that his direction to the jury—will presently be laid before the public: and there is no man in office, but who thus finds himself compelled, in almost every instance, to choose between his duty, and the surrender of all his former reputation.

It will, I am aware, be thought that I speak in too high terms of the effects produced by the public newspapers. I indeed confess that all the pieces contained in them are not patterns of good reasoning, or of the truest Attic wit; but, on the other hand, it scarcely ever happens that a subject in which the laws, or in general the public welfare, are really concerned, fails to call forth some able writer, who, under some form or other, communicates to the public his observations and complaints. I shall add here, that, though an upright man, labouring for a while under a strong popular prejudice, may, supported by the consciousness of his innocence, endure with patience the severest imputations; the guilty man, hearing nothing in the reproaches of the public but what he knows to be true, and already upbraids himself with, is very far from enjoying any such comfort; and that, when a man's own conscience takes part against him, the most despicable weapon is sufficient to wound him to the quick.*

* I shall take this occasion to observe, that the liberty of the press is so far from being injurious to the reputation of individuals (as some persons have complained), that it is, on the contrary, its surest guard. When there exist no means of communication with the public, every one is exposed, without defence, to the secret shafts of malignity and envy. The man in office loses his reputation, the merchant his credit, the private individual his character, without so much as knowing either who are his enemies, or which way they carry on their attacks. But when there exists a free press, an innocent man immediately brings the matter into open day, and crushes his adversaries at once, by a public challenge to lay before the public the grounds of their several imputations.

Even those persons whose greatness seems most to set them above the reach of public censure, are not those who least feel its effects. They have need of the suffrages of that vulgar whom they affect to despise, and who are, after all, the dispensers of that glory which is the real object of their ambitious cares. Though all have not so much sincerity as Alexander, they have equal reason to exclaim, *O people! what toils do we not undergo, in order to gain your applause!*

I confess that in a state where the people dare not speak their sentiments, but with a view to please the ears of their rulers, it is possible that either the prince, or those to whom he has trusted his authority, may sometimes mistake the nature of the public sentiments: or that, for want of that affection of which they are denied all possible marks, they may rest contented with inspiring terror, and make themselves amends in beholding how the over-awed multitudes smother their complaints.

But when the laws give a full scope to the people for the expression of their sentiments, those who govern cannot conceal from themselves the disagreeable truths which resound from all sides. They are obliged to put up even with ridicule; and the coarsest jests are not always those which give them the least uneasiness. Like the lion in the fable, they must bear the blows of those enemies whom they despise the most; and they are, at length, stopped short in their career, and compelled to give up those unjust pursuits which, they find, draw upon them, instead of that admiration which is the proposed end and reward of their labours, nothing but mortification and disgust.

In short, whoever considers what it is that constitutes the moving principle of what we call great affairs, and the invincible sensibility of man to the opinion of his fellow-creatures, will not hesitate to affirm, that if it were possible for the liberty of the press to exist in a despotic government, and (what is not less difficult) for it to exist without changing the constitution, this liberty would alone form a counterpoise to the power of the prince. If, for example, in an empire of the East, a place could be found which, rendered respectable by the ancient religion of the people, might ensure safety to those who should bring thither their observations of any kind, and from this sanctuary printed papers should issue, which, under a certain seal, might be equally respected, and which in their daily appearance should examine and freely discuss the conduct of the cadis, the pashas, the vizir, the divan, and the sultan himself,—that would immediately introduce some degree of liberty.*

CHAPTER XIII.—*The Subject continued.*

ANOTHER effect, and a very considerable one, of the liberty of the

* Blackstone, in his Commentaries, expresses the same opinion of the effects of a free press in a despotic government.—ED.

press, is, that it enables the people effectually to exert those means which the constitution has bestowed on them, of influencing the motions of the government.

It has been observed in a former place, how it came to be a matter of impossibility for any large number of men, when obliged to act in a body, and upon the spot, to take any well-weighed resolution. But this inconvenience, which is the inevitable consequence of their situation, does in no wise argue a personal inferiority in them, with respect to the few who, from some accidental advantages, are enabled to influence their determinations. It is not fortune, it is nature, that has made the essential differences between men; and whatever appellation a small number of persons, who speak without sufficient reflection, may affix to the general body of their fellow-creatures, the whole difference between the statesman, and many a man from among what they call the dregs of the people, often lies in the rough outside of the latter,—a disguise which may fall off on the first opportunity: and more than once has it happened, that from the middle of a multitude, in appearance contemptible, a Viriatus has been suddenly seen to rise, or a Spartacus to burst forth.*

Time, and a more favourable situation, are therefore the only things wanting to the people; and the freedom of the press affords the remedy to these advantages. Through its assistance, every individual may, at his leisure and in retirement, inform himself of every thing that relates to the questions on which he is to take a resolution. Through its assistance, a whole nation, as it were, holds a council, and deliberates, slowly indeed (for a nation cannot be informed like an assembly of judges), but after a regular manner, and with certainty. Through its assistance, all matters of fact are at length made clear; and, through the conflict of the different answers and replies, nothing at last remains but the sound part of the arguments.

Hence, though all good men may not think themselves obliged to concur implicitly in the tumultuary resolutions of a people whom their orators take pains to agitate, yet on the other hand, when this same people, left to itself, perseveres in opinions which have for a long time been discussed in public writings, and from which (it is essential to add) all errors concerning facts have been removed, such perseverance is certainly a very respectable decision; and then it is, though only

* The reader should be reminded that Viriatus was a native of Lusitania, the modern Portugal. From the humble station of a simple peasant, or hunter, he roused his countrymen to arms against the Roman invaders; and for fourteen years made a valiant and glorious stand. Unable to subdue him in the field, the proud enemy at length compassed his death by treachery.—Spartacus was a gladiator, who in the age of Marius and Sylla, excited a formidable insurrection of the slaves in Italy; he embodied them into a regular disciplined army, and acted as their general with distinguished ability and spirit. Faithful to his character and adherents, he fell at their head in the last battle, wherein the whole were exterminated: '*War to the death,*' the watch-word of the brave, struggling for independence, be their motto and their epitaph. In the events of the last thirty years we have beheld many a Viriatus arise, and many a Spartacus burst forth: their disguises have fallen off, and they have shone with a lustre reflecting honour upon the human race at large.—Ed.

then, that we may with safety say,—'the voice of the people is the 'voice of God.'

How therefore can the people of England *act*, when, having formed opinions which may really be called their own, they think they have just cause to complain of the administration? It is, as has been said above, by means of the right they have of electing their representatives; and the same method of general intercourse that has informed them with regard to the objects of their complaints, will likewise enable them to apply the remedy to them.

Through this medium they are acquainted with the nature of the subjects that have been deliberated upon in the assembly of their representatives;—they are informed by whom the different motions were made,—by whom they were supported;—and the manner in which the suffrages are delivered, is such that they always can know the names of those who have voted constantly for the advancement of pernicious measures.

And the people not only know the particular dispositions of every member of the house of commons, but, from the general notoriety of affairs, have also a knowledge of the political sentiments of a great number of those whom their situation in life renders fit to fill a place in that house. And availing themselves of the several vacancies that happen, and still more of the opportunity of a general election, they purify, either successively or at once, the legislative assembly; and thus, without any commotion or danger to the state, they effect a material reformation in the views of the government.

I am aware that some persons will doubt these patriotic and systematic views, which I am here attributing to the people of England, and will object to me the disorders that sometimes happen at elections. But this reproach, which, by the way, comes with little propriety, from writers who would have the people transact every thing in their own persons,—this reproach, I say, though true to a certain degree, is not, however, so much so, as it is thought by certain persons who have taken only a superficial survey of the state of things.

Without doubt, in a constitution in which all important causes of uneasiness are so effectually prevented, it is impossible but that the people will have long intervals of inattention. Being then suddenly called, from this state of inactivity, to elect representatives, they have not examined before-hand the merits of those who solicit their votes; and the latter have not had, amidst the general tranquillity, any opportunity of making themselves known to them.

The elector, persuaded, at the same time, that the person whom he will elect will be equally interested with himself in the support of public liberty, does not enter into laborious disquisitions, and from which he sees he may exempt himself. Obliged, however, to give the preference to somebody, he forms his choice on motives which would not be excus-

able, if it were not that some motives are necessary to make a choice, and that, at this instant, he is not influenced by any other; and indeed it must be confessed, that, in the ordinary course of things, and with electors of a certain rank in life, that candidate who gives the best entertainment has a chance to get the better of his competitors.

But if the measures of government, and the reception of these measures in parliament, by means of a too-complying house of commons, should ever be such as to spread a serious alarm among the people, the same causes which have concurred to establish public liberty would, no doubt, operate again, and likewise concur in its support. A general combination would then be formed, both of those members of parliament who have remained true to the public cause, and of persons of every order among the people. Public meetings, in such circumstances, would be appointed; general subscriptions would be entered into, to support the expenses, whatever they might be, of such a necessary opposition; and all private and unworthy purposes being suppressed by the sense of the national danger, the choice of the electors would then be wholly determined by the consideration of the public spirit of the candidates, and the tokens given by them of such public spirit.

Thus were those parliaments formed, which suppressed arbitrary taxes and imprisonments. Thus was it, that, under Charles II. the people, when recovered from that enthusiasm of affection with which they received a king so long persecuted, at last returned to him no parliament but such as were composed of a majority of men attached to public liberty. Thus, it was, that, persevering in a conduct which the circumstances of the times rendered necessary, the people baffled the arts of the government; and Charles dissolved three successive parliaments, without any other effect than that of having those same men rechosen, and set again in opposition to him, of whom he hoped he had rid himself for ever.

Nor was James II. happier in his attempts than Charles had been. This prince soon experienced that his parliament was actuated by the same spirit as those which had opposed the designs of his late brother; and having suffered himself to be led into measures of violence, instead of being better taught by the discovery he made of the real sentiments of the people, his reign was terminated by that catastrophe with which every one is acquainted.

Indeed, if we combine the right enjoyed by the people of England, of electing their representatives, with the whole of the English government, we shall become continually more and more sensible of the excellent effects that may result from that right. All men in the state are, as has been before observed, really interested in the support of public liberty. Nothing but temporary motives, and such as are quite peculiar to themselves, can induce the members of any house of commons to

connive at measures destructive of this liberty. The people, therefore, under such circumstances, need only change these members, in order effectually to reform the conduct of that house: and it may fairly be pronounced before-hand, that a house of commons, composed of a new set of persons, will, from this bare circumstance, be in the interests of the people.

Hence, though the complaints of the people do not always meet with a speedy and immediate redress (a celerity which would be the symptom of a fatal unsteadiness in the constitution, and would sooner or later bring on its ruin); yet, when we attentively consider the nature and the resources of this constitution, we shall not think it too bold an assertion to say, that it is impossible but that complaints in which the people persevere (that is, well-grounded complaints) will sooner or later be redressed.

CHAPTER XIV.—*Right of Resistance.*

BUT all those privileges of the people, considered in themselves, are but feeble defences against the real strength of those who govern. All those provisions, all those reciprocal rights necessarily suppose that things remain in their legal and settled course: what would then be the resource of the people, if ever the prince, suddenly freeing himself from all restraint, and throwing himself as it were out of the constitution, should no longer respect either the person or the property of the subject, and either should make no account of his conventions with the parliament, or attempt to force it implicitly to submit to his will?—It would be resistance.

Without entering here into the discussion of a doctrine which would lead us to inquire into the first principles of civil government, consequently engage us in a long disquisition, and with regard to which, besides, persons free from prejudices agree pretty much in their opinions, I shall only observe here (and it will be sufficient for my purpose) that the question has been decided in favour of this doctrine by the laws of England, and that resistance is looked upon by them as the ultimate and lawful resource against the violences of power.

It was resistance that gave birth to the Great Charter, that lasting foundation of English liberty, and the excesses of a power established by force were also restrained by force.* It has been by the same means that, at different times, the people have procured the confirmation of the same charter. Lastly, it has also been the resistance to a king who

* Lord Lyttleton says, extremely well, in his Persian Letters, 'If the privileges of the 'people of England be concessions from the crown, is not the power of the crown itself a con-'cession from the people?' It might be said with equal truth, and somewhat more in point to the subject of this chapter,—If the privileges of the people be an encroachment on the power of kings, the power itself of kings was at first an encroachment (no matter whether effected by surprise) on the natural liberty of the people.

made no account of his own engagements, that has, in the issue, placed on the throne the family which is now in possession of it.

This is not all: this resource, which till then had only been an act of force opposed to other acts of force, was, at that æra, expressly recognised by the law itself. The lords and commons, solemnly assembled, declared, that 'King James II., having endeavoured to subvert 'the constitution of the kingdom, by breaking the original contract 'between the king and people, and having violated the fundamental 'laws, and withdrawn himself, had abdicated the government; and 'that the throne was thereby vacant.'*

And lest those principles, to which the revolution thus gave a sanction, should, in process of time, become mere *arcana* of state, exclusively appropriated, and only known to a certain class of subjects; the same act, we have just mentioned, expressly ensured to individuals the right of publicly preferring complaints against the abuses of the government, and, moreover, of being provided with arms for their own defence.—Judge Blackstone expresses himself in the following terms, in his Commentaries on the Laws of England.

'To vindicate these rights, when actually violated or attacked, the 'subjects of England are entitled, in the first place, to the regular 'administration and free course of justice in the courts of law; next, 'to the right of petitioning the king and parliament for redress of griev-'ances; and, lastly, to the right of having and using arms for self-'preservation and defence.'

Lastly, this right of opposing violence, in whatever shape, and from whatever quarter it may come, is so generally acknowledged, that the courts of law have sometimes grounded their judgments upon it. I shall relate on this head a fact which is somewhat remarkable.

A constable, being out of his precinct, arrested a woman whose name was *Anne Dekins;* one *Tooly* took her part, and, in the heat of the fray, killed the assistant of the constable.

Being prosecuted for murder, he alleged, in his defence, that the illegality of the imprisonment was a sufficient provocation to make the homicide *excusable*, and entitle him to the benefit of clergy. The jury, having settled the matter of fact, left the *criminalty* of it to be decided by the judge, by returning a *special verdict.* The cause was adjourned to the King's Bench, and thence again to Serjeants' Inn, for the opinion of the twelve judges. Here follows the opinion delivered by chief justice Holt, in giving judgment.

'If one be imprisoned upon an unlawful authority, it is a sufficient

* The Bill of Rights has since given a new sanction to all these principles.

[There is much confusion upon the doctrine of resistance. The constitution being a monarchy, though limited, no such principle as resistance is really contemplated by our law. It is but one of the *arcana imperii,* laid up for use in cases of extremity; the issue of which, like the dose of a desperate quack to a man at the point of death, is for a certainty kill or cure.—ED.]

'provocation to all people, out of compassion, much more so when it 'is done under colour of justice; and when the liberty of the subject 'is invaded, it is a provocation to all the subjects of England. A man 'ought to be concerned for *Magna Charta* and the laws; and if any 'one against law imprison a man, he is an offender against Magna 'Charta.' After some debate, occasioned chiefly by Tooly's appearing not to have known that the constable was out of his precinct, seven of the judges were of opinion that the prisoner was guilty of manslaughter, and he was admitted to the benefit of clergy.*

But it is with respect to this right of an ultimate resistance, that the advantage of a free press appears in a most conspicuous light. As the most important rights of the people, without the prospect of a resistance which overawes those who should attempt to violate them, are little more than mere shadows,—so this right of *resisting*, itself, is but vain, when there exist no means of effecting a general union between the different parts of the people.

Private individuals, unknown to each other, are forced to bear in silence injuries in which they do not see other people take a concern. Left to their own individual strength, they tremble before the formidable and ever-ready power of those who govern: and as the latter well know (and are even apt to over-rate) the advantages of their own situation, they think that they may venture upon anything.

But when they see that all their actions are exposed to public view, —that, in consequence of the celerity with which all things become communicated, the whole nation forms, as it were, one continued *irritable* body, no part of which can be touched without exciting an universal *tremor*,—they become sensible that the cause of each individual is really the cause of all, and that to attack the lowest among the people is to attack the whole people.

Here also we must remark the error of those who, as they make the liberty of the people consist in their power, so make their power consist in their action.

When the people are often called to act in their own persons, it is impossible for them to acquire any exact knowledge of the state of things. The event of one day effaces the notions which they had begun to adopt on the preceding day; and amidst the continual change of things, no settled principle, and, above all, no plans of union, have time to be established among them.—You wish to have the people love and defend their laws and liberty: leave them, therefore, the necessary time to know what laws and liberty are, and to agree in their opinion concerning them; you wish an union, a *coalition*, which cannot be obtained but by a slow and peaceable *process*; forbear therefore continually to shake the vessel.

* See Reports of Cases argued, debated, and adjudged, in *Banco Reginæ*, in the time of queen Anne.

Nay, farther, it is a contradiction, that the people should *act*, and at the same time retain any real power. Have they, for instance, been forced by the weight of public oppression to throw off the restraints of the law, from which they no longer received protection?—they presently find themselves suddenly become subject to the command of a few leaders, who are the more absolute in proportion as the nature of their power is less clearly ascertained: nay, perhaps, they must even submit to the toils of war, and to military discipline.

If it be in the common and legal course of things that the people are called to move, each individual is obliged, for the success of the measures in which he is then made to take a concern, to join himself to some party; nor can this party be without a head. The citizens thus grow divided among themselves, and contract the pernicious habit of submitting to leaders. They are, at length, no more than the clients of a certain number of patrons; and the latter soon becoming able to command the arms of the citizens in the same manner as they at first governed their votes, make little account of a people, with one part of which they know how to curb the other.

But when the moving springs of government are placed entirely out of the body of the people, their action is thereby disengaged from all that could render it complicated, or hide it from the eye. As the people thenceforward consider things speculatively, and are, if I may be allowed the expression, only spectators of the game, they acquire just notions of things; and as these notions, amidst the general quiet, gain ground and spread themselves far and wide, they at length entertain, on the subject of their liberty, but one opinion.

Forming thus, at it were, one body, the people, at every instant, have it in their power to strike the decisive blow, which is to level everything. Like those mechanical powers, the greatest efficiency of which exists at the instant which precedes their entering into action, it has an immense force, just because it does not yet exert any: and in this state of stillness, but of attention, consists its true *momentum.*

With regard to those who (whether from personal privileges, or by virtue of a commission from the people) are intrusted with the active part of government, as they, in the mean while, see themselves exposed to public view, and observed as from a distance by men free from the spirit of party, and who place in them but a conditional trust, they are afraid of exciting a commotion, which, though it might not prove the destruction of all power, yet would surely and immediately be the destruction of their own. And if we might suppose that, through an extraordinary conjunction of circumstances, they should resolve among themselves upon the sacrifice of those laws on which public liberty is founded, they would no sooner lift up their eyes towards that extensive assembly, which views them with a watchful attention, than they would find their public virtue return upon them, and would make haste to re-

sume that plan of conduct, out of the limits of which they can expect nothing but ruin and perdition.

In short, as the body of the people cannot act without either subjecting themselves to some power, or effecting a general destruction, the only share they can have in a government, with advantage to themselves, is not to interfere, but to influence—to be able to act, and not to act.

The power of the people is not when they strike, but when they keep in awe: it is when they can overthrow every thing, that they never need to move; and Manlius included all in four words, when he said to the people of Rome—*Ostendite bellum, pacem habebitis.*

CHAP. XV.—*Proofs drawn from Facts, of the Truth of the Principles laid down in the present Work.*—1. *The peculiar Manner in which Revolutions have always been concluded in England.*

IT may not be sufficient to have proved by arguments the advantages of the English constitution; it will perhaps be asked, whether the effects correspond to the theory? To this question (which I confess is extremely proper) my answer is ready: it is the same which was once made, I believe, by a Lacedæmonian—*Come and see.*

If we peruse the English history, we shall be particularly struck with one circumstance to be observed in it, and which distinguishes most advantageously the English government from all other free governments; I mean the manner in which revolutions and public commotions have always been terminated in England.

If we read with some attention the history of other free states, we shall see that the public dissensions that have taken place in them have constantly been terminated by settlements in which the interests only of a *few* were really provided for, while the grievances of the *many* were hardly, if at all, attended to. In England the very reverse has happened; and we find revolutions always to have been terminated by extensive and accurate provisions for securing the general liberty.

The histories of the ancient Grecian commonwealths, and, above all, of the Roman republic, of which more complete accounts have been left us, afford striking proof of the former part of this observation.

What was, for instance, the consequence of that great revolution by which the kings were driven from Rome, and in which the senate and patricians acted as the advisers and leaders of the people? The consequence was, as we find in Dionysius of Halicarnassus, and Livy, that the senators immediately assumed all those powers lately so much complained of by themselves, which the kings had exercised. The execution of their future decrees was intrusted to two magistrates, taken from their own body, and entirely dependent on them, whom they called *consuls*, and who were made to bear about them all the ensigns

of power which had formerly attended the kings. Only, care was taken that the axes and *fasces*, the symbols of the power of life and death over the citizens, which the senate now claimed to itself, should not be carried before both consuls at once, but only before one at a time, for fear, says Livy, of doubling the terror of the people.*

Nor was this all: the senators drew over to their party those men who had the most interest at that time among the people, and admitted them as members into their own body;† which indeed was a precaution they could not prudently avoid taking. But the interests of the great men in the republic being thus provided for, the revolution ended. The new senators, as well as the old, took care not to lessen, by making provisions for the liberty of the people, a power which was now become their own. Nay, they presently stretched this power beyond its former tone: and the punishments which the consul inflicted, in a military manner, on a number of those who still adhered to the former mode of government, and even upon his own children, taught the people what they had to expect for the future, if they presumed to oppose the power of those whom they had unwarily made their masters.

Among the oppressive laws or usages which the senate, after the expulsion of the kings, had permitted to continue, what were most complained of by the people, were those by which such citizens as could not pay their debts, with the interest (which at Rome was enormous), at the appointed time, became slaves to their creditors, and were delivered over to them, bound with cords: hence the word *nexi*, by which slaves of that kind were denominated. The cruelties exercised by creditors on those unfortunate men, whom the private calamities, caused by the frequent wars in which Rome was engaged, rendered very numerous, at last roused the body of the people: they abandoned both the city and their inhuman fellow-citizens, and retreated to the other side of the river *Anio*.

But this second revolution, like the former, only procured the advancement of particular persons. A new office was created, called the tribuneship. Those whom the people had placed at their head when they left the city, were raised to it. Their duty, it was agreed, was, for the future, to protect the citizens; and they were invested with a certain number of prerogatives for that purpose. This institution, it must however be confessed, would have, in the issue, proved very beneficial to the people, at least for a long course of time, if certain precautions had been taken with respect to it, which would have much lessened the future personal importance of the new tribunes:‡ but these precau-

* Omnia jura *(regum)*, omnia insignia, primi consules tenuere; id modò cautum est, ne, si 'ambo fasces, haberent, duplicatus terror videretur.' *Tit. Liv.* lib. ii. § 1.

† These new senators were called *conscripti;* hence the name of *patres conscripti*, afterwards indiscriminately given to the whole senate.—*Tit. Liv.* ibid.

‡ Their number, which was only ten, ought to have been much greater; and they never ought to have accepted the power left to each of them, of stopping, by his single opposition, the proceedings of all the rest.

tions the latter did not think proper to suggest ; and in regard to those abuses themselves, which had at first given rise to the complaints of the people, no farther mention was made of them.*

As the senate and patricians, in the early ages of the commonwealth, kept themselves closely united, the tribunes, for all their personal privileges, were not able, during the first times after their creation, to gain an admittance either to the consulship, or into the senate, and thereby to separate their condition any farther from that of the people. This situation of theirs, in which it was to be wished they might always have been kept, produced at first excellent effects, and caused their conduct to answer, in a great measure, the expectation of the people. The tribunes complained loudly of the exorbitancy of the powers possessed by the senate and consuls ; and here we must observe that the powers exercised by the latter over the lives of the citizens, had never been yet subjected (which will probably surprise the reader) to any known laws, though sixty years had already elapsed since the expulsion of the kings. The tribunes therefore insisted that laws should be made in that respect, which the consuls should thenceforward be bound to follow, and that they should no longer be left, in the exercise of their power over the lives of the citizens, to their own caprice and wantonness.†

Equitable as these demands were, the senate and patricians opposed them with great warmth, and, either by naming dictators, or calling in the assistance of the priests, or other means, they defeated for nine years together, all the endeavours of the tribunes. However, as the latter were at that time in earnest, the senate was at length obliged to comply ; and the *Lex Terentilla* was passed, by which it was enacted, that a general code of laws should be made.

These beginnings seemed to promise great success to the cause of the people. But, unfortunately for them, the senate found means to have it agreed, that the office of tribune should be set aside during the whole time that the code should be framing. They, moreover, obtained that the ten men, called decemvirs, to whom the charge of composing this code was to be given, should be taken from the body of the patricians. The same causes, therefore, produced again the same effects ; and the power of the senate and consul was left in the new code, or laws of the Twelve Tables, as undefined as before. As to the laws above-mentioned, concerning debtors, which never had ceased to be bitterly complained of by the people, and in regard to which some satisfaction ought, in common justice, to have been given them, they were confirmed, and a new terror added to them from the manner in which they were expressed.

* Many other seditions were afterwards raised upon the same account.

† 'Quod populus in se jus dederit, eo consulem usurum; non ip libidinem ac licentiam 'suam pro lege habituros.'—*Tit. Liv.* lib. iii. § 9.

The true motive of the senate, when they thus trusted the framing of the new laws to a new kind of magistrates, called decemvirs, was, that, by suspending the ancient office of consul, they might have a fair pretence for suspending also the office of tribune, and thereby rid themselves of the people, during the time that the important business of framing the code should be carrying on: they even, in order the better to secure that point, placed the whole power of the republic in the hands of those new magistrates. But the senate and patricians experienced then, in their turn, the danger of intrusting men with an uncontrolled authority. As they themselves had formerly betrayed the trust which the people had placed in them, so did the decemvirs, on this occasion, likewise deceive them. They retained by their own private anthority the unlimited power that had been conferred on them, and at last exercised it on the patricians as well as the plebeians. Both parties therefore united against them, and the decemvirs were expelled from the city.

The former dignities of the republic were restored, and with them the office of tribune. Those from among the people who had been most instrumental in destroying the power of the decemvirs, were, as it was natural, raised to the tribuneship; and they entered upon their offices with a prodigious degree of popularity. The senate and the patricians were, at the same time, sunk extremely low in consequence of the long tyranny which had just expired; and those two circumstances united, afforded the tribunes but too easy an opportunity of making the present revolution end as the former ones had done, and converting it to the advancement of their own power. They got new personal privileges to be added to those which they already possessed; and moreover procured a law to be enacted, by which it was ordained, that the resolutions taken by the *comitia tributa* (an assembly in which the tribunes were admitted to propose new laws) should be binding upon the whole commonwealth;—by which they at once raised to themselves an *imperium in imperio*, and acquired, as Livy expresses it, a most active weapon. *(Acerrimum telum.)*

From that time great commotions arose in the republic, which, like all those before them, ended in promoting the power of a *few*. Proposals for easing the people of their debts, for dividing with some equality amongst the citizens, the lands which were taken from the enemy, and for lowering the rate of the interest of money, were frequently made by the tribunes. And indeed all these were excellent regulations to propose: but unfortunately for the people, the proposals of them were only pretences used by the tribunes for promoting schemes of a fatal, though somewhat remote, tendency to public liberty. Their real aims were at the consulship, the prætorship, the priesthood, and other offices of executive power, which they were intended to control, and not to share. To these views they con-

stantly made the cause of the people subservient. I shall relate, among other instances, the manner in which they procured to themselves an admittance to the office of consul.

Having, during several years, seized every opportunity of making speeches to the people on that subject, and even excited seditions in order to overcome the opposition of the senate, they at last availed themselves of the circumstance of an *interregnum* (a time during which there happened to be no other magistrates in the republic besides themselves), and proposed to the tribes, whom they had assembled, to enact the three following laws :—the first, for settling the rate of interest of money ; the second for ordaining that no citizen should be possessed of more than five hundred acres of land ; and the third for providing that one of the two consuls should be taken from the body of the plebeians. But on this occasion it evidently appeared, says Livy, which of the laws in agitation were most agreeable to the people, and which to those who proposed them ; for the tribes accepted the laws concerning the interest of money, and the lands ; but as to that concerning the plebeian consulship, they rejected it ; and both the former articles would from that moment have been settled, if the tribunes had not declared, that the tribes were called upon, either to accept, or reject, all their three proposals at once.* Great commotions ensued thereupon, for a whole year ; but at last the tribunes, by their perseverance in insisting that the tribes should vote on their three *rogations* jointly, obtained their ends, and overcame both the opposition of the senate, and the reluctance of the people.

In the same manner did the tribunes get themselves made capable of filling all other places of executive power, and public trust, in the republic. But when all their views of that kind were accomplished, the republic did not for all this enjoy more quiet, nor was the interest of the people better attended to, than before. New struggles then arose for actual admission to those places,—for procuring them to relatives or friends,—for governments of provinces, and commands of armies. A few tribunes, indeed, did at times apply themselves seriously, out of real virtue and love of their duty, to remedy the grievances of the people ; but their fellow-tribunes, as we may see in history, and the whole body of those men upon whom the people had, at different times, bestowed consulships, ædileships, censorships, and other dignities without number, united together with the utmost vehemence against them ; and the real patriots, such as Tiberius Gracchus, Caius Gracchus, and Fulvius, constantly perished in the attempt.

* 'Ab tribunis, velut per interregnum, concilio plebis habito, apparuit quæ ex promulgatis 'plebi, quæ latoribus, gratiora essent ; nam de fœnore atque agro rogationes jubebant, de 'plebeio consulatu antiquabant *(antiquis stabant)* ; et perfecta utraque res esset, ni tribuni se 'in omnia simul consulere plebem dixissent.'—*Tit. Liv.* lib. vi. § 39.

I have been somewhat explicit on the effects produced by the different revolutions that happened in the Roman republic, because its history is much known to us, and we have, either in Dionysius of Halicarnassus or in Livy, considerable monuments of the more ancient part of it. But the history of the Grecian commonwealths would also have supplied us with a number of facts to the same purpose. That revolution, for instance, by which the *Pisistratidæ* were driven out of Athens,—that by which the *four hundred*, and afterwards the *thirty*, were established,—as well as that by which the latter were in their turn expelled,—all ended in securing the power of a *few*. The republic of Syracuse, that of Corcyra, of which Thucydides has left us a pretty full account, and that of Florence, of which Machiavel has written the history, also present to us a series of public commotions ended by treaties, in which, as in the Roman republic, the grievances of the people, though ever so loudly complained of in the beginning by those who acted as their defenders, were, in the issue, most carelessly attended to, or even totally disregarded.*

But, if we turn our eyes towards the English history, scenes of a quite different kind will offer to our view; and we shall find, on the contrary, that revolutions in England have always been terminated by making such provisions, and only such, as all orders of the people were really and indiscriminately to enjoy.

Most extraordinary facts, these! and which, from all the other circumstances that accompanied them, we see, all along, to have been owing to the impossibility (a point that has been so much insisted upon in former chapters) in which those who possessed the confidence of the people, were, of transferring to themselves any branch of the executive authority, and thus separating their own condition from that of the rest of the people.

Without mentioning the compacts which were made with the first kings of the Norman line, let us only cast our eyes on *Magna Charta*, which is still the foundation of English liberty. A number of circumstances, which have been described in the former part of this work, concurred at that time to strengthen the regal power to such a degree that no men in the state could entertain a hope of succeeding in any other design than that of setting bounds to it. How great was the union which then arose among all orders of the people!—what extent, what caution, do we see in the provisions made by the Great Charter! All the objects for which men naturally wish to live in a state of society were settled in its various articles. The judicial authority was regulated. The person and property of the individual were secured. The safety of the merchant and stranger was provided for. The higher class of citizens gave up a number of oppressive privileges which they

* The revolutions which formerly happened in France, all ended like those above-mentioned. A similar remark may be extended to the history of Spain, Denmark, Sweden, Scotland, &c.

had long accustomed themselves to look upon as their undoubted rights.* Nay, the implements of tillage of the *bondman*, or slave, were also secured to him : and for the first time, perhaps, in the annals of the world, a civil war was terminated by making stipulations in favour of those unfortunate men to whom the avarice and lust of dominion, inherent in human nature, continued, over the greatest part of the earth, to deny the common rights of mankind.

Under Henry III. great disturbances arose ; and they were all ter minated by solemn confirmations given to the Great Charter. Under Edward I. Edward II. Edward III. and Richard III. those who were intrusted with the care of the interests of the people lost no opportunity that offered, of strengthening still farther that foundation of public liberty,—of taking all such precautions as might render the Great Charter still more effectual in the event. They had not ceased to be convinced that their cause was the same with that of all the rest of the people.

Henry of Lancaster having laid claim to the crown, the commons received the law from the victorious party. They settled the crown upon Henry, by the name of Henry IV. ; and added, to the act of settlement, provisions which the reader may see in the second volume of the *Parliamentary History* of England. Struck with the wisdom of the conditions demanded by the commons, the authors of the book just mentioned observe (perhaps with some simplicity) that the commons of England *were no fools at that time.* They ought rather to have said —The commons of England were happy enough to form among themselves an assembly in which everyone could propose what matters he pleased, and freely discuss them ;—they had no possibility left of converting either these advantages, or in general the confidence which the people had placed in them, to any private views of their own : they, therefore, without loss of time, endeavoured to stipulate useful conditions with that power by which they saw themselves at every instant exposed to be dissolved and dispersed, and applied their industry to insure the safety of the whole people, as it was the only means they had of procuring their own.

In the long contentions which took place between the houses of York and Lancaster, the commons remained spectators of disorders which in those times it was not in their power to prevent ; they successively acknowledged the title of the victorious parties ; but whether under Edward IV., under Richard III., or Henry VII., by whom those quarrels were terminated, they continually availed themselves of the importance of the services which they were able to perform to the new-established sovereign, for obtaining effectual conditions in favour of the whole body of the people.

* All possessors of lands took the engagement to establish in behalf of their tenants and vassals *(erga suos)* the same liberties which they demanded from the king.

At the accession of James I., which, as it placed a new family on the throne of England, may be considered as a kind of revolution, no demands were made by the men who were at the head of the nation, but in favour of general liberty.

After the accession of Charles I., discontents of a very serious nature began to take place; and they were terminated, in the first instance, by the act called the *Petition of Right*, which is still looked upon as a most precise and accurate delineation of the rights of the people.*

At the restoration of Charles II., the constitution being re-established upon its former principles, the former consequences produced by it began again to take place; and we see at that æra, and indeed during the whole course of that reign, a continued series of precautions taken for securing the general liberty.

Lastly, the great event which took place in the year 1689, affords a striking confirmation of the truth of the observation made in this chapter. At this æra the political wonder again appeared—of a revolution terminated by a series of public acts, in which no interests but those of the people at large were considered and provided for;—no clause, even the most indirect, was inserted, either to gratify the present ambition, or favour the future views, of those who were personally concerned in bringing those acts to a conclusion. Indeed, if any thing is capable of conveying to us an adequate idea of the soundness, as well as peculiarity, of the principles on which the English government is founded, it is the attentive perusal of the system of public compacts to which the revolution of the year 1689 gave rise,—of the Bill of Rights with all its different clauses, and of the several acts, which till the accession of the house of Hanover, were made in order to strengthen it.

CHAP. XVI.—*Second Difference.—The Manner after which the Laws for the Liberty of the Subject are executed in England.*

THE second difference I mean to speak of between the English government and that of other free states, concerns the important object of the execution of the laws. On this article, also, we shall find the advantage to lie on the side of the English government; and, if we make a comparison between the history of those states, and that of England, it will lead us to the following observation, viz.: that though in other free states the laws concerning the liberty of the citizens were imperfect, yet the execution of them was still more defective. In England, on the

* The disorders which took place in the latter part of the reign of that prince seem indeed to contain a complete contradiction to the assertion which is the subject of the present chapter; but they, at the same time, are no less convincing confirmation of the truth of the principles laid down in the course of this whole work. The above-mentioned disorders took rise from that day in which Charles I., gave up the power of dissolving his parliament,—that is, from the day in which the members of that assembly acquired an independent, personal, and permanent authority, which they soon began to turn against the people who had raised them to it

contrary, not only the laws for the security of the subject are very extensive in their provisions, but the manner in which they are executed carries these advantages still farther; and English subjects enjoy no less liberty from the spirit both of justice and mildness, by which all branches of the government are influenced, than from the accuracy of the laws themselves.

The Roman commonwealth will here again supply us with examples to prove the former part of the above assertion. When I said, in the foregoing chapter, that, in times of public commotion, no provisions were made for the body of the people, I meant no provisions that were likely to prove effectual in the event. When the people were roused to a certain degree, or when their concurrence was necessary to carry into effect certain resolutions, or measures, that were particularly interesting to the men in power, the latter could not, with any prudence, openly profess a contempt for the political wishes of the people; and some declarations expressed in general words, in favour of public liberty, were indeed added to the laws that were enacted on those occasions. But these declarations, and the principles which they tended to establish, were afterwards even openly disregarded in practice.

Thus, when the people were made to vote, about a year after the expulsion of the kings, that the regal government never should be again established in Rome, and that those who should endeavour to restore it should be devoted to the gods, an article was added, which, in general terms, confirmed to the citizens the right they had before enjoyed under the king, of appealing to the people from the sentences of death passed upon them. No punishment (which will surprise the reader) was decreed against those who should violate this law; and indeed the consuls, as we may see in Dionysius of Halicarnassus and Livy, concerned themselves but little about the appeals of the citizens, and in the more than military exercise of their functions, continued to sport with rights which they ought to have respected, however imperfectly and loosely they had been secured.

An article, to the same purport with the above, was afterwards also added to the laws of the Twelve Tables; but the decemvirs, to whom the execution of those laws was at first committed, behaved exactly in the same manner, and even worse than the consuls had done before them; and after they were expelled,* the magistrates who succeeded them, appear to have been as little tender of the lives of the citizens. I shall, out of many instances, select one which will show upon what slight grounds the citizens were exposed to have their lives taken away.—Spurius Mælius being accused of endeavouring to make himself king, was summoned by the master of the horse to appear before

* At the time of the expulsion of the decemvirs, a law was also enacted, that no magistrate should be created from whom no appeal could be made to the people (*magistratus sine provocatione. Tit. Liv.* lib. iii. § 55.); by which the people expressly meant to abolish the dictatorship: but this law was not better observed than the former ones had been.

the dictator, in order to clear himself of this somewhat extraordinary imputation. Spurius took refuge among the crowd; the master of the horse pursued him, and killed him on the spot. The people having thereupon expressed a great indignation, the dictator had them called to his tribunal, and declared that Spurius had been lawfully put to death, even though he might be innocent of the crime laid to his charge, for having refused to appear before the dictator when desired to do so by the master of the horse.*

About one hundred and forty years after the times we mention, the law concerning the appeal to the people was enacted for the third time. But we do not see that it was better observed in the sequel than it had been before: we find it frequently violated, after that period, by the different magistrates of the republic; and the senate itself, notwithstanding this same law, at times made formidable examples of the citizens. Of this we have an instance in three hundred soldiers who had pillaged the town of Rhegium. The senate of its own authority ordered them all to be put to death. In vain did the tribune Flaccus remonstrate against so severe an exertion of public justice on Roman citizens; the senate, says Valerius Maximus, nevertheless persisted in its resolution.†

All these laws for securing the lives of the citizens had hitherto been enacted without any mention of a punishment against those who should violate them. At last the celebrated *Lex Porcia* was passed, which subjected to banishment those who should cause a Roman citizen to be scourged and put to death. From a number of instances posterior to this law, it appears that it was not better observed than those before it had been: Caius Gracchus, therefore, caused the *Lex Sempronia* to be enacted, by which a new sanction was given to it. But this second law did not secure his own life, and that of his friends, better than the *Lex Porcia* had done that of his brother, and those who had supported him; indeed all the events which took place about those times rendered it manifest that the evil was such as was beyond the power of any laws to cure. I shall here mention a fact which affords a remarkable instance of the wantonness with which the Roman magistrates had accustomed themselves to take away the lives of the citizens. A citizen, named Memmius, having put up for the consulship, and publicly canvassing for the same, in opposition to a man whom the tribune Saturninus supported, the latter caused him to be apprehended, and made

* Tumultuantem deinde multitudinem, incertâ existimatione, facti, ad concionem vocari jussit, et *Mælium jure cæsum* pronunciavit, *etiamsi regni crimine insons fuerit, qui vocatus a magistro equitum, ad dictatorem non venisset.* *Tit. Liv.* lib. iv. § 15.

† Val. Max. book ii. ch. 7.' This author does not mention the precise number of those who were put to death on this occasion: he only says that they were executed fifty at a time, on different successive days; but other authors make the number of them amount to four thousand. Livy speaks of a whole legion—*Legio Campana, quæ Rhegium occupaverat, obsessa, deditione factâ, securi percussa est.*—*Tit. Liv.* lib. xv. *Epit.*—I have here followed Polybius, who says, that only three hundred were taken and brought to Rome.

him expire under the blows in the public forum. The tribune even carried his insolence so far (as Cicero informs us) as to give to this act of cruelty, transacted in the presence of the whole people assembled, the outward form of a lawful act of public justice.*

Nor were the Roman magistrates satisfied with committing acts of injustice in their political capacity, and for the support of the power of that body of which they made a part. Avarice and private rapine were at last added to political ambition. The provinces were first oppressed and plundered. The calamity, in process of time, reached Italy itself, and the centre of the republic: till at last the *Lex Calpurnia de repetundis* was enacted to put a stop to it. By this law an action was given to the citizens and allies for the recovery of the money extorted from them by magistrates, or men in power; and the *Lex Junia* afterwards added the penalty of banishment to the obligation of making such restitution.

But here another kind of disorder arose. The judges proved as corrupt as the magistrates had been oppressive. They equally betrayed, in their own province, the cause of the republic with which they had been intrusted; and rather chose to share in the plunder of the consuls, prætors, and proconsuls, than put the laws in force against them.

New expedients were therefore resorted to, in order to remedy this new evil. Laws were made for judging and punishing the judges themselves; and, above all, continual changes were made in the manner of composing their assemblies. But the malady lay too deep for common legal provisions to remedy. The guilty judges employed the same resources, in order to avoid conviction, as the guilty magistrates had done; and those continual changes, at which we are amazed, that were made in the constitution of the judiciary bodies,† instead of obviating the corruption of the judges, only transferred to other men the profit arising from becoming guilty of it. It became a general com-

* The fatal forms of words *(cruciatus carmina)* used by the Roman magistrates when they ordered a man to be put to death, resounded (says Tully in his speech for *Rabirius*) in the assembly of the people, in which the censors had forbidden the common executioner even to appear, *I, lictor, colliga manus. Caput obnubito. Arbori infelici suspendito.*—Memmius being a considerable citizen, as we may conclude from his canvassing with success for the consulship, all the great men in the republic took the alarm at the atrocious action of the tribune: the senate, the next day, issued out its solemn mandate, or form of words, to the consuls, *to provide that the republic should receive no detriment;* and the tribune was killed in a pitched battle that was fought at the foot of the Capitol.

† The judges (over the assembly of whom the prætor usually presided) were taken from the body of the senate, till some years after the last Punic war; when the *Lex Sempronia*, proposed by Caius S. Gracchus, enacted that they should in future be taken from the equestrian order. The consul Cæpio procured afterwards a law to be enacted, by which the judges were to be taken from both orders equally. The *Lex Servilia* soon after put the equestrian order again in possession of the *judgments;* and, after some years, the *Lex Livia* restored them entirely to the senate. The *Lex Plautia* enacted afterwards, that the judges should be taken from the three orders,—the senatorian, equestrian, and plebeian. The *Lex Cornelia*, framed by the dictator Sylla, enacted again, that the judges should be entirely taken from the body of the senate. The *Lex Aurelia* ordered anew, that they should be taken from the three orders. Pompey made afterwards a change in their number (which he fixed at seventy-five), and in the manner of electing them. And lastly, Cæsar restored the judgments to the order of the senate

plaint, so early as the times of the Gracchi, that no man, who had money to give could be brought to punishment. *(App. de Bell. Civ.)* Cicero says, that, in his time, the same opinion was universally received *(Act. in Verr. i.* § 1); and his speeches are full of his lamentations on what he justly calls the *levity* and the *infamy*, of the public judgments.

Nor was the impunity of corrupt judges the only evil under which the republic laboured. Commotions of the whole empire at last took place. The horrid vexations, and afterwards the acquittal, of Aquilius, proconsul of Syria, and of some others who had been guilty of the same crimes, drove the provinces of Asia to desperation: and then it was that the terrible war of Mithridates arose, which was ushered in by the death of 80,000 Romans massacred in one day, in the various cities of Asia. *(Appian.)*

The laws and public judgments not only thus failed of the end for which they had been established: they even became, at length, new means of oppression added to those which already existed. Citizens possessed of wealth, persons obnoxious to particular bodies, or the few magistrates who attempted to stem the torrent of the general corruption, were accused and condemned; while Piso, of whom Cicero, in his speech against him, relates facts which make the reader shudder with horror, and Verres, who had been guilty of enormities of the same kind, escaped unpunished.*

Hence a war arose, still more formidable than the former, and the dangers of which we wonder that Rome was able to surmount. The greatest part of the Italians revolted at once, exasperated by the tyranny of the public judgments; and we find in Cicero, who informs us of the cause of this revolt, which was called the *Social War*, a very expressive account both of the unfortunate condition of the republic, and of the perversion that had been made of the methods taken to remedy it. 'A hundred and ten years have not yet elapsed (says he) 'since the law for the recovery of money extorted by magistrates was 'first propounded by the tribune Calpurnius Piso. A number of other 'laws to the same effect, continually more and more severe, have fol-'lowed: but so many persons have been accused, so many condemned, 'so formidable a war has been excited in Italy by the terror of the 'public judgments, and, when the laws and judgments have been sus-'pended, such an oppression and plunder of our allies have prevailed, 'that we may truly say, it is not by our own strength, but by the weak-'ness of others, that we continue to exist.' *(Cic. de Off. lib. ii.* § 75.)

* To say that Verres escaped unpunished is not quite correct. Being convicted of one of the many charges against him, and fearing the event of the rest, he abandoned his defence, and retired into a voluntary banishment. This would have been part of his sentence, had he dared to stand the full issue of the trial. Verres lived many years in exile, and it is said he fell in the proscription of the Second Triumvirate, a victim to the pique of Marc Anthony, occasioned by a quarrel at Corinth, on the point of precedence.—ED.

I have entered into these particulars with regard to the Roman commonwealth, because the facts on which they are grounded are remarkable of themselves, and yet no just conclusion can be drawn from them, unless a series of them were presented to the reader. Nor are we to account for these facts by the luxury which prevailed in the latter ages of the republic, by the corruption of the manners of the citizens, their degeneracy from their ancient principles, and such loose general phrases, which may perhaps be useful to express the manner itself in which the evil became manifested, but do by no means set forth the real causes of it.

The above disorders arose from the very nature of the government of the republic,—of a government in which the executive and supreme power being made to centre in the body of those in whom the people had once placed their confidence, there remained no other effectual power in the state that might render it necessary for them to keep within the bounds of justice and decency. And in the meantime, as the people, who were intended as a check over that body, continually gave a share in this executive authority to those whom they intrusted with the care of their interests, they increased the evils they complained of, as it were, at every attempt they made to remedy them; and instead of raising up opponents to those who were become the enemies of their liberty, as it was their intention to do, they continually supplied them with new associates.

From this situation of affairs, flowed, as an unavoidable consequence, that continual desertion of the cause of the people, which, even in times of revolutions, when the passions of the people themselves were roused, and they were in a great degree united, manifested itself in so remarkable a manner. We may trace the symptoms of the great political defect here mentioned, in the earliest ages of the commonwealth, as well as in the last stage of its duration. In Rome, while small and poor, it rendered vain whatever rights or power the people possessed, and blasted all their endeavours to defend their liberty, in the same manner as, in the more splendid ages of the commonwealth, it rendered the most salutary regulations utterly fruitless, and even instrumental to the ambition and avarice of a few. The prodigious fortune of the Roman republic, in short, did not create the disorder; it only gave full scope to it.

But if we turn our view towards the history of the English nation, we shall see how, from a government in which the above defects did not exist, different consequences have followed;—how cordially all ranks of men have always united together, to lay under proper restraints this executive power, which they knew could never be their own. In times of public revolutions, the greatest care, as we have before observed, was taken to ascertain the limits of that power; and after peace had been restored to the state, those who remained at the head of the

nation continued to manifest an unwearied jealousy in maintaining those advantages which the united effort of all had obtained.

Thus it was made one of the articles of Magna Charta, that the executive power should not touch the person of the subject, but in consequence of a judgment passed upon him by his peers; and so great was afterwards the general union in obtaining this law, that the *trial by jury*,—that admirable mode of proceeding, which so effectually secures the subject against all the attempts of power, even (which seemed so difficult to obtain) against such as might be made under the sanction of the judicial authority—hath been preserved to this day. It has even been preserved in all its original purity, though the same has been successively suffered to decay, and then to be lost, in the other countries of Europe, where it had been formerly known.* Nay, though this privilege of being tried by one's peers was at first a privilege of conquerors and masters, exclusively appropriated to those parts of nations which had invaded and reduced the rest by arms, it has in England been successively extended to every order of the people.

And not only the person, but also the property of the individual, has been secured against all arbitrary attempts from the executive power; and the latter has been successively restrained from touching any part of the property of the subject, even under pretence of the necessities of the state, any otherwise than by the free grant of the representatives of the people. Nay, so true and persevering has been the zeal of these representatives, in asserting on that account the interests of the nation, from which they could not separate their own, that this privilege of taxing themselves, which was in the beginning grounded on a most precarious tenure, and only a mode of governing adopted by the sovereign for the sake of his own convenience, has become, in time, a settled right of the people, which the sovereign has found it necessary solemnly and repeatedly to acknowledge.

Nay more, the representatives of the people have applied this right of *taxation* to a still nobler use than the mere preservation of property:

* The trial by jury was in use among the Normans long before they came over into England; but, even among them, it soon degenerated from its first institution; we see in Hale's History of the *Common Law* of England, that the unanimity among jurymen was not required in Normandy for making a good verdict; but when jurymen dissented, some were taken out, and others added in their stead, till an unanimity was procured. —In Sweden, where, according to the opinion of the learned in that country, the *trial by jury* had its origin, only some forms of that institution are now preserved in the lower courts in the country, where sets of jurymen are established for life, and have a salary accordingly. And in Scotland, the vicinity of England has not been able to preserve to the trial by jury its genuine ancient form: the unanimity among jurymen is not required (as I have been told) to form a verdict; but the majority is decisive.

[In Scotland a majority of two thirds is required to give a verdict of conviction. Until the passing of the act 55 Geo. III. ch. 42. the Scots had not the benefit of trial by jury in civil actions, except in cases of revenue.—This is a temporary and experimental law, and is to endure for seven years from its date and to the end of the then next session of parliament. By virtue of this act all civil cases, wherein matters of fact are to be proved, may be tried and determined by a jury in the manner therein directed: but the courts have the power to refuse sending a case to a jury, if they think fit. It is probable the act will be continued and made perpetual, with such alterations though as experience shall have suggested.—ED.]

they have, in process of time, succeeded in converting it into a regular and constitutional mean of influencing the motions of the executive power. By means of this right, they have gained the advantage of being constantly called to concur in the measures of the sovereign,—of having the greatest attention shown by him to their requests, as well as the highest regard paid to any engagements that he enters into with them. Thus has it become at last the peculiar happiness of English subjects, to whatever other people, either ancient or modern, we compare them, to enjoy a share in the government of their country, by electing representatives, who, by reason of the peculiar circumstances in which they are placed, and of the extensive rights they possess, are both *willing* faithfully to serve those who have appointed them, and *able* to do so.

And indeed the commons have not rested satisfied with establishing, once for all, the provisions for the liberty of the people which have been just mentioned; they have afterwards made the preservation of them the first object of their care,* and taken every opportunity of giving them new vigour and life.

Thus, under Charles I., when attacks of a most alarming nature were made on the privilege of the people, to grant free supplies to the crown, the commons vindicated, without loss of time, that great right of the nation, which is the constitutional bulwark of all others, and hastened to oppugn, in the beginning, every precedent of a practice that must in the end have produced the ruin of public liberty.

They even extended their care to abuses of every kind. The judicial authority, for instance, which the executive power had imperceptibly assumed to itself, both with respect to the person and property of the individual, was abrogated by the act which abolished the court of Star-chamber; and the crown was thus brought back to its true constitutional office, viz., the countenancing, and supporting with its strength, the execution of the laws.

The subsequent endeavours of the legislature have carried to a still greater extent the above privileges of the people. They have, moreover, succeeded in restraining the crown from any attempt to seize and confine, even for the shortest time, the person of the subject, unless it be in the cases ascertained by the law, of which the judges of it are to decide.

Nor has this extensive unexampled freedom at the expense of the executive power been made, as we might be inclinable to think, the exclusive appropriated privilege of the great and powerful. It is to be enjoyed alike by all ranks of subjects. Nay, it was the injury done to a common citizen that gave existence to the act which has com-

* The first operation of the commons, at the beginning of a session, is to appoint four grand committees. One is a committee of religion, another of courts of justice, another of trade, and another of grievances: they are to be standing committees during the whole session.

pleted the security of this interesting branch of public liberty. The *oppression of an obscure individual*, says judge Blackstone, *gave rise to the famous Habeas Corpus Act.* Junius has quoted this observation of the judge; and the same is well worth repeating a third time, for the just idea it conveys of that readiness of all orders of men to unite in defence of common liberty, which is a characteristic circumstance in the English government.*

And this general union in favour of public liberty has not been confined to the framing of laws for its security: it has operated with no less vigour in bringing to punishment such as have ventured to infringe them; and the sovereign has constantly found it necessary to give up the violators of those laws, even when his own servants, to the justice of their country.

Thus we find, so early as the reign of Edward I., judges who were convicted of having committed exactions, in the exercise of their offices, to have been condemned by a sentence of parliament.† From the immense fines which were laid upon them, and which it seems they were in a condition to pay, we may indeed conclude that, in those early ages of the constitution, the remedy was applied rather late to the disorder; but yet it was at last applied.

Under Richard II., examples of the same kind were renewed. Michael de la Pole, earl of Suffolk (who had been lord chancellor of the kingdom), the duke of Ireland, and the archbishop of York, having abused their power by carrying on designs that were subversive of public liberty, were declared guilty of high treason; and a number of judges, who, in their judicial capacity, had acted as their instruments, were involved in the same condemnation.‡

In the reign of Henry VIII., Sir Richard Empson, and Edmund Dudley, who had been the promoters of the exactions committed under the preceding reign, fell victims to the zeal of the commons for

* The individual here alluded to was one Francis Jenks, who having made a motion at Guildhall, in the year 1676, to petition the king for a new parliament, was examined before the privy council, and afterwards committed to the Gate-house, where he was kept about two months, through the delays made by the several judges to whom he applied, in granting him a *Habeas Corpus.—State Trials*, vol. vii. anno 1676.

† Sir Ralph de Hengham, chief justice of the King's Bench, was fined 7000 marks; Sir Thomas Wayland, chief justice of the Common Pleas, had his whole estate forfeited; and Sir Adam de Stratton, chief baron of the Exchequer, was fined 3400 marks.

‡ The most conspicuous among these judges were Sir Robert Belknap, and Sir Robert Tresilian, chief justice of the King's Bench. The latter had drawn up a string of questions calculated to confer a despotic authority on the crown, or rather on the ministers abovenamed, who had found means to render themselves entire masters of the person of the king. These questions Sir Robert Tresilian proposed to the judges, who had been summoned for that purpose, and they gave their opinion in favour of them. One of these opinions of the judges, among others, tended to annihilate, at one stroke, all the rights of the commons, by taking from them that important privilege mentioned before, of starting and freely discussing whatever subjects of debate they think proper: the commons were to be restrained, under pain of being punished as traitors, from proceeding upon any articles besides those limited to them by the king. All those who had had a share in the above declarations of the judges were attainted of high treason. Tresilian, and Brembre, who had been mayor of London, were hanged; the others were only banished, at the intercession of the bishops.—Parl. History of England, vol. i.

vindicating the cause of the people. Under king James I., the lord chancellor Bacon experienced that neither his high dignity, nor great personal qualifications, could screen him from having the severest censure passed upon him, for the corrupt practices of which he had suffered himself to become guilty. And in the reign of Charles I., the judges having attempted to imitate the example of the judges under Richard II., by delivering opinions subversive of the rights of the people, found the same spirit of watchfulness in the commons, as had proved the ruin of the former. Lord Finch, keeper of the great seal, was obliged to fly beyond the sea. The judges Davenport and Crawley were imprisoned: and judge Berkeley was seized while sitting upon the bench, as we are informed by Rushworth.

In the reign of Charles II. we find fresh instances of the vigilance of the commons. Sir William Scroggs, lord chief justice of the King's Bench, Sir Francis North, chief justice of the Common Pleas, Sir Thomas Jones, one of the judges of the King's Bench, and Sir Richard West, one of the barons of the Exchequer, were impeached by the commons, for partialities shown by them in the administration of justice; and chief justice Scroggs, against whom some positive charges were well proved, was removed from his employments.

The several examples offered here to the reader have been taken from different periods of the English history, in order to show that neither the influence nor the dignity of the infractors of the laws, even when they have been the nearest servants of the crown, have ever been able to check the zeal of the commons in asserting the right of the people. Other examples might perhaps be related to the same purpose; though the whole number of those to be met with, will, upon enquiry, be found the smaller, in proportion as the danger of infringing the laws has already been indubitable.

So much regularity has even (from all the circumstances abovementioned) been introduced into the operations of the executive power in England,—such an exact justice have the people been accustomed, as a consequence, to expect from that quarter, that even the sovereign, for his having once suffered himself personally to violate the safety of the subject, did not escape severe censure. The attack made by order of Charles II., on the person of Sir John Coventry, filled the nation with astonishment; and this violent gratification of private passion, on the part of the sovereign (a piece of self-indulgence with regard to inferiors, to which the whole classes of individuals in certain countries almost think that they have a right), excited general ferment, 'This event,' says Bishop Burnet, 'put the house of commons in 'a furious uproar.—It gave great advantages to all those who opposed 'the court; and the names of the *court* and *country* party, which till 'now had seemed to be forgotten, were revived.' *

* Burnet's History, vol. i. anno 1669.—An act of parliament was made on this occasion, for

These are the limitations that have been set, in the English government, on the operations of the executive power: limitations to which we find nothing comparable in any other free states, ancient or modern; and which are owing, as we have seen, to that very circumstance which seemed at first sight to prevent the possibility of them,—I mean the greatness and unity of that power; the effect of which has been, in the event, to unite, upon the same object, the views and efforts of all orders of the people.

From this circumstance, that is, the *unity* and peculiar stability of the executive power in England, another most advantageous consequence has followed, that has been before noticed, and which it is not improper to mention again here, as this chapter is intended to confirm the principles laid down in the former ones;—I mean the unremitted continuance of the same general union among all ranks of men, and the spirit of mutual justice which thereby continues to be diffused through all orders of subjects.

Though surrounded by the many boundaries that have just now been described, the crown, we must observe, has preserved its prerogative undivided; it still possesses its whole effective strength, and is only tied by its own engagements, and the consideration of what it owes to its dearest interests.

The great, or wealthy men in the nation, who, assisted by the body of the people, have succeeded in reducing the exercise of its authority within such well-defined limits, can have no expectation that it will continue to confine itself to them any longer than they themselves continue, by the justice of their own conduct, to deserve that support of the people, which alone can make them appear of consequence in the eye of the sovereign,—no probable hopes that the crown will continue to observe those laws by which their wealth, their dignity, and liberty, are protected, any longer than they themselves also continue to observe them.

Nay more, all those claims of their rights which they continue to make against the crown, are encouragements which they give to the rest of the people to assert their own rights against them. Their constant opposition to all arbitrary proceedings of that power, is a continual declaration they make against any acts of oppression which the superior advantages they enjoy might entice them to commit on their inferior fellow-subjects. Nor was that severe censure, for instance, which they concurred in passing on an unguarded violent action of their sovereign, only a restraint put upon the personal actions of future English kings; no, it was a much more extensive provision for the securing of public liberty;—it was a solemn engagement entered into by all the powerful men in the state to the whole body of the people, scrupulously to respect the person of the lowest among them.

giving a farther extent to the provisions before made for the personal security of the subject which is still called the *Coventry* act.

And indeed the constant tenor of the conduct, even of the two houses of parliament, shows us that the above observations are not matters of mere speculation. From the earliest times we see the members of the house of commons to have been very cautious not to assume any distinction that might alienate from them the affections of the rest of the people.* Whenever those privileges which were necessary to them for the discharge of their trust have proved burdensome to the community, they have retrenched them. And those of their members who have applied either these privileges, or in general that influence which they derived from their situation, to any oppressive purposes, they themselves have endeavoured to bring to punishment.

Thus, we see, that in the reign of James I., Sir Giles Montpesson, a member of the house of commons, having been guilty of monopolies, and other acts of great oppression on the people, was not only expelled, but impeached and prosecuted with the greatest warmth by the house, and finally condemned by the lords to be publicly degraded from his rank of a knight, held for ever an infamous person, and imprisoned during life.

In the same reign, Sir John Benet, who was also a member of the house of commons, having been found to have been guilty of corrupt practices, in his capacity of judge of the *Prerogative* Court of Canterbury (such as taking exorbitant fees, and the like), was expelled the house, and prosecuted for those offences.

In the year 1641, Mr. Henry Benson, member for Knaresborough, having been detected in selling protections, experienced likewise the indignation of the house, and was expelled.

In fine, in order, as it were, to make it completely notorious, that neither the condition of representative of the people, nor even any degree of influence in their house, could excuse any one of them from strictly observing the rules of justice, the commons did on one occasion pass the most severe censure they had power to inflict, upon their speaker himself, for having, in a single instance, attempted to convert the discharge of his duty, as speaker, into the means of private emolument.—Sir John Trevor, speaker of the house of commons, having, in the sixth year of the reign of king William, received a thousand guineas from the city of London, 'as a gratuity for the trouble he had taken with regard to the passing of the *Orphan Bill*,' was voted guilty of a high crime and misdemeanor, and expelled the house. Even the inconsiderable sum of twenty guineas which Mr Hungerford, another member, had been weak enough to accept on the same score, was

* In all cases of public offences, down to a simple breach of the peace, the members of the house of commons have no privileges whatever above the rest of the people; they may be committed to prison by any justice of the peace; and are dealt with afterwards in the same manner as any other subjects. With regard to civil matters, their only privilege is to be free from arrests during the time of a session, and forty days before, and forty days after: but they may be sued, by process against their goods, for any just debt during that time.

looked upon as deserving the notice of the house; and he was likewise expelled.*

If we turn our view towards the house of lords, we shall find that they have also constantly taken care that their peculiar privileges should not prove impediments to the common justice which is due to the rest of the people.† They have constantly agreed to every just proposal that has been made to them on that subject by the commons: and indeed, if we consider the numerous and oppressive privileges claimed by the *nobles* in most other countries, and the vehement spirit with which they are commonly asserted, we shall think it no small praise to the body of the nobility in England (and also to the nature of that government of which they make a part), that it has been by their free consent that their privileges have been confined to what they now are; that is, to no more, in general, than what is necessary to the accomplishment of the end and constitutional design of that house.

In the exercise of their judicial authority with regard to civil matters, the lords have manifested a spirit of equity nowise inferior to that which they have shown in their legislative capacity. They have, in the discharge of that function (which of all others is so liable to create temptations), shown an incorruptness really superior to what any judicial assembly in any other nation can boast. Nor do I think that I run any risk of being contradicted, when I say, that the conduct of the house of lords, in their civil judicial capacity, has constantly been such as has kept them above the reach of even suspicion or slander.

Even that privilege which they enjoy, of exclusively trying their own members, in case of any accusation that may affect their lives (a privilege which we might at first sight think repugnant to the idea of a regular government, and even alarming to the rest of the people), has constantly been rendered, by the lords, subservient to the purpose of doing justice to their fellow-subjects; and if we cast our eyes either on the collection of the *State Trials*, or on the History of England, we shall find very few examples, if any, of a peer realty guilty of the offence laid to his charge that has derived any advantage from his not being tried by a jury of *commoners*.

Nor has this just and moderate conduct of the two houses of parliament, in the exercise of their powers (a moderation so unlike what has been related of the conduct of the powerful men in the Roman republic), been the only happy consequence of that salutary jealousy which

* Other examples, of the attention of the house of commons to the conduct of their members, might be produced, either before, or after, that which is mentioned here. The reader may, for instance, see the relation of their proceedings in the affair of the *South-Sea Company* scheme; and a few years after, in that of the *Charitable Corporation*,—a fraudulent scheme, particularly oppressive to the poor, for which several members were expelled.

† In case of a public offence, or even a simple breach of the peace, a peer may be committed till he finds bail, by any justice of the peace; and peers are to be tried by the common course of the law, for all offences under felony. With regard to civil matters, they are at all times free from *arrests;* but execution may be had against their effects, in the same manner as against those of other subjects.

those two bodies entertain of the power of the crown. The same motive has also engaged them to exert their utmost endeavours to put the courts of justice under proper restraints; a point of the highest importance to public liberty.

They have, from the earliest times, preferred complaints against the influence of the crown over these courts, and at last procured laws to be enacted by which such influence has been entirely prevented; all which measures, we must observe, were at the same time strong declarations that no subjects, however exalted their rank might be, were to think themselves exempt from submitting to the uniform course of the law, or hope to influence or over-awe it. The severe examples which they have united to make on those judges who have rendered themselves the instruments of the passions of the sovereign, or of the designs of the ministers of the crown, are also awful warnings to the judges who have succeeded them, never to attempt to deviate in favour of any, the most powerful individuals, from that straight line of justice which the joint wisdom of the legislature has marked out to them.

This singular situation of the English judges, relatively to the three constituent powers of the state (and also the formidable support which they are certain to receive from them as long as they continue to be the faithful ministers of justice), has at last created such an impartiality in the distribution of public justice in England, has introduced into the courts of law the practice of such a thorough disregard to either the influence or wealth of the contending parties, and procured to every individual, both such an easy access to these courts, and such a certainty of redress, as are not to be paralleled in any other government. Philip de Comines, so long as three hundred years ago, commended in strong terms the exactness with which justice was done in England to all ranks of subjects; and the impartiality with which the same is administered in these days, will, with still more reason, excite the surprise of every stranger who has an opportunity of observing the customs of this country.*

Indeed to such a degree of impartiality has the administration of public justice been brought in England, that it is saying nothing beyond the exact truth, to affirm that any violation of the laws, though

* Soon after I came to England for the first time (if the reader will give me leave to make mention of myself in this case), an action was brought in a court of justice against a prince very nearly related to the crown; and a noble lord was also, much about that time, engaged in a law suit for the property of some valuable lead mines in Yorkshire. I could not but observe that in both these cases a decision was given against the two most powerful parties; though I wondered but little at this, because I had before heard much of the impartiality of the law proceedings in England, and was prepared to see instances of that kind. But what I was much surprised at was, that nobody appeared to be in the least so, even at the strictness with which the ordinary course of the law had, particularly in the former case, been adhered to,—and that those proceedings which I was disposed to consider as great instances of justice, to the production of which some circumstances peculiar to the times, at least some uncommon virtue or spirit on the part of the judges, must have more or less co-operated, were looked upon by all those whom I had heard speak about it, as nothing more than the common and expected course of things. This circumstance became a strong inducement to me to inquire into the nature of a government by which such effects were produced.

perpetrated by men of the most extensive influence—nay, though committed by the special direction of the very first servants of the crown—will be publicly and completely redressed. And the very lowest of subjects will obtain such redress, if he has but spirit enough to stand forth, and appeal to the laws of his country. Most extraordinary circumstances these! which those who know the difficulty of establishing just laws among mankind, and of providing afterwards for their due execution, only find credible because they are matters of fact, and can begin to account for, only when they look up to the constitution of the government itself: that is to say, when they consider the circumstances in which the executive power, or the crown, is placed in relation to the two bodies that concur with it to form the legislature,—the circumstances in which those two assemblies are placed in relation to the crown, and to each other,—and the situation in which all the three find themselves with respect to the whole body of the people.*

In fine, a very remarkable circumstance in the English government (and which alone evinces something peculiar and excellent in its nature), is that spirit of extreme mildness with which justice, in criminal cases, is administered in England: a point with regard to which England differs from all other countries in the world.

When we consider the punishments in use in the other states of Europe, we wonder how men can be brought to treat their fellow-creatures with so much cruelty; and the bare consideration of those punishments would sufficiently convince us (if we did not know the

* The assertion above made, with respect to the impartiality with which justice is, in all cases, administered in England, not being of a nature to be proved by alleging single facts, I have entered into no particulars on that account. However, I will subjoin two cases, which, I think, cannot but appear remarkable to the reader.

The first is the case of the prosecution commenced in the year 1763, by some journeymen printers, against the king's messengers, for apprehending and imprisoning them for a short time, by virtue of a *general warrant* from the secretary of state; and that which was afterwards carried on by another private individual against one of the secretaries themselves.—In these actions, all the ordinary forms of proceedings used in cases of actions between private subjects, were strictly adhered to; and both the secretary of state, and the messengers, were, in the end, condemned. Yet, which it is proper the reader should observe, from all the circumstances that accompanied this affair, it is difficult to propose a case in which ministers could, of themselves, be under greater temptations to exert an undue influence to hinder the ordinary course of justice. Nor were the acts for which those ministers were condemned acts of evident oppression, which nobody could be found to justify. They had done nothing but follow a practice, of which they found several precedents, established in their offices: and their case, if I am well informed, was such that most individuals, under similar circumstances, would have thought themselves authorised to have acted as they had done.

The second case I propose to relate, affords a singular instance of the confidence with which all subjects in England claim what they think their just rights, and of the certainty with which the remedies of the law are in all cases open to them. The fact I mean, is the arrest executed in the reign of queen Anne, in the year 1708, on the person of the Russian ambassador, by taking him out of his coach for the sum of fifty pounds. And the consequences that followed this fact are still more remarkable. The czar highly resented the affront, and demanded that the sheriff of Middlesex, and all others concerned in the arrest, should be punished with instant death. 'But the queen,' (to the amazement of that despotic court, says judge Blackstone, from whom I borrowed this fact) 'directed the secretary of state to inform him that she could inflict no punishment upon any, the meanest of her subjects, unless warranted by the law of the land.' An act was afterwards passed to free from arrests the persons of foreign ministers, and such of their servants as they have delivered a list of to the secretary of state. A copy of this act, elegantly engrossed and illuminated, continues judge Blackstone, was sent to Moscow, and an ambassador extraordinary commissioned to deliver it.

fact from other circumstances) that the men in those states who frame the laws, and preside over their execution, have little apprehension that either they, or their friends, will ever fall victims to those laws which they thus rashly establish.

In the Roman republic, circumstances of the same nature with those just mentioned were also productive of the greatest defects in the kind of criminal justice which took place in it. That class of citizens who were at the head of the republic, and who knew how mutually to exempt each other from the operation of any too severe laws or practice, not only allowed themselves great liberties, as we have seen, in disposing of the lives of the inferior citizens, but had also introduced, into the exercise of the illegal powers they assumed to themselves in that respect, a great degree of cruelty.*

Nor were things more happily conducted in the Grecian republics. From their democratical nature, and the frequent revolutions to which they were subject, we naturally expect to find that authority used with mildness, which those who enjoyed it must have known to have been precarious; yet such were the effects of the violence attending those very revolutions, that a spirit both of great irregularity and cruelty had taken place among the Greeks, in the exercise of the power of inflicting punishments. The very harsh laws of *Draco* are well known, of which 't was said that they were not written with ink, but with blood. The severe laws of the Twelve Tables among the Romans were in great part brought over from Greece. And it was an opinion commonly received in Rome, that the cruelties practised by the magistrates on the citizens were only imitations of the examples which the Greeks had given them.†

In fine, the use of torture, that method of administering justice, in which folly may be said to be added to cruelty, had been adopted by the Greeks in consequence of the same causes which had occurred to produce the irregularity of their criminal justice.—And the same practice continues, in these days, to prevail on the continent of Europe, in consequence of that general arrangement of things which creates there such a carelessness about remedying abuses of public authority.

But the nature of that same government which has procured to the people of England all the advantages we have before described, has, with still more reason, freed them from the most oppressive abuses which prevail in other countries.

That wantonness in disposing of the dearest rights of mankind, those

* The common manner in which the senate ordered citizens to be put to death, was by throwing them headlong from the top of the Tarpeian rock. The consuls, or other particular magistrates, sometimes caused citizens to expire upon a cross; or, which was a much more common case, ordered them to be beaten to death, with their heads fastened between the branches of a fork; which they called *cervicem furcæ inserere.*

† Cæsar expressly reproaches the Greeks with this fact in his speech in favour of the accomplices of Cataline, which Sallust has transmitted to us—*Eodem illo tempore, Græciæ morem imitati* (majores nostri), *verberibus animadvertebant in cives; de condemnatis summum supplicium sumebant.*

insults upon human nature, of which the frame of the governments established in other states unavoidably becomes more or less productive, are entirely banished from a nation which has the happiness of having its interest guarded by men who continue to be themselves exposed to the full pressure of those laws which they concur in making, of every tyrannic practice which they suffer to be introduced,—by men whom the advantages which they possess above the rest of the people render only more exposed to the abuses they are appointed to prevent, only more alive to the dangers against which it is their duty to defend the community.*

Hence we see that the use of torture has, from the earliest times, been utterly unknown in England.—And all attempts to introduce it, whatever might be the power of those who made them, or the circumtances in which they renewed their endeavours, have been strenuously opposed and defeated.

From the same cause also arose that remarkable forbearance of the English laws to use any cruel severity in the punishments which experience showed it was necessary for the preservation of society to establish ;† and the utmost vengeance of those laws, even against the most enormous offenders, never extends beyond the simple deprivation of life.‡

Nay, so anxious has the English legislature been to establish mercy, even to convicted offenders, as a fundamental principle of the government of England, that they made it an express article of that great public compact which was framed at the important æra of the Revolution, that 'no cruel and unusual punishments' should be enforced.§—They even endeavoured, by adding a clause for that purpose to the oath which kings were thenceforward to take at their coronation, as it were

* Historians take notice that the commons, in the reign of Charles II. made haste to procure the abolition of the old statute, *De Hæretico comburendo* (for burning Heretics), as soon as it became publicly known that the presumptive heir to the crown was a Roman catholic. Perhaps they would not have been so diligent and earnest, if they had not been fully convinced that a member of the house of commons, or his friends, might be brought to trial as easily as any other individuals among the people, so long as an express and written law could be produced against them.

† [There would seem though to be some unnecessary severities in punishment overlooked by the author. In cases of high-treason, as already remarked, the sentence is too revolting to be fully carried into effect. The worst parts of it are now always remitted. For petit-treason, wives are sentenced to be burned ; whether this punishment would in these days be executed, the want of an example leaves us in doubt. Other crimes, such as heresy, witchcraft, &c. were formerly visited with equal cruelties, though now happily either obsolete, or expressly repealed.—ED.]

‡ A very singular instance occurs in the history of the year 1605, of the care of the English legislature not to suffer precedents of cruel practices to be introduced. During the time that those concerned in the gunpowder-plot were under sentence of death, a motion was made in the house of commons to petition the king, that the execution might be stayed, in order to consider of some extraordinary punishment to be inflicted upon them: but this motion was rejected. A proposal of the same kind was also made in the house of lords, where it was dropped. Parl. Hist. of England, vol. v., anno 1605.

§ See the Bill of Rights, Art. x. 'Excessive bail ought not to be required nor excessive fines imposed ; nor cruel and unusual punishments inflicted.'

to render it an everlasting obligation of English kings, to make justice to be 'executed with mercy.'*

CHAP. XVII.—*A more inward View of the English Government than has hitherto been offered to the Reader in the course of this Work.—Very essential differences between the English Monarchy, as a Monarchy, and all those with which we are acquainted.*

THE doctrine constantly maintained in this work, and which has, I think, been sufficiently supported by facts and comparisons drawn from the history of other countries, is, that the remarkable liberty enjoyed by the English nation is essentially owing to the impossibility under which their leaders, or in general all men of power among them, are placed, of invading and transferring to themselves any branch of the governing executive authority; which authority is exclusively vested, and firmly secured, in the crown. Hence the anxious care with which those men continue to watch the exercise of that authority. Hence their perseverance in observing every kind of engagement which themselves may have entered into with the rest of the people.

But here a consideration of a most important kind presents itself: How comes the crown in England thus constantly to preserve to itself (as we see it does) the executive authority in the state, and moreover to preserve it so completely as to inspire the great men in the nation with that conduct so advantageous to public liberty, which has just been mentioned?—These are effects which we do not find, upon examination, that the power of *crowns* has hitherto been able to produce in other countries.

In all states of a monarchical form, we indeed see that those men whom their rank and wealth, or their personal power of any kind, have raised above the rest of the people, have formed combinations among themselves to oppose the power of the monarch. But their views, we must observe, in forming these combinations, were not by any means to set general and impartial limitations on the sovereign authority.—They endeavoured to render themselves entirely independent of that authority; or even to annihilate it, according to circumstances.

Thus we see that in all the states of ancient Greece, the kings were at last destroyed and exterminated. The same event happened in Italy, where in remote times there existed for a while several kingdoms, as we learn both from the ancient historians and poets. And in Rome,

* Those same dispositions of the English legislature which have led them to take such precautions in favour even of convicted offenders, have still more engaged them to make provisions in favour of such persons as are only suspected and accused of having committed offences of any kind. Hence the zeal with which they have availed themselves of every important occasion,—such, for instance, as that of the Revolution,—to procure new confirmations to be given to the institution of the trial by jury, to the laws on imprisonments, and in general to that system of criminal jurisprudence of which a description has been given in the first part of this work.

we even know the manner and circumstances in which such a revolution was brought about.

In more modern times, we see the numerous monarchical sovereignties (which had been raised in Italy on the ruins of the Roman empire) successively destroyed by powerful factions: and events of much the same nature have at different times taken place in the kingdoms established in the other parts of Europe.

In Sweden, Denmark, and Poland, for instance, we find the *nobles* reducing their sovereigns to the condition of simple presidents over their assemblies,—of mere ostensible heads of the government.

In Germany and in France, countries where the monarchs, being possessed of considerable demesnes, were better able to maintain their independence than the princes just mentioned, the nobles waged war against them, sometimes singly and sometimes jointly; and events similar to these have successively happened in Scotland, Spain, and the modern kingdoms of Italy.

In fine, it has only been by means of standing armed forces that the sovereigns of most of the kingdoms we have mentioned have been able, in a course of time, to assert the prerogatives of the crown. And it is only by continuing to keep up such forces, that, like the eastern monarchs, and indeed like all the monarchs that ever existed, they continue to be able to support their authority.

How therefore can the crown of England, without the assistance of any armed force, maintain, as it does, its numerous prerogatives? How can it, under such circumstances, preserve to itself the whole executive power in the state? For here we must observe, the crown in England does not derive any support from what regular forces it has at its disposal; and if we doubted this fact, we need only look to the astonishing subordination in which the military is kept to the civil power, to become convinced that an English king is not indebted to his army for the preservation of his authority.*

If we could suppose that the armies of the kings of Spain or France, for instance, were, through some very extraordinary circumstances, all to vanish in one night, the power of those sovereigns, we must not doubt, would, in six months, be reduced to a mere shadow. They would immediately behold their prerogatives, however formidable they may be at present, invaded and dismembered;† and supposing that regular governments continued to exist, they would be reduced to have little more influence in them than the doges of Venice or of Genoa possess in the governments of those republics.‡

* Henry VIII. the most absolute prince, perhaps, who ever sat upon a throne, kept no standing army.

† As was the case in the several kingdoms into which the Spanish monarchy was formerly divided; and, in no very remote times, in France itself.

‡ Or than the kings of Sweden were allowed to enjoy, before the last revolution of 1772 in that country.

How therefore,—to repeat the question once more, which is one of the most interesting that can occur in politics,—how can the crown in England, without the assistance of any armed force, avoid those dangers to which all other sovereigns are exposed?

How can it, without any such force, accomplish even incomparably greater works than those sovereigns, with their powerful armies, are, we find, in a condition to perform?—How can it bear that universal effort (unknown in other monarchies), which, we have seen, is continually and openly exerted against it? How can it even continue to resist this effort so powerfully as to preclude all individuals whatever from entertaining any views besides those of setting just and *general* limitations to the exercise of its authority? How can it enforce the laws upon all subjects, indiscriminately, without injury or danger to itself? How can it, in fine, impress the minds of all the great men in the state with so lasting a jealousy of its power, as to necessitate them, even in the exercise of their undoubted rights and privileges, to continue to court and deserve the affection of the rest of the people?

Those great men, I shall answer, who even in quiet times prove so formidable to other monarchs, are in England divided into two assemblies; and such, it is necessary to add, are the principles upon which this division is made, that from it result, as necessary consequences, the solidity and the indivisibility of the power of the crown.

The reader may perceive that I have led him, in the course of this work, much beyond the line within which writers on the subject of government have confined themselves; or rather, that I have followed a track entirely different from that which those writers have pursued. But as the observation just made, on the stability of the power of the crown in England, and the cause of it, is new in its kind, so do the principles from which its truth is to be demonstrated totally differ from what is commonly looked upon as the foundation of the science of politics. To lay those principles here before the reader, in a manner completely satisfactory to him, would lead us into philosophical discussions on what really constitutes the basis of governments and power amongst mankind, both extremely long, and in a great measure foreign to the subject of this book. I shall therefore content myself with proving the above observations by facts; which is more, after all, than political writers usually undertake to do with regard to their speculations.

As I chiefly proposed to show that the extensive liberty the English enjoy is the result of the peculiar frame of their government, and occasionally to compare the same with the republican form, I even had at first intended to confine myself to that circumstance, which both constitutes the essential difference between those two forms of government, and is the immediate cause of English liberty,—I mean the having placed all the executive authority in the state out of the hands of those in whom the people trust. With regard to the remote cause of that

same liberty, that is to say, the stability of the power of the crown, the singular solidity, without the assistance of any armed force, by which this executive authority is so secured, I should perhaps have been silent, had I not found it absolutely necessary to mention the fact in this place, in order to obviate the objections which the more reflecting part of readers might otherwise have made, both to several of the observations before offered to them, and to others which are soon to follow.

Besides, I shall confess here, I have been several times under apprehensions, in the course of this work, that the generality of readers, misled by the similarity of names, might put too extensive a construction upon what I said with regard to the usefulness of the power of the crown in England ;—that they might accuse or suspect me, for instance, of attributing the superior advantages of the English mode of government over the republican form, merely to its approaching nearer to the nature of the monarchies established in the other parts of Europe, and of looking upon every kind of monarchy as preferable in itself to a republican government ;—an opinion which I do not by any means, or in any degree, entertain : I have too much affection, or (if you please) prepossession, in favour of that form of government under which I was born ; and, as I am sensible of its defects, so do I know how to set a value upon the advantages by which it compensates for them.

I therefore have, as it were, made haste to avail myself of the first opportunity of explaining my meaning on this subject,—of indicating that the power of the crown in England stands upon foundations entirely different from those on which the same power rests in other countries,—and of engaging the reader to observe (which for the present will suffice), that, as the English monarchy differs, in its nature and main foundations, from every other, so all that is said here of its advantages is peculiar and confined to it.

But to come to the proofs (derived from facts) of the solidity accruing to the power of the crown in England, from the *co-existence* of the two assemblies which concur to form the English parliament, I shall first point out to the reader several open acts of these two houses, by which they have by turns effectually defeated the attacks of each other upon its prerogative.

Without looking farther back for examples than the reign of Charles II., we see that the house of commons had, in that reign, begun to adopt the method of adding (or tacking, as it is commonly expressed) such bills as they wanted more particularly to have passed, to their money bills. This forcible use of their undoubted privilege of granting money, if it had been suffered to grow into common practice, would have totally destroyed the equilibrium that ought to subsist between them and the crown. But the lords took upon themselves the task of maintaining that equilibrium ; they complained with great warmth of the several precedents that were made by the commons, of the prac-

tice we mention: they insisted that bills should be framed '*in the old and decent way of parliament;*' and at last made it a standing order of their house, to reject, upon the sight of them, all bills that are tacked to money bills.

Again, about the thirty-first year of the same reign, a strong party prevailed in the house of commons; and their efforts were not entirely confined, if we may credit the historians of those times, to serving their constituents faithfully, and providing for the welfare of the state. Among other bills which they proposed in their house, they carried one to exclude from the crown the immediate heir to it; an affair this, of a very high nature; and with regard to which it may well be questioned whether the legislative assemblies have a right to form a resolution, without the express and declared concurrence of the body of the people. But both the crown and the nation were delivered from the danger of establishing such a precedent, by the interposition of the lords, who threw out the bill on the first reading.

In the reign of William III., a few years after the Revolution, attacks were made upon the crown from another quarter. A strong party was formed in the house of lords; and, as we may see in bishop Burnet's History of his Own Times, they entertained very deep designs. One of their views, among others, was to abridge the royal prerogative of calling parliaments, and judging of the proper times of doing it.* They accordingly framed and carried in their house a bill for ascertaining the sitting of parliament every year: but the bill, after it had passed in their house, was rejected by the commons. (*Nov.* 28, 1693.)

Again, we find, that, a little after the accession of George I., an attempt was made by a party in the house of lords, to wrest from the crown a prerogative which is one of its finest flowers, and is, besides, the only check it has on the dangerous views which that house (which may stop both money bills and all other bills) might be brought to entertain; I mean the right of adding new members to it, and judging of the times when it may be necessary to do so. A bill was accordingly presented, and carried, in the house of lords, for limiting the members of that house to a fixed number, beyond which it should not be increased; but after great pains taken to ensure the success of this bill, it was at last rejected by the commons.

In fine, the several attempts which a majority in the house of commons have in their turn made to restrain, farther than it now is, the influence of the crown arising from the distribution of preferments and other advantages, have been checked by the house of lords, and

* They, besides, proposed to have all money bills stopped in their house, till they had procured the right of taxing themselves, their own estates, and to have a committee of lords, and a certain number of the commons, appointed to confer together concerning the state of the nation: 'which committee (says bishop Burnet) would soon have grown to have been a council 'of state, that would have brought all affairs under their inspection, and never had been pro-'posed but when the nation was ready to break into civil wars.—Burnet's History, anno 1693.

all place-bills have, from the beginning of the eighteenth century, constantly miscarried in that house.*

Nor have these two powerful assemblies only succeeded in thus warding off the open attacks of each other on the power of the crown. Their co-existence, and the principles upon which they are severally framed, have been productive of another effect much more extensive, though at first less attended to,—I mean the preventing even the making of such attacks; and in times too, when the crown was of itself incapable of defending its authority; the views of each house destroying, upon these occasions, the opposite views of the other, like those positive and negative equal quantities (if I may be allowed the comparison), which destroy each other on the opposite sides of an equation.

Of this we have several remarkable examples: for instance, when the sovereign has been a minor. If we examine the history of other nations, especially before the invention of standing armies, we shall find that the event we mention never failed to be attended with open nvasions of the royal authority, or even sometimes with complete and settled divisions of it. In England, on the contrary, whether we look at the reign of Richard II., or that of Henry VI., or of Edward VI., we shall see that the royal authority was quietly exercised by the councils that were appointed to assist those princes; and when they came of age, it was delivered over to them undiminished.

But nothing so remarkable can be alleged on this subject as the manner in which the two houses have acted upon those occasions, when, the crown being without any present possessor, they had it in their power, both to settle it on what person they pleased, and to divide and distribute its effectual prerogatives, in what manner, and to what set of men, they might think proper. Circumstances like these we mention have never failed, in other kingdoms, to bring on a division of the effectual authority of the crown, or even of the state itself. In Sweden, for instance (to speak of a kingdom which has borne the greatest outward resemblance to that of England) when queen Christina was put under a necessity of abdicating the crown, and it was transferred to the prince who stood next to her in the line of succession, the executive authority in the state was immediately divided, and either distributed among the nobles, or assigned to the

* This is rather a broad assertion. By the act passed in the sixth year of the reign of queen Anne, (A. D. 1707) for the security of her majesty's person and government, and of the succession to the crown of Great Britain, in the Protestant line, it is enacted that no person having any new office whatsoever under the crown, created since Oct. 25, 1705, nor any person holding certain appointments therein mentioned, should be capable of being elected, or sitting, or voting, as a member of the house of commons. And if any person, being a member, accept any such office, his seat becomes vacant, with a power though for him to be re-elected. And by the acts 1 Geo. I. stat. 2, ch. 56, 15 Geo. II. ch. 22, and 22 Geo. III. ch. 45, the incapacity to sit as a member of the house of commons, is extended as well to persons holding offices under the crown, not included in the act of queen Anne, as to pensioners for years and to contractors.—ED.

senate, into which the nobles alone could be admitted; and the new king was only to be a president over it.

After the death of Charles XII., who died without male heirs, the disposal of the crown (the power of which Charles XI. had found means to render again absolute) returned to the states, and was settled on the princess Ulrica, and the prince her husband. But the senate, at the same time it thus settled the possession of the crown, again assumed to itself the effectual authority which had formerly belonged to it. The privilege of assembling the states was vested in that body. They also secured to themselves the power of making war and peace, and treaties with foreign powers,—the disposal of places,—the command of the army and of the fleet,—and the administration of the public revenue. Their number was to consist of sixteen members. The majority of votes was to be decisive upon every occasion. The only privilege of the new king was to have his vote reckoned for two: and if at any time the king should refuse to attend their meetings, the business was nevertheless to be done as effectually and definitely without him.*

But in England, the revolution of the year 1689 was terminated in a manner totally different. Those who at that interesting epoch had the guardianship of the crown,—those in whose hands it lay *vacant*—did not manifest so much as a thought to split and parcel out its prerogative. They tendered it to a single indivisible possessor, impelled as it were by some secret power operating upon them, without any salvo, without any article to establish the greatness of themselves or of their families It is true, those prerogatives destructive of public liberty, which the late king had assumed, were retrenched from the

* The senate had procured a seal to be made, to be affixed to their official resolutions, in case the king should refuse to lend his own. The reader will find more particulars concerning the former government of Sweden in the nineteenth chapter.

Regulations of a similar nature had been made in Denmark, and continued to subsist, with some variations, till the revolution which, in the seventeenth century, placed the whole power of the state in the hands of the crown, without control. The different kingdoms into which Spain was formerly divided, were governed in much the same manner.

And in Scotland, that seat of anarchy and aristocratical feuds, the great offices in the state were not only taken from the crown, but they were moreover made hereditary in the principal families of the body of the nobles: such were the offices of high admiral, high steward, high constable, great chamberlain, and justice general; this last office implied powers analogous to those of the chancellor and the chief justice of the king's bench, united.

The king's minority, or personal weakness, or, in general, the difficulties in which the state might be involved, were circumstances of which the Scotch leaders never failed to avail themselves for invading the governing authority. A remarkable instance of the claims which they used to set forth on those occasions occurs in a bill that was framed in the year 1703, for settling the succession to the crown, after the demise of the queen, under the title of *An Act for the Security of the Kingdom.* The Scotch parliament was to sit by its own authority every year, on the first day of November, and adjourn itself as it should think proper. The king was to give his assent to all laws agreed to, and offered by, the estates; or commission proper officers for doing the same. A committee of one and thirty members, chosen by the parliament, were to be called the King's Council, and govern during the recess, being accountable to the parliament. The king was not to make any foreign treaty without the consent of parliament. All places and offices, both civil and military, and all pensions formerly given by the king, were ever after to be given by parliament.—*Parliamentary Debates*, A. 1703.

crown; and thus far the two houses agreed. But as to any attempt to transfer to other hands any part of the authority of the crown, no proposal was even made about it.—Those branches of prerogative which were taken from the kingly office were annihilated, and made to cease to exist in the state: and all the executive authority that was thought necessary to be continued in the government, was, as before, left undivided in the crown.

In the very same manner was the whole authority of the crown transferred afterwards to the princess who succeeded William III., and who had no other claim to it but what was conferred on her by the parliament. And in the same manner again it was settled, a long time beforehand, on the princes of Hanover who succeeded her.*

There is yet one more extraordinary fact, to which I desire the reader to give attention. Notwithstanding all the revolutions we mention, although parliament hath sat every year since the beginning of this century, and though they have constantly enjoyed the most unlimited freedom both as to the subjects and the manner of their deliberations, and numberless proposals have in consequence been made,—yet such has been the efficiency of each house, in destroying, preventing. or qualifying, the views of the other, that the crown has not been obliged during all that period to make use, even once, of its negative voice; and the last bill rejected by the king of England was that rejected by Will. III. in the year 1692, for triennial parliaments.†

There occurs another instance yet more remarkable of this forbearing conduct of the parliament in regard to the crown, to whatever open or latent cause it may be owing, and how little their *esprit de corps* in reality leads them, amidst the apparent heat sometimes of their struggles, to invade its governing executive authority: I mean, the facility with which they have been prevailed upon to give up any essential branch of that authority, even after a conjunction of preceding circumstances had caused them to be actually in possession of it: a case this, however, that has not frequently happened in the English history. After the restoration of Charles II. for instance, the parliament of their own accord, passed an act (in the first year that followed that event), by which they annihilated at one stroke, both the independent legislative authority, and all claims to such authority, which they had as-

* It may not be improper to observe here, as a farther proof of the indivisibility of the power of the crown (which has been above said to result from the peculiar frame of the English government), that no part of the executive authority of the king is vested in his privy council, as it was in the senate of Sweden: the whole business centres in the sovereign: the votes of the members are not even counted; and in fact, the constant style of the law is, the king *in* council, and not the king *and* council. A proviso is indeed sometimes added to some bills, that certain acts mentioned in them are to be transacted by the king in council; but this is only a precaution taken in the view that the most important affairs of a great nation may be transacted with proper solemnity, and to prevent, for instance, all objections that might, in process of time, be drawn from the uncertainty whether the king had assented, or not, to certain particular transactions. The king names the members of the privy council; or excludes them, by causing their names to be struck out of the book.

† He assented a few years afterwards to that bill, when several amendments had been made in it.

sumed during the preceding disturbances: by the stat. 13 Car. II. c. 1, it was forbidden, under the penalty of a *præmunire*, to affirm that either of the two houses of parliament, or both jointly possess, without the concurrence of the king, the legislative authority. In the fourth year after the Restoration, another capital branch of the governing authority of the crown was also restored to it, without any manner of struggle :—by the stat. 16 Car. II. c. 1, the act was repealed by which it had been enacted, that in case the king should neglect to call a parliament once at least in three years, the peers should issue the writs for an election : and that, should they neglect to issue the same, the constituents should of themselves assemble to elect a parliament.

It is here to be observed, that, in the same reign, the parliament passed the *Habeas Corpus* Act, as well as the other acts that prepared for the same, and in general showed a jealousy in watching over the liberty of the subject, superior perhaps to what has taken place at any other period of the English history. This is another striking confirmation of what has been remarked in a preceding chapter, concerning the manner in which public disturbances have been terminated in England. Here we find a series of parliaments to have been tenaciously and perseveringly jealous of those kinds of popular universal provisions, which great men in other states ever disdained seriously to think of, or give a place to, in those treaties by which internal peace was restored to the nation ; and at the same time these parliaments cordially and sincerely gave up those high and splendid branches of governing authority, which the senates, or assemblies of great men who surrounded the monarchs in other limited monarchies, never ceased anxiously to strive to assume to themselves,—and which the monarchs, after having lost them, never were able to recover but by military violence, aided by surprise, or through national commotions. All these are political singularities, certainly remarkable enough. It is a circumstance in no small degree conducive to the solidity of the executive authority of the English crown (which is the subject of this chapter), that those persons who seem to have it in their power to wrest the same from it, are even prevented from entertaining thoughts of doing so.*

* I shall mention another instance of this real disinterestedness of the parliament in regard to the power of the crown ;—nay, of the strong bent that prevails in that assembly to make the crown the general depository of the executive authority of the nation ; I mean to speak of the manner in which they are accustomed to provide for the execution of such resolutions of an active kind as they may at times adopt ; it is always by addressing the crown for that purpose, and desiring it to interfere with its own executive authority. Even in regard to the printing of their Journals, the crown is applied to by the commons, with a promise of making good to it the necessary expenses. Certainly, if there existed in that body any latent anxiety, any real ambition (I speak here of the general tenor of their conduct) to invest themselves with the executive authority in the state, they would not give up the providing by their own authority, at least for the object just mentioned ; it might give them a pretence for having a set of officers belonging to them, as well as a treasury of their own, and, in short, for establishing in their favour some sort of beginning or precedent ; at the same time that a wish on their part to be the publishers of their own journals, could not be decently opposed by the crown, nor would be likely to be disapproved by the public. To some readers the fact we are speaking

As another proof of the peculiar solidity of the power of the crown, in England, may be mentioned the facility, and safety to itself and to the state, with which it has at all times been able to deprive any particular subjects of their different offices, however overgrown and even dangerous their private power might seem to be. A very remarkable instance of this kind occurred when the great duke of Marlborough was suddenly removed from all his employments: the following is the account given by dean Swift in his 'History of the four last Years of 'the Reign of Queen Anne.'

'As the queen found herself under a neccssity, either, on the one 'side, to sacrifice those friends, who had ventured their lives in rescu- 'ing her out of the power of some, whose former treatment she had 'little reason to be fond of,—to put an end to the progress she had 'made towards a peace, and dissolve her parliament; or, on the other 'side, by removing one person from so great a trust, to get clear of all 'her difficulties at once; her majesty determined upon the latter ex- 'pedient, as the shorter and safer course; and, during the recess at 'Christmas, sent the duke a letter, to tell him she had no farther occa- 'sion for his service.

'There has not perhaps in the present age been a clearer instance to 'show the instability of greatness which is not founded on virtue: and 'it may be an instruction to princes who are well in the hearts of their 'people, that the overgrown power of any particular person, although 'supported by exorbitant wealth, can, by a little resolution, be reduced 'in a moment, without any dangerous consequences. This lord, who 'was, beyond all comparison, the greatest subject in Christendom, 'found his power, credit, and influence, crumble away on a sudden; 'and except a few friends and followers, the rest dropped off in course,' &c. (B. I. near the end.)

The ease with which such a man as the duke was suddenly removed, dean Swift has explained by the necessary advantages of princes who possess the affection of their people, and the natural weakness of power which is not founded on virtue. However, these are very unsatisfactory explanations. The history of Europe, in former times, presents a continual series of examples to the contrary. We see in it numberless instances of princes incessantly engaged in resisting in the field the competition of the subjects invested with the eminent dignities of the realm, who were not by any means superior to them in point of virtue, —or, at other times, living in a continual state of vassalage under some

of may appear trifling; to me it does not seem so: I confess I never see a paragraph in the newspapers, mentioning an address to the crown for borrowing its executive prerogative in regard to the inconsiderable object here allnded to, without pausing on the article. Certainly there must exist causes of a very peculiar nature, which produce in an assembly possessed of so much weight that remarkable freedom from any serious ambition to push their advantages farther,—which inspire it with the great political forbearance we have mentioned, with so sincere an indifference in general, in regard to arrogating to themselves any branch of the executive authority of the crown: they really seem as if they did not know what to do with it after having acquired it, or of what kind of service it may be to them.

powerful man whom they durst not resist, and whose *power*, *credit*, and *influence*, they would have found it far from possible to *reduce in a moment or crumble on a sudden*, by the sending of a single letter, even though assisted *by a little resolution*, to use dean Swift's expression, and without any dangerous consequences.

Nay, certain kings, such as Henry III. of France, in regard to the duke of Guise, and James II. of Scotland, in regard to the two earls of Douglas successively, had at last recourse to plot and assassination; and expedients of a similar sudden violent kind are the settled methods adopted by the eastern monarchs; nor is it very sure that they can always easily do otherwise.*

Even in the present monarchies of Europe, notwithstanding the awful force by which they are outwardly supported, a discarded minister is the cause of more or less anxiety to the governing authority; especially if, through the length of time he has been in office, he happens to have acquired a considerable degree of influence. He is generally sent and confined to one of his estates in the country, which the crown names to him: he is not allowed to appear at court, nor even in the metropolis; much less is he suffered to appeal to the people in loud complaints, to make public speeches to the great men in the state, and intrigue among them, and, in short, to vent his resentment by those bitter, and sometimes desperate methods, which, in the constitution of this country, prove in a great measure harmless.

But a dissolution of the parliament, that is, the dismission of the whole body of the great men in the nation, assembled in a legislative capacity, is a circumstance in the English government, in a much higher degree remarkable and deserving our notice than the depriving any single individual, however powerful, of his public employments. When we consider in what an easy and complete manner such a dissolution is effected in England, we must become convinced that the power of the crown bears upon foundations of very uncommon, though perhaps hidden, strength; especially, if we attend to the several facts that take place in other countries.

In France, for example,† we find the crown, notwithstanding the immense outward force by which it is surrounded, to use the utmost caution in its proceedings towards the parliament of Paris; an assembly only of a judiciary nature, without any legislative authority or avowed

* We might also mention here the case of the emperor Ferdinand II. and the duke of Walstein, which seems to have at the time made a great noise in the world.—The earls of Douglas were sometimes attended by a retinue of 2000 horse. Robertson's History of Scotland.—The Duke of Guise was warned, some hours before his death, of the danger of trusting his person in the king's presence or house; he answered, *On n'oseroit*, They durst not.

If Mary, queen of Scots, had possessed a power analogous to that exerted by queen Anne, she might perhaps have avoided being driven into those instances of ill-conduct which were followed by such tragical consequences.

† We must be observant of the date at which the author last revised his work; namely, the year 1784.—Ed.

claim, and which, in short, is very far from having the same weight in the kingdom of France as the English parliament has in England. The king never repairs to that assembly, to signify his intentions, or hold a *lit de justice*, without the most overawing circumstances of military apparatus and preparation, constantly choosing to make his appearance among them rather as a general than as a king.

And when the king (Louis XV.), having taken a serious alarm at the proceedings of this parliament, at length resolved upon their dismission, he fenced himself, as it were, with his army; and military messengers were sent with every circumstance of secrecy and dispatch, who, at an early part of the day, and at the same hour, surprised each member in his own house, causing them severally to retire to distant parts of the country, which were described to them, without allowing them time to consider, much less to meet, and hold any consultation.

But the person who is invested with the kingly office in England, has need of no other weapon, no other artillery, than the civil *insignia* of his dignity to effect a dissolution of the parliament. He steps into the midst of them, telling them that they are dissolved; and they are dissolved:—he tells them that they are no longer a parliament; and they are no longer so. Like the wand of Popilius,* a dissolution instantly puts a stop to their warmest debates and most violent proceedings. The peremptory words by which it is expressed have no sooner met their ears, than all their legislative faculties are benumbed: though they may still be sitting on the same benches, they look no longer on themselves as forming an assembly; they no longer consider each other in the light of associates or of colleagues. As if some strange kind of weapon, or a sudden magical effort, had been exerted in the midst of them, all the bonds of their union are cut off; and they hasten away, without having so much as the thought of continuing for a single minute the duration of their assembly.†

* A Roman ambassador who stopped the army of Antiochus, king of Syria. *Livii Hist* lib. xlv.

† Nor has London post-horses enough to drive them far and near into the country, when the declaration, by which the parliament is dissolved, also mentions the calling of a new one.

A dissolution, when proclaimed by a common crier assisted by a few beadles, is attended by the very same effects.

To the account of the expedient used by Louis XV. of France to effect the dismission of the parliament of Paris, we may add the manner in which the crown of Spain, more arbitrary perhaps than that of France, undertook some years ago to rid itself of the religious society of the Jesuits, whose political influence and intrigues had grown to give it umbrage. They were seized by an armed force at the same minute of the same day, in every town or borough of that extensive monarchy, where they had residence, in order to their being hurried away to ships that were waiting to carry them into another country; the whole business being conducted with circumstances of secrecy, of surprise, and of preparation, far superior to what is related of the most celebrated conspiracies mentioned in history.

The dissolution of the parliament which Charles II. had called at Oxford is an extremely curious event; a very lively account of it is to be found in Oldmixon's History of England.

If certain alterations, however imperceptible they may perhaps be at first to the public eye, ever take place, the period may come at which the crown will no longer have it in its power to dissolve the parliament; that is to say, a dissolution will no longer be followed by the same effects that it is at present.

To all these observations concerning the peculiar solidity of the authority of the crown in England, I shall add another that is supplied by the whole series of the English history; which is, that though bloody broils and disturbances have often taken place in England, and war been often made against the king, yet it has scarcely ever been done, but by persons who positively and expressly laid claim to the crown. Even while Cromwell contended with an armed force against Charles the First, it was in the king's own name that he waged war against him.

The same objection might be expressed in a more general manner, and with strict truth, by saying that no war has been waged, in England, against the governing authority, except upon national grounds; that is to say, either when the title to the crown has been doubtful, or when general complaints, either of a political or religious kind, have arisen from every part of the nation. As instances of such complaints, may be mentioned those that gave rise to the war against king John, which ended in the passing of the Great Charter; the civil wars in the reign of Charles I.; and the Revolution of the year 1689. From the facts just mentioned it may also be observed as a conclusion, that the crown cannot depend on the great security we have been describing any longer than it continues to fulfil its engagements to the nation, and to respect those laws which form the compact between it and the people. And the imminent dangers, or at least the alarms and perplexities, in which the kings of England have constantly involved themselves, whenever they have attempted to struggle against the general sense of the nation, manifestly show that all that has been above observed concerning the security and remarkable stability somehow annexed to their office, is to be understood, not of the capricious power of the man, but of the lawful authority of the head of the state.*

* One more observation may be made on the subject; which is, that when the kingly dignity had happened in England to be wrested from the possessor, through some revolution, it has been recovered, or struggled for, with more difficulty than in other countries: in all the other countries upon earth, a king *de jure* (by claim) possesses advantages in regard to the king in being, much superior to those of which the same circumstance may be productive in England. The power of the other sovereigns in the world is not so securely established as that of an English king; but then their character is more indelible; that is to say,—till their antagonists have succeeded in cutting off them and their families, they possess, in a high degree, a power to renew those claims and disturb the state. Those family pleas or claims of priority, and, in general, those arguments to which the bulk of mankind have agreed to allow so much weight, cease almost entirely to be of any effect in England, against the person actually invested with the kingly office, as soon as the constitutional parts and springs have begun to move, and, in short, as soon as the machine of the government has once begun to be in full play. An universal general ferment, similar to that which produced the former disturbances, is the only time of real danger.

The remarkable degree of internal national quiet, which, for very near a century past, has followed the Revolution of the year 1689, is a strong proof of the truth of the observations above made; nor do I think that, all circumstances being considered, any other country can produce the like instance.

Second Part of the Chapter.

THERE is certainly a very great degree of singularity in all the circumstances we have been describing here; those persons who are acquainted with the history of other countries cannot but remark with surprise that stability of the power of the English crown,—that mysterious solidity, that inward binding strength with which it is able to carry on with certainty its legal operations, amidst the clamorous struggle and uproar with which it is commonly surrounded, and without the medium of any armed threatening force. To give a demonstration of the manner in which all these things are brought to bear and operate, it is not, as I said before, my design to attempt here; the principles from which such demonstration is to be derived, suppose an inquiry into the nature of man, and of human affairs, which rather belongs to philosophy (though to a branch hitherto unexplored) than to politics; at least such an inquiry certainly lies out of the sphere of the common science of politics.* However, I had a very material reason for introducing all the above-mentioned facts concerning the peculiar stability of the governing authority of England, inasmuch as they lead to an observation of a most important political nature; which is, that this stability allows several essential branches of English liberty to take place, which, without it, could not exist. For there is a very essential consideration to be made in every science, though speculators are sometimes apt to lose sight of it, which is this—in order that things may have existence, they must be *possible;* in order that political regulations of any kind may obtain their effect, they must imply no direct contradiction, either open or hidden, to the nature of things, or to the other circumstances of the government. In reasoning from this principle, we shall find that the stability of the governing executive authority in England, and the weight it gives to the whole machine of the state, have actually enabled the English nation, considered as a free nation, to enjoy several advantages which would really have been totally unattainable in the other states we have mentioned in former chapters, whatever degree of public virtue we might even suppose to have belonged to the men who acted in those states as the advisers of the people, or, in general, who were intrusted with the business of framing the laws.

One of these advantages resulting from the solidity of the government, is, the extraordinary personal freedom which all ranks of individuals in England enjoy at the expense of the government authority. In the Roman commonwealth, for instance, we behold the senate

* It may, if the reader pleases, belong to the science of *metapolitics;* in the same sense as we say *metaphysics;* that is, the science of those things which lie beyond physical or substantial things. A few more words are bestowed upon the same subject in the preface to this work.

invested with a number of powers totally destructive of the liberty of the citizens : and the continuance of these powers was, no doubt, in a great measure, owing to the treacherous remissness of those men to whom the people trusted for repressing them, or even to their determined resolution not to abridge those prerogatives. Yet, if we attentively consider the constant situation of affairs in that republic, we shall find, that though we should suppose those persons to have been ever so truly attached to the cause of the people, it would not really have been possible for them to procure to the people an entire security. The right enjoyed by the senate, of suddenly naming a dictator with a power unrestrained by any law, or of investing the consuls with an authority of much the same kind, and the power it at times assumed of making formidable examples of arbitrary justice, were resources of which the republic could not, perhaps, with safety have been totally deprived : and though these expedients frequently were used to destroy the just liberty of the people, yet they were also very often the means of preserving the commonwealth.

Upon the same principle we should possibly find that the *ostracism*, that arbitrary method of banishing citizens, was a necessary resource in the republic of Athens. A Venetian noble would perhaps also confess, that however terrible the state inquisition, established in his republic, may be even to the nobles themselves, yet it would not be prudent entirely to abolish it. And we do not know but a minister of state in France, though ever so virtuous and moderate a man, would say the same with regard to secret imprisonments, the *lettres de cachet* and other arbitrary deviations from the settled course of law, which often take place in that kingdom, and in the other monarchies of Europe. No doubt, if he was the man we suppose, he would confess that the expedients mentioned, have, in numberless instances, been basely prostituted to gratify the wantonness and private revenge of ministers, or of those who had any interest with them ; but still perhaps he would continue to give it as his opinion, that the crown, notwithstanding its apparently immense strength, could not avoid recurring at times to expedients of this kind ; much less could it publicly and absolutely renounce them for ever.

It is therefore a most advantageous circumstance in the English government, that its security renders all such expedients unnecessary, and that the representatives of the people have not only been constantly willing to promote the public liberty, but that the general situation of affairs has also enabled them to carry their precautions as far as they have done. And indeed, when we consider what prerogatives the crown, in England, has implicitly renounced ;—that, in consequence of the independence conferred on the judges, and of the method of *trial by jury*, it is deprived of all means of influencing the settled course of the law both in civil and criminal matters :—that it has renounced all

power of seizing the property of individuals, and even of restraining in any manner whatsoever, and for the shortest time, the liberty of their persons ;—we do not know which we ought most to admire, whether the public virtue of those who have deprived the supreme executive power of all those dangerous prerogatives, or the nature of that same power, which has enabled it to give them up without ruin to itself,—whether the happy frame of the English government, which makes those in whom the people trust, continue so faithful to the discharge of their duty, or the solidity of that same government, which can afford to leave to the people so extensive a degree of freedom.*

Again, the liberty of the press, that great advantage enjoyed by the English nation, does not exist in any of the other monarchies of Europe, however well established their power may at first seem to be ; and it might even be demonstrated that it cannot exist in them. The most watchful eye, we see, is constantly kept in those monarchies upon every kind of publication ; and a jealous attention is paid even to the loose and idle speeches of individuals. Much unnecessary trouble (we may be apt at first to think) is taken upon this subject : but yet if we consider how uniform is the conduct of all those governments, how constant and unremitted are their cares in those respects, we shall become convinced, without looking farther, that there must be some sort of necessity for their precautions.

In republican states, for reasons which are at bottom the same as in the before-mentioned governments, the people are also kept under the greatest restraints by those who are at the head of the state. In the Roman commonwealth, for instance, the liberty of writing was curbed by the severest laws :† with regard to the freedom of speech, things were but little better, as we may conclude from several facts ; and many instances may even be produced of the dread with which the private citizens, upon certain occasions, communicated their political opinions to the consuls, or to the senate. In the Venetian republic, the press is most strictly watched ; nay, to forbear to speak in any matter whatsoever of the conduct of the government is the funda-

* At the times of the invasions of the Pretender, assisted by the forces of hostile nations, the *Habeas Corpus* Act was indeed suspended (which by the bye may serve as one proof, that, in proportion as a government is in danger, it becomes necessary to abridge the liberty of the subject) : but the executive power did not thus of itself stretch its own authority ; the precaution was deliberated upon and taken by the representatives of the people ; and the detaining of individuals in consequence of the suspension of the act was limited to a certain fixed time. Notwithstanding the just fears of internal and hidden enemies which the circumstances of the times might raise, the deviation from the former course of the law was carried no farther than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals ; the proceedings against them were to be carried on no otherwise than in a public place : they were to be tried by their peers, and have all the usual legal means of defence allowed to them, such as calling of witnesses, peremptory challenge of juries, &c.

† The law of the Twelve Tables had established the punishment of death against the author of a libel : nor was it by a *trial by jury* that they determined what was to be called a libel. SI QUIS CARMEN OCCENTASSIT, ACTITASSIT, CONDIDISSIT, QUOD ALTERI FLAGITIUM FAXIT, CAPITAL ESTO.

mental maxim which they inculcate on the minds of the people throughout their dominions.*

With respect therefore to this point, it may again be looked upon as a most advantageous circumstance in the English government, that those who have been at the head of the people have not only been constantly disposed to procure the public liberty, but also that they have found it possible for them to do so; and that the remarkable strength and steadiness of the government have admitted of that extensive freedom of speaking and writing which the people of England enjoy. A most advantageous privilege this! which affording to every man a means of laying his complaints before the public, procures him almost a certainty of redress against any act of oppression that he may have been exposed to: and which leaving, moreover, to every subject a right to give his opinion on all public matters, and, by thus influencing the sentiments of the nation, to influence those of the legislature itself (which is sooner or later obliged to pay a deference to them), procures to him a sort of legislative authority of a much more efficacious and beneficial nature than any formal right he might enjoy of voting by a *yea* or *nay*, upon general propositions suddenly offered to him, and which he could have neither a share in framing, nor any opportunity of objecting to and modifying.

Such a privilege, by supporting in the people a continual sense of their security, and affording them undoubted proofs that the government, whatever may be its form, is ultimately designed to ensure the happiness of those who live under it, is both one of the greatest advantages of freedom, and its surest characteristic. The kind of security, as to their persons and possessions, which subjects, who are totally deprived of that privilege, enjoy at particular times under other governments, perhaps may entitle them to look upon themselves as the well administered property of masters who rightly understand their own interests; but it is the right of canvassing without fear the conduct of those who are placed at their head, which constitutes a free nation.†

* Of this I have myself seen a proof somewhat singular, which I beg leave of the reader to relate. Being, in the year 1768, at Bergamo, the first town of the Venetian state as you come into it from the state of Milan, about 120 miles distant from Venice, I took a walk in the evening in the neighbourhood of the town: and wanting to know the names of several places which I saw at a distance, I stopped a young countryman to ask for information. Finding him to be a sensible young man, I entered into some farther conversation with him; and as he had himself a great inclination to see Venice, he asked me, whether I proposed to go there? I answered that I did: on which he immediately warned me, when I was at Venice, not to speak of the prince *(del prencipe)*; an appellation assumed by the Venetian government, in order, as I suppose, to convey to the people a greater idea of their union among themselves. As I wanted to hear him talk farther on the subject, I pretended to be entirely ignorant in that respect, and asked for what reason I must not speak of the prince? But he (after the manner of the common people in Italy, who, when strongly affected by anything, rather choose to express themselves by some vehement gesture than by words) ran the edge of his hand, with great quickness, along his neck, meaning thereby to express, that being strangled, or having one's throat cut, was the instant consequence of taking such liberty.

† If we consider the great advantages to public liberty which result from the institution of the trial by jury, and from the liberty of the press, we shall find England to be in reality a more democratical state than any other we are acquainted with. The judicial power, and the censorial power, are vested in the people.

The unbounded freedom of debate, possessed by the English parliament, is also a consequence of the peculiar stability of the government. All sovereigns have agreed in their jealousy of assemblies of this kind, in their dread of the privileges of assemblies who attract in so high a degree the attention of the rest of the people,—who in the course of time become connected by so many essential ties with the bulk of the nation, and acquire so much real influence by the essential share they must needs have in the management of public affairs, and by the eminent services, in short, which they are able to perform to the community.* Hence it has happened that monarchs, or single rulers, in all countries, have endeavoured to dispense with the assistance of assemblies like those we mention, notwithstanding the capital advantages they might have derived from their services towards the good government of the state ; or, if the circumstances of the times have rendered it expedient for them to call such assemblies together, they have used the utmost endeavours in abridging those privileges and legislative claims which they soon found to prove so hostile to their security : in short, they have ever found it impracticable to place an unreserved trust in public meetings of this kind.

We may here name Cromwell, as he was supported by a numerous army, and possessed more power than any foreign monarch who has not been secured by an armed force. Even after he had *purged*, by the agency of colonel Pride and two regiments, the parliament that was sitting when his power became settled, thereby thrusting out all his opponents, to the amount of about two hundred, he soon found his whole authority endangered by the proceedings of those who remained, and was under a necessity of turning them out in the military manner with which every one is acquainted. Finding still a meeting of this kind highly expedient to legalise his military authority, he called together that assembly which was called *Barebones'* parliament. He had himself chosen the members of this parliament, to the number of about a hundred and twenty, and they had severally received the summons from him ; yet notwithstanding this circumstance, and the total want of personal weight in most of the members, he began in a very few months, and in the midst of his powerful victorious army, to feel a serious alarm at their proceedings ; he soon heard them talk of their own divine commission, and of the authority they had received from the *Lord;* and, in short, finding he could not trust them, he employed the offices of a second colonel, to effect their dismission. Being now dignified with the legal appellation of *Protector*, he ventured to call a parliament elected by considerable parts of the people ; but though the existence of this parliament was grounded, we might say grafted, upon

* And which they do actually perform, till they are able to throw off the restraints of impartiality and moderation,—a thing which, being men, they never fail to do when their influence is generally established, and proper opportunities offer. Sovereigns know these things, and dread them.

his own, and though bands of soldiers were even posted in the avenues to keep out all such members as refused to take certain personal engagements to him, he made such haste, in the issue, to rid himself of their presence, as to contrive a mean quibble or device to shorten the time of their sitting by ten or twelve days.* To a fourth assembly he again applied; but though the elections had been so managed as to procure him a formal tender of the crown during the first sitting, he put an end to the second with resentment and precipitation.†

The example of the Roman emperors, whose power was outwardly so prodigious, may also be introduced here. They used to show the utmost jealousy in their conduct with respect to the Roman senate; and that assembly, which the prepossession of the people, who looked upon it as the ancient remains of the republic, had made it expedient to continue, were not suffered to assemble but under the drawn scymitars of the prætorian guards.

Even the kings of France, though their authority is so unquestioned, so universally respected, as well as strongly supported, have felt frequent anxiety from the claims and proceedings of the parliament of Paris, an assembly of much less weight than the English parliament. The alarm has been mentioned which Louis XV. at last expressed concerning their measures, as well as the expedient to which he resorted, to free himself from their presence. And when his successor thought proper to call again this parliament together, a measure highly prudent in the beginning of his reign, every jealous precaution was at the same time taken to abridge those privileges of deliberating and remonstrating, upon which any distant claim to, or struggle for, a share of the supreme authority, might be grounded.

It may be objected that the pride of kings or single rulers makes them averse to the existence of assemblies like those we mention, and despise the capital services which they might derive from them for the good government of their kingdoms. I grant it may in some measure be so. But if we inquire into the general situation of affairs in different states, and into the examples with which their history supplies us, we shall also find that the pride of those kings agrees in the main with the interest and quiet of their subjects, and that their preventing the assemblies we speak of from meeting, or, when met, from assuming too large a share in the management of public affairs, is, in a great measure, matter of necessity.

We may therefore reckon it as a very great advantage, that, in

* They were to have sat five months; but Cromwell pretended that the months were to consist of only twenty-eight days; as this was the way of reckoning time used in paying the army and the fleet.

† The history of the conduct of the deliberating and debating assemblies we are alluding to, in regard to the monarchs, or single rulers of any denomination, who summon them together, may be expressed in very few words. If the monarch is unarmed, they over-rule him so as almost entirely to set him aside; if his power is of a military kind, they form connexions with the army.

England, no such necessity exists. Such is the frame of the government, that the supreme executive authority can both give leave to assemble, and show the most unreserved trust, when assembled, to those two houses which concur together to form the legislature.

These two houses, we see, enjoy the most complete freedom in their debates, whether the subject be *grievances*, or regulations concerning government matters of any kind : no restriction whatever is laid upon them ; they may start any subject they please. The crown is not to take any notice of their deliberations : its wishes, or even its name, are not to be introduced in the debates. And, in short, what makes the freedom of deliberating, exercised by the two houses, really unlimited, is the privilege, or sovereignty we may say, enjoyed by each within its own walls, in consequence of which, nothing done or said in parliament is to be questioned in any place out of parliament. Nor will it be pretended by those persons who are acquainted with the English history, that these privileges of parliament we mention are nominal privileges, only privileges upon paper, which the crown has disregarded whenever it has thought proper, and to the violations of which the parliament have used very tamely to submit. That these remarkable advantages,—this total freedom from any compulsion or even fear, and, in short, this unlimited liberty of debate, so strictly claimed by the parliament, and so scrupulously allowed by the crown,—should be exercised, year after year, during a long course of time, without producing the least relaxation in the execution of the laws, the smallest degree of anarchy,—are certainly very singular political phænomena.

It may be said, that the remarkable solidity of the governing executive authority, in England, operates to the advantage of the people with respect to the objects we mention, in a two-fold manner. In the first place, it so far takes from the great men in the nation all serious ambition to invade this authority, that their debates do not produce such anarchical and more or less bloody struggles as have very frequently disturbed other countries. In the second place, it inspires those great men with that salutary jealousy of the same authority which leads them to frame such effectual provisions for laying it under proper restraints. On which I shall observe, by way of a short digression, that this distinguished *stability* of the executive authority of the English crown affords an explanation of the peculiar manner in which public commotions have constantly been terminated in England, compared with the manner in which the same events have been concluded in other kingdoms.—When I mentioned in a former chapter, this peculiarity in the English government, I mean the accuracy, impartiality, and universality of the provisions by which peace, after internal disturbances, has been restored to the nation, I confined my comparisons to instances drawn from republican governments, purposely postponing to say anything of governments of a monarchical

form, till I had introduced the very essential observations contained in this chapter, which is, that the power of *crowns*, in other monarchies, has not been able, by itself, to produce the same effects it has in England,—that is, has not been able to inspire the great men in the state with any thing like that salutary jealousy we mention, nor of course to induce them to unite in a real common cause with the rest of the people. In other monarchies,* those men who, during the continuance of the public disturbances, were at the head of the people, finding it in their power in the issue, to parcel out, more or less, the supreme governing authority (or even the state itself), and to transfer the same to themselves, constantly did so, in the same manner, and for the very same reasons, as it happened in the ancient commonwealths; those monarchical governments being in reality, so far as that, of a republican nature: and the governing authority was left, at the conclusion, in the same undefined extent it had before.† But in England, the great men in the nation finding themselves in a situation essentially different, lost no time in pursuits like those in which the great men of other countries used to indulge themselves on the occasions we mention. Every member of the legislature plainly perceived, from the general aspect of affairs, and his feelings, that the supreme executive authority in the extent must in the issue fall somewhere undivided, and continue so; and being moreover sensible, that neither personal advantages of any kind, nor the power of any faction, but the law alone, could afterwards be an effectual restraint upon its motions, they had no thought or aim left, except to frame with care those laws on which their own liberty was to continue to depend, and to restrain a power which they judged it so impracticable to transfer to themselves or to their party, or to render themselves independent of. These observations I thought necessary to be added to those in the fifteenth chapter to which I now refer the reader.

Nor has the great freedom of canvassing political subjects we have described, been limited to the members of the legislature, or confined to the walls of Westminster, that is, to the exclusive spot on which the two houses meet: the like privilege is allowed to the other orders of the people: and a full scope is given to that spirit of party, and a complete security ensured to those numerous and irregular meetings, which, especially when directed to matters of government, create so much uneasiness in the sovereigns of other countries. Individuals even may, in such meetings, take an active part for procuring the success of those public steps which they wish to see pursued: they may frame petitions to be delivered to the crown, or to both houses, either to procure the

* I mean before the introduction of those numerous standing armies which are now kept by all the crowns of Europe: since that epoch, which is of no very ancient date, no treaty has been entered into by those crowns with any subject.

† As a remarkable instance of such a treaty, may be mentioned that by which the war for *the public good* was terminated in France.

repeal of measures already entered upon by government, or to prevent the passing of such as are under consideration, or to obtain the enacting of new regulations of any kind; they may severally subscribe their names to such petitions: the law sets no restriction on their numbers; nor has it, we may say, taken any precaution to prevent even the abuse that might be made of such freedom.

That mighty political engine, the press, is also at their service; they may avail themselves of it to advertise the time and place, as well as the intent, of the meetings, and moreover to set off and inculcate the advantages of those notions which they wish to see adopted.

Such meetings may be repeated; and every individual may deliver what opinion he pleases on the proposed subjects, though ever so directly opposite to the views or avowed designs of the government. The member of the legislature may, if he chooses, have admittance among them, and again enforce those topics which have not obtained the success he expected, in that house to which he belongs. The disappointed statesman, the minister turned out, also find the door open to them: they may bring in the whole weight of their influence and of their connexions: they may exert every nerve to enlist the assembly in the number of their supporters; they are bidden to do their worst: they fly through the country from one place of meeting to another; the clamour increases: the constitution, one may think, is going to be shaken to its very foundations:—but these mighty struggles, by some means or other, always find a proportionate degree of re-action; new difficulties, and at last insuperable impediments, grow up in the way of those who would take advantage of the general ferment to raise themselves on the wreck of the governing authority: a secret force exerts itself, which gradually brings things back to a state of moderation and calm; and that sea so stormy, to appearance so deeply agitated, constantly stops at certain limits which it seems as if it wanted the power to pass.

The impartiality with which justice is dealt to all orders of men in England, is also in great measure owing to the peculiar stability of the government: the very remarkable, high degree, to which this impartiality is carried, is one of those things, which, being impossible in other countries, are possible under the government of this country. In the ancient commonwealths, from the instances that have been introduced in a former place, and from others that might be quoted, it is evident that no redress was to be obtained for the acts of injustice or oppression committed by the men possessed of influence or wealth, upon the inferior citizens. In the monarchies of Europe, in former times, abuses of a like kind prevailed to a most enormous degree. In our days, notwithstanding the great degrees of strength acquired by the different governments, it is matter of the utmost difficulty for subjects of the inferior classes to obtain the remedies of the law against certain individuals; in some countries it is impossible, let the abuse be

ever so flagrant; an open attempt to pursue such remedies being moreover attended with danger. Even in those monarchies of Europe in which the government is supported both by real strength, and by civil institutions of a very advantageous nature, great differences prevail between individuals in regard to the facility of obtaining the remedies of the law: and to seek for redress, is at best, in many cases, so arduous and precarious an attempt, as to take from injured individuals all thoughts of encountering the difficulty. Nor are these abuses we mention, in the former or present governments of Europe, to be attributed only to the want of resolution in the heads of those governments. In some countries, the sovereign, by an open design to suppress these abuses, would have endangered at once his whole authority: and in others, he would find obstructions multiply so in his way as to compel him, perhaps very quickly, to drop the undertaking. How can a monarch, alone, make a persevering stand against the avowed expectations of all the great men by whom he is surrounded, and against the loud claims of powerful classes of individuals? In a commonwealth, what can the senate do when they find that their refusing to protect a powerful offender of their own class, or to indulge some great citizen with the impunity of his friends, is likely to be productive of serious divisions among themselves, or perhaps of disturbances among the people?

If we cast our eyes on the strict and universal impartiality with which justice is administered in England, we shall soon become convinced that some inward essential difference exists between the English government and those of other countries, and that its power is founded on causes of a distinct nature. Individuals of the most exalted rank do not entertain so much as the thought to raise the smallest direct opposition to the operation of the law. The complaint of the meanest subject, if preferred and supported in the usual way, immediately meets with a serious regard. The oppressor of the most extensive influence, though in the midst of a train of retainers, nay, though in the fullest flight of his career and pride, and surrounded by thousands of applauders and partisans, is stopped short at the sight of the legal paper which is delivered into his hands; and a tipstaff is sufficient to bring him away, and produce him before the bench.

Such is the *greatness*, and such the uninterrupted *prevalence* of the law; *(Lex magna est, et prævalebit;)* such is, in short, the continuity of omnipotence, of resistless superiority which it exhibits, that the extent of its effects at length ceases to be a subject of observation to the public.

Nor are great or wealthy men to seek for redress or satisfaction of any kind, by any other means than such as are open to all; even the sovereign has bound himself to resort to no other; and experience has shown that he may without danger trust the protection of his person,

and of the places of his residence, to the slow and litigious assistance of the law.*

Another very great advantage attending the remarkable stability of the English government, is, that the same is effected without the assistance of an armed standing force : the constant expedient this of all other governments. On this occasion I shall introduce a passage of Adam Smith,† in a work published since the present chapter was first written, in which passage an opinion certainly erroneous is contained; the mistakes of persons of his very great abilities deserve attention. This gentleman, struck with the necessity of a sufficient power of reaction, of a sufficient strength, on the side of government, to resist the agitations attendant on liberty, has looked round, and judged that the English government derived the singular stability it manifests from the standing force it has at its disposal: the following are his expressions :—'To a sovereign who feels himself supported, not only by the 'natural aristocracy of the country, but by a well-regulated standing 'army, the rudest, the most groundless, and the most licentious remon-'strances can give but little disturbance. He can safely pardon or 'neglect them, and his consciousness of his superiority naturally dis-'poses him to do so. *That degree of liberty which approaches to li-'centiousness, can be tolerated only in countries where the sovereign is 'secured by a well-regulated standing army.*'‡

The above positions are grounded on the notion, that an army places in the hands of the sovereign a united irresistible strength, a strength liable to no accidents, difficulties, or exceptions; a supposition this, which is not conformable to experience. If a sovereign was endued with a kind of extraordinary power attending on his person, at once to lay under water whole legions of insurgents, or to repulse and sweep them away by flashes and shocks of the electrical fluid, then indeed he might use the great forbearance above described:—though it is not perhaps very likely he would put up with the *rude* and *groundless* remonstrances of his subjects, and with their *licentious* freedom, yet he might, with safety, do or not do so, at his own choice. But an army is not that simple weapon which is here supposed. It is formed of officers and soldiers who feel the same passions with the rest of the people,—the same disposition to promote their own interest and importance, when they find out their strength, and proper opportunities offer. What will therefore be the resource of the sovereign, if into that army on the assistance of which he relies, the same party spirit creeps, by which his other subjects are actuated? Where will he take refuge, if

* I remember, soon after my first coming to this country, I took notice of the boards set up from place to place behind the inclosure of Richmond park.—'Whoever trespasses upon 'this ground will be prosecuted.'

† An *Inquiry into the Nature and Causes of the Wealth of Nations*. Book v. chap. i.

‡ The author's design, in the whole passage, is to show that standing armies, under proper restrictions, cannot be hurtful to public liberty: and may in some cases be useful to it, by freeing the sovereign from any troublesome jealousy in regard to this liberty.

the same political caprices, abetted by the serious ambition of a few leading men,—the same restlessness, and at last perhaps the same disaffection,—begin to pervade the smaller kingdom of the army, by which the main kingdom or nation is agitated?

The prevention of dangers like those just mentioned constitutes the most essential part of the precautions and state-craft of rulers, in those governments which are secured by standing armed forces. Mixing the troops formed of natives with foreign auxiliaries, dispersing them in numerous bodies over the country, and continually shifting their quarters, are among the methods that are used; which it does not belong to our subject to enumerate, any more than the extraordinary expedients employed by the eastern monarchs for the same purposes. But one caution, very essential to be mentioned here, and which the governments we allude to never fail to take before every other, is to retrench from their unarmed subjects a freedom, which, transmitted to the soldiery, would be attended with such fatal consequences; hindering such bad examples from being communicated to those in whose hands their power and life are trusted, is what every notion of self-preservation suggests to them; every weapon is accordingly exerted to suppress the rising and spreading of so awful a contagion.

In general, it may be laid down as a maxim, that, where the sovereign looks to his army for the security of his person and authority, the same military laws by which this army is kept together, must be extended over the whole nation; not in regard to military duties and exercises, but certainly in regard to all that relates to the respect due to the sovereign and to his orders. The martial law, concerning these tender points, must be universal. The jealous regulations concerning mutiny and contempt of orders cannot be severely enforced on that part of the nation which secures the subjection of the rest, and enforced too through the whole scale of military subordination, from the soldier to the officer, up to the very head of the military system,—while the more numerous and inferior part of the people are left to enjoy an unrestrained freedom:—that secret disposition which prompts mankind to resist and counteract their superiors cannot be surrounded by such formidable checks on one side, and be left to be indulged to a degree of licentiousness and wantonness on the other.

In a country where an army is kept, capable of commanding the obedience of the nation, this army will both imitate the licentiousness above-mentioned, and check it in the people. Every officer and soldier, in such a country, claims a superiority in regard to other individuals; and, in proportion as their assistance is relied upon by the government, expects a greater or less degree of submission from the rest of the people.*

* In the beginning of the passage which is here examined, the author says, 'Where the 'sovereign is himself the general, and the principal nobility and gentry of the country are 'the chief officers of the army,—where the military force is placed under the command of 'those who have the greatest interest in the support of the civil authority, because they have

The same author concludes his above quoted observations concerning the security of the power of an armed sovereign, by immediately adding: 'It is in such countries only that it is unnecessary that the 'sovereign should be trusted with any discretionary power for suppressing even the wantonness of this licentious liberty.' The idea here expressed coinciding with those already discussed, I shall say nothing farther on the subject. My reason for introducing the above expressions, has been, that they lead me to take notice of a remarkable circumstance in the English government. From the expression, *it is unnecessary that the sovereign should be trusted with any discretionary power*, the author appears to think that a sovereign at the head of an army, and whose power is secured by this army, usually waits to set himself in motion, till he has received leave for that purpose; that is, till he has been trusted with a power for so doing. This notion in the author we quote, is borrowed from the steady and thoroughly legal government of this country: but the like law-doctrine, or principle, obtains under no other government. In all monarchies (and it is the same in republics), the executive power in the state is supposed to possess, originally and by itself, all manner of lawful authority; every one of its exertions is deemed to be legal: and they do not cease to be so, till they are stopped by some express and positive regulation.—The sovereign, and also the civil magistrate, till so stopped by some positive law, may come upon the subject when they choose: they may question any of his actions; they may construe them into unlawful acts; and inflict a penalty, as they please: in these respects they may be thought to abuse, but not to exceed their power. The authority of the government, in short, is supposed to be unlimited so far as there are no visible boundaries set up against it; within which boundaries lies whatever degree of liberty the subject may possess.

In England the very reverse obtains. It is not the authority of the government, it is the liberty of the subject which is supposed to be un-

'the greatest share of that authority,—a standing army can never be dangerous to liberty. On 'the contrary, it may in some cases be favourable to liberty,' &c. In a country so circumstanced, a standing army can never be dangerous to liberty; no, not the liberty of those principal nobility and gentry, especially if they have wit enough to form combinations among themselves against the sovereign. Such a union as is here mentioned, of the civil and military powers, in the aristocratical body of the nation, leaves both the sovereign and the people without resource. If the former kings of Scotland had adopted the expedient of a standing army, and had trusted this army, thus defrayed by them, to those noblemen and gentlemen who had rendered themselves hereditary admirals, hereditary high-stewards, hereditary high-constables, hereditary great-chamberlains, hereditary justices-general, hereditary sheriffs of counties, &c., they would have ill repaired the disorders under which the government of their country laboured; they would only have supplied these nobles with fresh weapons against each other, against the sovereign, and against the people.

If those members of the British parliament, who sometimes make the whole nation resound with the clamour of their dissensions, had an army under their command which they might engage in the support of their pretensions, the rest of the people would not be the better for it. Happily the swords are secured, and force is removed from their debates.

The author whom we are quoting has deemed a government to be a more simple machine, and an army a more simple instrument, than they in reality are. Like many other persons of great abilities, while struck with a certain peculiar consideration, he has overlooked others no less important.

bounded. All the actions of an individual are supposed to be lawful, till that law is pointed out which makes them to be otherwise. The *onus probandi* is here transferred from the subject to the prince. The subject is not at any time to show the grounds of his conduct. When the sovereign or magistrate think proper to exert themselves, it is their business to find out and produce the law in their own favour, and the prohibition against the subject.*

This kind of law principle, owing to the general spirit by which all parts of the government are influenced, is even carried so far, that any quibble, or trifling circumstance, by which an offender may be enabled to step aside and escape, though ever so narrowly, the reach of the law, will screen him from punishment, let the immorality or intrinsic guilt of his conduct be ever so openly admitted.†

Such a narrow circumscription of the exertions of the government is very extraordinary; it does not exist in any other country but this; nor could it. The situation of other governments is such, that they cannot thus allow themselves to be shut out of the unbounded space unoccupied by any law, in order to have their motions confined to that spot which express and previously declared provisions have chalked out. The power of these governments being constantly attended with more or less precariousness, there must be a degree of *discretion* answerable to it.‡

* I shall take the liberty to mention another fact respecting myself, as it may serve to elucidate the above observations, or at least my manner of expressing them. I remember, when I was beginning to pay attention to the operations of the English government, I was under a prepossession of quite a contrary nature to that of a gentleman whose opinions have been discussed: I used to take it for granted that every article of liberty the subject enjoys in this country was grounded upon some positive law by which this liberty was ensured to him. In regard to the freedom of the press, I had no doubt that it was so, and that there existed some particular law, or rather series of laws or legislative paragraphs, by which this freedom was defined and carefully secured: and as the liberty of writing happened at that time to be carried very far, and to excite a great deal of attention (the noise about the Middlesex election had not yet subsided), I particularly wished to see those laws, I supposed, not doubting that there must be something remarkable in the wording of them. I looked into those law books which I could meet with; such as Jacob's and Cunningham's *Law Dictionaries*, Wood's *Institutes*, and judge Blackstone's *Commentaries*. I also found means to have a sight of Comyn's *Digest of the Laws of England*, and I was again disappointed: this author, though the work consists of five folio volumes, had not had, any more than the authors just mentioned, room to spare for the interesting law I was in search of. At length it occurred to me, that this liberty of the press was grounded upon its not being prohibited;—that this want of prohibition was the sole, and at the same time solid, foundation of it. This led me, when I afterwards thought of writing upon the government of this country, to give that definition of the freedom of the press which is contained in pp. 258-263: adding to it the important consideration, that all actions respecting publications are to be decided by a jury.

† A number of instances, some even of a ludicrous kind, might be quoted in support of the above observation. Even a trifling flaw in the mere words of an indictment is enough to make it void. I do not remember the name of that political author, who, having published a treasonable writing for which he escaped punishment, used afterwards to answer to his friends, when they reproached him with his rashness, *I knew I was writing within an inch of the gallows.* The law being both ascertained and strictly adhered to, he had been enabled to bring his words and positions so nicely within due compass.

‡ It might perhaps also be proved, that the great lenity used in England in the administration of criminal justice, both in regard to the mildness, and to the frequent remission of punishments, is essentially connected with the same circumstance of the *stability* of the government. Experience indicates that it is needless to use any great degree of harshness and severity in regard to offenders; and the supreme governing authority is under no necessity of showing the subordinate magistracies any bad example in that respect.

The foundation of that law principle, or doctrine, which confines the exertion of the power of the government to such cases only as are expressed by a law in being, was laid when the Great Charter was passed: this restriction was implied in one of those general impartial articles which the barons united with the people to obtain from the sovereign. The crown, at that time, derived from its foreign dominions that stability and inward strength (in regard to the English nation), which are now in a secret hidden manner annexed to the civil branch of its office, and which, though operating by different means, continue to maintain that kind of confederacy against it, and union between the different orders of the people. By the article in *Magna Charta* here alluded to, the sovereign bound himself neither to *go*, nor *send*, upon the subject, otherwise than by the trial of peers, and the law of the land. This article was, however, afterwards disregarded in practice, in consequence of the lawful efficiency which the king claimed for his *proclamations*, and especially by the institution of the court of *Star-chamber*, which grounded its proceedings not only upon these proclamations, but also upon the particular rules it chose to frame within itself. By the abolition of this court (and also of the court of High Commission) in the reign of Charles I., the above provision of the Great Charter was put in actual force; and it has appeared by the event, that the very extraordinary restriction upon the governing authority we are alluding to, and its execution, are no more than what the intrinsic situation of things, and the strength of the constitution, can bear.*

The law doctrine we have above described, and its being strictly regarded by the high governing authority, I take to be the most characteristic circumstance in the English government, and the most pointed proof that can be given of the true freedom which is the consequence of its frame. The practice of the executive authority thus to square its motions upon such laws, and such only as are ascertained and declared beforehand, cannot be the result of that kind of stability which the crown might derive from being supported by an armed force, or, as the above-mentioned author has expressed it, from the sovereign being the general of an army; such a rule of acting is even contradictory to the office of a general: the operations of a general eminently depend for their success, on their being sudden, unforeseen, attended by surprise.

In general, the stability of the power of the English crown cannot

* The court of Star-chamber was like a court of equity in regard to criminal matters; it took upon itself to decide, upon those cases of offence upon which the usual courts of law, when uninfluenced by the crown, refused to decide, either on account of the silence of the laws in being, or of the particular rules they had established within themselves; which is exactly the office of the court of Chancery (and of the Exchequer) in regard to matters of property. The great usefulness of courts of this kind has caused the courts of Equity, in regard to civil matters, to be supported and continued: but experience has shown, that no essential inconvenience can arise from the subject being indulged with the very great freedom he has acquired by the total abolition of all arbitrary or provisional courts in regard to criminal matters.

be the result of that kind of strength which arises from an armed force: the kind of strength which is conferred by such a weapon as an army, is too uncertain, too complicated, too liable to accidents: in a word, it falls infinitely short of the degree of steadiness necessary to counterbalance, and at last quiet, those extensive agitations in the people which sometimes seem to threaten the destruction of order and government. An army, if its support be well directed, may be useful to prevent this restlessness in the people from beginning to exist; but it cannot keep it within bounds, when it has once taken place.

If, from general arguments and considerations, we pass to particular facts, we shall actually find that the crown, in England, does not rely for its support, nor ever has relied, upon the army of which it has the command. From the earliest times,—that is, long before the invention of standing armies among European princes,—the kings of England possessed an authority certainly as full and extensive as that which they now enjoy. After the weight they derived from their possessions beyond sea had been lost, a certain arrangement of things began to be formed at home, which supplied them with strength of another kind, though not less solid; and they began to derive from the civil branch of their regal office that secure power which no other monarchs had ever possessed, except through the assistance of legions and prætorian guards, of armies of Janissaries, or of Strelitzes.

The princes of the house of Tudor, to speak of a very remarkable period in the English history, though they had no other visible present force than inconsiderable retinues of servants, were able to exert a power equal to that of the most absolute monarchs that ever reigned; equal to that of a Domitian or a Commodus, an Amurath or a Bajazet: nay, it even was superior, if we consider the steadiness and outward show of legality with which it was attended throughout.

The stand which the kings of the house of Stuart were able to make, though unarmed, and only supported by the civil authority of their office, during a long course of years, against the restless spirit which began to actuate the nation, and the vehement political and religious notions that broke out in their time, is still more remarkable than even the exorbitant power of the princes of the house of Tudor, during whose reign prepossessions of a contrary nature were universal.

The struggle opened with the reign of James I.; yet he peaceably weathered the beginning storm, and transmitted his authority undiminished to his son. Charles I., indeed, was at last crushed under the ruins of the constitution; but if we consider that, after making the important national concessions contained in the *Petition of Right*, he was able, single and unarmed, to maintain his ground without loss or real danger, during the space of eleven years (that is, till the year 1640), we shall be inclined to think that, had he been better advised, he might have avoided the misfortunes that at length befell him.

Even the events of the reign of James II. afford a proof of that solidity which is annexed to the authority of the English crown. Although the whole nation, not excepting the army, were in a manner unanimous against him, he was able to reign four years, standing single against all, without meeting with any open resistance. Nor was such justifiable and necessary resistance easily brought about at length.* Though it is not to be doubted that the dethroning of James II. would have been effected in the issue, and perhaps in a very tragical manner; yet, if it had not been for the assistance of the prince of Orange, the event would certainly have been postponed for a few years. That authority on which James relied with so much confidence, was not annihilated at the time it was, otherwise than by a ready and considerable armed force being brought against it from the other side of the sea,—like a solid fortress, which, though without any visible outworks, requires, in order to be compelled to surrender, to be battered with cannon.

If we look into the manner in which this country has been governed since the Revolution, we shall evidently see that it has not been by means of the army that the crown has been able to preserve and exert its authority. It is not by means of their soldiers that the kings of Great Britain prevent the manner in which elections are carried on, from being hurtful to them; for these soldiers must move from the places of election one day before such elections are begun, and not return till one day after they are finished. It is not by means of their military force that they prevent the several kinds of civil magistracies in the kingdom from invading aud lessening their prerogative; for this military force is not to act till called for by these latter, and under their direction. It is not by means of their army that they lead the two branches of the legislature into that respect to their regal authority which we have described; since each of these two branches, severally, is possessed of an annual power of disbanding this army.†

There is another circumstance, which, abstractedly from all others, makes it evident that the executive authority of the crown is not supported by the army: I mean the very singular subjection in which the military is kept in regard to the civil power in this country.

* Mr. Hume is rather too anxious in his wish to exculpate James II. He begins the conclusive character he gives of him, with representing him as a prince *whom we may safely pronounce more unfortunate than criminal.* If we consider the solemn engagements entered into, not by his predecessors only, but by himself, which this prince endeavoured to break, how cool and deliberate was his attack on the liberties and religion of the people, how unprovoked the attempt, and, in short, how totally destitute he was of any plea of self-defence or necessity, a plea to which most of the princes who have been at variance with their subjects have had a more or less distant claim, we shall look upon him as being perhaps the most guilty monarch that ever existed.

† The generality of the people have from early times been so little accustomed to see any display of force used to influence the debates of the parliament, that the attempt made by Charles I. to seize the *five members*, attended by a retinue of about 200 servants, was the actual spark that set in a blaze the heap of combustibles which the preceding contests had accumulated. The parliament, from that fact, took a pretence to make military preparations in their turn; and then the civil war began.

In a country where the governing authority in the state is supported by the army, the military profession, who, in regard to the other professions, have on their side the advantage of present force, being now moreover countenanced by the law, immediately acquire, or rather assume, a general ascendency ; and the sovereign, far from wishing to discourage their claims, feels an inward happiness in seeing that instrument on which he rests his authority, additionally strengthened by the respect of the people, and receiving a kind of legal sanction from the general outward consent.

And not only the military profession at large, but the individuals belonging to it, also claim personally a pre-eminence : chief commanders, officers, soldiers or janissaries, all claim, in their own spheres, some sort of exclusive privilege : and these privileges, whether of an honorary, or of a more substantial kind, are violently asserted, and rendered grievous to the rest of the community, in proportion as the assistance of the military force is more evidently necessary to, and more frequently employed by, the government. These things cannot be otherwise.

Now, if we look into the facts that take place in England, we shall find that a quite different order prevails from what is above described. All courts of a military kind are under a constant subordination to the ordinary courts of law. Officers who have abused their private power, though only in regard to their own soldiers, may be called to account before a court of common law, and compelled to make proper satisfaction. Even any flagrant abuse of authority committed by members of courts-martial, when sitting to judge their own people, and determine upon cases entirely of a military kind, makes them liable to the animadversion of the civil judge.*

* A great number of instances might be adduced to prove the above-mentioned subjection of the military to the civil power. I shall introduce one which is particularly remarkable : I met with it in the periodical publications of the year 1746.

A lieutenant of marines, whose name was *Frye*, had been charged, while in the West Indies, with contempt of orders, for having refused, when ordered by the captain, to assist another lieutenant in carrying another officer prisoner on board the ship : the two lieutenants wished to have the order given in writing. For this lieutenant Frye was tried at Jamaica by a court-martial, and sentenced to fifteen years' imprisonment, besides being declared incapable of serving the king. He was brought home : and his case (after being laid before the privy council) appearing in a justifiable light, he was released. Some time after, he brought an action against Sir Chaloner Ogle, who had been president of the above court-martial, and had a verdict in his favour for one thousand pounds damages, as it was also proved that he had been kept fourteen months in the most severe confinement before he was brought to his trial. The judge moreover informed him that he was at liberty to bring his action against any of the members of the said court-martial he could meet with. The following part of the affair is still more remarkable.

Upon application made by lieutenant Frye, Sir John Willes, lord chief justice of the Common Pleas, issued his writ against Admiral Mayne, and Captain Rentone, two of the persons who had composed the above court-martial, who happened to be at that time in England, and were members of the court-martial that was then sitting at Deptford, to determine on the affair between Admirals Matthews and Lestock, of which Admiral Mayne was also president ; and they were arrested immediately after the breaking-up of the court. The other members resented highly what they thought an insult ; they met twice on the subject, and came to certain *resolutions*, which the judge-advocate was directed to deliver to the Board of Admiralty, in order to their being laid before the king. In these resolutions they demanded,

To the above facts concerning the pre-eminence of the civil over the military power at large, it is needless to add that all offences committed by persons of the military profession, in regard to individuals belonging to the other classes of the people, are to be determined upon by the civil judge. Any use they may make of their force, unless expressly authorised and directed by the civil magistrate, let the occasion be what it may, makes them liable to be convicted of murder for any life that may have been lost. To allege the duties or customs of their profession, in extenuation of any offence, is a plea which the judge will not so much as understand. Whenever claimed by the civil power, they must be delivered up immediately. Nor can it, in general, be said that the countenance shown to the military profession by the ruling power in the state has constantly been such as to inspire the bulk of the people with a disposition tamely to bear their acts of oppression, or to raise in magistrates and juries any degree of prepossession sufficient to lead them always to determine with partiality in their favour.*

The subjection of the military to the civil power, carried to that extent it is in England, is another characteristic and distinctive circumstance in the English government.

It is sufficiently evident that a king does not look to his army for his support, who takes so little pains to bribe and unite it to his interest.

In general, if we consider all the different circumstances in the English government, we shall find that the army cannot procure to the sovereign any permanent strength,—any strength upon which he can rely,—and from it expect the success of any future and any distant measures.

The public notoriety of the debates in parliament induces all individuals, soldiers as well as others, to pay some attention to political

'satisfaction for the high insult upon their president, from all persons, how high soever in 'office, who have set on foot this arrest, or in any degree devised or promoted it:'—moreover complaining, that, by the said arrest, 'the order, discipline, and government of his majesty's 'armies by sea were dissolved, and the statute 13 Car. II. made null and void.'

The altercations on that account lasted some months. At length the court-martial thought it necessary to submit; and they sent to the lord chief justice Willes a letter signed by the seventeen officers, admirals and commanders, who composed it, in which they acknowledge that '*the resolutions of the 16th and 21st of May were unjust and unwarrantable, and* '*to ask pardon of his lordship, and the whole Court of Common Pleas, for the indignity* '*offered to him and the court.*'

This letter judge Willes read in the open court, and directed the same to be registered in the *Remembrance* Office, 'as a memorial *to the present and future ages that whoever set* '*themselves above the law, will in the end find themselves mistaken.*' The letter from the court-martial, and judges Willes' acceptation, were inserted in the next Gazette, November 15, 1746.

* The reader may see, in the publications of the year 1770, the clamour that was raised on account of a general in the army (Gen. Gansell) having availed himself of the vicinity of his soldiers to prevent certain sheriff's officers from executing an arrest upon his person, at Whitehall. It however appeared that the general had done nothing more than put forth a few of his men, in order to perplex and astonish the sheriff's officers; and in the meantime he took an opportunity for himself to slip out of the way. The violent clamour we mention was no doubt owing to the party spirit of the time; but it nevertheless shows what the notions of the bulk of the people were on the subject.

subjects; and the liberty of speaking, printing, and intriguing, being extended to every order of the nation by whom they are surrounded, makes them liable to imbibe every notion that may be directly contrary to the views of that power which maintains them.

The case would be still worse if the sovereign should engage in a contest with a very numerous part of the nation. The general concern would increase in proportion to the vehemence of the parliamentary debates: individuals, in all the different classes of the public, would try their eloquence on the same subjects; and this eloquence would be in a great measure exerted, during such interesting times, in making converts of the soldiery: these evils the sovereign could not obviate, nor even know, till it should be in every respect too late. A prince, engaged in the contest we suppose, would scarcely have completed his first preparations,—his project would scarcely be half ripe for execution,—before his army would be taken from him. And the more powerful this army might be, the more adequate, seemingly, from its numbers, to the task it is intended for, the more open it would be to the danger we mention.

Of this, James II. made a very remarkable experiment. He had augmented his army to the number of thirty thousand. But when the day came in which their support was to have been useful to him, some deserted to the enemy: others threw down their arms: and those who continued to stand together, showed more inclination to be spectators of, than agents in, the contest. In short, he gave all over for lost, without making any trial of their assistance.*

From all the facts before-mentioned, it is evident that the power of the crown of England, rests upon foundations quite peculiar to itself,

* The army made loud rejoicings on the day of the *acquittal of the bishops*, even in the presence of the king, who had purposely repaired to Hounslow Heath on that day. He had not been able to bring a single regiment to declare an approbation of his measures in regard to the test and penal statutes. The celebrated ballad *Lero lero lillibulero*, which is reported to have had such an influence on the minds of the people at that time, and of which bishop Burnet says, '*Never perhaps so slight a thing had so great an effect*,' originated in the army: '*the whole army, and at last people both in city and country, were perpetually singing it.*'

To a king of England, engaged in a project against public liberty, a numerous army, ready formed before-hand, must, in the present situation of things, prove a very great impediment; he cannot give his attention to the proper management of it: the less so, as his measures for that purpose must often be contradictory to those he is to pursue with the rest of the people.

If a king of England, wishing to set aside the present constitution, and to assimilate his power to that of the other sovereigns of Europe, should do me the honour to consult me as to the means of obtaining success, I would recommend to him, as his first preparatory step, and before his real project is even suspected, to disband his army, keeping only a strong guard, not exceeding twelve hundred men. This done, he might, by means of the weight and advantages of his place, set himself about undermining such constitutional laws as he dislikes; using as much temper as he can, that he may have the more time to proceed. And when at length things should be brought to a crisis, then I would advise him to form another army, out of those friends or class of the people whom the turn and incidents of the preceding contests will have linked and riveted to his interest; with this army he might now take his chance; the rest would depend on his generalship, and even in a great measure on his bare reputation in that respect.

In offering my advice to the king of England, I would, however, conclude with observing to him, that his situation is as advantageous to the full as that of any king upon earth, and, upon the whole, that all the advantages which can arise from the success of his plan cannot make it worth his while to undertake it.

and that its security and strength are obtained by means totally different from those by which the same advantages are so incompletely procured, and so dearly paid for, in other countries.

It is without the assistance of an armed force that the crown in England is able to manifest that dauntless independence on particular individuals, or whole classes of them, with which it discharges its legal functions and duties. Without the assistance of an armed force, it is able to counterbalance the extensive and unrestrained freedom of the people, and to exert that resisting strength which constantly keeps increasing in a superior proportion to the force by which it is opposed,—that ballasting power by which, in the midst of boisterous winds and gales, it recovers and rights again the vessel of the state.*

It is from the civil branch of its office the crown derives that strength by which it subdues even the military power, and keeps it in a state of subjection to the laws, unexampled in any other country. It is from a happy arrangement of things it derives that uninterrupted steadiness, that invisible solidity, which procure to the subject both so certain a protection, and so extensive a freedom. It is from the nation it receives the force with which it governs the nation. Its resources are official energy, and not compulsion,—free action, and not fear,—and it continues to reign through the political *drama*, the struggle of the voluntary passions of those who pay obedience to it.†

CHAP. XVIII.—*How far the Examples of Nations who have lost their Liberty are applicable to England.*

EVERY government (those writers observe, who have treated on these subjects) containing within itself the efficient cause of its ruin, a cause which is essentially connected with those very circumstances that had produced its prosperity; the advantages attending the English government cannot therefore, according to these writers, exempt it from that latent defect which is secretly working its ruin; and M. de Montesquieu, giving his opinion both of the cause and the effect, says, that the English constitution will lose its liberty, will perish: 'Have not 'Rome, Lacedæmon, and Carthage, perished? It will perish when 'the legislative power shall have become more corrupt than the exe-'cutive.'

* There are many circumstances in the English government, which those persons who wish for speculative meliorations, such as parliamentary reform, or other changes of a like kind, do not perhaps think of taking into consideration. If so, they are, in their proceedings, in danger of meddling with a number of strings, the existence of which they do not suspect. While they only mean reformation and improvement, they are in danger of removing the *talisman* on which the existence of the fabric depends, or, like the daughter of king *Nisus*, of cutting off the fatal hair with which the fate of the city is connected.

† Many persons, satisfied with seeing the elevation and upper parts of a building, think it immaterial to give a look under ground and notice the foundation. Those readers, therefore, who choose, may consider the long chapter that has just been concluded, as a kind of foreign digression, or parenthesis, in the course of the work.

Though I do by no means pretend that any human establishment can escape the fate to which we see everything in nature is subject, nor am I so far prejudiced by the sense I entertain of the great advantages of the English government as to reckon among them that of eternity, —I will, however, observe in general, that as it differs by its structure and resources from all those with which history makes us acquainted, so it cannot be said to be liable to the same dangers. To judge of one from the other, is to judge by analogy where no analogy is to be found: and my respect for the author I have quoted will not preclude me from saying that his opinion has not the same weight with me on this occasion that it has on many others.

Having neglected, as indeed all systematic writers upon politics have done, to inquire attentively into the real foundations of power and of government among mankind, the principles he lays down are not always so clear, or even so just, as we might have expected from a man of so acute a genius. When he speaks of England, for instance, his observations are much too general: and though he had frequent opportunities of conversing with men who had been personally concerned in the public affairs of this country, and he had been himself an eye-witness of the operations of the English government, yet, when he attempts to describe it, he rather tells us what he conjectured than what he saw.

The examples he quotes, and the causes of dissolution which he assigns, particularly confirm this observation. The government of Rome, to speak of the one which, having gradually, and as it were of itself, fallen to ruin, may afford matter for exact reasoning, had no relation to that of England. The Roman people were not, in the latter ages of the commonwealth, a people of citizens but of conquerors.—Rome was not a state, but the head of a state. By the immensity of its conquests, it came in time to be in a manner only an accessory part of its own empire. Its power became so great, that, after having conferred it, it was at length no longer able to resume it: and from that moment it became itself subjected to it, for the same reason that the provinces were so.

The fall of Rome, therefore, was an event peculiar to its situation; and the change of manners which accelerated this fall, had also an effect which it could not have had but in that same situation. Men who had drawn to themselves all the riches of the world, could no longer be content with the supper of Fabricius, or with the cottage of Cincinnatus. The people who were masters of all the corn of Sicily and Africa, were no longer obliged to plunder their neighbours.—All possible enemies, besides, being exterminated, Rome, whose power was military, ceased to be an army; and that was the æra of her corruption; if, indeed, we ought to give that name to what was the inevitable consequence of the nature of things.

In a word, Rome was destined to lose her liberty when she lost her empire ; and she was destined to lose her empire, whenever she should begin to enjoy it.

But England forms a society founded upon principles entirely different. Here, all liberty and power are not accumulated as it were in one point, so as to leave, everywhere else, only slavery and misery, consequently only seeds of division and secret animosity. From one end of the island to the other the same laws take place, and the same interests prevail : the whole nation, besides, equally concurs in the framing of the government ; no one part, therefore, has cause to fear that the other parts will suddenly supply the necessary forces to destroy its liberty : and the whole have, of course, no occasion for those ferocious kinds of virtue which are indispensably necessary to those who, from the situation to which they have brought themselves, are continually exposed to dangers, and, after having invaded everything, must abstain from everything.

The situation of the people of England, therefore, essentially differs from that of the people of Rome.—The form of the English government does not differ less from that of the Roman republic : and the great advantages it has over the latter, for preserving the liberty of the people from ruin, have been described at length in the course of this work.

Thus, for instance, the ruin of the Roman republic was principally brought about by the exorbitant power to which several of its citizens were successfully enabled to rise. In the latter times of the commonwealth, those citizens went so far as to divide amongst themselves the dominions of the republic in much the same manner as they might have done lands of their own. And to them others in a short time succeeded, who not only did the same, but even proceeded to such a degree of tyrannical insolence, as to make cessions to each other, by express and formal compacts, of the lives of thousands of their fellow-citizens.* But the great and constant authority and weight of the crown, in England, prevent, in their very beginning (as we have seen), all misfortunes of this kind ; and the reader may recollect what has been said before on that subject.

At last the ruin of the republic, as everyone knows, was completed. One of those powerful citizens to whom we alluded, in process of time, found means to exterminate all his competitors ; he immediately assumed the whole power of the state, and erected an arbitrary monarchy. But such a sudden and violent establishment of a monarchical power, and all the fatal consequences that would result from such an event, are calamities which cannot take place in England. That kind of power has here existed for ages : it is circumscribed by fixed laws, and established upon regular and well-known foundations.

* Public proscriptions happened more than once at Rome, but the members of the second Triumvirate are alluded to in particular.—ED.

Nor is there any great danger that this power may, by means of those legal prerogatives it already possesses, suddenly assume others, and at last openly make itself absolute. The important privilege of granting to the crown its necessary supplies, we have before observed, is vested in the nation: and how extensive soever the prerogatives of a king of England may be, it constantly lies in the power of his people either to grant or deny him the means of exercising them.

This right, possessed by the people of England, constitutes the great difference between them and all the other nations that live under monarchical governments. It likewise gives them great advantage over such as are formed into republican states, and confers on them a means of influencing the conduct of the government, not only more effectual, but also (which is more in point to the subject of this chapter) incomparably more lasting and secure than those reserved to the people, in the states we mention.

In those states, the political rights which usually fall to the share of the people are those of voting in general assemblies, either when laws are to be enacted, or magistrates to be elected. But as the advantages arising from these general rights of giving votes are never very clearly ascertained by the generality of the people, so neither are the consequences attending particular forms or modes of giving these votes generally and completely understood. They accordingly never entertain any strong and constant preference for one method rather than another; and hence it always proves too easy a thing in republican states, either by insidious proposals made at particular times to the people, or by well-contrived precedents, or other means, first to reduce their political privileges to mere ceremonies and forms, and, at last, entirely to abolish them.

Thus, in the Roman republic, the mode which was constantly in use for about one hundred and fifty years, of dividing the citizens into *centuriæ* when they gave their votes, reduced the right of the greater part of them, during that time, to little more than a shadow. After the mode of dividing them by tribes had been introduced by the tribunes. the bulk of the citizens indeed were not, when it was used, under so great a disadvantage as before; but yet the great privileges exercised by the magistrates in all the public assemblies, the power they assumed of moving the citizens out of one tribe into another, and a number of other circumstances, continued to render the rights of the citizens more and more inefficient: and in fact we do not find that when those rights were at last entirely taken from them, they expressed any very great degree of discontent.

In Sweden (the former government of which partook much of the republican form) the right allotted to the people in the government was that of sending deputies to the general states of the kingdom, who were to give their votes on the resolutions that were to be taken in that as-

sembly. But the privilege of the people of sending such deputies was, in the first place, greatly diminished by some essential disadvantages under which these deputies were placed with respect to the body, or *order*, of the nobles. The same privilege of the people was farther lessened by their deputies being deprived of the right of freely laying their different proposals before the states, for their assent or dissent; and by vesting the exclusive right of framing such proposals in a private assembly, which was called the *secret committee.* Again, the right allowed to the order of the nobles, of having a number of members in this secret committee, double to that of all the other orders taken together, rendered the rights of the people still more ineffectual. At the last revolution, the rights we mention were in a manner taken from the people; and they do not seem to have made any great efforts to preserve them.*

But the situation of affairs in England is totally different from that which we have just described. The political rights of the people are inseparably connected with the right of property—with a right which it is as difficult to invalidate by artifice, as it is dangerous to attack by force, and which we see that the most arbitrary kings, in the full career of their power, have never offered to violate without the greatest precautions. A king of England who would enslave his people, must begin with doing, for his first act, what all other kings reserve for the last; and he cannot attempt to deprive his subjects of their political privileges, without declaring war against the whole nation at the same time, and attacking every individual at once in his most permanent and his best-understood interest.

The means possessed by the people of England, of influencing the conduct of the government, is not only in a manner secure against any danger of being taken from them: it is moreover attended with another advantage of the greatest importance; which is that of conferring naturally, and as it were necessarily, on those to whom they intrust the care of their interests, the great privilege we have before described, of debating among themselves whatever questions they deem conducive to the good of their constituents, and of framing whatever questions they think proper, and in what terms they choose.

This privilege of starting new subjects of deliberation, and, in short, of *propounding* in the business of legislation, which, in England, is allotted to the representatives of the people, forms another capital difference between the English constitution, and the government of other free states, whether limited monarchies or commonwealths, and prevents that which, in those states, proves a most effectual mean of

* I might have produced examples of a number of republican states, in which the people have been brought, at one time or other, to submit to the loss of their political privileges. In the Venetian republic, for instance, the right, long vested exclusively in a certain number of families,—of enacting laws, and electing the doge and other magistrates,—was originally enjoyed by the whole people.

subverting the laws favourable to public liberty,—namely, the undermining of these laws by the precedents and artful practices of those who are invested with the executive power in the government.

In the states we mention, the *active* share, or the business of *propounding*, in legislation, being ever allotted to those persons who are invested with the executive authority, they not only possess a general power, by means of insidious and well-timed proposals made to the people, of getting those laws repealed which set bounds to their authority; but when they do not choose openly to discover their wishes in that respect, or perhaps are even afraid of failing in the attempt, they have another resource, which, though slower in its operation, is no less effectual in the issue. They neglect to execute those laws which they dislike, or deny the benefit of them to the separate straggling individuals who claim it, and, in short, introduce practices that are directly repugnant to them. These practices in a course of time become respectable *usages*, and at length obtain the force of *laws*.

The people, even where they are allowed a share in legislation, being ever *passive* in the exercise of it, have no opportunities of framing new provisions by which to remove these spurious practices or regulations, and declare what the law in reality is. The only resource of the citizens, in such a state of things, is either to be perpetually cavilling, or openly to oppose: and, always exerting themselves either too soon or too late, they cannot come forth to defend their liberty, without incurring the charge, either of disaffection, or of rebellion.

And while the whole class of politicians, who are constantly alluding to the usual forms of limited governments, agree in deciding that freedom, when once lost, cannot be recovered,* it happens that the maxim *principiis obsta*, which they look upon as the safeguard of liberty, and which they accordingly never cease to recommend, besides its requiring a degree of watchfulness incompatible with the situation of the people, is in a manner impracticable.

But the operation of preferring grievances, which in other governments is a constant forerunner of public commotions, and that of framing new law-remedies, which is so jealously secured to the ruling powers of the state, are, in England, the constitutional and appropriated offices of the representatives of the people.

How long soever the people may have remained in a state of supineness, as to their most valuable interests, whatever may have been the neglect and even the errors of their representatives, the instant the latter come either to see these errors, or to have a sense of their duty, they proceed, by means of the privilege we mention, to abolish those abuses or practices which, during the preceding years, had taken place of the laws. To how low soever a state public liberty may happen to

* Ye free nations remember this maxim: 'Freedom may be acquired, but it cannot be recovered.' Rousseau's Social Contract, chap. viii.

be reduced, they take it where they find it, lead it back through the same path, and to the same point, from which it had been compelled to retreat; and the ruling power, whatever its usurpations may have been,—how far soever it may have overflowed its banks,—is ever brought back to its old limits.

To the exertions of the privilege we mention, were owing the frequent confirmations and elucidations of the Great Charter that took place in different reigns. By means of the same privilege the act was repealed, without public commotion, which had enacted that the king's proclamation should have the force of law: by this act public liberty seemed to be irretrievably lost; and the parliament which passed it, seemed to have done what the Danish nation did but a century afterwards. The same privilege procured the peaceable abolition of the Court of Star-chamber,—a court which, though in itself illegal, had grown to be so respected through the length of time it had been suffered to exist, that it seemed to have for ever fixed and riveted the unlawful authority it conferred on the crown. By the same means was set aside the power which the privy council had assumed of imprisoning the subject without admitting to bail, or even mentioning any cause. This power was, in the first instance, declared illegal by the *Petition of Right;* and the attempts of both the crown and the judges to invalidate this declaration, by introducing or maintaining practices that were derogatory to it, were as often obviated, in a peaceable manner, by fresh declarations of parliament, and, in the end, by the celebrated *Habeas Corpus* act.*

I shall take this opportunity of observing, in general, how the different parts of the English government mutually assist and support each other. It is because the whole executive authority of the state is vested in the crown, that the people may without danger delegate the care of their liberty to their representatives:—it is because they share in the government only through these representatives, that they are enabled to possess the greater advantage arising from framing and proposing new laws: but for this purpose it is again absolutely necessary that a correspondent prerogative of the *crown*, that is to say, a *veto* of extraordinary power, should exist in the state.

It is, on the other hand, because the balance of the people is placed in the right of granting to the crown its necessary supplies, that the latter may, without danger, be intrusted with the great authority we

* The case of general warrants may also be mentioned as an instance. The issuing of such warrants, with the name of the person to be arrested left blank, was a practice that had been followed by the secretaries of state for above sixty years. In a government differently constituted, that is, in a government in which the magistrates, or executive power, should have been possessed of the *key* of legislation, it is difficult to say how the contest might have been terminated; these magistrates would have been but indifferently inclined to frame and bring forth a declaration which would abridge their assumed authority. In the republic of Geneva, the magistracy, instead of rescinding the judgment against M. Rousseau, of which the citizens complained, chose rather openly to avow the maxim, that standing *uses* were valid derogations from the written law, and ought to supersede it. This rendered the clamour more violent than before.

mention ; and that the right, for instance, which is vested in it, of judging of the proper time for calling and dissolving parliaments (a right absolutely necessary to its preservation*) may exist without producing, *ipso facto*, the ruin of public liberty. The most singular government upon earth, and which has carried farthest the liberty of the individual, was in danger of total destruction, when Bartholomew Columbus was on his passage to England, to teach Henry VII. the way to Mexico and to Peru.

As a conclusion of this subject (which might open a field for speculation without end) I shall take notice of an advantage peculiar to the English government, and which, more than any other we could mention, must contribute to its duration. All the political passions of mankind, if we attend to it, are satisfied and provided for in the English government ; and whether we look at the monarchical, the aristocratical, or the democratical part of it, we find all those powers already settled in it in a regular manner, which have an unavoidable tendency to arise, at one time or other, in all human societies.

If we could for an instant suppose that the English form of government, instead of having been the effect of a concurrence of fortunate circumstances, had been established from a settled plan by a man who had discovered, before-hand and by reasoning, all those advantages resulting from it which we now perceive from experience, and had undertaken to point them out to other men capable of judging of what he said to them, the following is, most likely, the manner in which he would have expressed himself.

'Nothing is more chimerical (he might have said) than a state either 'of total equality, or total liberty, amongst mankind. In all societies 'of men, some power will necessarily arise. This power, after gra- 'dually becoming confined to a smaller number of persons, will, by a 'like necessity, at last fall into the hands of a single leader; and these 'two effects (of which you may see constant examples in history) aris- 'ing from the ambition of one part of mankind, and from the various 'affections and passions of the other, are absolutely unavoidable.

'Let us, therefore, admit this evil at once, since it is impossible to 'avoid it. Let us, of ourselves, establish a chief among us, since we 'must, some time or other, submit to one ; we shall by this step, effec- 'tually prevent the conflicts that would arise among the competitors 'for that station. But let us, above all, avoid plurality ; lest one of 'the chiefs, after successively raising himself on the ruin of his rivals, 'should, in the end, establish despotism, and that through a train of 'incidents the most pernicious to the nation.

'Let us even give him every thing we can confer without endanger- 'ing our security. Let us call him our sovereign ; let us make him

* As affairs are situated in England, the dissolution of a parliament on the part of the crown is no more than an appeal either to the people themselves, or to another parliament.

'consider the state as being his own patrimony; let us grant him, in 'short, such personal privileges as none of us can ever hope to rival 'him in; and we shall find that those things which we were at first 'inclined to consider as a great evil, will be in reality a source of ad- 'vantage to the community. We shall be the better able to set bounds 'to that power which we shall have thus ascertained and fixed in one 'place. We shall thus render more interested the man whom we 'shall have put in possession of so many advantages, in the faithful 'discharge of his duty; and we shall procure, for each of us, a power- 'ful protector at home, and for the whole community, a defender 'against foreign enemies, superior to all possible temptation of betray- 'ing his country.

'You may also have observed (he might continue) that in all states 'there naturally arise around the person or persons, who are invested 'with the public power, a class of men, who, without having any actual 'share in that power, yet partake of its lustre,—who, pretending to be 'distinguished from the rest of the community, do from that very cir- 'cumstance become distinguished from it: and this distinction, though 'only a matter of opinion, and at first thus surreptitiously obtained, 'yet may become in time the source of very grievous effects.

'Let us therefore regulate this evil, which we cannot entirely pre- 'vent. Let us establish this class of men, who would otherwise grow 'up among us without our knowledge, and gradually acquire the most 'pernicious privileges. Let us grant them distinctions that are visible 'and clearly ascertained: their nature will thus be the better understood, 'and they will of course be much less likely to become dangerous. By 'the same means also, we shall preclude all other persons from the 'hopes of usurping them. As to pretend to distinctions can thence- 'forward be no longer a title to obtain them, every one who shall not 'be expressly included in their number must continue to confess him- 'self one of the people; and, just as we said before, 'Let us choose 'ourselves one master that we may not have fifty,' we may now say, '"Let us establish three hundred lords, that we may not have ten thou- 'sand nobles."

'Besides, our pride will better reconcile itself to a superiority which 'it will no longer think of disputing. Nay, as they will themselves 'see that we are before-hand in acknowledging it, they will think them- 'selves under no necessity of being insolent to furnish us a proof of it. 'Secure as to their privileges, all violent measures on their part for 'maintaining, and at last perhaps extending them, will be prevented: 'they will never combine with any degree of vehemence, but when they 'really have cause to think themselves in danger; and by having 'made them indisputably great men, we shall have a chance of often 'seeing them behave like modest and virtuous citizens.

'In fine, by being united in a regular assembly, they will form an

'intermediate body in the state, that is to say, a very useful part of the 'government.

'It is also necessary (our reasoning lawgiver might add) that we, 'the people, should have an influence upon government: it is neces- 'sary for our own security; it is no less necessary for the security of 'the government itself. But experience must have taught you, at the 'same time, that a great body of men cannot act, without being, though 'they are not aware of it, the instruments of the designs of a small 'number of persons; and that the power of the people is never any 'thing but the power of a few leaders, who (though it may be impossible 'to tell when or how) have found means to secure themselves the di- 'rection of its exercise.

'Let us, therefore, be also before-hand with this other inconvenience. 'Let us effect openly what would otherwise take place in secret. Let 'us intrust our power, before it be taken from us by address. Those 'whom we shall have expressly made the depositories of it, being 'freed from any anxious care about supporting themselves, will have 'no object but to render it useful. They will stand in awe of us the 'more, because they well know that they have not imposed upon us; 'and instead of a small number of leaders, who would imagine they 'derive their whole importance from their own dexterity, we shall have 'express and acknowledged representatives, who will be accountable 'to us for the evils of the state.

'But, above all, by forming our government with a small number of 'persons, we shall prevent any disorder that may take place in it from 'ever becoming dangerously extensive. Nay more, we shall render it 'capable of such inestimable combinations and resources, as would be 'utterly impossible in the government of all, which never can be any- 'thing but uproar and confusion.

'In short, by expressly divesting ourselves of a power, of which we 'should, at best, have only an apparent enjoyment, we shall be entitled 'to make conditions for ourselves: we will insist that our liberty be 'augmented; we will, above all, reserve to ourselves the right of watch- 'ing and censuring that administration which will have been estab- 'lished by our own consent. We shall the better see its faults, because 'we shall be only spectators of it: we shall correct them the better, 'because we shall not have personally concurred in its operations.'*

The English constitution being founded upon such principles as those we have just described, no true comparison can be made between it and the government of any other state; and since it evidently secures,

* He might have added,—'As we will not seek to counteract nature, but rather to follow 'it, we shall be able to procure ourselves a mild legislation. Let us not be without cause afraid of the power of one man; we shall have no need either of a Tarpeian rock, or of a council of 'ten. Having expressly allowed to the people a liberty to inquire into the conduct of govern- 'ment, and to endeavour to correct it, we shall neither need state-prisons, nor secret in- 'formers.'

not only the liberty, but the general satisfaction in all respects, of those who are subject to it, in a much greater degree than any other government ever did, this consideration alone affords sufficient ground to conclude, without looking farther, that it is also more likely to be preserved from ruin.

And indeed we may observe the remarkable manner in which it has been maintained in the midst of such general commotions as seemed to lead to its unavoidable destruction. It rose again, we see, after the wars between Henry III. and his barons,—after the usurpation of Henry IV.,—and after the long and bloody contentions between the houses of York and Lancaster. Nay, though totally destroyed in appearance after the fall of Charles I., and though the greatest efforts had been made to establish another form of government in its stead, yet no sooner was Charles II. called over, than the constitution was re-established upon all its ancient foundations.

However, as what has not happened at one time may happen at another, future revolutions (events which no form of government can totally prevent) may perhaps end in a different manner from that in which past ones have terminated. New combinations may possibly take place among the then ruling powers of the state, of such a nature as to prevent the constitution, when peace shall be restored to the nation, from settling again upon its ancient and genuine foundations: and it would certainly be a very bold assertion to affirm, that both the outward form, and the true spirit of the English government, would again be preserved from destruction, if the same dangers to which they have in former times been exposed should again happen to take place.

Nay, such fatal changes as those we mention may be introduced even in quiet times, or, at least, by means in appearance peaceable and constitutional. Advantages, for instance, may be taken by particular actions, either of the feeble capacity, or of the misconduct of some future king. Temporary prepossessions of the people may be so artfully managed as to make them concur in doing what will prove afterwards the ruin of their own liberty. Plans of apparent improvement in the constitution, forwarded by men who, though with good intentions, shall proceed without a due knowledge of the true principles and foundations of government, may produce effects quite contrary to those which were intended, and in reality pave the way to its ruin.*

* Instead of looking for the principles of politics in their true sources, that is to say, in the nature of the affections of mankind, and of those sacred ties by which they are united in a state of society, men have treated that science in the same manner as they did natural philosophy in the time of Aristotle, continually recurring to occult causes and principles, from which no useful consequence could be drawn. Thus, in order to ground particular assertions, they have much used the word constitution in a personal sense, *the constitution loves, the constitution forbids*, and the like. At other times they have had recourse to *luxury*, in order to explain certain events: and, at others, to a still more occult cause, which they have called *corruption*; and abundance of comparisons drawn from the human body have been also used for the same purposes; continued instances of such defective arguments and con-

The crown, on the other hand, may, by the acquisition of foreign dominions, acquire a fatal independency of the people : and if, without entering into any farther particulars on this subject, I were required to point out the principal events which would, if they were ever to happen, prove immediately the ruin of the English government, I would say,—the English government will be no more, either when the crown shall become independent of the nation for its supplies, or when the representatives of the people shall begin to share in executive authority.*

CHAP. XIX.—*A few additional Thoughts on the Attempts that at particular Times may be made to abridge the Power of the Crown, and some of the dangers by which such Attempts may be attended.*

THE power of the crown is supported by deeper and more numerous roots than the generality of people are aware of, as has been observed in a former chapter ; and there is no cause to fear that the wresting any capital branch of its prerogative may be effected, in common peaceable times, by the mere theoretical speculations of politicians. However, it is not equally impracticable that some event of the kind we mention may be brought about through a conjunction of several circumstances. Advantage may, in the first place, be taken of the minority, and even of the inexperience or the errors of the person invested with the kingly authority. Of this a remarkable instance happened in the reign of George I., while that bill, by which the order of peers was in future to be limited to a certain number, was under consideration in the house of commons, to whom it had been sent by the lords. So unacquainted was the king at that time with his own interest, and with the constitution of the English government, that, having been persuaded by the party who wished success to the bill, that the commons only objected to it from an opinion of its being disagreeable to him, he was prevailed upon to send a message to them, to let them know that such an opinion was ill-grounded, and that, should the bill pass in their house, it would meet with his assent. Considering the prodigious importance of the consequences of such a bill, the fact is certainly very remarkable.

siderations occur in the works of *M. de Montesquieu*, though a man of so much genius, and from whose writings so much information is nevertheless to be derived. Nor is it only the obscurity of the writings of politicians, and the impossibility of applying their speculative doctrines to practical uses, which prove that some peculiar and uncommon difficulties lie in the way of the investigation of political truths ; but the remarkable perplexity which men in general, even the ablest, labour under, when they attempt to descant and argue upon abstract questions in politics, also justifies this observation, and proves that the true first principles of this science, whatever they are, lie deep both in the human feelings and understanding.

* And if at any time dangerous changes were to take place in the English constitution, the pernicious tendency of which the people were not able at first to discover, restrictions on the liberty of the press, and on the power of juries, will give them the first information.

With those personal disadvantages under which the sovereign may lie for defending his authority, other causes of difficulty may concur,—such as popular discontents of long continuance in regard to certain particular abuses of influence or authority. The generality of the public, bent, at that time, both upon remedying the abuses complained of, and preventing the like from taking place in future, will perhaps wish to see that branch of the prerogative which gave rise to them taken from the crown : a general disposition to applaud such a measure, if effected, will be manifested from all quarters ; and at the same time men may not be aware, that the only material consequence that may arise from depriving the crown of that branch of power which has caused the public complaints, will perhaps be the having transferred that branch of power from its former seat to another, and having intrusted it to new hands, which will be still more likely to abuse it than those in which it was formerly lodged.

In general, it may be laid down as a maxim, that power under any form of government must exist, and be intrusted somewhere. If the constitution does not admit of a king, the governing authority is lodged in the hands of magistrates. If the government, at the same time that it is a limited one, bears a monarchical form, those portions of power that are retrenched from the king's prerogative will most probably continue to subsist, and be vested in a senate or assembly of great men, under some other name of the like kind.

Thus, in the kingdom of Sweden, which having been a limited monarchy, may supply examples very applicable to the government of this country, we find that the power of convoking the general states (or parliament) of that kingdom had been taken from the crown ; but at the same time we also find that the Swedish senators had invested themselves with that essential branch of power which the crown had lost : I mean here the government of Sweden as it stood before the revolution of 1772.

The power of the Swedish king to confer offices and employments had been also very much abridged. But what was wanting to the power of the king, the senate enjoyed : it had the nomination of three persons for every vacant office, out of whom the king was empowered to choose one.

The king had but a limited power in regard to pardoning offenders ; but the senate likewise possessed what was wanting to that branch of his prerogative, and it appointed two persons, without the consent of whom the king could not remit the punishment of any offence.

The king of England has an exclusive power in regard to foreign affairs, war, peace, treaties ;—in all that relates to military affairs, he has the disposal of the existing army, of the fleet, &c. The king of Sweden had no such extensive powers ; but they nevertheless existed ; everything relating to the above-mentioned objects was transacted

in the assembly of the senate; the majority decided; the king was obliged to submit to it; and his only privilege consisted in his vote being accounted two.*

If we pursue farther our inquiry on the subject, we shall find that the king of Sweden could not raise whom he pleased to the office of senator, as the king of England can in regard to the office of member of the privy council; but the Swedish states, in the assembly of whom the nobility enjoyed most capital advantages, possessed a share of the power we mention, in conjunction with the king; and in cases of vacancies in the senate, they elected three persons, out of whom the king was to return one.

The king of England may, at all times, deprive the ministers of their employments. The king of Sweden could remove no man from his office; but the states enjoyed the power that had been denied to the king; and might deprive of their places both the senators, and those persons in general who had a share in the administration.

The king of England has the power of dissolving, or keeping assembled, his parliament. The king of Sweden had not that power; but the states might of themselves prolong their duration as they thought proper.

Those who think that the prerogative of a king cannot be too much abridged, and that power loses all its influence on the dispositions and views of those who possess it, according to the kind of name used to express the offices by which it is conferred, may be satisfied, no doubt, to behold those branches of power that were taken from a king distributed to several bodies, and shared by the representatives of the people; but those who think that power, when parcelled and diffused, is never so well repressed and regulated as when it is confined to a sole indivisible seat, which keeps the nation united and awake,—those who know, that, names by no means altering the intrinsic nature of things, the representatives of the people, as soon as they are invested with independent authority, become, *ipso facto*, its masters,—those persons, I say, will not think it a very happy regulation in the former constitution of Sweden to have deprived the king of prerogatives formerly attached to his office, in order to vest the same either in a senate, or in the deputies of the people, and thus to have intrusted

* The Swedish senate was fully composed of sixteen members. In regard to affairs of smaller moment they formed themselves into two divisions, in either of these, when they did sit, the presence of seven members was required for the effectual transacting of business: in affairs of importance, the assembly was formed of the whole senate: and the presence of ten members was required to give force to the resolutions. When the king could not or would not take his seat, the senate proceeded nevertheless, and the majority continued to be equally decisive.

As the royal seal was necessary for putting in execution the resolutions of the senate, king Adolphus Frederic tried, by refusing to lend the same, to procure that power which he had not by his suffrage, and to stop the proceedings of the senate. Great debates in consequence of that pretension arose, and continued for a while; but at last, in 1756, the king was overruled by the senate, who ordered a seal to be made, that was named the *king's seal*, which they affixed to their official resolutions, when the king refused to lend his own.

with a share in the exercise of the public power those very men whose constitutional office should have been to watch and restrain it.

From the indivisibility of the governing authority in England, a community of interest takes place among all orders of men; and hence arises, as a necessary consequence, the liberty enjoyed by all ranks of subjects. This observation has been insisted upon at length in the course of the present work. The shortest reflection on the frame of the human heart suffices to convince us of its truth, and at the same time manifests the danger that would result from making any changes in the form of the existing government, by which this general community of interest might be lessened,—unless we are at the same time also determined to believe, that partial nature forms men in this island with sentiments very different from the selfish and ambitious dispositions which have ever been found in other countries.*

But experience does not by any means allow us to entertain so pleasing an opinion. The perusal of the history of this country will show us, that the care of its legislators, for the welfare of the subject, always kept pace with the exigencies of their own situation. When, through the minority, or easy temper of the reigning prince, or other circumstances, the dread of a superior power began to be overlooked, the public cause was immediately deserted in a greater or less degree, and pursuit after private influence and lucrative offices took the place of patriotism. When, in the reign of Charles I., the authority of the

* Such regulations as may essentially effect, through their consequences, the equipoise of a government, may be brought about, even though the promoters themselves of those regulations are not aware of their tendency. When the bill passed in the seventeenth century, by which it was enacted that the crown should give up its prerogative of dissolving the parliament then sitting, the generality of people had no thought of the calamitous consequences that were to follow: very far from it. The king himself certainly felt no very great apprehension on that account; else he would not have given his assent; and the commons themselves, it appears, had very faint notions of the capital changes which the bill would speedily effect in their political situation.

When the crown of Sweden was, in the first instance, stripped of all the different prerogatives we have mentioned, it does not appear that those measures were effected by sudden open provisions for that purpose: it is very probable that the way had been paved for them by indirect regulations formerly made, the whole tendency of which scarcely anyone perhaps could foresee at the time they were framed.

When the bill was in agitation, for limiting the house of peers to a certain number, its great constitutional consequences were scarcely attended to by anybody. The king himself certainly saw no harm in it, since he sent an open message to promote the passing of it; a measure, which was not, perhaps, strictly regular. The bill was, it appears, generally approved out of doors. Its fate was for a long time doubtful in the house of commons; nor did they acquire any favour with the bulk of the people by finally rejecting it: and judge Blackstone, as I find in his Commentaries, does not seem to have thought much of the bill, and its being rejected, as he only observes that the commons 'wished to keep the door of the house of lords as open as possible.' Yet, no bill of greater constitutional importance was ever agitated in parliament; since the consequences of its being passed would have been the freeing the house of lords, both in their judicial and legislative capacities, from all constitutional check whatever, either from the crown or the nation. Nay, it is not to be doubted, that they would have acquired, in time, the right of electing their own members: though it would be useless to point out here by what series of intermediate events the measure might have been brought about. Whether there existed any actual project of this kind among the first framers of the bill, does not appear: but a certain number of the members of the house we mention would have thought of it soon enough, if the bill in question had been enacted into a law; and they would certainly have met with success, had they been contented to wait, and had they taken time. Other equally important changes in the substance, and perhaps the outward form, of the government would have followed.

crown was for a while annihilated, those very men, who till then had talked of nothing but Magna Charta and liberty, instantly endeavoured openly to trample both under foot.

Since the time we mention, the former constitution of the government having been restored, the great outlines of public liberty have indeed been warmly and seriously defended; but if any partial unjust laws or regulations have been made, especially since the revolution of the year 1689,—if any abuses injurious to particular classes of individuals have been suffered to continue, it will certainly be found upon inquiry, that those laws and those abuses were of such a complexion, that from them, the members of the legislature well knew, neither they nor their friends would ever be likely to suffer.

If, through the unforeseen operations of some new regulation made to restrain the royal prerogative, or through some sudden public revolution, any particular bodies or classes of individuals were ever to acquire a personal independent share in the exercise of the governing authority, we should behold the public virtue and patriotism of the legislators and great men immediately cease with its cause, and aristocracy, as it were, watchful of the opportunity, burst out at once, and spread itself over the kingdom.

The men who are now the ministers, but then the partners of the crown, would instantly set themselves above the reach of the law, and soon after ensure the same privilege to their several supporters or to their dependents.

Personal and independent power becoming the only kind of security of which men would now show themselves ambitious, the *Habeas Corpus* act, and in general all those laws which subjects of every rank regard with veneration, and to which they look up for protection and safety, would be spoken of with contempt, and mentioned as remedies fit only for peasants and for cits :—it even would not be long before they would be set aside, as obstructing the wise and the salutary steps of the senate.

The pretensions of an equality of right in all subjects of whatever rank and order, to their property and to personal safety, would soon be looked upon as an old-fashioned doctrine, which the judge himself would ridicule from the bench. And the liberty of the press, now so universally and warmly vindicated, would, without loss of time, be cried down and suppressed, as only serving to keep up the insolence and pride of a refractory people.

And let us not believe, that the mistaken people, whose representatives we now behold making such a firm stand against the *indivisible* power of the crown, would, amidst the devastation of everything they hold dear, easily find men equally disposed to repress the encroaching, while *attainable*, power of a senate and body of nobles.

The time would be no more when the people, upon whatever men

they should fix their choice, would be sure to find them ready sincerely to join in support of every important branch of public liberty.

Present or expected personal power, and independence on the laws, being now the consequence of the trust of the people,—wherever they should apply for servants, they would only meet with betrayers. Corrupting, as it were, everything they should touch, they could confer no favour upon an individual but to destroy his public virtue : and, (to repeat the words used in a former chapter) 'their raising a man would 'only be immediately inspiring him with views opposite to their own, 'and sending him to increase the number of their enemies.'

All these considerations strongly point out the very great caution which is necessary to be used in the different business of laying new restraints on the governing authority. Let therefore the less informed part of the people, whose zeal requires to be kept up by visible objects, look (if they choose) upon the crown as the only seat of the evils they are exposed to ; mistaken notions on their part are less dangerous than political indifference ; and they are more easily directed than roused ; but, at the same time, let the more enlightened part of the nation constantly remember, that the constitution only subsists by virtue of a proper equilibrium,—by a discriminating line being drawn between power and liberty.

Made wise by the examples of several other nations, by those which the history of this very country affords, let the people, in the heat of their struggles in the defence of liberty, always take heed, only to reach, never to overshoot the mark,—only to repress, never to transfer and diffuse power.

Amidst the alarms that may at particular times arise from the really awful authority of the crown, let it, on one hand, be remembered, that even the power of the Tudors was opposed and subdued,—and on the other, let it be looked upon as a fundamental maxim, that, whenever the prospect of personal power and independence on the governing authority shall offer to the view of the members of the legislature, or in general of those men to whom the people must trust, even hope itself is destroyed. The Hollander, in the midst of a storm, though trusting to the experienced strength of the mounds that protect him, shudders, no doubt, at the sight of a foaming element, that surrounds him ; but they all gave themselves over for lost, when they thought the worm had penetrated into their dykes.*

* Such new forms as may prove destructive of the real substance of a government may be unwarily adopted, in the same manner as the superstitious notions and practices described in my work, entitled *Memorials of Human Superstition*, may be introduced into a religion, so as entirely to subvert the true spirit of it.

CHAP. XX.—*A few additional Observations on the Right of Taxation, which is lodged in the Hands of the Representatives of the People. What kind of Danger this Right may be exposed to.*

THE generality of men, or at least of politicians. seem to consider the right of taxing themselves, enjoyed by the English nation, as being no more than the means of securing their property against the attempts of the crown; while they overlook the nobler and more extensive efficiency of that privilege.

The right to grant subsidies to the crown, possessed by the people of England, is the safeguard of all their other liberties, religious and civil; it is a regular mean conferred on them by the constitution, of influencing the motion of the executive power; and it forms the tie by which the latter is bound to them. In short, this privilege is a sure pledge in their hands, that their sovereign, who can dismiss their representatives at his pleasure, will never entertain thoughts of ruling without the assistance of these.

If, through unforeseen events, the crown could attain to be independent on the people in regard to its supplies, such is the extent of its prerogative, that, from that moment, all the means the people possess to vindicate their liberty would be annihilated. They would have no resource left,—except indeed that uncertain and calamitous one, of an appeal to the sword; which is no more, after all, than what the most enslaved nations enjoy.

Let us suppose, for instance, that abuses of power should be committed, which, either by their immediate operation, or by the precedents they might establish, should undermine the liberty of the subject. The people, it will be said, would then have their remedy in the legislative power possessed by their representatives. The latter would, at the first opportunity, interfere, and frame such bills as would prevent the like abuses for the future. But here we must observe, that the assent of the sovereign is necessary to make those bills become laws; and if, as we have just now supposed, he had no need of the support of the commons, how could they obtain his assent to laws thus purposely framed to abridge his authority?

Again, let us suppose that, instead of contenting itself with making slow advances to despotism, the executive power, or its minister, should at once openly invade the liberty of the subject. Obnoxious men, printers for instance, or political writers, might be persecuted by military violence, or, to do things with more security, with the forms of law. Then, it will be said, the representatives of the people would impeach the persons concerned in those measures. Though unable to reach a king who personally *can do no wrong*, they at least would attack those men who were the immediate instruments of his tyrannical proceedings, and endeavour, by bringing them to condign punish-

ment, to deter future judges or ministers from imitating their conduct. All this I grant; and I will even add, that, circumstanced as the representatives of the people now are, and having to do with a sovereign who can enjoy no dignity without their assistance, it is most likely that their endeavours in the pursuit of such laudable objects would prove successful. But if, on the contrary, the king, as we have supposed, stood in no need of their assistance, and moreover knew that he should never want it, it is impossible to think that he would then suffer himself to remain a tame spectator of their proceedings. The impeachments thus brought by them would immediately prove the signal of their dismission: and the king would make haste, by dissolving them, both to revenge what would then be called the insolence of the commons, and to secure his ministers.

But even those are vain suppositions; the evil would reach much farther; and we may be assured that, if ever the crown should be in a condition to govern without the assistance of the representatives of the people, it would dismiss them for ever, and thus rid itself of an assembly which, continuing to be a clog on its power, would no longer be of any service to it. This Charles I. attempted to do when he found his parliaments refractory, and the kings of France really have done, with respect to the general estates of their kingdom.

Indeed if we consider the extent of the prerogative of the king of England, and especially the circumstance of his completely uniting in himself all the executive and active powers of the state, we shall find that it is no exaggeration to say that he has power sufficient to be as arbitrary as the kings of France, were it not for the right of taxation, which, in England, is possessed by the people: and the only constitutional difference between the French and English nations is, that the former can neither confer benefits on their sovereign, nor obstruct his measures; while the latter, how extensive soever the prerogative of their king may be, can deny him the means of exerting it.

But here a most important observation is to be made; and I entreat the reader's attention to the subject. This right of granting subsidies to the crown can only be effectual when it is exercised by one assembly alone. When several distinct assemblies have it equally in their power to supply the wants of the prince, the case becomes totally altered. The competition which so easily takes place between those different bodies, and even the bare consciousness which each entertains of its inability to obstruct the measures of the sovereign, render it impossible for them to make any effectual constitutional use of their privilege. 'Those different parliaments or estates (to repeat the observation introduced in the former part of this work) having no means 'of recommending themselves to their sovereign, but their superior 'readiness in complying with his demands, vie with each other in 'granting what it would not only be fruitless but even dangerous to 'refuse. And the king, in the mean time, soon comes to demand, as

'a tribute, a gift which he is confident to obtain.' In short, it may be laid down as a maxim, that when a sovereign is made to depend, in regard to his supplies, on more assemblies than one, he in fact depends upon none. And indeed the king of France is not independent of his people for his necessary supplies, any otherwise than by drawing the same from several different assemblies of their representatives: the latter have in appearance a right to refuse all his demands: and as the English call the grants they make to their kings, subsidies, the estates of the French provinces call theirs *dons gratuits*, or free gifts.

What is it, therefore, that constitutes the difference between the political situation of the French and English nations, since their rights thus seem outwardly to be the same? The difference lies in this, that there has never been in England more than one assembly that could supply the wants of the sovereign. This has always kept him in a state, not of a seeming, but of a real dependence on the representatives of the people for his necessary supplies; and how low soever the liberty of the subject may, at particular times, have sunk, they have always found themselves possessed of the most effectual means of restoring it, whenever they thought proper so to do. Under Henry VIII., for instance, we find the despotism of the crown to have been carried to an astonishing height: it was even enacted that the proclamations of the king should have the force of law: a thing which, even in France, never was so expressly declared: yet, no sooner did the nation recover from its long state of supineness, than the exorbitant power of the crown was reduced within its constitutional bounds.

To no other cause than the disadvantages of their situation, are we to describe the low condition in which the deputies of the people in the assembly called the general estates of the kingdom of France, were always forced to remain.

Surrounded as they were by the particular estates of those provinces into which the kingdom had been formerly divided, they never were able to stipulate conditions with their sovereign; and instead of making their right of granting subsidies to the crown serve to gain them in the end a share in the legislation, they ever remained confined to the unassuming privilege of 'humble supplication and remonstrance.'*

* An idea of the manner in which the business of granting supplies to the crown was conducted by the states of the province of Bretagne in the reign of Louis XIV., may be formed from several lively strokes to be met with in the Letters of Madame de Sevigné, whose estate lay in that province, and who had often assisted at the holding of those states. The granting of supplies was not, it seems, looked upon as any serious kind of business. The whole time the states were sitting, was a continued scene of festivity and entertainment: the canvassing of the demands of the crown was chiefly carried on at the table of the nobleman who had been deputed from court to hold the states; and the different points were usually decided by a kind of acclamation. In a certain assembly of those states, the duke of Chaulnes, the lord deputy, had a present of 50,000 crowns made to him, as well as a considerable one for his duchess, besides obtaining the demand of the court; and the lady we quote here, commenting somewhat jocularly on these grants says, *Ce n'est pas que nous soyons riches: mais nous sommes honnêtes, nous avons du courage, et entre midi et une heure nous ne savons rien refuser à nos amis.* 'It is not that we are rich; but we are civil, we are full of courage, and between twelve and one o'clock we are unable to deny anything to our friends.'

Those estates, however, as all the great lords in France were admitted into them, began at length to appear dangerous; and as the king could in the mean time do without their assistance, they were set aside. But several of the particular states of the provinces are preserved to this day (the year 1784), some, which for temporary reasons had been abolished, have been restored: nay, so manageable have popular assemblies been found by the crown, when it has to do with many, that the kind of government we mention is that which it has been found most convenient to assign to Corsica: and Corsica has accordingly been made *un pays d'états.**

That the crown in England should, on a sudden, render itself independent on the commons for its supplies,—that is, should on a sudden successfully assume to itself a right to lay taxes on the subject, by its own authority,—is not certainly an event likely to take place, nor indeed is it one that should, at the present time, raise any kind of political apprehension. But it is not equally impracticable that the right of the representatives of the people might become invalidated, by being divided in the manner that has been just described.

Such a division of the right of the people might be effected in various ways. National calamities for instance, unfortunate foreign wars attended with loss of public credit, might suggest methods for raising the necessary supplies, different from those which have hitherto been used. Dividing the kingdom into a certain number of parts, which should severally vote subsidies to the crown, or even distinct assessments to be made by the different counties into which England is now divided, might, in the circumstances we suppose, be looked upon as advisable expedients; and these, being once introduced, might be continued.

Another division of the right of the people, much more likely to take place than those just mentioned, might be such as might arise from acquisitions of foreign dominions, the inhabitants of which should in time claim and obtain a right to treat directly with the crown, and grant supplies to it, without the interference of the British legislature.

Should any colonies acquire the right we mention,—should, for instance, the American colonies have acquired, as they claimed it,—it is not to be doubted that the consequences which have resulted from a division like that we mention in most of the kingdoms of Europe,

The different provinces of France, it may be observed, are liable to pay several taxes besides those imposed on them by their own states. Dean Tucker, in one of his tracts, in which he has thought proper to quote this work, has added to the above instance of the French provinces that of the states of the Austrian Netherlands, which is very conclusive. And examples to the same purpose might be supplied by all those kingdoms of Europe in which provincial states are holden.

* In the year 1794 the English, with an armed force, assisted by the good will and submission of the inhabitants, obtained possession of Corsica; to which they granted a constitution and a parliament similar to their own. But this fickle people were not long pleased with their protestant masters: the island was evacuated in 1796, and repossessed by the French, of which nation it has ever since shared the fortunes; and it now forms a department of that kingdom.—ED.

would also have taken place in the British dominions, and that the spirit of competition, above described, would in time have manifested itself between the different colonies. This desire of ingratiating themselves with the crown, by means of the privilege of granting supplies to it, was even openly confessed by Dr. Franklin, an agent of the American provinces, when on his being examined by the house of commons in the year 1766, he said, 'the granting aids to the crown is 'the only means the Americans have of recommending themselves to 'their sovereign.' And the events that have of late years taken place in America, render it evident that the colonies would not have scrupled going any lengths to obtain favourable conditions at the expense of Britain and the British legislature.

That a similar spirit of competition might be raised in Ireland, is also sufficiently plain from certain late events. And should the American colonies have obtained their demands,—and at the same time should Ireland and America have increased in wealth to a certain degree,—the time might have come at which the crown might have governed England with the supplies of Ireland and America—Ireland with the supplies of England and of the American colonies—and the American colonies with the money of each other, and that of England and Ireland.

To this it may be objected, that the supplies granted by the colonies, even though joined by those of Ireland, never could have risen to such a height as to have counterbalanced the importance of the English commons.—I answer, in the first place, that there would have been no necessity that the aids granted by Ireland and America should have risen to an equality with those granted by the British parliament: it would have been sufficient to produce the effects we mention, that they had only borne a certain proportion to the latter, so far as to have conferred on the crown a certain degree of independence, and at the same time have raised in the English commons a correspondent sense of self-diffidence in the exercise of their undoubted privilege of granting, or rather *refusing*, subsidies to the crown.—Here it must be remembered, that the right of granting or refusing supplies to the crown is the only ultimate forcible privilege possessed by the British parliament: by the constitution it has no other, as has been observed in the beginning of this chapter. This circumstance ought to be combined with the exclusive possession of the executive powers lodged in the crown—with its prerogative of dissenting from the bills framed by parliament, and even of dissolving it.*

* Being with Dr. Franklin at his house in Craven-street, some months before he went back to America, I mentioned to him a few of the remarks contained in this chapter, and, in general, that the claim of the American colonies directly clashed with one of the vital principles of the English constitution. The observation, I remember, struck him very much: it led him afterwards to speak to me of the examination he had undergone in the house of commons: and he concluded with lending me that volume of the Collection of *Parliamentary Debates*, in which an account of it is contained. Finding the constitutional tendency of the claim of the Ame-

I shall mention, in the second place, a remarkable fact in regard to this subject (which may serve to show that politicians are not always consistent, or even sagacious in their arguments); which is, that the same persons who were the most strenuous advocates for granting to the American colonies their demands, were likewise the most sanguine in their predictions of the future wealth and greatness of America; and at the same time also used to make frequent complaints of the undue influence which the crown derives from the scanty supplies granted to it by the kingdom of Ireland.*

Had the American colonies fully obtained their demands, both the essence of the present English government, and the condition of the English people, would certainly have been altered thereby; nor would such a change have been inconsiderable, but in proportion as the colonies should have remained in a state of national poverty.†

CHAP. XXI.—*Conclusion.—A few Words on the Nature of the Divisions that take place in England.*

I SHALL conclude this work with a few observations on the total freedom from violence with which the political disputes and contentions in England are conducted and terminated, in order both to give a far-

ricans to be a subject not very generally understood, I added a few paragraphs concerning it in the English edition I some time after gave of this work; and on publishing a third edition of the same, I thought it might not be amiss to write something more compact on the subject, and accordingly added the present new chapter, into which I transferred the few additional paragraphs I mention, leaving in the place where they stood only the general observations on the right of granting subsidies, which were formerly in the French work. Several of the ideas, and even expressions contained in this chapter, made their appearance in the *Public Advertiser*, about the time I was preparing the first edition: I sent them myself to that newspaper, under the signature of *Advena*.

* For instance, the complaints made in regard to the pensions on the Irish establishment.

† When I observe that no man who wished for the preservation of the form and spirit of the English constitution ought to have desired that the claim of the American colonies might be granted to them, I mean not to say that the American colonies should have given up their claim. The wisdom of ministers, in regard to American affairs, ought to have been constantly employed in making the colonies useful to this country, and at the same time in hiding their subjection from them (a caution, which is, after all, more or less used in every government upon earth); it ought to have been exerted in preventing the opposite interests of Britain, and of America, from being brought to an issue,—to any such clashing dilemma as would render disobedience on the one hand, and the resort to force on the other, almost unavoidable. The generality of the people fancy that ministers use a great depth of thought and much forecast in their operations; whereas the truth is, that ministers, in all countries, never think but of providing for present, immediate contingencies; in doing which they constantly follow the open track before them. This method does very well for the common course of human affairs, and even is the safest; but whenever cases and circumstances of a new and unknown nature occur, sad blunders and uproar are the consequences.—The celebrated count Oxenstiern, chancellor of Sweden, one day when his son was expressing to him his diffidence of his own abilities, and the dread with which he thought of ever engaging in the management of public affairs, made the following Latin answer to him: *Nescis, mi fili, quam parvâ cum sapientiâ regitur mundus*—'You do not know, my son, with what little wisdom the world is governed.'

Matters having come to an eruption, it was no longer to be expected they could be composed by the palliative offers sent at different times from this country to America. When the Earl of Carlisle solicited to be at the head of the solemn commission that sailed for the purpose we mention, he did not certainly show modesty equal to that of the son of chancellor Oxenstiern. It has been said, in that stage of the contest, the Americans could not think that the proposals thus sent to them were seriously meant: however, this cannot have been the principal cause of the miscarriage of the commission. The fact is, that after the Americans had been induced to open their eyes on their political situation, and rendered sensible of the local advantages of

ther proof of the soundness of the principles on which the English government is founded, and to confute in general the opinion of foreign writers or politicians, who, misled by the apparent heat with which these disputes are sometimes carried on, and the clamour to which they give occasion, look upon England as a perpetual scene of civil broils and dissensions.

In fact, if we consider, in the first place, the constant tenor of the conduct of the parliament, we shall see that whatever different views the several branches that compose it may at times pursue, and whatever use they may accordingly make of their privileges, they never go, in regard to each other, beyond the terms of decency, or even of that general good understanding which ought to prevail among them.

Thus the king, though he preserves the style of his dignity, never addresses the two houses but in terms of regard and affection : and if at any time he chooses to refuse their bills, he only says that he will consider of them (*le roy s'avisera*) ; which is certainly a gentler expression than the word *veto*.

The two houses on their part, though very jealous, each within their own walls, of the freedom of speech, are, on the other hand, careful that this liberty shall never break out into unguarded expressions with regard to the person of the king. It is even a constant rule amongst them never to mention him, when they mean to blame the administration ; and those things which they may choose to censure, even in the speeches made by the king in person, and which are apparently his own acts, are never considered but as the deeds of his ministers, or, in general, of those who have advised him.

The two houses are also equally attentive to prevent every step that may be inconsistent with that respect which they owe to one another. The examples of their differences with each other are very rare, and have been, for the most part, mere misunderstandings. Nay, in order to prevent all subject of altercation, the custom is, that, when one house refuses to assent to a bill presented by the other, no formal declaration is made of such refusal; and that house whose bill is rejected, learns its fate only from hearing no more of it, or by what the members may be told as private persons.

In each house, the members take care, even in the heat of debate, never to go beyond certain bounds in their manner of speaking of each other : if they were to offend in that respect, they would certainly incur the censure of the house. And as reason has taught mankind to refrain, in their wars, from all injuries to each other that have no tend-

their country, it became in a manner impossible to strike with them any bargain at which either nation would afterwards have cause to rejoice, or even to make any bargain at all. It would be needless to say any thing more, in this place, on the subject of the American contest.

The motto of one of the English nobility should have been that of ministers, in their regulations for rendering the colonies useful to the mother country.—*Faire sans dire.*

ency to promote the main object of their contentions, so a kind of law of nations (if I may so express myself) has been introduced among the persons who form the parliament and take a part in the debates : they have discovered that they may very well be of opposite parties, and yet not hate and persecute one another. Coming fresh from debates carried on even with considerable warmth, they meet without reluctance in the ordinary intercourse of life ; and, suspending all hostilities, they hold every place out of parliament to be neutral ground.

In regard to the generality of the people, as they never are called upon to come to a final decision with respect to any public measures, or expressly to concur in supporting them, they preserve themselves still more free from party spirit than their representatives themselves sometimes are. Considering, as we have observed, the affairs of government as only matter of speculation, they never have occasion to engage in any vehement contests among themselves on that account : much less do they think of taking an active and violent part in the differences of particular factions, or the quarrels of private individuals. And those family feuds, those party animosities, those victories and consequent outrages of factions alternately successful ; in short, all those inconveniences which in so many other states have constantly been the attendants of liberty, and which authors tell us we must submit to, as the price of it, are things in very great measure unknown in England.

But are not the English perpetually making complaints against the administration? and do they not speak and write as if they were continually exposed to grievances of every kind?

Undoubtedly, I shall answer, in a society of beings subject to error, dissatisfaction will necessarily arise from some quarter or other ; and, in a free society, they will be openly manifested by complaints. Besides, as every man in England is permitted to give his opinion upon all subjects, and as, to watch over the administration, and complain of grievances, is the proper duty of the representatives of the people, complaints must necessarily be heard in such a government, and even more frequently, and upon more subjects, than in any other.

But those complaints, it should be remembered, are not, in England, the cries of oppression forced at last to break its silence. They do not suppose hearts deeply wounded. Nay, I will go farther,—they do not even suppose very determinate sentiments ; and they are often nothing more than the first vent which men give to their new and yet unsettled conceptions.

The agitation of the popular mind, therefore, is not in England what it would be in other states ; it is not the symptom of a profound and general discontent, and the forerunner of violent commotions. Foreseen, regulated, even hoped for by the constitution, this agitation animates all parts of the state, and is to be considered only as the bene-

ficial vicissitudes of the seasons. The governing power, being dependent on the nation, is often thwarted; but, so long as it continues to deserve the affection of the people, it can never be endangered. Like a vigorous tree which stretches its branches far and wide, the slightest breath can put it in motion; but it acquires and exerts at every moment a new degree of force, and resists the winds, by the strength and elasticity of its fibres, and the depth of its roots.

In a word, whatever revolutions may at times happen among the persons who conduct the public affairs in England, they never occasion the shortest interruption of the power of the laws, or the smallest diminution of the security of individuals. A man who should have incurred the enmity of the most powerful men in the state—what do I say?—though he had, like another *Vatinius*, drawn upon himself the united detestation of all parties,—might, under the protection of the laws, and by keeping within the bounds required by them, continue to set both his enemies and the whole nation at defiance.

The limits prescribed to this book do not admit of entering into any farther particulars on the subject we are treating here; but if we were to pursue this inquiry, and investigate the influence which the English government has on the manners and customs of the people, perhaps we should find that, instead of inspiring them with any disposition to disorder or anarchy, it produces in them a quite contrary effect. As they see the highest powers in the state constantly submit to the laws, and they receive, themselves, such a certain protection from those laws whenever they appeal to them, it is impossible but they must insensibly contract a deep-rooted reverence for them, which can at no time cease to have some influence on their actions. And in fact, we see that even the lower classes of the people, in England, notwithstanding the apparent excesses into which they are sometimes hurried, possess a spirit of justice and order superior to what is to be observed in the same rank of men in other countries. The extraordinary indulgence which is shown to accused persons of every degree, is not attended with any of those pernicious consequences which we might at first be apt to fear from it. And it is, perhaps, to the nature of the English constitution itself (however remote the cause may seem) and to the spirit of justice which it continually and insensibly diffuses through all orders of the people, that we are to ascribe the singular advantage possessed by the English nation, of employing an incomparably milder mode of administering justice in criminal matters than any other nation, and at the same time of affording, perhaps, fewer instances of violence or cruelty.

Another consequence which we might observe here, as flowing also from the principles of the English government, is the moderate behaviour of those who are invested with any branch of public authority. If we look at the conduct of public officers, from the minister of state

or the judge, down to the lowest officer of justice, we find a spirit of forbearance and lenity prevailing in England, among the persons in power, which cannot but create surprise in those who have visited other countries.

Two circumstances more I shall mention here, as peculiar to England; namely, the constant attention of the legislature in providing for the interests and welfare of the people, and the indulgence shown by them to their very prejudices; advantages these, which are, no doubt, the consequence of the general spirit that animates the whole English government, but are also particularly owing to the circumstance peculiar to it, of having lodged the active part of legislation in the hands of the representatives of the nation, and committed the care of alleviating the grievances of the people to persons who either feel them, or see them nearly, and whose surest path to advancement and fame is to be active in finding remedies for them.

I mean not, however, to affirm, that the English government is free from abuses, or that all possible good laws are enacted, but that there is a constant tendency in it, both to correct the one, and improve the other. And that all the laws which are in being are strictly executed, whenever appealed to, is what I look upon as the characteristic and undisputed advantage of the English constitution,—a constitution the more likely to produce all the effects we have mentioned, and to procure in general the happiness of the people, since it has taken mankind as they are, and has not endeavoured to prevent every thing, but to regulate every thing; I shall add, the more difficult to discover, because its form is complicated, while its principles are natural and simple. Hence it is that the politicians of antiquity, sensible of the inconveniences of the governments they had opportunities of knowing, wished for the establishment of such a government, without much hope of ever seeing it realised :* even Tacitus, an excellent judge of political subjects, considered it as a project entirely chimerical.† Nor was it because he had not thought of it, had not reflected on it, that he was of this opinion : he had sought for such a government, had had a glimpse of it, and yet continued to pronounce it impracticable.

Let us not, therefore, ascribe to the confined views of man, to his imperfect sagacity, the discovery of this important secret. The world might have grown old, generations might have succeeded generations, still seeking it in vain. It has been by a fortunate conjunction of circumstances,—I shall add, by the assistance of a favourable situation, —that Liberty has at last been able to erect herself a temple.

Invoked by every nation, but of too delicate a nature, as it should

* 'Statuo esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, 'et populari, modice confusa.'—Cic. *Frag.*

† 'Cunctas nationes et urbes, populus, aut priores, aut singuli, regunt. Delecta ex his et 'constituta reipublicæ forma, laudari facilius quam evenire: vel si evenit, haud diuturna esse 'potest.'—Tac. Ann. lib. iv.

seem, to subsist in societies formed of such imperfect beings as mankind, she showed, and merely showed herself, to the ingenious nations of antiquity who inhabited the south of Europe. They were constantly mistaken in the form of the worship they paid to her. As they continually aimed at extending dominion and conquest over other nations, they were no less mistaken in the spirit of that worship; and though they continued for ages to pay their devotions to this divinity, she still continued, with regard to them, to be the *unknown* goddess.

Excluded, since that time, from those places to which she had seemed to give a preference, driven to the extremity of the Western world, banished even out of the Continent, she has taken refuge in the Atlantic Ocean. There it is, that, freed from the dangers of external disturbance, and assisted by a happy pre-arrangement of things, she has been able to display the form that suited her; and has found six centuries to have been necessary for the completion of her work.

Being sheltered, as it were, within a citadel, she there reigns over a nation which is the better entitled to her favours, as it endeavours to extend her empire, and carries with it, to every part of its dominions, the blessings of industry and equality. Fenced in on every side (to use the expression of Chamberlayne) with a wide and deep ditch, the sea,—guarded with strong out-works, its ships of war,—and defended by the courage of her seamen,—she preserves that mysterious essence, that sacred fire so difficult to be kindled, and which, if it were once extinguished, would perhaps never be lighted again. When the world shall have been again laid waste by conquerors, she will continue to show mankind, not only the principle that ought to unite them, but what is of no less importance, the form under which they ought to be united. And the philosopher, when he considers the constant fate of civil societies amongst men, and observes the numerous and powerful causes which seem, as it were, unavoidably to conduct them all to a state of political slavery, will take comfort in seeing that Liberty has at length disclosed her nature and genuine principles, and secured to herself an asylum against despotism on one hand, and popular licentiousness on the other.

INDEX.

American Colonies, their claim of voting supplies to the crown, hurtful, if obtained, to the English constitution, 349, 350. What ought to have been the general conduct of ministers in regard to the colonies, 350. Appeal, in case of murder, its effects, and to whom allowed, 179; the right of, abrogated, 179, *note*. Army, restrictions on the power of the king in regard to the keeping of it, 179. Is not, in England, the means of supporting the authority of the crown, 318. How little its assistance was useful to James II., 327. Arrest, method of, in civil causes, by the English laws, 188, 189. By the Roman laws, 189. The alterations in the English law in that respect, 190. Assemblies, popular, the disadvantages they lie under in regard to each coming to any deliberate well-weighed resolution, 242. Advantages a few distinguished citizens have over them, 244.

Athens, arbitrary proceedings of its magistrates, 125; Tully's passage concerning them, 248. Aula Regis, what kind of Court, 150; the Court of Common Pleas dismembered from it, 187; The Court of King's Bench may be considered as the remains of it, 187. Author, occasional personal remarks of his, 291, 311, 318, 321; his Memorials of Human Superstition quoted, 344; his conversation with Dr. Franklin, 350.

Barons, originally in a great measure independent in France, 149; not so in England, 150; unite in a common cause with the people, 153, 276, 322; answer to one of the kings, 184, *note*. Baronies, English, Theory of Selden and Madox on, 9. Beauchamp, lord, procures the passing of a bill for limiting personal arrests, 190. Bills, how deliberated upon and framed, 170, 233, 236, 249; in Parliament, power of originating claimed by the House of Commons, 60. Bill of Rights, an account of, 166: utility of its provisions, 278. Blackstone, judge, quoted, 171, 200, 216, 268, 286, 292. Boroughs, cause of summoning deputies from, 23; nature of prescriptive boroughs, power of the sheriff to omit boroughs, reluctance of boroughs to send members, who the electors in boroughs were, 72. Burnet, bishop, quoted, 288, 327.

Cæsar, public speech of his quoted, 293.

Censorial power, that established in Rome only a senatorial artifice, 259.

Censors, in Rome, might remove a man from one tribe into another, and elect senators, 252. Chancery, court of, its office in regard to the framing of writs, 194. Charles I., sketch of his reign, 162, 164; maintains his ground eleven years against the violent political and religious spirit of his times, 394; his attempt to seize the five members led to the civil war, 324. Charles II., conduct of, 165. Charta, Magna, substance of, 154. Cicero quoted, 182, 199, 247, 248, 252, 288. Civil English laws, divided into unwritten and written law, 185; the sources of the unwritten law, 186; how far the civil law is a part of it, *ib.*; what the written law is, 187; peculiarities of the English civil laws, 188; refinements and subtilties in them, 188; compared with the old Roman civil laws, 194. Civil power in England, how superior to the military, 325, 326. Civil Roman laws, constant dislike of the English lawyers for them, 183; formalities in the ancient Roman laws, 192; the different collections of them, 202. Clergy had a right to sit in the House of Commons, 51. Coke, Sir Edward, quoted, 213, 215, 232, 260. Comines, Philip de, quoted, 160.

Commons, English, their origin, under Henry III. and Edward I., 156; how inconsiderable their weight at first, 156; this soon increases, 157; farther advances, 160; how the house is constituted, 168; vindicate the right of taxation against the attempts of the crown, 161, 164; and of the lords, 177; they cannot vote by proxy, 132; enjoy a freedom of debate superior to that ever possessed by any popular assembly, 236; debarred from any share in the executive authority, 254; thence led to serve the people faithfully, 255; striking instances of this in the laws they have framed at particular times, 331, 332; and in their watching their execution, 285; have impeached the servants of the crown and judges, 286; their proceedings in the case of Sir John Coventry, 287; abridge their own personal privileges, 289; do strict justice on their own members, 289; on what occasion they repealed the statute De Hæretico Comburendo, 293; their attacks on the crown's prerogative defeated by the lords, 299; they in their turn defeat the like attempts from the lords, 299.

Commonwealths, the people in them apt to be misled by favourite leaders, 222; the division of the executive authority that takes place in them, makes it very difficult to lay it under proper restraint, 231; the people unavoidably betrayed by those whom they trust with power, 250, 252, 253; revolutions always concluded, in them, in a manner disadvantageous to public liberty, 271; the

laws to secure the liberty of the citizens, besides being imperfect, are not even carefully executed, 278, et seq. ; cannot subsist without certain arbitrary powers, contrary to the liberty of the citizens, 309 ; do not admit the liberty of speaking and writing, and, perhaps, cannot, 310 ; the power of the government supposed by law to be unbounded, till stopped by some positive regulation, 320: by what means commonwealths generally lose their liberties, 331 ; great difficulty for the people in them to preserve their rights, 331, 332.
Condemnation (illegal), rare in England, 100.
Conquest, the, is the real æra of the formation of the English government, 147.
Constitution, English, on the present constitution of, 453, 582: the æras of its formation, 147, 160, 166, 175 ; being different from that of all other free states, cannot fall into ruin from the same causes, 328 ; causes that operate for its preservation, 332 ; endangered by the offers of Columbus to Henry VII., 335 ; farther reasons of its future preservation, 338 ; how it rises again, after being in a manner overwhelmed, *ib.* ; dangers to which it may be exposed, *ib.* ; in what circumstances it may be looked upon as annihilated, 339 ; meddling with it, upon the score of improvement, may prove very dangerous experiments, 328, 342 ; would have been altered by granting the Americans their claims, 350 ; seems to diffuse a spirit of order and justice among the lower classes of people, 353 ; and wished for by the politicians of antiquity, 355.
Consuls, the æra of their creation, and nature of their office, 271 ; unrestrained power, 251, 279. Copyholders, the origin of, 110. Convocation a nullity, 179 *note.* Coronation oath, 180. Corsica, state of, 348, *note.* Counties, representatives of, by whom chosen, 72 ; county election badly attended, 78. Courts of law, in England, their names and functions, 187 ; kept by parliament under strict rules, 290 ; the great impartiality of their proceedings, 289, &c. Coventry, Sir John, his case, 287 ; resentment of the commons, and their bill, *ib.* Cromwell, his fruitless attempts to form a popular assembly obedient to him, 312.
Crown, cases of dispensing power, claimed and executed by English kings, 59 ; influence of, on county elections, 78 ; its power much superior in England after the Conquest to what it was in France, 150 ; the barons compelled to unite with the commonalty, to restrain its power, 153. Its present constitutional prerogative, 171 ; restraints it lies under, 173, 174 ; totally dependent on the people for its supplies, 173 ; usefulness of its power in preventing any citizen or popular leader from acquiring a degree of power dangerous to public liberty, 224 ; instances of it, 228 ; is not to make open proposals to parliament for their assent or dissent, 236 ; may send messages to each house, and to what effect, 237 ; unites in itself the whole executive authority, 254 ; thereby produces a union in a common cause among all orders of subjects, 255 ; is like an ever subsisting Carthage, that maintains the virtue of the representatives of the people, 256 ; farther illustration of the same fact, 284, 288 ; the power of Crowns has not produced these effects in other countries, instances of this, 296 ; the stability of the executive power of the English crown, 297 ; is a great peculiarity of it, 298 ; is not a subject to be explained here otherwise than by facts, 298 ; its power alternately defended by the two houses, 298 ; the secret forbearance of the two houses from invading its prerogative, 300 ; remarkable instances of this, 301, 302, 303 ; its secure power rendered conspicuous in the facility with which it dismisses great men from their employments, 304 ; not so in other monarchies, 305 ; the facility with which it dismisses the parliament, 305 ; never attacked except by persons who positively laid claim to it, or at least upon national grounds, 307 ; its power more secure in itself, but not so indelibly annexed to the person of an individual as in other countries, 308. The secret causes of its peculiar stability form a subject more properly belonging to philosophy than to politics, 308 ; great advantages resulting from this stability, 309.—I. The numerous restraints it is able to bear, and great freedom it can allow the subject at its expense, *ib.*—II. The liberty of speaking and writing, 310, 311.—III. The unlimited freedom of debate in parliament, 312.—IV. The union among all orders of subjects in defence of public liberty, 315.—V. The unlimited freedom allowed to the people of meddling with government affairs, 316.—VI. The impartiality with which justice is administered, without respect to persons, 316.—VII. Needlessness of an armed force to support its power, 318.—VIII. Its strict respect even for the letter of the law, 322.—IX. The lenity used in the administration of criminal justice, may, perhaps, be ascribed in great part to the general security which the stable power of the crown gives to the whole machine of government, *ib.* The great power the crown formerly derived from its dominions beyond sea, supplied afterwards by sudden circumstances at home, 323 ; instances of this great power without the support of an armed force, 324 ; it keeps the military power in a surprising state of subjection to the law, 326 ; instances of this, *ib.* ; really could not, in the general situation of things, derive any assistance from a standing army against the people, 326 ; the method it should adopt for setting aside the present constitution, 328 ; its power is wholly annexed to the civil branch of its office, 328 ; hints concerning its effectual foundations, 328 ; prevents the English constitution from being destroyed in the same manner the Roman republic was, 330 ; the great usefulness of its veto power, 334 ; considerations on the attempts to abridge its prerogative, 339 ; in what circumstances these attempts might

be brought to succeed, 340; a comparison between its prerogative and that of the kings of Sweden, before the last revolution, 340; the abridging of its prerogative might not answer the expectations of those politicians who wish for it, 341; sketches of the dangers to public liberty that might arise therefrom, 343; the rule to be followed in pursuing such attempts, 344.

Debate, freedom of, secured by the bill of rights, 182; how conducted in the English parliament, 170, 249; the unlimited freedom exercised in the English parliament not followed by any bad consequences, and why, 314; publication of the, 261, *note*. Democracy, remarks on, 164, and 252, *note*. Dictators, their great power, 247, 281; their absolute power was often useful, 309. Disseisin, forcible remedy for, 106. Effects of dissolution of parliament, 169; easily effected by the crown in England, 306.

Edward I., surnamed the English Justinian, 156; confirms the charters, 5; character of his reign, 127. Elections, laws relating to them, 168, 182. Grenville's bill for deciding contested elections, 182; advantages arising from the right of the people to elect representatives, 257, 266. Elizabeth, queen, the inquisitorial court of High Commission established during her reign, 161. Emancipation of sons, in Rome, manner of, 199.

England, on the present constitution of, 5; the spiritual peers, the lay peers, earls and barons, 6; whether tenants in chief attended parliament under Henry III., 9; origin and progress of parliamentary representation, 10; whether the knights were elected by freeholders in general, 11; progress of towns, 14; towns let in fee-farm-charters of incorporation, 17; prosperity of English towns, particularly London, 18; towns when first summoned to parliament, 19; cause of summoning deputies from boroughs, 23; parliament, when divided into two houses, 24; the power of the king becomes very great at the æra of the Conquest, 150; the lords or barons much dependent on the crown, 150; are thence compelled to unite in a common cause with the people, 153; different from France, forming one compact united kingdom, and this circumstance favours the establishment of public liberty, 154; a peculiarity of its government, viz., the advantageous manner to public liberty in which revolutions have constantly been concluded, 276; the strictness with which laws favourable to the liberty of the subject are executed, 284; remarkable impartiality in the courts of law, 291; instances quoted, 292; farther strictures on the same subject, 317; singular law doctrine, concerning the authority of government, and the liberty of the subject, 321; the people's situation different from that of the people in Rome, 330; the balance of the people in government is connected with the right of property, 332; divisions among the people never carried very far, 352; the lower class possessed of a considerable spirit of order and justice, 353.

Equity, courts of; an inquiry into the meaning of the word, and their real office, 197; a court of this kind existed in Rome, 198; remedies afforded by the English courts of equity, 200; how these courts were first instituted, and the opposition they met, 201; their method of proceeding to enforce appearance, and submission to their decrees. 201; are kept within much more strict bounds than the prætor's equity court was at Rome, 201; farther definition of their office, 202. Executive power, lodged in the king, is more easily repressed when confined to a sole indivisible seat, 229 et seq.—is taken out of the hands of the representatives of the people, 254; great advantages thence arising, 255.

Faire sans dire, the motto, quoted, 351. Favourite of the people, how prevented in the English constitution from acquiring a power dangerous to public liberty, 225. Felton, his answer to the bishop of London, 215. Feudal government, introduced in France through a long series of events and years, 149; is introduced suddenly and at once in England by the Conquest, 150; consequences of this difference, 152; rights, abuses of in England, 95. Fictions of law, 196; Forest laws, jurisdiction of, 95.

France, the feudal government was established in it very slowly, 149; the crown was at first elective, 149; the authority of the king originally very inconsiderable, and the barons were in great measure very independent of the crown, 150; these circumstances were prejudicial to the liberty of the people, and the kingdom was formed by an aggregation of different sovereignties, 151; the remarkable treaty by which the war for the public good was terminated, 156; general estates, how constituted, and the third estate, or commons, never possessed any weight, 157; a remarkable insurrection, 158; Edits enrégistrés, 171; expedient for dismissing the Parliament of Paris, 306; the jealousy of the crown against that assembly, 313; comparison between the French and English constitution, in regard to the right of taxation, 347.

Frankleyn, condition of in England, 63. Franklin, Dr. quoted, 349, 350. Freeholders, the elective franchise, when restricted to freeholders of 40 acres, 75. French language introduced into the English laws by William the Conqueror, 171; is still used by the king in declaring his intention to the parliament, *ib.*

General warrants, set aside, 334. Geneva, republic of, mentioned, 233, 244, 264, 334. George I., king, led into an imprudent step, 340, 342. Germany, by what cause the growth of the power of the crown was checked there, 159. Gracchi, how forsaken by the people, 248. Grand jury, its office, 211. Grecian commonwealths, revolutions in them only favourable to the particular interests of leaders and demagogues, 276. The reproach made them by Cæsar, 293. Guise, death of the duke of, 305.

Habeas Corpus act, when passed, and for what purpose, 219; the tenour of it, *ib.*; the particular occasion of it, 286; expressions of Judge Blackstone on the subject, *ib.*; on what occasion suspended, and with what caution, 310; by what means finally settled, 334.
Hale, judge, quoted, 156; his description of the office of a jury, 215.
Haxey, Thos., prosecuted by Richard II. for proposing an obnoxious bill in parliament, 51; his judgment afterwards reversed, 52.
Henry I., charter of, 152.
Henry IV., petition of the House of Commons to him, his reply—his expenditure controlled by the House of Commons, 61.
Henry VI., disastrous events of his reign, 116; his mental derangement, 121; Duke of York made Protector—deposed, 126.
Henry VIII., his great power, 161; was unsupported by a standing army, 296.
Heresy, statute against, in the fifth of Richard II., not passed by House of Commons, 59.
Holt, judge, remarkable opinion delivered by him, 269.
House of Commons, when constituted a separate house, 24; knights of the shire, when first chosen for, 9; and by whom, 11; burgesses, when summoned, 19; how elected, 71; causes of their being summoned, 23; proper business of the house, 25; remonstrate against levying money without consent, 29; advice required in matters of war and peace, 34; their right to inquire into public abuses, 35; great increase of their power during the minority of Richard II., 37; legislative rights of this house established—impeach the king's ministers—establish the privilege of parliament, 65; and the right of determining contested elections, 70; fluctuations in the number of its members, 76.
House of Lords, when formed into a separate house, 25; their consent necessary in legislation, 32; their advice required in questions of war and peace, 35.
Hugh Gapet, the first hereditary king in France, 149; the haughty answer of a French lord to him, 150. Hume, Mr., a few words on the character, given by him of James II., 324.
Impeachment, public, remarks upon 160, *note;* what, and its effects, 180; continues from one parliament to another without abatement, 180, *note;* first instance of in Lord Latimer, 46; of the Earl of Suffolk—of ministers, 65; the king's pardon no bar to the prosecution of an impeachment, 180; can it prevent the execution of the judgment? *ib.*; instances of ministers and judges impeached by the commons, 180, 286, 287. Imprisonment, the methods formerly used for liberating imprisoned persons, 218; they were insufficient against the power of the court, *ib.*; a new force given to them by the petition of right, 219; Habeas Corpus Act, *ib.*
Ireland, members added to the House of Commons on the union with, 168; a separate state, 237, *note.*
James I., liberty begins to revive in his reign, 162; his lofty notions concerning regal authority, *ib.*; keeps his ground against the restless spirit of the times, 324; James II., how his dethronement was effected, 166; was inexcusable in his conduct, 324; received no assistance from his numerous army, 328.
Jesuits, how expelled from Spain, 306.
John, king, grants the great charter, 154.
Johnson, Dr. Samuel, his opinion concerning the office of the courts of equity, examined, 197. Judges, independence of, 174; their office, in criminal causes, is only to direct the jury, and afterwards to pronounce the law, 213; cannot alter the mode of punishment, 216; instances of judges impeached, 286. Judicial power, in regard to criminal matters, the necessary cautions in establishing such power, 204, et seq.; should not be trusted, especially in a free state, to any too powerful persons or bodies, 207, 208; allusions to the French courts of law, 208; may be said in England to be in the hands of nobody, 216; lodged in the people, 312. Junius's letters quoted, 213, 286. Jury, challenge of, 182, *note,* how they are to shape their verdict, 213; must decide both upon the fact and criminality of it, *ib.;* what rules must be followed in their opinion, 213, 214; Judge Hale's remarkable passage in that respect, *ib.;* usually pay a great regard to the judge's direction, 217; trial by, 217, *note;* the effect of their recommending to mercy, *ib.;* trial by in Scotland, 284. Justice, impartiality of its administration in England, 292, 316.
King, his prerogatives by the constitution, 167, 171, 172; the restrictions set by law upon the exercise of the same, 173, 174, 176; compelled to call a parliament yearly, 177; he is not to interfere, nor his privy-council, in the decision of causes either civil or criminal, 179; it is disputed whether he can remit the prosecution of a sentence awarded in consequence of an impeachment, 181; not to be named in debates, 249; the last instance of one using his negative voice, 302.
Labourers hired, when first mentioned in the English statute book—wages regulated, 113; impressed into the royal service, 95.
Land-tax made perpetual, 179; amount transferred to the redemption of, *ib. note.*
Laws of England, 185; author's strictures on are philosophical though not always accurate, 188, *note;* difficulty in procuring just ones, 241; how passed in cases of emergency, 249; all who can influence the execution of them, are to be strictly watched, 253; severity of the English in particular cases, 217, 294; a very necessary caution in framing them, 254. Law, as opposed to equity, 204, *note;* criminal, how strictly the letter of it is adhered to in England, without any extension, 214, 327; great mildness of it, 217. Legislative power, how formed in England, 167, et seq.; advantages arising from its being divided, 232; remarkable constancy in its operations in England, 232

not so in the ancient commonwealths, 232. Legislation, mode of, in commonwealths, 233; inconveniency of it, 235; the manner in which laws are framed in England, 235; advantages of the same, 236; would it be an advantage if laws were enacted by the people at large, 241, 244.

Libel, law of, 260, *note;* truth of, 261, *note;* alteration in the, through Fox's Act, 213, *note.* Liberty, causes of English, 152; its progress, 153; private liberty, 182; the word much misapplied or misunderstood, 239; a more accurate definition of the same, 240; how the provisions to secure it should be directed, 253; author the friend of illegal, 258, *note;* singular law doctrine in England concerning the liberty of the subject, 321. Livy, quoted, 243, 247, 272, 273, 275, 280.

London, state of, before the Norman Conquest, 18; power and opulence of its citizens subsequent to that event—population in the fourteenth century, 19. Lords, the house of, how constituted, 169; not suffered by the commons to frame, or even alter, a money-bill, 170, 179; make it a standing order to reject all money bills, to which bills of another nature have been tacked, 174, 298; have not given up their claim in regard to altering money bills, 177; the great pre-eminence allowed them in point of ceremony over the commons, 233; can vote by proxy, 233; unite in a common cause with the people against the power of the crown, 152, 163, 255, 286; abridge their own personal privileges, 289; their impartiality in their judicial capacity, 290; cannot be charged with having abused their privilege of trying their own members, *ib.*; defeat the attempts of the commons on the crown's prerogative, 299; their own attempts defeated by the commons, 300; a bill is framed to limit their number, 340; the importance of that bill generally overlooked, 342. Lyttleton, lord, quoted, 268.

Machiavel's History of the Republic of Florence, quoted, 223.

Magna Charta, remarkable extensiveness and impartiality of the provisions of, 277.

Manumission of villeins in England, 115. Marlborough, duke of, easily dismissed from his employments, 228, 304. Martial courts, a remarkable dispute between one and a court of law, 326. Martial law, must be universal, where the authority of the government is supported by a standing army, 319. Members of the House of Commons, their personal privileges, 289; instances of some punished by their own house, 289. Military power, a cause of anxiety to those sovereigns whose authority is supported by it, 319; cannot in such case be subjected to the civil power, 325; not necessary to support the power of the crown in England, 326; the surprising subjection of it to the civil power in England, 326. Minister, equally interested with other subjects in maintaining the laws concerning personal security, 255; a discarded one in other countries, the cause of some anxiety or jealousy to the government, 305; not so in England, *ib.*

Monarchies, revolutions generally concluded in them by provisions for the advantage of great men and leaders, not of the people, the same as in commonwealths, 276, 301; the executive power of the crown in all ancient or modern monarchies, wanting that peculiar stability of the English crown, 296; not secured otherwise than by standing armies, 296; the monarchs are afraid of powerful subjects, 305; cannot do without some arbitrary means of asserting their authority, 309; very jealous of the liberty of the press, and, perhaps, are really obliged to be so, 310; extremely averse, out of fear for their own security, to calling popular assemblies, 312; respect of persons in the administration of justice cannot be prevented in them, 317; anxious precautions taken in them in regard to the military power, 319; their law-doctrine concerning the executive authority of the government, 320; the military superior to the civil power, 325.

Money bills, sometimes altered in effect by the peers, 177.

Montesquieu, quoted, 165, 259, 328.

More's Utopia, quoted, 259.

Obedience, passive, an absurd doctrine, 167.

Office, disqualification for accepting, 300. Ostracism, an arbitrary unjust expedient, but, perhaps, necessary in the republic of Athens, 309. Oxenstiern, chancellor, his words to his son, 351.

Parliament, English, the constitution of, 168, 171; how to be convoked, 168, 178; proceedings in parliament not to be questioned in any other place or court, 182; the secret bent of that assembly to forbear invading the prerogative of the crown, 303; cautious conduct of the three branches towards each other, 351. Parliaments, French, great weight of, 208; difficult to be managed by the crown, 208; how Louis XV. dismissed that of Paris, 306; precautions taken by the next king in restoring it, 313. Parliamentary History of England, a superficial observation of its authors, 277.

Pardon, the prerogative of, lodged in the king, 172; cannot be pleaded as a bar to an impeachment being carried on, 181; often granted on the recommendation of a jury, 217. Patriotism, instances of, 264, *note.*

Peers, how to be tried, 215; have few real personal privileges above the subject, 290. Peers (lay), how created, 83; their right to a seat in parliament, 6.

People, how misled by favourites or demagogues, 222; how influenced or deceived by the magistrates or great men in commonwealths, 242; should act through representatives, 244; should entirely delegate the legislative authority to these, 245; how, and in what circumstances only, the right of *resistance* may be usefully exerted by them, 270; may be said in England to possess both the judicial and censorial powers, 312; the freedom they enjoy of interfering in government matters, 316.

Pope, Mr., quoted, 251. Popularity, progress of, 227, *note*. Population of London, 19. Porcia Lex de tergo civium, 251, 277. Præmunire, writ of, 220. Prætor, his office in Rome, 190; assumes the office of a judge of equity, 198; his provisions, *ib.*; their power very arbitrary, 202; when first restrained, *ib.* Prerogative (royal) defined, 94; notice of abuses, 95.
Press, liberty of the, is a real censorial power lodged in the people, 258; much more effectual and beneficial than the one established in Rome, 259; a licenser appointed upon the press by the star-chamber—the long parliament, *ib.*; Charles II., and James II., *ib.*; finally established in the year 1694, and how, *ib.*; a definition of it, 260; actions respecting the same not to be decided without a jury, *ib.*; how extensive its use has become, 261; great political advantages arising from the same, 262; is farther useful, combined with the other rights of the people, 263; such as the right of election, 265; how useful a support to the right of resistance, 268; is not allowed in commonwealths, or in monarchies, 309; its being tolerated in England to so high a degree, depends on the stability of the executive power of the crown, 311; the real foundation on which it rests in England, 321.
Prisoner, how to be committed, 212; when once acquitted, cannot be tried again for the same offence, 214. Privy Council, its power abridged by the same act which abolished the star-chamber, 178. Prorogation, its effects, 169; the term not to be afterwards shortened, 177.
Propounding, in legislation, the privilege of, reserved to the executive power in commonwealth, 234; allotted in the English constitution to the representatives of the people, 235; how the same point was formerly settled in France, Sweden, Scotland, and Ireland, 236; great advantage accruing to public liberty from this right being lodged in the representatives of the people, 237, 249; its remarkable advantages for preserving the English constitution, and instances of it, 333. Punishments, the judge cannot alter the mode of, 216; nor the sheriff, *ib.*; do not extend beyond the simple deprivation of life, 217; their mildness in England, 292; not so among the Greeks and Romans, 293; attention of the English legislature in that respect, 294. Purveyance, a branch of the ancient royal prerogative in England—its abuses, 95.
Rapine, prevalent habit of, in England, during the middle ages, 107; regency in England, historical instances of, 117; during the absence of the kings in France—at the accession of Henry III., of Edward I., and Edward III., 117; of Richard II., 118; of Henry VI., 118, 123.
Representatives, qualifications for being one, 168; advantages that accrue to the people from acting through representatives, 245, et seq.; more hurtful than beneficial when their interest is not in reality united with that of the people, 245; the people should entirely delegate the legislative authority to them, 248; the sedate manner in which in England they debate and vote, 249; do not allow the speaker to have a vote, or the king's name to be introduced in debates, 249; are debarred from all executive authority, 254; capital advantages thence arising, 254, et seq.
Resistance, right of, admitted by the English laws, 267; remarks on the doctrine of, 268, *note*; opinion of Judge Blackstone quoted, 268; recognised even by the courts of law, *ib.*; is in a great measure a useless right, unless combined with the liberty of the press, 269; what circumstances are required for its being usefully exerted, 270. Revenue, of the king, very trifling, without grants from the parliament, 173.
Revolutions, have always been concluded in England in a manner advantageous to public liberty, 271, 276; a series of instances, 277, &c.; not so in the Roman commonwealths, 272; a series of instances during the whole time of its duration, 272, 275; the same disadvantage occurred in the Greek republics, and in the limited monarchies of Europe, such as Scotland, Sweden, &c., 276. Revolution of the year 1689, how accomplished and improved, 166, 276; in England, of 1389 and 1688, parallel between, 54.
Re-unions of particular provinces to the crown, in France, 151. Right, the petition of, 164, 278.
Rome, wrong notions of liberty the patricians and senate gave to the people, 239; the influence of senators and great men over the people, and their artifices, 246; the people, and even the tribunes, greatly over-awed by a dictator, 248; the people betrayed by those in whom they trusted, 251; the tribunes not earnest in the defence of public liberty, *ib.*; the senate, consuls, and dictators, possessed of an arbitrary power over the lives of the citizens, 251; the censorial power only a piece of senatorial craft, 258; revolutions constantly concluded in a manner disadvantageous to public liberty, 271; the laws concerning the liberty of the citizens were not strictly executed, 279; remarkable instance of insolence and cruelty of a magistrate, 280; the rapacity of the men in power in regard to the allies and subjects of the republic, 281; corruption of the judges, *ib.*; remarkable changes in the formation of them, 281; a remarkable passage of Tully in regard to the disorders that took place in the republic, 282; a short sketch of their real cause, 283; dangers to which both its liberty and empire were exposed, 329; how the final overthrow of the republic was operated, 330; the political rights allotted to the people, 331.
Rousseau, quoted, 233, 238, 247, 258, 280.
Russian ambassador, cause of his arrest, 292.
Saxon government, abolished in England by the Norman conquest, 148; note upon that disputed subject, 147. Scotland, the number of representatives it sends to parliament,

167; the lords of the articles, what assembly, 236; trial by jury, extended to, 284, *note*; the authority of the crown commonly invaded by the nobles, 301; the bill framed for settling the crown on the house of Hanover, 320; no advantageous expedient to have trusted the nobility with the command of a standing army, 320. Secretary of state, case of an action brought against one, by a private individual, 292. Selden, remark of, 97, *note*. Senate, Roman, how formed, 252; its conduct at the expulsion of the kings, 271. Sévigné, Madame de, quoted, 347. Sheriff, power of omitting boroughs that had sent members to parliament, 74. Smith, Dr. Adam, his opinion on liberty, and on the effects produced by a standing army, examined, 319; further observations on the same subject in general, 323. Socage and socagers, question considered whether freeholders in Socage were liable to contribute wages to knights in parliament, 75. Spain, how that monarchy was formed, 109. Spelman, quoted, 148.

Star-chamber, court of, how constituted, 164; it crushed the liberty of the press, 259; expressions of Sir Edward Coke concerning it, *ib.*; was a kind of court of equity in regard to criminal matters, 322; by what means abolished, 334; Statute, de hæretico comburendo, for what reason repealed, 294; that for allowing parliaments to meet of themselves, repealed, 303. Statutes, distinction between them and ordinances, 32; sometimes drawn up by the judges after a dissolution of parliament, fraudulently altered in consequence, 59. Subsidies (parliamentary) by whom assessed, 10: how granted, 103; Supremacy of the state, endeavours made to suppress it in England, 17. Supplies, the power of withholding questioned, 221, *note*.

Sweden, an account of the revolutions that have taken place in its government, and of the restraints at times put on the authority of the crown, 300; the disadvantages of the body of the people in the legislature, 332; an account of its government before the last revolution, 340. Swift, dean, quoted, 304.

Tacitus, quoted, 161, 354. Taxation, right of, when first secured to the lords and commons, 157; possessed in England by a single parliament, not by several assemblies as in France, 161; is rendered thereby a much more efficacious check upon the crown, 167; all taxes or money bills must originate in the House of Commons, as well as the alterations in such bills, 170; the great constitutional efficiency of that right, 173, 175; the existence of the commons depends upon the same, 177; the advantages of this right of the commons, when combined with the right of propounding law-remedies, 236, 238; how firmly it secures all the other rights of the people, and the whole constitution, against the attempts of the crown, 332; is the constitutional balance of the people against the crown, 344; at the same time the only forcible one, 345, 346, 350; rendered ineffectual when lodged in several distinct provincial assemblies, 161, 347; how it might become so divided in England, 348.

Temple, Sir William, quoted, 147. Tennants in chief by knights' service, whether parliamentary barons by virtue of their tenures, 7. Torture, attempted to be introduced in the reign of Hen. VI., 215; declared illegal by the judges, and never known in England, 100. Towns, progress of in England, to the 12th cent., 14; when let in fee-farm-charters, of incorporation granted to them, their prosperity in the 12th cent., 18. Treason, high, statutes concerning it, repealed, 161, 175; how trials in cases of treason are to be conducted, 212. Trial by jury, revived in the reign of Henry II., 153; how to be conducted, 213; great advantages of this institution, 216, 218; how strictly preserved in England, 284; not so in Normandy, Sweden, and Scotland, 284. Trials, the manner in which prisoners are tried in foreign countries, 209. Tribunes, Roman, betrayed the cause of the people, 251; their interested public conduct, 274. Tucker, Dean, 347. Tudors, the great power of the princes of that house, 161, 176, 323.

Verdict, how to be expressed, 213; a special one, what, *ib.* Villenage of the English peasantry and its extinction, 110-116. Villeins regardant and villeins ingross, 111.

Walstein, duke of, caused to be slain by the Emperor Ferdinand II., 305; Wicliffe (John) influenceof the principles of in effecting the abolition of, villenage, 114.

William the conqueror set aside the Saxon, and substituted the feudal government, 148, 150; possessed an uncommonly great authority, 150. Writers, political, their ill-judged expressions and notions, 239; their unwise admiration of the censorial power in Rome, 259; have not penetrated into the real foundation of the science of politics, 329; have treated it as an occult kind of science, as natural philosophy was considered in the time of Aristotle, 338; anecdote of one, 322. Writs, their importance in the English courts of law, 194; compared to the Roman actiones legis, *ib.*; the difficulty in creating new writs, 195.

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