A MANUAL

OF

CONSTITUTIONAL HISTORY,

FOUNDED ON THE WORKS OF

Hallam, Creasy, May and Broom;

CONTAINING THE

FUNDAMENTAL PRINCIPLES

AND THE

LEADING CASES IN CONSTITUTIONAL LAW.

BY

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OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW.

"Condisce modos, amanda
Voce quos reddas: minuentur atræ
Carmine curæ."

HORACE.

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TO

CHARLES T. RITCHIE, ESQ., M.P.,

AS A TRIBUTE

TO THE GALLANT MANNER IN WHICH HE FOUGHT THE BATTLE OF THE CONSTITUTION IN THE TOWER HAMLETS AT THE LATE GENERAL ELECTION,

THIS HUMBLE ATTEMPT

TO FACILITATE A KNOWLEDGE OF

Constitutional Law and History

IS INSCRIBED

BY HIS SINCERE FRIEND,

THE AUTHOR.

PREFACE.

THERE is scarcely any branch of learning which has received fuller elucidation at the hands of some of our ablest men than Constitutional History. Our libraries have been enriched by the stately periods of Henry Hallam, and the graceful eloquence of Sir Erskine May, and new light is being continually thrown upon the subject by the researches of Professors Stubbs and Freeman.

Yet, in spite of the value of these works, the field of Constitutional History is a *terra incognita* to the great mass of the public, and the reason is not far to find.

A very general feeling exists that Hallam is a very hard book, and it must be confessed that it is not the lightest possible reading; but if Hallam is hard Professor Stubbs is ten thousand times harder, and without a general acquaintance with the subject it is difficult to follow either author.

The authorities of our schools have been at last compelled by the force of public opinion to

introduce modern subjects into their curriculum; the old antiquated idea that all that was necessary for the purposes of education was a smattering of Latin and Greek and the Mathematics, is dead and buried, the old order has changed and given place to a new, and the late Mr. Cobden's sneer about the Ilissus and Chicago is no longer deserved.

Modern subjects have not, however, so far included Constitutional History, mainly because no one has been hitherto sufficiently enterprising to write a careful, comprehensive text-book; the existing ignorance of its simplest facts is most deplorable, and it is in the earnest hope that the present work may supply the want so much felt that I have been induced to bring it before the public.

But though primarily this book is written in the hope that it may have a general circulation, I have had distinctly in view the wants of our numerous law-students.

Constitutional Law and History are now special subjects both for the General Examination prior to call to the Bar, and for the first LL.B. at the University of London, and I trust this book may be found useful in preparing for both examinations.

One word of warning to those who use it for this purpose—*recollect that a text-book should be merely the basis of other reading, and that the examiners at London are somewhat hard to please.*

Besides the works of Hallam, and Sir Erskine May, I have derived the very greatest assistance from Sir Edward Creasy's Constitutional History, which, if it were a little more complete, would be of incalculable value to the law student.

The constitutional law portion of the work I have gathered from Dr. Broom's book. Very many thanks are due to the learned doctor for having collected the leading cases on the subject; but what evil genius could have tempted him to compile the ponderous tome in which they are published, which I venture to say no law-student ever regarded for the first time without a shudder, it is impossible to conjecture. One thing is quite certain, and that is that if it were the one-twentieth part of its present size, it would be twenty times more valuable.

A word more and I have done, and that is with reference to the unhealthy desire to reform *everything*, which is the leading characteristic of the present day.

Knowing nothing of the history of the institutions under which they have the good fortune to

live, and consequently ignorant how much of her greatness England owes to the present form of her constitution, which has been the slow growth of centuries, the masses are only too ready to listen to unprincipled demagogues, and to believe that, instead of being the most fortunate, they are the most miserable of mankind.

I trust this book may tend to dispel some at least of this ignorance, and that if the day should ever come, when political adventurers, to answer party purposes and promote their own miserably selfish ends, shall raise their voices to bring about the abolition of the House of Lords, or the supplanting of the Monarchy, an enlightened public opinion may prevent our constitution from lying stranded like some stately ship upon the shore of time.

"My task is done—my song hath ceased—my theme
Has died into an echo; it is fit
The spell should break of this protracted dream.
The torch shall be extinguished which hath lit
My midnight lamp—and what is writ, is writ,—
Would it were worthier!"

4, Essex Court, Temple,
Dec. 9th, 1874.

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A Manual

OF

CONSTITUTIONAL HISTORY.

CHAPTER I.

FROM THE EARLIEST TIMES TO THE ACCESSION OF WILLIAM I.

Introductory—Montesquieu quoted—Rome and England compared—Freeman quoted—Governments—Limited Monarchy—Austin quoted—From Cæsar to Hastings—Thanes and Ceorls—Slaves—Townships—Sac and Soc—Hundreds—Court of the Hundred—The Shire Court—The Witanagemot—The Clergy—The Towns—Trial by Jury—*Bushell's Case*—Frankpledge—Bocland and Folcland.

It is our intention in the following pages to endeavour to trace the growth and progress of the British Constitution through the many centuries of its gradual development. For most, if not for all men, the study of history possesses great and varied attractions, but that portion of it which treats of the history of the institutions under which we have the good fortune to live, is, for Englishmen, at once the most interesting and the

most important. Montesquieu says, "as Rome, Lacedæmon and Carthage perished, so England will perish when the legislative power shall have become more corrupt than the executive." England, however, differs both in its structure and resources from all those with which history makes us acquainted—her free institutions have been ever growing, and her constitution has had within itself the means of effecting reforms, without bringing about a revolution in the form of government. Rome, of all ancient states, most resembled England, but the Roman people in the later ages of the commonwealth were not a people of citizens but conquerors; Rome was not a state, but the head of a state. By the immensity of her conquests she became only an accessory part of her own empire; her wealth was boundless, and all possible enemies being defeated she ceased to be an army, and thence dates the era of her corruption. Rome, in a word, was destined to lose her liberty when she lost her empire, and she was destined to lose her empire whenever she began to enjoy it.

In England all liberty and power is not accumulated in one point. The same laws and the same interests prevail everywhere; the whole nation equally concurs in the framing of the government; no one part has therefore need to fear that another part will supply the necessary forces to destroy it.

The ruin of Rome may be in a great measure traced to the exorbitant power which several of its citizens succeeded in attaining; in England the power of the crown has effectually prevented this.

Such a violent establishment of monarchical power as that which took place in Rome after the death of Julius Cæsar cannot take place in England. Here that kind of power has existed for ages, it is circumscribed by fixed laws, and established upon regular and well-laid foundations; nor is there any great danger that this power may, by means of those legal prerogatives it already possesses, assume others, and at last openly make itself absolute.

The power of granting supplies is vested in the nation; let the prerogatives be as great as they will, the people of England have the power of preventing the exercise of them. 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 Peru. Freeman says: "On the Teutonic mainland the old Teutonic freedom, with its free assemblies, national and local, gradually died out before the encroachments of a brood of petty princes. In the Teutonic island it has changed its form from age to age; it has lived through many storms; it

Freeman.

has withstood the attacks of many enemies, but it has never utterly died out. The continued national life of the people, notwithstanding foreign conquests and internal revolutions, has remained unbroken for 1,400 years. At no time has the tie between the present and the past been wholly rent asunder; at no time have Englishmen sat down to put together a wholly new constitution in obedience to some dazzling theory. Each step in our growth has been the natural consequence of some earlier step; each change in our law and constitution has been, not the bringing in of anything wholly new, but the development and improvement of something that was already old. Our progress has in some ages been faster, in others slower; at some moments we have seemed to stand still or even to go back, but the great march of political development has never wholly stopped; it has never been permanently checked since the day when the coming of the Teutonic conqueror began to change Britain into England. New and foreign elements have from time to time thrust themselves into our law; but the same spirit which could develop and improve whatever was old and native has commonly found means, sooner or later, to cast forth again whatever was new and foreign. The lover of freedom, the lover of progress, the man who has eyes keen enough to discover real identity under a garb of outward unlikeness, need never shrink from tracing

up the political institutions of England to their earliest shape. The 1,400 years of English history are the possession of those who would ever advance, not the possession of those who would stand still or go backward. The wisdom of our forefathers was ever shown, not in a dull and senseless clinging to things as they were at any given moment, but in that spirit, the spirit alike of the true reformer and the true conservative, which keeps the whole fabric standing, by repairing and improving from time to time whatever part of it stands in need of repair or improvement.

"But the old paths have in England ever been the paths of progress; the ancient custom has ever been to shrink from mere change for the sake of change, but fearlessly to change whenever change was really needed. And many of the best changes of later times—many of the most wholesome improvements in our law and constitution—have been only the casting aside of innovations which have crept in, in modern and evil times. They have been the calling up again, in an altered garb, of principles as old as the days when we get our first sight of our forefathers in their German forests. Changed as it is in all outward form and circumstances, the England in which we live has in its true life and spirit far more in common with the England of the earlier times than it has with the England of days far nearer to our own. In many a wholesome act of

modern legislation we have gone back, wittingly or unwittingly, to the earliest principles of our race. We have advanced by falling back on a more ancient state of things; we have reformed by calling to life again the institutions of earlier and ruder times, by setting ourselves free from the slavish subtleties of Norman lawyers, and by casting aside as an accursed thing the innovations of Tudor tyranny and Stuart usurpation."

Governments.

Austin divides all supreme governments into two great classes:—

I. Monarchies, or the government of one.

II. Aristocracies, or the government of a number.

These latter he again subdivides into three classes:—

(*a*) Oligarchies—when the proportion of the sovereign number to the number of the entire community is extremely small.

(*b*) Aristocracies (in the specific sense)—when the proportion is small, but not very small.

(*c*) Democracies — when the proportion is large.

Now, inasmuch as every elector must be held to be a unit of the governing body of this country, it is obvious that, probably since the Reform Bill of 1832, and certainly since that of 1867, we have been living under a democratic form of government, since the proportion of those having votes to the entire community is large.

Limited monarchy.

The government of England is usually styled a "limited monarchy." In all, or most governments of the kind, a single individual shares the sovereign powers with a body of other individuals, the share of the single individual being greater than that of any of the individuals composing the body taken singly. But, as Austin points out, the foremost individual cannot be called a monarch in the true sense of the term, since, considered singly, he is subject to the sovereign body of which he is merely a limb; and a monarch, properly so called, is supreme. Limited monarchy, therefore, is not monarchy but one of the forms of aristocracy. As meaning monarchical power, limited by positive law, the name "limited monarchy" involves a contradiction in terms, since a sovereign or supreme power is incapable of *legal limitation*. It is true that an aristocracy called a limited monarchy is limited by positive morality, and also by the law of God, but so is every government, which renders the term absurd. If the head of the aristocracy is called a king, the government of king, lords and commons is styled a limited monarchy; if the head were called a protector, or stadtholder, it would probably be called a republic. "And," says Austin, "for such verbal differences between the forms of supreme government has the peace of mankind been frequently troubled by ignorant and headlong fanatics."

Austin.

Not a little of our national character is due to the fact of our being an essentially *composite* nation, and four elements have combined to make up the great whole. First, the Roman and Celtic element, but this only in a small degree; secondly, the Saxon element, which largely predominates; thirdly, the Danish element, like the Roman and Celtic, to a very small extent; and, lastly, the Norman, which, together with the Saxon, practically makes up the English nation.

From Cæsar to Hastings.

The Romans under Julius Cæsar made two incursions into Britain in the years B.C. 55 and B.C. 54; but they attempted nothing like a permanent settlement until A.D. 43, in the reign of the Emperor Claudius. They continued to occupy Britain for nearly four centuries, until pressed by the inroads of the barbarians at home, they withdrew their legions A.D. 409. The unfortunate Britons, who under Roman rule had entirely lost their warlike attributes, and degenerated into a race of husbandmen, soon fell a prey to the attacks of their neighbours the Picts and Scots; and, being unable to defend themselves, had recourse for assistance to the Saxons, a race living in the district bordering on the mouth of the Elbe. The Saxons landed under Hengist and Horsa, and effectually disposed of the Picts and Scots; but finding Britain likely to prove a very much more pleasant place to live in than their own country, they proceeded to conquer the whole kingdom,

and the Britons found that they had only escaped the rock of Sylla to fall into the whirlpool of Charybdis. Fresh bodies of Saxons continued to arrive, and the seven very unequal kingdoms of the Saxon Heptarchy were formed successively out of the districts wrested from the Britons. Three out of the seven kingdoms became after a while predominant—Wessex, Mercia and Northumberland. The latter soon gave way under the prowess of the Mercian kings; finally Mercia itself was overrun, and all England united under Egbert in the year 827.

About this time, a fresh and formidable enemy appeared in the Danes, a horde of Scandinavian pirates, who threatened to subvert the Saxon monarchy, and bring about a period of anarchy; but from this fate the country was saved by the courage and genius of Alfred. The Danes, however, made considerable settlements in different parts of the kingdom, and the weakness and cruelty of Ethelred the Unready, who planned and executed a cowardly massacre of the Danes in the year 1002, led to the temporary overthrow of the Saxon line, and established Canute of Denmark upon the throne of England.

Two centuries had, however, much altered the character of the Danish people; they had lost much of their rude barbarism, had abandoned their hideous religion and submitted themselves to the civilizing influences of Christianity.

Three sovereigns only of the Danish line sat on the throne of England,—Canute, Harold and Hardicanute; and on the death of the latter in 1042, the Saxon line was restored under Edward the Confessor, and finally overthrown by the defeat of Harold on the plains of Hastings in 1066.

Thanes and ceorls.

The only denominations of persons in Saxon times above the class of servitude were thanes and ceorls—the gentry and the inferior people. The thanes were subdivided into king's thanes, whose lives were valued at 1200*s.*, and those of inferior degree, whose composition was half that sum. That of a ceorl was 200*s.* The ceorl was not bound to the land which he cultivated; though when we come to consider how very little intercourse there was in those days between one part of the country and another, and the fact that every man had to be a member of some tything, the members of which were mutually responsible for one another's good conduct, we are forced to the conclusion that practically he must have been so, seeing that it must have been almost impossible for a stranger to gain entrance into any tything. More than this, every man was bound to enrol himself in the service of some lord, the "*lordless*" man being looked upon in the light of an outlaw, and subject to death at the hands of any person who met him. The ceorl was protected from personal injuries and trespasses on his land; he

was occasionally called upon to bear arms for the public safety, and was capable of property and of the privileges which it conferred. The thanes did not compose a hereditary caste or *noblesse;* they were an aristocracy, but open to receive recruits from below; any ceorl who could acquire five hydes of land, with a church and mansion of his own, becoming *ipso facto* a thane.

Slaves.

Beneath the ceorls in political estimation were the conquered natives of Britain, and these were nothing more nor less than slaves; and though frequently the objects of legislation, it was merely for the purpose of ascertaining their punishments and not of securing their rights. His crimes, or the tyranny of others, might reduce a Saxon ceorl to this condition, but "it is inconceivable," says Hallam. Hallam, "that the lowest of those who won England with their swords, should in the establishment of the new kingdoms have been left destitute of personal liberty."

Townships.

Among the Anglo-Saxons the townships may be looked upon as the integral molecules out of which the state was formed. These townships consisted of the residence of the lord of the manor, and the lands appertaining thereto. Every township elected its own officer, called a *reeve*, and also four men, who with the reeve represented the township in the court of the hundred and the county court. It also managed its own police, and if any murder were committed had to raise

the hue and cry and apprehend the offender. The township had generally its own local court.

Lingard. Lingard says "the lowest species of jurisdiction known among the Anglo-Saxons was that of '*Sac and Soc*,' words the derivation of which has puzzled the ingenuity of antiquaries, though the meaning is sufficiently understood. It was the privilege of holding pleas and imposing fines within a certain district, and with a few variations was perpetuated in the manorial courts of the Norman dynasty. It seems to have been claimed and exercised by all the greater and several of the lesser thanes; but was differently modified by the terms of the original grant or by immemorial usage. Some took cognizance of all crimes committed within their soke; the jurisdiction of others was confined to offences of a particular description. Some might summon every delinquent, whether native or stranger, before their tribunal; whilst others could inflict punishment on none but their own tenants. From the custom of holding these courts in the hall of the lord, they were usually termed the hall-motes. These courts absorbed much of the business which would otherwise have been carried before the courts of the hundred and county; and from them are derived our present courts baron with civil, and courts leet with criminal jurisdiction."

Hundreds. The whole of England was divided into hundreds, and these again into tythings. It seems

clear that the division into hundreds could not have taken place at one time, or upon one system, as it is impossible to reconcile the varying size of hundreds to any single hypothesis, *e.g.*, Sussex contained sixty-five, Dorset forty-three, whereas Yorkshire had only twenty-six, and Lancashire but six. Now, granting that the south of the country was much more populous than the north, even this will not account for such a prodigious disparity, and we are forced to believe that the hundreds of the north of England, which were styled wapentakes, were formed upon some other system than that adopted in the south, where it appears, probable, that a hundred consisted of a hundred free families, including the ceorls as well as their landlords. Hundreds still exist in many parts of England, but townships have become quite obsolete, owing partly to the introduction of the Norman manors and partly to the establishment of the ecclesiastical division of the country into parishes.

The court of the hundred.

The court of the hundred was composed of all the thanes living within the district, the reeve and four representatives from each township. This court was held monthly, and was subordinate to the court of the shire.

The shire court.

The shire or county courts were held twice a-year, and were presided over by the bishop and the eorlderman. Each shire had its reeve, who in the absence of the earl presided over the court, in

conjunction with the bishop. All the thanes in the county, the four men, and the reeve of each township and twelve men elected to represent each hundred, attended the county court; it seems, however, more than doubtful whether any save the thanes had a voice in it. There was a final appeal from the shire courts to the witanagemot.

Witanagemot.

The great council by which an Anglo-Saxon king was guided in all the main acts of government was styled the witanagemot. Its first and primary duty was the election of the king. Hallam says, "It is an unwarranted assertion of Carte, that the rule of the Anglo-Saxon monarchy was 'lineal agnatic succession, the blood of the second son having no right until the extinction of that of the eldest.' Unquestionably the eldest son of the last king, being of full age, and not manifestly incompetent, was his natural and probable successor; nor is it perhaps certain that he always waited for an election to take upon himself the rights of sovereignty, although the ceremony of coronation, according to the ancient form, appears to imply its necessity. But the public security in those times was thought incompatible with a minor king, and the artificial substitution of a regency, which stricter notions of hereditary right have introduced, had never occurred to so rude a people." The witan made laws and voted taxes; but this last was a rare necessity. The king was bound to take its advice as to making

Hallam.

war or peace, and on all important measures of government, and, as has already been pointed out, it formed the supreme court of appeal both in civil and criminal cases.

It was composed of the prelates and abbots, and the aldermen of shires; but whether the lesser thanes were entitled to a place in it, as they certainly were in the county court, is not easily to be decided.

The clergy. The influence of the clergy in Anglo-Saxon times was very great, but they had not yet succeeded in obtaining those privileges and immunities by which, in later times, the English clergy separated themselves from the laity. The clerk and the layman were governed by the same laws, and subject to the same judicial tribunals. The clergy, however, enjoyed unbounded reverence and respect; their bishops were appointed by the king, and had equal dignity in the state with the earls: one distinction they enjoyed above the earls, and in common with the king alone, viz., that a bishop's testimony in a court of justice was conclusive without the corroboration of compurgators.

The towns. The Saxon population was principally agricultural, but the towns, nevertheless, were of some importance; they were organized like the hundred, and had similar subdivisions. The burhwara, or men of the borough, elected their own officers for keeping the peace, and managing

other municipal matters. They elected their own borough-reeve, who presided in their local courts (called burhwaremot or hustings), and in time of war led the armed burgesses into the field.

Trial by jury. The institution of trial by jury has been attributed to Alfred the Great; and though there is no evidence of a reliable character in support of this view, it is clearly traceable to Saxon times.

Its history seems most conveniently to divide itself into three stages:—

First stage. I. By compurgators.

The principle of the law of compurgation was founded on the stress which the Teutonic race laid upon general character. With reference to the point before us the oldest Saxon law remaining is a part of the agreement between Alfred and Guthrum. It runs thus:—"If any accuse a king's thane of homicide, if he dare to purge himself, let him do it along with twelve king's thanes; but if the thane accused be of lower degree, let him purge himself along with eleven of his equals and one king's thane." At a later period we find the sheriff choosing twelve compurgators, residents of the neighbourhood, and adding them to twelve or twenty-four selected by the accused himself.

Second stage. II. The second stage of trial by jury was by recognitors. Henry II. abolished compurgation, and the Norman usage is considered as settled in the grand assize. By grand assize is meant being

tried by four knights summoned by the sheriff, and twelve more selected by them, forming altogether the sixteen recognitors, as they were called, by whose verdict the cause was determined. Our present system of grand juries seems to be clearly traceable to these recognitors. The second or petty jury came in about the time of Henry III., in connection with the abolition of ordeals. In the reign of Edward III. we see the connecting link between the ancient and modern jury, when witnesses were summoned distinct from the recognitors, but joined to them, to afford the benefit of their testimony, and yet without having any voice in the verdict.

III. The third and last stage is when the jury become triers of the issue. Before this they were only sworn "to speak the truth," but afterwards "to give a true verdict according to the evidence." The witnesses were now examined at the bar of the court, and the jury formed their own conclusions from this testimony. This modern form of jury is distinctly discernible in the reign of Edward IV., from which time it gradually assumed the form it now sustains. It was not, however, until the reign of Mary that witnesses in favour of the accused were allowed to be sworn. Third stage.

A jury cannot lawfully be punished by fine, imprisonment or otherwise for finding against the evidence, or against the direction of the judge.

Bushell's case. The leading case, and the one which firmly established this principle, is *Bushell's case* in the reign of Charles II. Two Quakers, Penn and Mead, were tried for having preached to a large crowd in the street, stringent acts being then in force against the Nonconformists. The jury, of whom Bushell was one, acquitted the prisoners, were fined for contempt for doing so, and committed in default of payment. A writ of habeas corpus was sued out, directed to the sheriffs, to produce the body of Bushell, and state the day and cause of his caption and detention, before the court. The return to this writ set out the facts as above, but did not state whether the evidence given at the trial was "full and manifest, or doubtful, lame and dark," nor did it state that the jurors acquitted the persons indicted corruptly, and knowing the evidence to be full and manifest and not doubtful, lame and dark. All the judges resolved upon this return that finding against the evidence, or direction of the court, is no sufficient cause to fine a jury. The prisoners were discharged.

This case may be said to have settled the point; but even afterwards some attempts were made to interfere with the ordinary course of justice, and successfully repelled by the judges. A secret tampering with justice was often indulged in, for the king constantly consulted the judges in matters affecting the crown before they came

judicially before them; and we find that Hussey, C. J., besought Henry VII. that he would not desire to have their opinion beforehand concerning Humphrey Stafford. The last occasion of doing this was in 1760, before the trial by court-martial of Lord Sackville. The House of Lords may, and constantly does, ask the judges their opinion, both in cases which come before them judicially, and where they wish their opinion to guide them in matters of legislation. There seem to have been two ways in which juries were punished, by attaint, and as in the principal case. The writ of attaint was to inquire whether a jury of twelve gave a false verdict, by the finding of twenty-four. This writ was abolished by 6 Geo. IV. c. 50, and persons guilty of embracery are to be proceeded against by indictment or information; long before this, however, the writ of attaint had in practice been superseded by motion for a new trial.

Writ of attaint.

Motion for new trial.

Passing from trial by jury, it is necessary briefly to explain the Saxon law of frankpledge, or the mutual responsibility of members of a tything for one another's abiding the course of justice. It seems to have passed through the following stages:—

Frankpledge.

(*a*) At first, an accused person was obliged to find bail for standing his trial.

(*b*) Next, his relations were called upon to become sureties for the payment of the composition and other fines to which he was liable.

(*c*) Later, we find persons already convicted, or

of suspicious repute, have to give securities for their future behaviour.

(*d*) In the reign of Edgar, we catch sight of the first general law, placing every man in the condition of the guilty, and compelling him to find a surety responsible for his appearance when judicially summoned.

(*e*) Lastly, the laws of Canute declare the necessity of belonging to some tything, as well as of providing sureties.

Bocland and folcland.

Lands are commonly supposed to have been divided among the Anglo-Saxons into bocland and folcland. The nature of both tenures has been perspicuously illustrated by Mr. Allen in his Inquiry into the Rise and Growth of the Royal Prerogative. "The distribution of landed property in England by the Anglo-Saxons appears to have been regulated on the same principle that directed their brethren on the continent. Part of the lands they acquired was converted into estates of inheritance for individuals; part remained the property of the public, and was left at the disposal of the state. The former was called bocland; the latter I apprehend to have been that description of landed property which was known by the name of folcland. Folcland, as the word imports, was the land of the folk or people. It was the property of the community. It might be occupied in common, or possessed in severalty; and, in the latter case, it was probably

parcelled out to individuals in the folcgemot, or court of the district, and the grant attested by the freemen who were then present. But while it continued to be folcland, it could not be alienated in perpetuity; and, therefore, on the expiration of the term for which it had been granted, it reverted to the community, and was again distributed by the same authority. Bocland was held by book or charter. It was land that had been severed by an act of government from the folcland, and converted into an estate of perpetual inheritance. It might belong to the church, to the king, or to a subject. It might be alienable and devisable at the will of the proprietor. It might be limited in its descent, without any power of alienation in the possessor. It was often granted for a single life, or for more lives than one, with remainder in perpetuity to the church. It was forfeited for various delinquencies to the state."

CHAPTER II.

FROM THE ACCESSION OF WILLIAM I. TO THE BATTLE OF BOSWORTH.

The Conquest—Feudal System—How far in Existence previously—Fully established at the Conquest—Tenants-in-capite—The Feudal Incidents—Aids, &c.—The Feudal System as established in England how different from that existing on the Continent—William II.—The Crusades—Henry I.—His Charter—The Laws of the Confessor, what—Stephen—Establishment of Schools at Oxford for the Study of the Canon and Civil Law—Henry II.—The Quarrel with Becket—Constitutions of Clarendon—Richard I.—John—State of England at his Accession—Villeinage—*Somerset's Case*—*Slave Grace's Case*—Pressing for the Navy—*Wallis* v. *Day*—Villeinage, when established—Villeins regardant—Villeins in gross—Means for gradual Extinction of Villeinage—Probably confined to Rural Districts—Tenures by which Lands were held—Tenure by Knight Service—Tenure by free Socage—Grand Serjeanty—Petit Serjeanty—Incidents common to all three Tenures and those peculiar to each—Tenure in Villeinage—Copyholds—Rights of Common—Inclosure of Commons, how effected—The Legal System—Curia or Aula Regis—Court of King's Bench—Of Common Pleas—Of Exchequer—The Chief Justiciar—The Curia Regis, how distinguished from the Great Council—The Court of Exchequer—Justices in Eyre—The Court of Common Pleas—The Office of Chief Justiciar abolished by Edward I.—The Court of King's Bench—The Lord Chief Justice of England—The Court of Chancery—Magna Charta—Hallam's Summary of the Provisions of the Charter—Mackintosh on the Charter—Edward I.—Legislative Improvements—Blackstone's Classification—Mortmain, what—Gifts in Mortmain forbidden by Statute—Invention of *Uses*—Statute of Uses—Use upon a

Use—The Use devisable—Statute of Wills—Mortmain Act—Statute of Provisors—Statute of Præmunire—Nobility—Noblesse—Civil Equality, to what attributable.

NEVER was there conquest more rapid and more complete than that effected by William the Norman in 1066. "His tyranny," says Hallam, "displayed less of passion or insolence than of that indifference about human suffering which distinguishes a cold and far-sighted statesman. Impressed by the frequent risings of the English at the commencement of his reign, and by the recollection, as one historian observes, that the mild government of Canute had only ended in the expulsion of the Danish line, he formed the scheme of riveting such fetters upon the conquered nations, that all resistance should become impracticable. The name of Englishman was turned into a reproach. None of that race for a hundred years were raised to any dignity in the state or church. Their language and the characters in which it was written were rejected as barbarous; in all schools children were taught French, and the laws were administered in no other tongue. It is well known that this use of French in all legal proceedings lasted till the reign of Edward III." The Conquest.

One of the most considerable results growing out of the Conquest was the establishment of important alterations in the tenure by which lands were held. We must first of all, however, briefly Feudal system. How far in

existence previously.

inquire to what extent the feudal system existed in England before the Conquest.

In Saxon times all freehold lands, except those belonging to the church, were subject to two burthens:—(*a*) Military service in the king's expeditions. (*b*) Repair of the bridges and royal fortresses. These obligations, and especially the first, have been sometimes thought to denote a feudal tenure. In every country, however, the supreme power has the right to use the arm of each citizen in the public defence; and though, on the other hand, it is important to notice that a thane forfeited his hereditary freehold by misconduct in battle,—a penalty more severe than was inflicted on allodial proprietors on the continent,—still, since sanctions may be more or less severe in different countries, a law of forfeiture in such cases can hardly be considered as positively implying a feudal tenure. A much stronger presumption is afforded by passages that indicate a mutual relation of lord and vassal among the free proprietors, since the most powerful subjects have not a natural right to the service of other freemen. It is not, however, sufficient to prove a mutual relation between the higher and lower order of gentry in order to establish the existence of feudal tenures; for this relation was often *personal*, whereas feudal vassalage was *real*, resulting entirely from the tenure of particular lands. No direct evidence appears as to the ceremony of homage,

or the oath of fealty, before the Conquest. The feudal exaction of aids seems to have been unknown, and wardship and marriage were unheard of; Hallam, however, is of opinion that the heriot, if not identical with the relief, was at least closely analogous, and, indeed, a charter of Ethelred interprets one word by the other. A distinction is drawn by Spelman, who points out that the heriot was by law due from the personal estate but the relief from the heir; but this seems hardly applicable to so remote an age, when the law of succession to real and personal property was not different.

Fully established at the Conquest.

Whatever may be the conclusion at which we may arrive as to the extent to which the feudal system existed in England before the Conquest, there can be no doubt about its general adoption after that event. To the student of English history this subject is of immense importance; it has left permanent traces in our law of real property, and appears on nearly every page of our annals, down to the abolition of feudal tenures in the time of Charles II. This abolition is frequently merely cursorily alluded to by historians, but it has always seemed to us one of the most striking eras in our history, as it is from 1660 that we must date our modern system of taxation.

Description.

The feudal system was one in which an estate called a feud or fief was granted on conditions,

and not as an estate of absolute and independent ownership.

The lord who granted the estate became known as the lord paramount, and those who received such estates tenants-in-capite. By the practice of subinfeudation there was formed a class of sub-vassals, the tenants-in-capite granting away a part of their land. In England the king was lord paramount, and the number of knights' fees 60,215.

Tenants-in-capite of two kinds.

Tenancy-in-chief was of two kinds:—

(a) Ut de honore.

(*a*) Ut de honore, *i. e.*, where the land was held of the king as proprietor of some honor, castle or manor:

(b) Ut de coronâ.

(*b*) Ut de coronâ, where it was held of him in right of the crown itself.

The ceremonies in granting a fief were three:—

(1) Homage, as an expression of submission and devotedness, in consideration of lands held of the lord:

(2) Fealty, or the confirmation of the promise by an oath:

(3) Investiture, or the actual conveyance of the lands constituting the fief.

The feudal incidents.

Besides the claim of fealty and service, the lord derived other advantages, known as feudal incidents.

Aids.

(*a*) Aids, which were money payments to the lord on special occasions, reduced by

Magna Charta to three: ransoming the lord's person, knighting his eldest son, and marrying his eldest daughter:

(*b*) Reliefs, or money payments made by one of full age taking a fief by descent; at first they were merely arbitrary and at the will of the lord, but were fixed by the charter at one-fourth of the annual value of the estate: Reliefs.

(*c*) Primer seisin, a payment made only by tenants-in-capite ut de coronâ, consisting of one year's profit of the lands; it was in addition to the relief: Primer seisin.

(*d*) Wardship, or the right of the lord to hold the persons and lands of minors, without giving any account of the profits; a right which, it is needless to add, was grossly abused: Wardship.

(*e*) Marriage, or the right of the lord to dispose of his wards in marriage, and to impose a fine in case of non-compliance: Marriage.

(*f*) Fine was a payment made to obtain the lord's consent to alienate the estate: Fine.

(*g*) Escheat, which was the return of the estate to the lord of the fee when his vassal died without heirs, or was attainted for treason or felony. Escheat.

Feudal system as established in England, how different from that

The peculiar qualities of William, to which attention was drawn at the commencement of the present chapter, eminently displayed themselves

existing on the continent.

in the way in which he organized feudalism in this country. He adopted it so far as it tended to confirm his conquest and consolidate his power, at the same time modifying it from the form in which it existed on the continent, so far as to guard his throne from being overshadowed by a haughty and turbulent nobility, in the manner in which he himself over-awed the French crown.

In the first place he required an oath of allegiance not merely from his immediate tenants-in-chief, but also from their sub-vassals; secondly, those who received a large number of knights' fees held them distributed in different parts of the kingdom; and, lastly, he established the Aula Regis, or King's Court, a formidable tribunal, which received appeals from all the courts of the barons, and decided in the last resort on the estate, honour and lives of the barons themselves. Being composed of the great officers of the crown, removable at the king's pleasure, and having the king himself for president, it kept the first noblemen in the land under the same control as the meanest subject.

William II.

The reign of the second William is in no way remarkable constitutionally, nor, indeed, in any other respect save for that strange outburst of religious fanaticism, which culminated in the first

The Crusades.

Crusade. The social advantage of the Crusades to Europe was considerable; they lasted at intervals for nearly two centuries, and the observation of

manners new and various, and the comparison of a multitude of usages, extended the ideas of the people, and rooted up a great number of errors and prejudices.

William Rufus was succeeded by his brother, Henry I. Henry I. Henry I., and most writers, while they censure in the strongest terms the detestable profligacy and unscrupulous ambition of this monarch, accord him some praise for his partial re-establishment of the Saxon laws, and also for having granted a charter which paved the way for that series of subsequent royal concessions, the same in form, though much more extended in amount, which lie at the foundation of our national liberties. There can be no doubt that the country made considerable progress during this reign, undisturbed as it was by any internal commotion, and enjoying, notwithstanding much oppression on the part of the crown, probably a more regular dispensation of justice between man and man, and more security from disorder and violence, than it had known since the coming over of the Normans.

The charter to which we have alluded is im- His charter. portant, as showing what were deemed the principal grievances in the two preceding reigns, and still more so if it be true, as some state, that a copy of it coming into the hands of Stephen Langton formed a model for the construction of the Magna Charta of John. It does not contain any thing specially expressed, except a remission

of unreasonable reliefs, wardships and other feudal burthens. It proceeds, however, to declare that he gives his subjects the laws of Edward the Confessor, with the improvements made by his father, with the consent of his barons. Hallam adds: "What these laws were, or more properly perhaps these customs, subsisting in the Conqueror's age, was not very distinctly understood. So far, however, was clear, that the rigorous feudal servitudes, and the weighty tributes upon poorer freemen, had never prevailed before the Conquest. In claiming the laws of Edward the Confessor, our ancestors meant but the redress of those grievances which tradition told them had not always existed."

The laws of the Confessor —what.

Stephen.

During nearly the whole of the next reign the country was torn asunder by a cruel and bloody civil war between King Stephen and the Empress Maud, daughter of Henry I.; and the perusal of the Saxon Chronicle discloses a state of society the blackest perhaps in our annals. Reeves tells us that Vacarius, an Italian lawyer, came to England towards the end of Stephen's reign, and began to read lectures at Oxford on the canon and civil law. By the former is to be understood a body of Roman ecclesiastical law, compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see.

Establishment of schools at Oxford for the study of the canon and civil law.

The civil law comprises the municipal law of

Rome, as codified by Tribonian, by order of the Emperor Justinian, and is to be found in the Institutes, the Pandects, the Code and the Novels.

Henry II.

The following reign, that of Henry II., is memorable for a serious collision between the crown and the church, they having been more or less at variance since the days of Dunstan. The cause of the church was strenuously upheld by Thomas à Becket, who maintained the right of the clergy to answer for their crimes only to the ecclesiastical courts. A gross outrage having been committed by one of the clergy, the king resolved to have the ancient customs defined, to which the clergy should yield obedience. For this purpose he summoned a general council of barons and prelates to meet at Clarendon, in 1164, where the customs known as the "*Constitutions of Clarendon*" were at once agreed to by the barons, but with much reluctance by Becket.

The quarrel with Becket.

Constitutions of Clarendon.

Richard I.

Passing lightly over the rule of the troubadour king, which contains nothing worthy of note in this place, we find ourselves face to face with a reign the most infamous, and yet, strange to say, the most important in the whole of our history—the reign of John. Creasy says, "Had he been less vicious and cruel, it is probable that the barons would not have leagued with the inferior freemen of England against their Norman king. Had he been less imbecile, it is probable that the

John.

national league would have been crushed by him. Even the foreign events of John's reign (I mean those which more immediately affected the continental provinces of the Plantagenet princes) were of infinite moment in determining the future destinies of England."

State of England at the accession of John.

Before turning to the provisions of the Great Charter, we propose briefly to consider what the state of England was at the commencement of the thirteenth century. The population has been estimated at about two millions, of whom probably one-half were in a state of slavery. The technical name for the kind of slavery which prevailed in Anglo-Norman times is villeinage. This subject is best considered in connection with the case of the negro *Somerset*, decided in the reign of George III. An application was made to Lord Mansfield, supported by affidavits, showing that James Somerset, a negro, was confined on board a ship lying in the Thames, bound for Jamaica. His lordship allowed a writ of *habeas corpus* directed to Knowles, the master of the vessel. Six days after Knowles produced the body of Somerset, and returned for cause of detainer that Somerset was the negro slave of one Mr. Stuart, who had delivered him into his custody to carry to Jamaica, and there sell him as a slave. Affidavits were also made to prove that Stuart had purchased Somerset as a slave in Virginia, and had brought

Villeinage.

Somerset's case.

him to England, that he refused to return, and this was the cause of his being on board Knowles' ship.

Lord Mansfield, in pronouncing the judgment of the court, declared that the cause on the return was insufficient, and, therefore, that Somerset must be discharged.

Mr. Hargreave's celebrated argument in this case, in support of Somerset, established the following propositions:—

I. That the law of England never recognized any species of domestic slavery, except the ancient one of villeinage.

II. That it has sufficiently provided against a new slavery.

III. That the owner of a slave has no authority or control over him in England, nor any right forcibly to send him back to the colonies.

Slave Grace's case.

These propositions are to a certain extent qualified; for we gather from *Slave Grace's case* that if a slave comes to England with his master, and does not claim his freedom whilst there, but returns voluntarily to the West Indies, he loses his right to it. It has been decided that if a slave escapes to an English ship he becomes free, and subject to English law. The right to press for the navy depends on necessity and the principle of self-preservation; this right is a crown prerogative, grounded on the common law, and recognized by many

Pressing for the navy.

Wallis v. *Day*, 2 M. & W. 273.

statutes. Lastly, we may mention in connection with this subject, that it was held in *Wallis* v. *Day*, that a contract well and faithfully to serve during life is good.

Villeinage—when established.

Returning from this digression to the question of villeinage, we find that it is doubtful when it became fully established, probably about the time of Henry II. Villeins were of two classes: "villeins regardant" annexed to the soil, and passing with it whenever an estate changed hands, and "villeins in gross," not so annexed; but this latter class does not appear to have been very numerous.

Villeins regardant.

Villeins in gross.

Now, though this species of slavery was widely established, we find the law providing means for its gradual and ultimately certain extinction; and turning to the time of Henry VII., who reigned about two centuries and a half later, we find all traces of it had passed away.

Means for gradual extinction.

Creasy says, "The lord might at any time enfranchise his villein; and there were also many acts of the lord, from which the law inferred an enfranchisement, though none could be proved to have actually taken place. If the lord treated the villein as a freeman, by vesting the ownership of lands in him, or by accepting from him the feudal solemnity of homage, or by entering into an obligation under seal with him, or by pleading with him in an ordinary action, the law held that the lord should never afterwards be per-

mitted to contradict his own act by treating him as a villein. There were many other modes of constructive enfranchisement. One of the most important was that, if a villein remained unclaimed by his lord for a year and a day in any privileged town (that is to say, in any town possessed of franchises by prescription or charter), he was thereby freed from his villeinage. Moreover, in all disputes on the subject of villeinage, the presumption of law was in favour of liberty. The burden of proof always lay upon the lord, and there were only two ways in which villeinage could be proved. One was by showing that the alleged villein, and his ancestors before him, had been the property of the claimant and of those from whom he deduced title, from time whereof the memory of man ran not to the contrary; the other was by showing that the alleged villein had solemnly confessed his villeinage in a court of justice. The first of these modes of proof was always liable to be defeated by showing that the alleged villein, or some one of his ancestors, through whom the villeinage was said to be traced, had been born out of wedlock. For as the law held that an illegitimate child was *nullius filius*, it also held that an illegitimate child could not possibly inherit the condition of villeinage."

Villeinage probably confined to rural districts.

It seems clear that in John's time villeinage must have been confined to the rural districts, and though our information as to the condition of the

towns is very meagre, from the fact that a villein who remained for a year and a day unclaimed by his lord in a town with franchises obtained his freedom, it seems necessarily to follow that even the lowest of those born within the town would not be in a worse condition.

Tenures by which lands were held.

Turning to the upper and middle classes, we find that there were three tenures by which the subjects of John held their lands:—

(1) Tenure by knight service.

(2) Tenure in free socage—the original of our modern freehold tenure.

(3) Tenure in villeinage—the original of our modern copyhold tenure.

(1) Tenure by knight service.

Of these, the first was the most honourable as it was the most burdensome; and this latter point deserves our particular attention, because the oppression which the barons suffered at the hands of the crown caused them to become the leaders in the great national movement which wrested the charter from King John, and laid the foundation of English liberty.

(2) Tenure in free socage.

In the reign of Charles II. this tenure was turned into free and common socage; but tenures by grand and petit serjeanty, which were included under it, have been retained.

Grand serjeanty.

Grand serjeanty was where a man held his lands of the king by services to be done in his own proper person to the king, *e. g.*, to carry his banner or his lance, or to be his marshal; petit serjeanty was where he

held them of the king to yield him a bow, or a sword, or a dagger, or some such small thing belonging to war. These were but socage in effect, because such a tenant was not to do any personal service, but to render and pay yearly certain things to the king, and this accounts for their remaining unaffected by the statute of Charles II. Petit serjeanty.

The incidents common to all three kinds of tenure were fealty, homage, escheat, and forfeiture, aids, fines, and reliefs; those peculiar to knight service were personal service of a military kind, wardship and marriage; and those attached to common socage, rent and personal service of a base kind. It was called "*free*," in opposition to to villein tenure, and "*common*" as being the usual tenure. Incidents common to all three tenures and those peculiar to each.

The following is the description of the origin of copyholds given by Mr. Joshua Williams in his work on the Law of Real Property. "In former days a baron or great lord, becoming possessed of a tract of land, granted part of it to freemen for estates in fee simple. Part of the land he reserved to himself, forming the demesnes of the manor, properly so called: other parts of the land he granted out to his villeins or slaves, permitting them as an act of pure grace and favour to enjoy such lands at his pleasure; but sometimes enjoining, in return for such favour, the performance of certain agricultural services, such as ploughing the demesne, carting the manure and other servile works. Such (3) Tenure in villeinage —copyholds.

lands as remained, generally the poorest, were the waste lands of the manor, over which rights of common were enjoyed by the tenants."

Right of common.

Common, or right of common, is "a profit which a man hath in the lands of another," and is chiefly of four kinds:—

(*a*) Common of pasture, or the right to feed beasts:

(*b*) Common of piscary, or the right to catch fish:

(*c*) Common of turbary, or the right to dig turf:

(*d*) Common of estovers, or the right to take the wood necessary for the use, or furniture of a house, or farm.

Inclosure of commons—how effected.

It is obvious that the inclosure of common fields and waste lands, and the consequent extinction of common rights therein, are objects of much importance to agricultural improvement; and we find that, by the Statute of Merton, 20 Hen. III. c. 4, power is given to the lord of the manor to inclose against common of pasture (though not in general against common of estovers or turbary), provided he leaves common sufficient for those entitled. But an improvement of this description is now generally effected by force of local acts, and also in virtue of the powers vested in "the Inclosure Commissioners for England and Wales."

The legal system.

Turning to the legal system prevalent during the period, we find the Norman Conquest did not

abolish, though it modified, the judicial institutions of the Anglo-Saxons; hence the manor, hundred and county courts continued to exercise their ancient powers, subject to the control of the Curia Regis, or King's Court. As this latter court was composed of the prelates, earls, barons and principal officers of state, it was found difficult to hold it, except on special occasions, and, for purposes of convenience, its powers were distributed, and thus originated the Court of Exchequer in the reign of Henry I., the Court of King's Bench in that of Henry II., and the Common Pleas under Richard I.

Curia Regis.

Courts of King's Bench, Common Pleas and Exchequer.

The Norman Conquest not only established the King's Court, but introduced a new legal functionary in the Chief Justiciar, who became the greatest subject in England. Besides presiding in the King's Court and in the Exchequer, he was originally, by virtue of his office, the regent of the kingdom during the absence of the sovereign, which, till the loss of Normandy, occurred very frequently. Writs at such times ran in his name, and were tested by him. For at least two centuries subsequent to the Norman Conquest the history of the King's Court is involved in considerable obscurity. It seems that in the time of Edward I. it was composed of the chancellor, the treasurer, the justices of either bench, the serjeants, some of the principal clerks of chancery, and such others, usually bishops, earls and barons,

The Chief Justiciar.

The Curia Regis must be distinguished from the Great Council.

as the king thought fit to name. It is necessary that great care be taken not to confuse this supreme council with the "Great Council," or parliament of the period. With respect to the constitution of the latter, it seems clear that all those who held of the king in chief had the right to attend, and probably those residing in the immediate neighbourhood in which the council was held did attend; but, with respect to those living at a distance, only the more powerful and wealthy of the tenants-in-chief appear to have availed themselves of their privilege. Besides these, the prelates, and the heads of the chief abbeys and priories, formed here, as in every country in Christendom, an essential part of the Great Council. It would seem that the members of the Curia Regis, or King's Court, were always members of the Great Council, and that the latter was a simultaneous assemblage of the members of the usual council, and of such other persons as were summoned or returned to treat and advise concerning the welfare of the realm; in other words, that during the Session of Parliament the Curia Regis was a component part of the legislative body.

The Court of Exchequer.

The separation of the Court of Exchequer from the King's Court was directly due to the introduction of the feudal system; it will be readily perceived that the burthens incident to it, such as escheat and forfeiture, wardship and marriage,

must have given rise to claims on the part of the crown, as lord paramount, of an exceedingly complicated and multifarious kind; and at its origin the Court of Exchequer seems to have been nothing more than a select committee of the supreme council, appointed for the purpose of compelling the payment of such feudal dues as were in arrear to him. Although, however, the jurisdiction of the Exchequer was in the first instance confined to matters connected with the revenue, it is certain that at a very early period this court had acquired jurisdiction in personal actions not at all affecting the rights or revenues of the crown. That this was so is manifest from the express words of the Statute of Rutland, passed in the time of Edward I., which enacts, "That no plea shall be holden or pleaded in the Exchequer aforesaid, unless it do specially concern us and our ministers aforesaid." But this statute was evaded by the judges ruling that it did not apply to suits between subjects who were debtors to the crown; and then conniving at the debtor's falsely suggesting that he was such a debtor, and that by reason of the defendant not paying what he owed to the plaintiff, the latter would be less able to pay what he owed to the crown. This senseless fiction, which is only an instance of many others, was not abolished till the reign of William IV.

The institution of Justices in Eyre grew out of Justices in Eyre.

the Exchequer, and they were at first intended to check and punish frauds committed at a distance from that court. Some doubt exists as to the precise time when the appointment was first made, for though usually attributed to Henry II., itinerant justices are known to have been employed by Henry I. It is at any rate certain that at the council of Northampton (1176) the kingdom was divided into six circuits, and three justices assigned to each, with powers to hear and determine most of the causes cognizable before only in the King's Court. As part of their duty was to assess the tallages on royal towns, it appears certain they must have gone round at least once a year.

The Court of Common Pleas.

With respect to the Court of Common Pleas it seems probable that originally it was only a committee, some of the justices leaving the high bench, and retiring into some convenient apartment for the purpose of hearing "common pleas" or suits between private persons, as distinguished from "pleas of the crown." By Magna Charta it was enacted that common pleas should not follow the king's person, but that the court should be permanently located at Westminster. Now, though suitors were thus no longer obliged to travel about after the King's Court in order to obtain justice, another evil almost as great arose, in that they were compelled to come up to Westminster even from the most distant parts of

England. To remedy this it was provided by the Statute of Westminster 2, in the time of Edward I., that parties to suits could appear by attorney.

The office of Chief Justiciar, which had suffered in dignity by the permanent establishment of the Courts of Common Pleas and Exchequer, and by the secession of the chancellor from the King's Court in the time of Henry III., seems to have fallen into desuetude, and was finally abolished by Edward I. This prince not only assigned more precise limits to the respective jurisdictions of the Common Pleas and Exchequer, but definitely established the Court of King's Bench, and directed that it should be presided over by a chief magistrate denominated Chief Justice of England, endowed with a twofold jurisdiction :—

The office of Chief Justiciar abolished by Edward I.

The Court of King's Bench.

The Lord Chief Justice of England.

(1) Pleas of the crown not relating to revenue;

(2) Matters of a private nature, involving injuries alleged to have been committed with force, or in which the defendant was charged with falsity or deceit.

It next becomes necessary to examine into the extraordinary jurisdiction of the Court of Chancery. A great part of the foundation of the common law consists of Roman material. It is a well-known fact that, during the Anglo-Saxon and early Norman periods, the principles of the civil law were familiar to the clergy,—those great repositories of learning in early times, who, being

The Court of Chancery.

the expounders and administrators of the law, naturally imported into their decisions many of the doctrines of the Roman Code. For a considerable period English law continued to receive large accessions from the Jus Civile; and there is reason to believe that had the process of amalgamation been allowed to proceed, equity, as a system distinct from the common law, would not have existed. Several causes, however, combined to prevent this,—amongst others, the inapplicability of the doctrines of the civil law to the laws governing the tenures by which lands were held in England, and the unpopularity of the civil law in the time of Edward III., owing to the exactions of the court of Rome, which, indeed, reached to such an extent that in the next reign we find the barons protesting that they never would suffer the kingdom to be governed by the Roman law, and the judges prohibiting it from being any longer cited in the common law tribunals. It was soon discovered that the common law courts fell short of the performance of their judicial duties, and became incapable of meeting the growing legal wants of society; notably they altogether refused to enforce "*trusts*," to recognize the separate existence of "*married women*" and their power to hold property independently of their husbands, or, in any way, to decree "*specific performance*" of contracts of any kind, leaving the injured party, if the contract were

broken, to seek his remedy in damages. A fresh tribunal therefore of necessity arose, which took for its guidance the neglected principles of the civil law, and thus originated the equitable jurisdiction of the Court of Chancery. There is no doubt the Curia Regis originally combined both law and equity, and when the partition of this jurisdiction took place the Court of Chancery retained as its portion the present prerogative offices of the English chancellors,—such as the care of infants, idiots and lunatics. It must be regarded as originally the residuum of the jurisdiction of the Curia Regis, when it was subdivided into distinct tribunals, and it still maintains the character which it originally claimed of being the complement of legal jurisdiction, in that it affords relief in all cases where justice requires some remedy, and where, without the intervention of the Court of Chancery, the plaintiff must fail, either wholly or in part. The well-defined development of the distinct exercise of equitable jurisdiction for the most part dates from the reign of Edward I., though its character is but crude and imperfect until the time of Sir Thomas More and Cardinal Wolsey under Henry VIII. Sir Heneage Finch, afterwards Earl of Nottingham, who was elevated to the bench in 1673, laid the foundation of modern equity jurisprudence, and has been called "*the father of equity.*" His immediate successors availed themselves very

greatly of his profound learning and judgment, but a successor was still wanted, who with equal genius and abilities should hold the seals for a period long enough to enable him to widen the foundation and complete the structure begun and planned by that illustrious man. Such a person at length appeared in Lord Hardwicke, who was created lord chancellor in 1737, and held the office for twenty years.

Magna Charta.

It now becomes necessary for us to retrace our steps in order to consider the provisions of the Charter of John, of which such frequent mention has already been made. It originally consisted of seventy-two clauses, but these, when it was renewed by Henry III., were reduced to thirty-seven, by re-constructing some of the articles and striking out those of temporary interest. Henry's Charter, to which reference is mostly made, was solemnly confirmed by Edward I. in the year 1297. It appears that in this year Edward became involved in foreign warfare, but when the armies were collected, the Earls of Hereford and Norfolk refused to serve on account of the great exactions levied to carry on the war. Addressing himself to the marshal, the king exclaimed, "By the everlasting God, sir earl, you shall go or hang." To which Norfolk replied, "By the everlasting God, sir king, I will neither go nor hang." He then withdrew, and was followed by fifteen baronets and fifteen hundred knights.

Edward, nevertheless, embarked for Flanders with as many as would follow. During his absence, the two earls, supported by many of the nobles, forbad the officers of the revenue to exact payment of certain taxes which had been levied without proper consent of parliament. When Edward understood the strength of the movement, he sent over authority to make concessions, and this led to the confirmation of the two charters.

Hallam says, "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 of 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."

Hallam's summary of the provisions of the Charter.

Speaking of the Charter he says, "By the Magna Charta of John, reliefs were limited to a certain sum, according to the rank of the tenant, the waste committed by guardians in chivalry restrained, the disparagement in matrimony of female wards forbidden, and widows secured from compulsory marriage. These regulations, extending to the sub-vassals of the crown, redressed the

worst grievances of every military tenant in England. The franchises of the city of London, and of all towns and boroughs, were declared inviolable. The freedom of commerce was guaranteed to alien merchants. The Court of Common Pleas, instead of following the king's person, was fixed at Westminster. The tyranny exercised in the neighbourhood of royal forests met with some check, which was further enforced by the Charter of Forests under Henry III. But the essential clauses of Magna Charta are those which protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation. 'No freeman' (says the 29th chapter of Henry III.'s Charter which, as the existing law, I quote in preference to that of John, the variations not being material) 'shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him nor send upon him, but by lawful judgment of peers, or by the law of the land. We will sell to no man, we will not deny, or delay to any man justice or right.' It is obvious, that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of King John's Charter it must have been a clear principle of our constitution that no man can be detained in prison without trial. Whether

courts of justice framed the writ of Habeas Corpus in conformity with the spirit of this clause, or found it already in their register, it became from that era the right of every subject to demand it. That writ, rendered more actively remedial by the statute of Charles II., but founded upon the broad basis of Magna Charta, is the principal bulwark of English liberty; and if ever temporary circumstances, or the doubtful plea of political necessity, shall lead men to look on its denial with apathy, the most distinguishing characteristic of our constitution will be effaced. As the clause recited above protects the subject from any absolute spoliation of his freehold rights, so others restrain the excessive amercements which had an almost equally ruinous operation. The magnitude of his offence, by the 14th clause of Henry III.'s Charter must be the measure of his fine; and in every case the *contenement* (a word expressive of chattels necessary to each man's station, as the arms of a gentleman, the merchandise of a trader, the plough and waggon of a peasant) was exempted from seizure.

A provision was made in the Charter of John, that no aid or escuage should be imposed, except in the three feudal cases of aid, without consent of parliament. And this was extended to aids paid by the city of London. But the clause was omitted in the three charters granted by Henry III., though parliament seems to have acted upon it during the most part of his reign." The levying of

tallages, which was not made illegal by John's Charter, was rendered so when it was confirmed by Edward I. This celebrated charter was not enactive, but declaratory of dormant privileges and ancient rights. Though the Magna Charta became now the theory of the constitution, its practical application was secured only by fresh contests with the crown, which were continued till the passing of the no less celebrated Bill of Rights in 1689. English monarchs ever looked upon it as an encroachment on the sovereign prerogatives, for which they had to thank their imbecile predecessor; the people, however, saw in it the expression of their just rights; hence there was evasion on the one hand and a continual struggle to maintain its integrity on the other. Sir E. Coke reckons thirty-two instances of its being solemnly ratified; Lingard makes thirty-eight, and most of them, Hallam says, were purchased by subsidies. Most writers wax eloquent in writing on this subject; thus Mackintosh:—"To have produced it, to have preserved it, to have matured it, constitutes the immortal claim of England upon the esteem of mankind. Her Bacons and Shakespeares, her Miltons and Newtons, with all the truth which they have revealed, and all the generous virtue which they have inspired, are of inferior value when compared with the subjection of men and their rulers to the principles of justice; if, indeed, it be not more true that these mighty

Mackintosh on the Charter.

spirits could not have been formed except under equal laws, nor roused to full activity without the influence of that spirit which the Great Charter breathed over their forefathers."

Edward I.

The reign of the first Edward is one in every way memorable. Sir Matthew Hale says that more was done, during the first thirteen years of his rule, to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together. The changes introduced are arranged by Blackstone under fifteen heads, of which the following are some of the most important:—

Legislative improvements.

Blackstone's classification.

(1) Edward established, confirmed and settled the Great Charter and the Charter of Forests.

(2) He gave a decided check to the encroachments of the Pope and clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction; and by obliging the ordinary, to whom all goods of intestates at that time belonged, to discharge the debts of the deceased.

(3) He defined the limits of the several temporal courts of the highest jurisdiction—those of the King's Bench, Common Pleas and Exchequer—so that they might not interfere with each other's proper business, to do which they were afterwards obliged to have recourse to fictions.

(4) He settled the boundaries of the inferior

courts in counties, hundreds and manors, confining them to causes of no great amount, according to their primitive institution.

(5) He secured the property of the subject by abolishing all arbitrary taxes, and tallages levied without consent of the national council.

(6) He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes.

(7) He first established a repository for the public records of the kingdom, few of which are more ancient than the reign of his father, and these were by him collected.

(8) He settled and reformed many of the abuses incident to tenures, and removed some restraints on the alienation of property by the statute of *Quia emptores*.

(9) He effectually closed the great gulf in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain, most admirably adapted to meet the frauds that had then been devised. Their success, however, was in a great measure nullified by the invention of *uses*.

(10) He established a new limitation of property by the creation of estates tail.

(11) He reduced all Wales to the subjection, not

only of the crown, but, in great measure, of the laws.

Mortmain—what.

Mortmain was such a possession of property as made it unalienable, whence it was said to be in *dead hands*. Under the feudal system, as we know, the lord of the fee had certain rights of service and profit, *e.g.*, wardship, marriage, reliefs. But when the estate passed into the hands of a corporate body, the lord lost the whole of his expectations, for a corporation has perpetual continuance and succession. By the common law a corporation is as capable of purchasing lands as an individual; yet it always was, and still is, necessary for corporations to have a licence in mortmain from the crown to enable them to hold lands. We find, however, that the influence and ingenuity of the clergy was such that this rule was easily evaded. As alienations of land to corporate bodies increased, it was observed that the feudal services ordained for the defence of the kingdom were every day visibly withdrawn; and therefore to prevent this, it was ordered by the second of Henry III.'s great charters, that all such gifts should be void, and the land forfeited to the lord of the fee. This prohibition extended, however, for some reason only to religious *houses*, bishops and other corporations sole not being included, and even the corporations aggregate managed to creep out of the statute by taking leases for long terms, a thou-

sand years and more, now so frequent in conveyances. The result was the passing of the statute "De religiosis," 7 Edward I., by which it was forbidden to religious persons, or any other, by any means, act or contrivance, to appropriate lands or tenements, so that they came into mortmain in any way, under pain of forfeiture.

Gifts in mortmain forbidden by statute.

Invention of *uses*.

This seemed to be a sufficient security against all alienation in mortmain; but in order to evade the stringency of these statutes, the ecclesiastics hit upon the device of obtaining grants to persons *to the use* of the religious houses. In law, the person to whom a gift of lands was made and seisin delivered was held to be the owner. In equity, however, this was not always the case, for the chancellor, in the exercise of his jurisdiction over the conscience, held that the mere delivery of the possession or seisin by one person to another was not at all conclusive of the right of the latter to enjoy the lands. Equity was unable to take from him the title which he possessed and could always assert in a court of law; but equity could and did compel him to make use of that legal title for the benefit of any other person who might have a more righteous claim to the beneficial enjoyment. Thus if A. conveyed lands to B. to the use of C., B., though the owner in point of law, was compelled by the Court of Chancery to hand over the rents and profits to C.

Statute of Uses.

In the reign of Henry VIII. was passed the

famous Statute of Uses, by which it was enacted that in cases such as the above, C., who had the use, and was entitled to the rents and profits through the aid of the Court of Chancery, should also be the owner in point of law. It was hoped that by this means uses would be for ever abolished; but the common law judges thought fit to declare that the statute did not apply *to a use upon a use; e. g.*, that if land were given to A. to the use of B. to the use of C., *B., who had the first use*, took the legal estate by virtue of the Statute of Uses, and that C.'s existence could not be in any way recognized. The Court of Chancery immediately availed itself of this, and compelled B. to act merely as trustee for C. Thus, the distinction between legal and equitable estates again revived, and continues at the present time. Among the benefits conferred by uses upon landowners, the power of disposition by will —a power which seems necessary to complete the idea of property—was one of the most valuable and important. Previous to the time of Henry VIII., an estate in fee simple, if not disposed of in the lifetime of the owner, descended, on his death, to his heir-at-law. The hardship of this rule was mitigated by the prevalence of conveyances to *uses*, and the Court of Chancery allowing the *use* to be devised by will. But when the Statute of Uses came into operation, and all uses were turned into legal estates, the title of the

Use upon a use.

The use devisable.

heir again prevailed, and it became necessary six years later to pass the Statute of Wills, by which lands were, for the first time, made devisable. In the reign of George II. an act was passed, commonly called the "Mortmain Act," the object of which, as expressed in the preamble, was to prevent improvident alienations or dispositions of landed estates, by languishing or dying persons, to the disherison of their lawful heirs. By it, it was declared that no lands, or money to be laid out in lands, shall be given or conveyed for the benefit of any charitable uses whatsoever, except by deed executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six calendar months after its execution; and unless such gift be made to take effect immediately, and be without power of revocation, or other clause for the benefit of the donor, or those claiming under him.

Statute of Wills.

Mortmain Act, temp. George II.

The reigns of Edward II., Edward III., Richard II. and the sovereigns of the Houses of Lancaster and York are of the utmost importance in connection with the growth and progress of the House of Commons; but as we propose treating of this subject in the next chapter very little remains to be said here.

Reigns from Edward II. to Richard II. unimportant except in relation to parliament.

In the year 1344, in the reign of Edward III., the Statute of Provisors was passed, which was the first Act of Supremacy of which we read in

Statute of Provisors.

our history. For a long period the papal court had assumed the right of granting provisions, "in virtue of which persons (usually foreign priests) were intruded into English churches, and even bishops' sees, in violation of the rights of the king and other patrons." A stop was put to this by the statute. The second Act of Supremacy was the Statute of Præmunire, under Richard II., in 1393; it appears to be so called from the first word of the writ, which is framed as follows: "*præmunire facias* A. B., cause A. B. to be forewarned, that he appear before us to answer the contempt wherewith he stands charged, which contempt is particularly recited in the preamble to the writ." The statute of Richard enacts, that whoever procures at Rome, or elsewhere, processes, bulls, instruments or other things which touch the king, his crown and realm, and all persons aiding and assisting, shall suffer forfeiture. Subsequently a *præmunire* has been applied to many offences of a different kind, *e. g.*, by the Habeas Corpus Act, to send an inhabitant of England to prison beyond seas, subjects the parties committing the offence to the penalties of this statute.

Statute of Præmunire.

"I cannot," says Hallam, "conclude the present chapter without observing one most prominent and characteristic distinction between the constitution of England and that of every other country in Europe; I mean, its refusal of civil

A nobility compared with a *noblesse*.

privileges to the lower nobility, or those whom we denominate the gentry. In France, in Spain, in Germany, wherever, in short, we look, the appellations of nobleman and gentleman have been strictly synonymous. Those entitled to bear them by descent, by tenure of land, by office or royal creation, have formed a class distinguished by privileges inherent in their blood from ordinary freemen. Marriage with noble families, or the purchase of military fiefs, or the participation of many civil offices, were, more or less, interdicted to the commons of France and the empire. Of these restrictions nothing, or next to nothing, was ever known in England. The law has never taken notice of gentlemen. From the reign of Henry III., at least, the legal equality of all ranks below the peerage was, for every essential purpose, as complete as at present.

"There is no part, perhaps, of our constitution so admirable as this equality of civil rights;—this *isonomia*, which the philosophers of ancient Greece only hoped to find in democratical government. From the beginning our law has been no respecter of persons. It screens not the gentleman of ancient lineage from the judgment of an ordinary jury, nor from ignominious punishment. It confers not, it never did confer, those unjust immunities from public burthens which the superior orders arrogated to themselves upon the continent. Thus, while the privileges of our peers,

as hereditary legislators of a free people, are incomparably more valuable and dignified in their nature, they are far less invidious in their exercise than those of any other nobility in Europe. It is, I am firmly persuaded, to this peculiarly democratical character of the English monarchy that we are indebted for its long permanence, its regular improvement, and its present vigour. It is a singular, a providential circumstance, that in an age when the gradual march of civilization and commerce was so little foreseen, our ancestors, deviating from the usages of neighbouring countries, should, as if deliberately, have guarded against that expansive force which, in bursting through obstacles improvidently opposed, has scattered havoc over Europe."

Civil equality—to what attributable.

This tendency to civil equality in the English law he attributes principally to three causes:—

(1) That the feudal institutions were far less military in England than upon the continent, since from the time of Henry II., *escuage*, or pecuniary commutation for personal service, became almost universal, and the armies of our kings were composed of hired troops.

(2) To the existence of the important and respectable class of free socagers, having in general full rights of alienating their land, and who were judges in civil causes determined before the manorial tribunal. Such

privileges set them greatly above the *roturiers* of France.

(3) The change which took place in the constitution of parliament consummated the degradation of the lower nobility. "I mean," says Hallam, "not so much their attendance by representation, instead of personal summons, as their election by the whole body of the freeholders, and their separation, along with citizens and burgesses, from the house of peers."

CHAPTER III.

THE GROWTH OF PARLIAMENT.

PART I.

Early History of Parliament.

The Great Council—The Barons and inferior Tenants-in-chief —Principle of Representation—Name of Parliament when first given—Lesser Barons—Selden's Theory—Madox's Theory—Selden's Theory adopted—Representation of Cities and Boroughs—Rendered indispensable by the Abolition of Tallages—Progress of the Towns—Towns let to Fee-farm—Charters of Incorporation—City of London—Political Influence of London—Authorities in favour of an earlier Representation of Boroughs—St. Albans—Barnstaple —The Upper House—The Bishops—The temporal Peers—Peerage becomes hereditary—Life Peers—Fact of there being only two Houses of Parliament important—One Parliament for all England—Differences between the two Houses few—Reasons—Gradual Growth of the Constitution —Right of Taxation—Directing and checking Expenditure —Supply to depend on Redress of Grievances—Illegal Ordinances and Interpolations—Private Bills—Punishing Members—Instances of important Impeachments—Mompesson— —Bacon—The Earl of Middlesex—Buckingham—Strafford —Clarendon—Danby—Fitzharris.

As ours is a constitution consisting of king, lords and commons, we cannot strictly carry it further back than the admission of the latter into parliament. We have already briefly alluded to the composition of the Great Council of the Anglo- The Great Council.

Norman period, and have drawn attention to the fact that, although every tenant-in-chief was entitled to his summons, by reason of their comparative poverty, and the distance of their estates from the cities where the council was usually convened, the poorer of these soon ceased to attend, or to be expected to attend, with any degree of regularity. Traces of the distinction between the richer and more powerful tenants-in-chief, styled "barons," and those of an inferior degree, appear earlier than John's reign, but in that king's Great Charter the line is drawn decisively and broadly between these two bodies. The important clause runs thus:—"We shall cause the archbishops, bishops, abbots, earls and greater barons to be separately summoned by our letters. And we shall cause our sheriffs and bailiffs to summon generally all others who hold of us in chief." A remedy was thus found for the inconvenience attached to the personal attendance of the inferior tenants-in-chief in parliament, by introducing the principle of representation. If we consider that, by virtue of the 14th clause, the mass of inferior tenants-in-chief in each county would, at the summons of their sheriff, elect certain individuals of their body to represent them in the great council of the realm, we see a clear recognition of that part of the supreme assembly which now consists of the county members of the House of Commons; and we see the principle of representa-

The barons and inferior tenants-in-chief.

Principle of representation.

tion also. In 1245 we find Henry III., in the very terms of the Great Charter of John, summoning the great barons singly, and the other tenants-in-chief generally, by writs to the sheriff of each county. To a "*Great Council*" summoned in 1246, the title of "*Parliament*" is first given. Finally in 1265, in the celebrated parliament summoned by De Montford in Henry's name, at which the representation of boroughs was created, the representation of the counties was undoubtedly confirmed on its permanent basis, as the writs are still extant by which each sheriff is directed to return two lawful, good and discreet knights for his shire.

Name of *Parliament* first given.

It is important to notice that soon after the principle of representation was introduced, from the circumstance of the knights being elected at the county courts, at which all the freeholders of the shire did suit and service, a considerable extension of the franchise took place. We find that certainly in the reign of Henry III., and probably earlier, the county members of England were elected by all the freeholders, whether they held by military or socage tenure,—whether they were immediate tenants of the crown or not. Selden and Madox have entertained different opinions as to the origin of the "lesser barons."

Lesser barons.

According to the former, every tenant-in-chief by knight-service was an honorary or parliamentary baron by reason of his tenure. The old

Selden's theory.

and rich barons became anxious to be distinguished from the poorer and parvenu peers, and they succeeded, about the latter end of John's reign, in having the most eminent tenants-in-chief summoned by particular writs, the rest by a general summons through the sheriffs of the counties; and also in making the lesser barons pay relief, not as for an entire barony, but for so many knights' fees. Thus their tenure was changed to one by mere knight-service, and their denomination to tenants-in-chief.

Madox's theory.

According to the latter, on the other hand, tenure of knight-service-in-chief was always distinct from that by barony; and certainly tenants-in-chief are enumerated as distinct from earls and barons in the Charter of Henry I.

Selden's theory adopted.

We have ourselves adopted the view taken by Selden, which seems the best supported by evidence; but it was thought better to draw the attention of the reader to both theories before dismissing the lesser barons from our notice.

Representation of cities and boroughs.

For the commencement of the other branch of our House of Commons, the representatives of cities and boroughs, we must take a date subsequent to the Great Charter of John. Simon de Montfort was the first statesman who perceived and fully appreciated the growing importance of the commercial middle classes in England. After the battle of Lewes, a parliament was called in 1264, and two burgesses were returned for every

borough in each county. Parliaments continued to be summoned on De Montfort's plan, and when, in the twenty-fifth year of Edward I., tallages were, as we have seen, abolished, the presence of the burgesses in the parliaments of England became thenceforward essential and indispensable.

Rendered indispensable by abolition of tallages.

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. At the Conquest we find the burgesses, or inhabitants of towns, living under the protection of the king or some other lord to whom they paid annual rent and determined dues or customs. (In two or three instances they seem to have possessed common property belonging to a sort of guild or corporation.) Besides the regular payments, which were in general not heavy, they were liable to tallages at the discretion of their lords. Still the towns became considerably richer, for the profits of their traffic were undiminished by competition.

Progress of the towns.

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 let to fee-farm to the burgesses and their successors for ever.

Towns let to fee-farm.

It was evident to the most selfish tyrant that

Charters of incorporation.

the wealth of his burgesses was his wealth, and their prosperity his interest. From the time of William II., there was no reign in which charters were not granted to different towns.

City of London.

The original charter of Henry I. gives the city of London not only commercial advantages, but allows the citizens to choose their own sheriff, to the exclusion of every foreign jurisdiction.

Corporations became more and more numerous, and the spirit of monopoly gave strength to these institutions, each class of traders forming itself into a body, in order to exclude competition. Thus originated the companies in corporate towns, that of the "Weavers" of London being, perhaps, the earliest. Except in a few places the right of choosing magistrates was first given by King John. From the middle of the twelfth to that of the thirteenth century 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.

Political influence of London.

London might, even in these early times, be justly termed a member of the political system. This great city was rich and prosperous long before the Conquest, and, according to one writer, joined with the nobility to place Edmund Ironside on the throne. The citizens were active in the civil war of Stephen and Matilda, and we always

find them on the barons' side, in the contests of the latter with the crown. The instances sometimes asserted of borough representation before the time of Simon de Montfort are both scanty and spurious.

Authorities for an earlier representation.

The most plausible testimony in favour of an earlier representation is that furnished by the case of St. Albans.

St. Albans.

The burgesses of St. Albans complained to the council, in the early part of the reign of Edward II., that although they held of the king in chief, 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 had performed in the time of the late king Edward and his ancestors, 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, neglected to cause an election and return to be made. The burgesses, it will be noticed, claim a prescriptive right from the usage of all past times, and it has been argued that this could not have 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 for some time discontinued. Madox notices 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. Hume remarks that it is not surprising, that a petition which advances two falsehoods should contain one historical mistake, which, indeed, amounts only to an inaccurate expression.

Barnstaple.

Those whom St. Albans does not convince will hardly be carried away by the case of Barnstaple. This town set forth in the reign 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. A commission was issued which declared that for fifty years they had enjoyed the right of sending two representatives to parliament. A second commission found that they had enjoyed the right since the time of Athelstan. A third declared that the finding of the second had been fraudulently obtained, and that no such charter as that claimed ever existed. Now Barnstaple was a town belonging to Lord Audley, and it seems clear that the real object of the petition of the inhabitants was to withdraw themselves from the jurisdiction of their lord, because the main part of it

was concerned with the statement that the said charter conferred on them the right of devising their tenements and electing their own mayor.

The origin of the upper house of parliament, consisting of lords spiritual and temporal, can be clearly traced to the clause in the Great Charter which we have already quoted: "We shall cause the archbishops, bishops, abbots, earls and greater barons to be separately summoned by our letters." The Upper House.

It has been frequently maintained that the lords spiritual sat in parliament only by virtue of their baronial tenure. This is clearly too contracted a view to take of the rights of the English hierarchy, for the bishops were entitled to sit in councils by the general custom of Europe. The spiritual peers formed a majority of the House of Lords up to the Reformation, when the mitred abbots were deprived of their seats, and a loss of thirty-six seats thus accrued to the church party. It appears, presumably, in some way to compensate for this loss, that six new bishoprics were created. At the present day, on the formation of new sees, care is taken that the number of bishops sitting in the House of Lords is not increased; thus, when Manchester was recently erected into a see, it was at the same time provided that the junior bishop for the time being should not be entitled to a seat in the house. The bishops.

With respect to the temporal peers, it is evident that they originally consisted of a body composed The temporal peers.

of the most powerful landowners in the kingdom, and such a peerage naturally became hereditary without any express enactment to that effect. This will appear clear if we bear in mind that lands were not devisable until the time of Henry VIII., and although alienation was permitted on payment of a fine, the entire transfer of large estates could seldom have occurred by this means, for the simple reason that there were at that time no persons wealthy enough to purchase the lands of an impoverished baron at a single bargain. "Thus the estates of the great barons descended generally from heir to heir, and as each heir on coming into possession had the same right as his predecessor to be treated as a great baron of the realm, the idea of hereditary descent became gradually associated with the *status* of a peer. And this theory of the descent of peerage at last prevailed so far as to be extended to a new species of peers: to men who held no baronial possessions, but whom our kings summoned by writ to meet and consult among the prelates, the magnates and the chief men of the realm. This mode of creating peers by writ is said to have been first practised in Edward I.'s reign; and it appears to have been established as early as Richard II.'s reign, that such a writ of summons to parliament, and the fact of having sat there by virtue of such writ, gave a hereditary right to the descendants of the persons so summoned.

Peerage becomes hereditary.

The modern form of the sovereign creating a peer by letters patent dates from the reign of Richard II. By an almost invariable usage, the letters patent creating a peer direct its hereditary descent. Whether it is in the power of the crown to grant a peerage which shall not be hereditary, is an interesting question on which high authorities have differed. It has been practically raised, and, perhaps, practically settled in our own time."

Life peers.

Between Richard II. and Henry VI. several precedents are to be found for the creation of life peerages, but for upwards of four hundred years there has not been a single instance of any one being admitted to sit as a peer for life in the House of Lords. There are, however, several later instances of life peerages having been granted to women,—for instance, Charles II. created his mistress Duchess of Portsmouth for life, and George II. conferred the title of Countess of Yarmouth on Madame Walmoden for the same term; altogether there were eighteen instances between the time of James II. and George II. But this class of cases cannot be relied upon in support of the right of the crown to introduce life peers into the House of Lords, seeing that women cannot sit there.

In 1856, Sir J. Parke, Baron of the Exchequer, was made Baron Wensleydale for life. The peers objected to his taking his seat, and Lord Lyndhurst proposed, in a masterly speech, to refer his excep-

tional patent to the committee of privileges. An animated debate followed, throughout which the abstract right of the crown to create life peers was admitted, the real point at issue being whether such peers could sit in the House of Lords. It was argued that a peerage granted for life was a mere title of honour, and though it was admitted that life peers had formerly sat in the house, it was contended that, as no instance had occurred for upwards of four hundred years, the ancient prerogative of the crown had been lost by desuetude. The ministers, relying on the maxim "nullum tempus occurrit regi," argued that there could be no loss of prerogative by lapse of time. On the other hand, it was pointed out that the crown could not alter the settled constitution of the realm. In ancient times the crown had withheld writs of summons from peers who were unquestionably entitled, by inheritance, to sit in parliament; the crown had disfranchised ancient boroughs by prerogative; and had enfranchised new boroughs by royal charter. What would now be said of such an exercise of the prerogative? By constitutional usage, having the force of law, the House of Lords had been for centuries a chamber consisting of hereditary councillors of the crown, and it was contended that the crown had no more power to change the constitution of the House of Lords by admitting life peers, than it had to change the representation of the

people by raising or lowering the franchise of electors. Passing beyond the legal right of the crown, the opponents of life peerages dilated upon the hazardous consequences of admitting this new class of peers. Was it probable that such peerages would be confined to law lords? Might not the house at some time, and for some purpose, be swamped by new creations for life? Would it not become customary to grant life peerages to distinguished men instead of the cherished hereditary dignity? On a division the patent was referred to the committee of privileges by a majority of thirty-three. The said committee duly reported "that neither the letters-patent, nor the letters-patent with the usual writ of summons issued in pursuance thereof, can entitle the grantee to sit and vote in parliament."

The crown was forced to submit to this decision, and Lord Wensleydale soon after took his seat, under a new patent, as a hereditary peer. Creasy says:—"The fact of the division of our parliament into TWO houses, neither more nor less, has been of infinite importance in our constitutional history. We have escaped thereby the miseries which the instability, the violence and the impassioned temerity of a single legislative assembly have ever produced when that form of government has been attempted, as it often was in the Italian republics of the middle ages, as it was for a short time in Pennsylvania and Georgia, and as it has

Fact of there having been only *two* Houses of Parliament important.

been repeatedly essayed by revolutionary France, Spain, Naples and Portugal in our time. The great political writers of the United States—Kent, Story and Lieber—have exhausted the arguments on this topic, and have completely proved how essential a guarantee for orderly and permanent liberty is 'the Principle of Two Houses,' or the 'Bicameral system,' as it has been phrased by Jeremy Bentham. An increase of the number of houses beyond two, gives no advantage which the bicameral plan does not afford, and introduces irreparable mischief by the complicated dissensions, the vacillations and the delays which are inevitable when there are three or more legislative councils. The facilities for corruption and intimidation by the sovereign or his ministers are also fearfully augmented, and it becomes an easy matter for an adroit and ambitious politician to gain an ascendancy in one weak house out of many, and thereby to destroy the general free action of the political body. It is useful to compare, in this respect, the primary institutions of our own country with the different forms assumed by the national assemblies of other European nations in early times. For example, we shall find in mediæval Sweden four estates in four houses; in mediæval Spain and France, three estates in three houses; and we shall find that of all the free institutions of Europe, our own alone have been permanent."

Another characteristic of our parliament has been that we have always had *one* parliament for all England, and not separate legislative and taxing assemblies for separate counties or separate provinces. Without this centralization of parliamentary power, our sovereigns never could have been kept under parliamentary control and within the limited scope of action which alone is open to a constitutional king.

One parliament for all England.

Hallam notices a grand distinction between the English parliament and continental assemblies of estates, by pointing out that every member of the British House of Commons represents not only his own particular borough or county, but the whole of the United Kingdom.

The differences between the lords and commons have not by any means been frequent, and this seems to be due to the high prerogative of the English crown, its having the exclusive disposal of offices of trust which are the ordinary subjects of contention, its power of putting a stop to parliamentary disputes by a dissolution, and, above all, to the necessity which both the peers and commons have often felt, of a mutual good understanding for the maintenance of their privileges. The general harmony, or at least the absence of open schism, between the two houses of parliament is, perhaps, due still more to the happy gradation of ranks, which renders the elder and younger sons of our nobility two links in the

Differences between two houses few—reasons.

unsevered chain of society; the one trained in the school of popular rights, and accustomed for a considerable portion of their lives to regard the privileges of the house whereof they form a part full as much as those of their ancestors; the other falling without hereditary distinction into the class of other commoners, and mingling the sentiments natural to their birth and family affections with those that are more congenial to the whole community. It is owing also to the wealth and dignity of those ancient families which would be styled noble in any other country, and who give an aristocratic character to the popular part of our legislature.

Gradual growth of constitution.

"What was said of the Roman constitution by two of its greatest statesmen, and written by another, may with equal truth be averred of the English,—that no one man and no one age sufficed for its full production. But its kindly growth went rapidly on during the reigns of the later Plantagenets, and the historian of the last century of the middle ages traces with pride and pleasure the increase and systemization of the power of the House of Commons in asserting and maintaining the exclusive right of taxation; in making the grant of supplies dependent on the redress of grievances; in directing and checking the public expenditure; in establishing the necessity of the concurrence of both houses of parliament in all legislation; in securing the people

against illegal ordinances and interpolations of statutes; in inquiring into abuses; in controlling the royal administration; in impeaching and bringing to punishment bad ministers and other great offenders against the laws and liberties of the land, and in defining and upholding their own immunities and privileges."

Right of taxation.

I. The pretence of levying money without consent of parliament expired with Edward III. Richard never made illegal tallages, though doubtless his innocence in this respect was the result of weakness. He, however, extorted forced loans which became the frequent resource of arbitrary sovereigns in later times. Under the Lancastrian kings there is much less appearance of raising money in an unparliamentary manner, but still there are examples of arbitrary conduct.

Directing and checking expenditure.

II. The principle of appropriating public monies to particular purposes began during the minority of Richard II., and was among the best fruits of that period. Lord Furnival and Sir John Pelham, the treasurers of war, were sworn in parliament to execute their trust.

Supply to depend on redress of grievances.

III. In the second year of Edward II.'s reign we find the commons, when applied to for a grant of money to the crown, making it upon condition that the king should take advice and grant redress upon certain articles wherein they are aggrieved. The commons, in the second year of Henry IV., request, that instead of their petitions

being answered at the end of the session, they might be answered before they made their grant of subsidy.

Illegal ordinances and interpolations.

IV. It had long been beyond all question 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. Formerly statutes were framed in the following manner: there were two rolls, the one in the nature of a journal, called the parliament roll, in which the petition of the commons was entered with the king's answer thereto, agreeing to the whole or some portion of the prayer, or may be wholly differing from it; on the other roll, called the statute roll, was entered the act as drawn up in form by the judges, and this act was afterwards promulgated and proclaimed upon a writ issued to the sheriff of each county. The great mischief incident to this mode of legislation was, that the acts so prepared by the judges sometimes materially differed from the petitions upon which they were supposed to be founded. At last the commons hit upon an efficient expedient for protecting themselves from these encroachments, which has lasted without alteration to the present time. This was the introduction of complete statutes, under the name of bills, instead of the old petitions, and it has become a constant principle that the king must admit or reject them without qualifica-

tion. This alteration was gradually introduced in Henry VI.'s time.

Private bills.

From the first years of Henry V. the commons began to concern themselves with the petitions of individuals to the lords in council. 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 the parliaments of Henry V. and Henry VI.

Punishing ministers.

V. It is observable that the commons, during the reign of Edward III., in their opposition to the royal power, do not attack the king himself, but they lay all blame upon his ministers, and begin to assert and popularize the principles of parliamentary responsibility. They frequently addressed Edward, complaining of his counsellors and officers; and in 1376 we find them exercising for the first time the formidable constitutional weapon of impeachment. In that year the commons accused, before the House of Lords, the Lords Latimer and Nevil, and four commoners, Lyons, Ellis, Peachy and Bury, who had been employed by the king in revenue matters, for various acts of ministerial misconduct. The lords tried and convicted them, except Bury, who did not appear to take his trial. The unpopularity of Henry VI.'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, provoked an attack upon her own creature, the Duke of Suffolk. In Suffolk's case the commons seem to have proceeded by bill of attainder. The following are some of the most important instances of impeachment:—

Instances of important impeachments.

(*a*) JAMES I.

Mompesson. *Mompesson*, the holder of a patent obnoxious to the commons.

Bacon. *Lord Chancellor Bacon*, for taking bribes.

Earl of Middlesex. *The Earl of Middlesex*, lord treasurer, for systematic bribery.

(*b*) CHARLES I.

Buckingham and Strafford. *Buckingham* and *Strafford*, the latter for his conduct in Ireland.

(*c*) CHARLES II.

Clarendon. *Clarendon*, for maintaining a standing army, imprisoning beyond seas and other illegal acts.

Danby. *Danby.*

The impeachment of Earl Danby, who was Prime Minister under Charles II., took place in the year 1678, and requires more than a passing notice, as several important points arose at the trial.

(1) The commons moved that the earl should be committed to the Tower, but the motion was negatived by the lords by a large majority. The refusal to commit on a charge of treason had created a dispute

between the two houses in the instance of Lord Clarendon. In any future case it ought to be open to debate whether articles of impeachment pretending to contain a charge of high treason do substantially set forth overt acts of such a crime; and if the House of Lords shall be of opinion, either by consulting the judges or otherwise, that no treason is specially alleged, they shall, notwithstanding any technical words, treat the offence as a misdemeanour, and admit the prisoner to bail.

(2) Two other points upon which there was much discussion were, whether the king could pardon upon a parliamentary impeachment, and whether the bishops had any right to vote on the question. With respect to the bishops it was decided that the lords spiritual had a right to sit and vote in parliament in capital cases until judgment had to be pronounced, and that they should then retire.

With regard to the first and more important question, though it might be admitted that long usage had established the royal prerogative of granting pardons under the great seal, yet it could not be inferred that it extended to cases of impeachment. In ordinary criminal proceedings by indictment the crown prosecutes, the suit is in

the name of the sovereign who can at any time stay process by entering a *noll. pros.*; and to pardon before or after judgment is clearly a branch of the royal prerogative, and is a great constitutional trust to be exercised at the discretion of the crown. On the other hand, when an accusation of felony is brought by the injured party or his next of blood, a proceeding wherein the king's name does not appear, it is undoubted that he cannot remit the capital sentence. The same principle seemed applicable to an impeachment at the suit of the commons of England. Though this question remained in suspense and was not settled in *Danby's case*, it was finally decided by the legislature in the Act of Settlement, which provides that no pardon under the great seal shall be pleadable to an impeachment by the commons in parliament. The right of the crown *to grant a pardon after sentence* seems to be admitted.

(3) The third question which arose was whether the commons could continue an impeachment from one parliament to another. This was settled in the affirmative at the trial of Warren Hastings in 1791.

Fitzharris. *Fitzharris.*

This impeachment gave rise to an important question concerning our law. The commons im-

peached Fitzharris for high treason, but the lords voted that he should be proceeded against at the common law. As a precedent for their refusal they had the protest of the lords in the case of Sir Simon de Bereford in the reign of Edward III., against hearing an impeachment against anyone not of their own order. On the other hand, there were several precedents in the reign of Richard II. of such impeachments for treason, and there had been more than one under Charles I. The point was not decided in this case, but after the Revolution, the commons having impeached Sir Adam Blair and some others for high treason, a committee was appointed to search for precedents on this subject; and, after full deliberation, the House of Lords came to the resolution that they would proceed on the impeachments.

PART II.

Privileges of Parliament and its later History.

Freedom from Arrest—Summary of Cases—Freedom of Speech—Summary of Cases—Money Bills—Disputed Elections—Punishing Members—Appropriation of Supplies—Commission of Public Accounts—Qualification of Electors—7 Hen. IV. c. 15—8 Hen. VI.—First Disfranchising Statute on record—Growing Importance of the House of Commons—Members Paid up to Henry VIII.'s Reign—Number of the House, temp. Edward I.—Creation of Boroughs, temp. Edward VI.—Temp. Mary—Temp. Elizabeth—Newark last instance of Borough created by Royal Charter—In whom the Elective Franchise in Ancient Boroughs was vested—

Theories on the Subject—Number of Members composing the House of Lords—Judicial Power of the House of Lords —*Skinner's Case*—House of Lords establish their Right to Freedom from Arrest, temp. Charles I.—*The Earl of Arundel's Case*—Refusal of a Writ of Summons to the Earl of Bristol—Voting by Proxy—Recording Dissent in Journals of the House—Attempt to limit the Number of Peers—Constant additions to the House—Representative Peers of Scotland—Representative Peers of Ireland—Permission given to Irish Peers to sit in the House of Commons —Peerages of the United Kingdom—Summary of Creations —Antiquity of Peerage—Changes in the Composition of the Peerage—Its Representative Character—Extension of the Representative Principle—Disproportion between the Representative and Hereditary Peers — Scottish Peers created Peers of Great Britain—Their Right to sit denied —Rights admitted—Present Position of Scottish Peerage— Fusion of the Peerages of the Three Kingdoms—Hereditary Character of Peerage—Reform Bill of 1832—Reform Bill of 1867—The Ballot Act—Table of Privileges of Parliament —Grenville's Act—Sir R. Peel's Act—The Act of 1868— Government by Party—Publication of Debates.

Privilege of parliament.

PRIVILEGE of parliament, an extensive and singular branch of our constitutional law, begins to attract attention under our Lancastrian princes. Probably one considerable immunity, namely, freedom from arrest for persons transacting the king's business in his national councils, was much older. 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 the law. After several remonstrances, which the crown had evaded, the commons obtained the statute 11 Hen. VI. for the punishment of such as assault any members on their way to

Freedom from arrest.

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 charges of treason, felony, and breach of the peace, which is their present measure of privilege. The most celebrated of the early cases of privilege is that of Sir Thomas Thorpe, speaker of the House of Commons, in the year 1247. This person had been imprisoned on an execution at suit of the Duke of York. The commons sent some of their members to complain to the king and lords in parliament of this violation of privilege, and to demand Thorpe's release. The lords referred the question to the judges, who, after deliberation, said that it was usual that all members of the house arrested should be released from that arrest. The truth is, that, with a right pretty clearly recognized, as is admitted by the judges in *Thorpe'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 year of Henry VI., and of Clarke, 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 neither members nor their servants might be taken, except for treason, felony, and breach of the peace;

but the king put a negative upon this part of their petition.

Notwithstanding the answer of the judges in *Thorpe's case,* it was decided by the lords that Thorpe should remain in prison, without regarding the alleged privilege. The present law of privilege seems not to have been fully established, or at least effectually maintained, before the reign of Henry VIII.

Summary of cases on freedom from arrest.

The history of the law relating to the freedom of members of the House of Commons from arrest may be conveniently arranged under the following heads:—

(1) In early times we may presume a freedom from arrest for persons transacting the king's business in his councils.

(2) An act of Henry VI. provides against assaults being committed on persons going to and from the parliament.

(3) Thorpe, the speaker of the house, was arrested at suit of the Duke of York in the reign of Henry VI., and, although the judges were favourable to his release, he was detained in custody.

(4) In Edward IV.'s time a special act was passed to obtain a supersedeas in the case of a member (Atwell) who had been sued.

(5) In the reign of Henry VIII. a burgess named Ferrers was arrested, and his release demanded by the commons, which

assertion of privilege was confirmed by the king.

(6) Under Elizabeth, the serjeant of the house was sent to deliver the servant of a member (Smalley).

(7) Soon after the succession of James I., Sir T. Shirley was arrested for a debt, and the warden of the Fleet having refused to give him up, was committed to the Tower for his obstinacy.

(8) The case of Shirley led to the passing of 1 James I. c. 13, which allows a new execution to be sued out against a member of parliament after his privilege has expired, and discharges from liability the person delivering him during the continuance of his privilege.

Freedom of speech.

No privilege of the House of Commons can be so fundamental as liberty of speech. This is claimed at the opening of every parliament, and could never be infringed without shaking the ramparts of the constitution. Richard II.'s attack upon Haxey, for words spoken in debate, was a flagrant evidence of his despotic intentions, and no slight cause of the popular indignation by which that misguided prince was driven from the throne. No other case occurs until the thirty-third of Henry VI., when Thomas Young, member for Bristol, complained that he had been arrested and imprisoned in the Tower, six years

before, on account of a motion which he had brought forward in the house. The object of this motion had been, to declare, that as the king had no children, the Duke of York was the legitimate heir to the throne. The commons transmitted this petition to the lords, and the king commanded his council to do whatever might be judged fitting on behalf of the petitioner. The fact was that at the time Young made his petition the Duke of York was Protector, and he, no doubt, thought it a good opportunity to prefer his claim to remuneration.

Summary of cases on freedom of speech.

The law relating to the freedom of speech enjoyed by members may be thus summarized:—

(1) Richard II., hearing that an objectionable bill was about to be presented, demanded the surrender of its author, Thomas Haxey, and the commons gave way. Haxey's life was spared at the intercession of the bishops.

(2) In the year 1455, in the reign of Henry VI., Thomas Young complained that six years before he had been imprisoned in the Tower for words spoken in parliament; his party being in power he preferred his complaint in the hope of reward.

(3) An act was passed in the reign of Henry VIII., on the occasion of one Strode having been imprisoned, annulling all that had been done against him.

(4) Elizabeth was in the habit of restraining members from entering on prohibited subjects.

(5) In the reign of Charles I., the judges held that they had jurisdiction to try Sir Thomas Eliot for words uttered in the house.

(6) In 1667 the commons resolved that the above judgment was illegal and against the freedom and privilege of parliament, and the lords gave their concurrence.

(7) The right of the commons to freedom of speech has never since been called in question.

Money bills.

There is a remarkable precedent in the ninth of Henry IV., which is 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 on this ground, and, for the first time, the commons ventured to clash openly with their superiors, the circumstance is for this additional reason worthy of attention. At first the lords and commons appear to have made their several grants of supplies, without mutual communication, not in the form of laws, but tendered in written indentures, entered afterwards on the roll of parliament. The latest instance of such

distinct grant is 18 Edw. III.; and we find that in the twenty-second year of this reign the commons alone granted three-fifteenths of their goods. There seems to be no doubt from the remarkable passage on the roll of 9 Hen. IV., to which we have alluded, that at that time the grant of money was to be considered as mainly theirs, subject only to the assent of the other house. In the first parliament of Charles I. the commons began to omit the name of the lords in the preamble to bills of supply. The originating power as to taxation thus indubitably rested with the commons, but a dispute arose in the time of Charles II. as to whether the lords had any right to make any alteration in such bills. This question does not seem to have been raised before, and in the Convention parliament the lords made several alterations in undoubted money bills. In April, 1671, the lords having reduced the amount of an imposition on sugar, it was resolved by the other house "that in all aids given to the king by the commons, the rate or tax ought not to be altered by the lords." Several conferences took place on the question, and Hallam thinks the arguments on the side of the lords much stronger than those on the side of the commons. The case stands now thus: the lords have never acknowledged any further privilege than that of originating bills of supply, but the good sense

of both parties, and of an enlightened nation, has rendered this little jealousy unproductive of any mischief.

Disputed elections.

The want of all judicial authority either to issue process, or to examine witnesses, deprived the house of one of its most fundamental privileges, the cognizance of disputed elections. Six instances only occur during the reigns of the Plantagenet family, wherein the misconduct or mistake of the sheriff is recorded as having called for a specific animadversion, though it was frequently the ground of general complaint, and even of some statutes. 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.

Summary of cases on disputed elections.

The following is a summary of the law on the subject:—

(1) In early times the absence of power to issue process and examine witnesses, deprived the house of this privilege.

(2) Complaints of the misconduct of the sheriff were made under the Plantagenets.

(3) Statutes were passed under the Lancastrians to check the partiality of sheriffs.

(4) In the reign of Mary, the commons decided that Alexander Newell, being prebendary of Westminster, and thereby having a

voice in the convocation house, could not sit in the House of Commons.

(5) In 1586 the house appointed a committee to examine into the circumstances of the Norfolk election.

(6) James I. summoned his first parliament by a proclamation, which declared that no outlaw should be returned. *Goodwin*, who had been outlawed, was returned—the return was sent back—the house declared Goodwin duly elected. A compromise between the king and the house was fortunately arranged.

(7) No attempt was made afterwards to dispute this privilege.

Punishing members.

The House of Commons claim for themselves the right of punishing their own members, thus:—

(1) Storie was committed to the Tower by order of the House of Commons in the time of Edward VI.

(2) In the reign of Elizabeth Arthur Hall was punished for writing a book derogatory to the house.

(3) Dr. Parry was expelled for speaking very strongly against a bill punishing Jesuits.

(4) In 1714 Sir R. Steele was expelled the house for writing a pamphlet reflecting on the ministry.

(5) In 1769 Wilkes was expelled and voted incapable of sitting in the then parliament.

The commons, in the time of Charles II., took advantage of the pressure which the war with Holland brought on the administration, to establish two very important principles on the basis of their sole right of taxation,— Appropriation of supplies.

I. *The appropriation of supplies to limited purposes.*

This, indeed, was so far from an absolute novelty, that precedents for it are found in the reigns of Richard II. and Henry IV.; a period when the authority of the House of Commons was, as we have seen, at a very high pitch. There was, however, no subsequent instance until the year 1624, when the last parliament of James I., at the king's own suggestion, directed their supply for the relief of the Palatinate to be paid into the hands of commissioners named by themselves. There were cases of a similar nature in the year 1641, which though, of course, they could no longer be held as precedents, had accustomed the house to the idea that they had something more to do than simply to grant money, without any security or provision for its application. In the session of 1665 an enormous supply, as it then appeared, of 1,250,000*l.*, after one of double that amount in the preceding year, having been voted for the Dutch war, Sir J. Downing, one of the tellers of the Exchequer, introduced into the subsidy bill a proviso that the money raised by virtue of that act should be applicable only to the pur-

poses of the war. That supplies granted by parliament are only to be expended for particular objects specified by itself became, from this time, an undisputed principle, recognized by frequent, and at length constant practice.

Commission of public accounts.

II. *Commission of public accounts.*

It was a consequence of this right of appropriation, that the House of Commons should be able to satisfy itself as to the expenditure of their monies in the services for which they were voted. For this, too, there was some show of precedent in the ancient days of Henry IV.; but what, undoubtedly, had more influence was the recollection that during the civil war between Charles and his parliament, and during the subsequent period of the Commonwealth, the house had superintended, through its committees, the whole receipts and issues of the national treasury.

Qualification of electors.

The constitutional history of the reigns of the Lancastrian kings is very important, by reason of the attempts then made by the legislature to determine the qualifications both of electors and of persons to be elected. It is to be remembered that the great instruments of the crown, in packing a House of Commons, were the sheriffs who were nominated by the king. When a parliament was convened, it was to these officers that the royal precept was addressed for the election of knights, citizens and burgesses. The statute of the 7th Henry IV. was passed "on the grievous com-

plaints of the commons against undue elections for shires." It contained regulations for the time and manner of the election of knights; and, among other things, ordained that all those who should be present at the county court, as well suitors duly summoned for that cause as others, should enter upon the election of knights, and then in full court they were to proceed freely and indifferently, notwithstanding any request or command to be contrary. It will thus be seen that the statute 7 Henry IV. c. 15, while guarding against the mal-practices of sheriffs in county elections, recognized and established the right of all persons who were present at the county court to vote for knights of the shire. But in the eighth year of Henry VI. was passed an act that was framed in a very different spirit. This remarkable statute, the first disfranchising one upon record, reciting the grievous uproar and disorder at elections, enacted that for the future the franchise should be restricted to those persons, resident in the counties, having free land to the value of 40*s.* a year, above all charges. The act required both the tenure and the interest to be freehold, consequently excluding copyholders and leaseholders for lives. It will be noticed that this statute, besides fixing a property qualification for voters in county elections, had also the object of limiting the right of voting to those who were residents in the county. Hallam thinks that the

7 Hen. IV. c. 15.

8 Hen. VI. First disfranchising statute on record.

Hallam.

old custom 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." He points out that probably the practice of electing non-residents had begun in the reign of Edward III.

Growing importance of the House of Commons.

Creasy says, "There is no surer proof of the growing importance of the House of Commons during the latter half of the fifteenth century, than the anxiety which was then beginning to be shown to obtain a seat in parliament. Formerly that post had been looked upon as a burthen, and it had been found requisite to impose a fine by statute on members who absented themselves from their duty. The electors also looked on their franchise as a grievance, inasmuch as it imposed on them the necessity of paying wages to their representatives. The excuse that a borough was too poor to raise the money to pay their burgesses in parliament was often set up, and often allowed by the sheriffs. Both county and borough members seem regularly to have received their wages to the end of Henry VIII.'s reign, and a few later instances have been found. But there is good evidence that during the reign of the last Plantagenets, country gentlemen and others had begun make eager canvass for places in parliament."

Members paid up to Hen. VIII.'s reign.

Members of the House—temp. Edw. I.

The House of Commons from the earliest records of its regular existence in the twenty-third year of Edward I., consisted of seventy-

four knights, and a varying number of deputies from cities and boroughs, sometimes amounting to as many as two hundred and sixty, sometimes to two-thirds only of that number. New boroughs having grown into importance under Henry VIII., we find two hundred and twenty-four burgesses from one hundred and eleven towns—London sending four. Hallam thinks "that the change which appears to have taken place in the English government, towards the end of the thirteenth century, was founded upon the maxim that all who possessed land or moveable property ought, as freemen, to be bound by no laws, and especially by no taxation, to which they had not consented through their representatives." If we look at the constituents of a House of Commons under Edward I. or Edward III., we shall perceive that almost every one who contributed towards the tenths and fifteenths granted by the parliament might have exercised the franchise by voting for those who sat in it. The accessions to the popular chamber after the reign of Henry VIII. were by no means derived from a popular principle, such as had influenced its earlier constitution. The design of those who brought about the influx of new members from petty boroughs, which began in the short reigns of Edward and Mary, and continued under Elizabeth, must have been to secure the authority of the government, especially in the

Creation of boroughs—temp. Edw. VI., Mary, Eliz.

successive revolutions of religion. Five towns only in Cornwall made returns at the succession of Edward VI.; twenty-one at the death of Elizabeth. We find that Edward VI. created fourteen boroughs, Mary added twenty-one, Elizabeth sixty, and James I. twenty-seven. In the reign of the latter sovereign the house, out of favour to popular rights, laid it down that every town which had at any time returned members to parliament was entitled to a writ as a matter of course. The speaker accordingly issued writs to Hertford, Pomfret, and some other places on their petition; and we find that the boroughs restored in this manner down to 1641 were fifteen in number. But though the doctrine that an elective franchise cannot be lost by disuse is still current in parliament, none of the very numerous boroughs which have ceased to enjoy that franchise since the days of the first three Edwards have, from the Restoration downwards, made any attempt at retrieving it; nor is it by any means likely that they would be successful in the application. In 1673 the county and city of Durham were raised by act of parliament to the privileges of their fellow subjects. About the same time a charter was granted to the city of Newark, enabling it to return two burgesses. It passed with some slight objection at the time; but four years afterwards, after two debates, it was carried by one hundred

Newark last instance of borough created by royal charter.

and twenty-five to seventy-three that, by virtue of the charter granted to the city of Newark, it hath a right to send burgesses to sit in parliament.

Notwithstanding this apparent recognition of the king's prerogative to summon burgesses from a town not previously represented, no later instance of it has occurred; and it would unquestionably have been resisted by the commons,—not, as is vulgarly supposed, because the Act of Union with Scotland has limited the English members to 513 (which is not the case), but upon the broad maxim of exclusive privilege in matters relating to their own body, which the house was fully powerful enough to assert against the crown.

In whom was the elective franchise in ancient boroughs vested.

It is difficult to determine with exactness by what class of persons the elective franchise in ancient boroughs was originally possessed. There have been four theories put forward on the subject:—

(1) That the right of voting was vested in the inhabitant householders resident in the borough and paying scot and lot; under those words including local rates, and probably general taxes:

(2) The right sprang from the tenure of certain freehold lands, or burgages within the borough, and did not belong to any but such tenants:

(3) It was derived from the charters of incor-

poration, and belonged to the community of freemen of the corporate body:

(4) It did not extend to the generality of freemen, but was limited to the governing part, or municipal magistracy.

Of these propositions, the first was laid down by a celebrated committee of the House of Commons in 1624, the chairman being Serjeant Glanville. It is called by them the common law right, and is that which ought always to obtain when prescriptive usage to the contrary cannot be shown. This decision has met with little favour with the House of Commons since the Restoration.

The second theory has the authority of Lord Holt in *Ashby* v. *White*.

2 Ld. Raym. 953.

The third has been most received in modern times.

The last was propounded by Dr. Brady under James II., and is unfounded.

Number of members composing the House of Lords.

Turning to the House of Lords we find that the number of temporal peers summoned to parliament in 1454 was fifty-three, while the first parliament of Henry VII. contained only twenty-nine; this large decrease being due to the long-continued civil war. In subsequent parliaments during this reign the number increased by fresh creations, but never much exceeded forty; under Henry VIII. the greatest number appears to have been fifty-one; in the first parliament of James I.

we find eighty-two, and in his last ninety-six; while under Charles I. we find one hundred and seventeen in 1628, and one hundred and nineteen in 1640.

As we have already seen, the spiritual peers formed a majority of the house before the Reformation, but on the dissolution of the monasteries the clergy lost thirty-six votes, and only gained six by the formation of new bishoprics.

Judicial power of the House of Lords.

With respect to the judicial power of the House of Lords we find that for some time it claimed the right of original jurisdiction. But it is remarkable that so far as the lords themselves could allege from the Rolls of Parliament, one instance only occurs, between 4 Hen. IV. (1403) and 43 Eliz. (1602), where their house had entered upon any petition in the nature of an original suit; though in that (Edward IV. 1461) they had certainly taken on them to determine a question cognizable in the ordinary courts of justice. During the latter part of this long interval the council and the court of Star Chamber were in all their vigour, which may account for the intermission of parliamentary judicature. It was owing also to the long interval between parliaments from the time of Henry VI., extending sometimes to five or six years. In 1621 and 1624 we find the lords making orders without hesitation on private petitions of an original nature. They continued to exercise this jurisdiction in the first parliament

of Charles I., and in one instance, that of a riot at Banbury, even assumed the power of punishing a misdemeanour unconnected with privilege. This encroachment they continued under the Long Parliament. The ultimate jurisdiction of the House of Lords, either by removing into it causes commenced in the lower courts, or by writs of error complaining of judgment given therein, seems to have been as ancient. After the first half of the fifteenth century there was a considerable interval. About the year 1580 they began to receive writs of error from the Court of King's Bench, though for forty years more the instances were by no means numerous. But the statute passed in 1585, constituting the Court of Exchequer Chamber as an intermediate tribunal of appeal between the King's Bench and the parliament, recognized the jurisdiction of the latter in the strongest terms.

Skinner's case.

It was decided, in the famous case of *Skinner* v. *The East India Co.*, that they had no right of jurisdiction in original suits. Skinner presented a petition to the king, wherein he complained that, having gone as a merchant to the Indian seas at a time when there was no restriction upon that trade, the East India Company's agents had plundered his property, taken away his ships, and dispossessed him of an island which he had purchased from a native prince. Conceiving that he could have no sufficient redress in the ordinary courts of justice, he besought his sovereign to

enforce reparation by some other means. After several ineffectual attempts by a committee of the privy council to bring about a compromise between the parties, the king transmitted the documents to the House of Lords, with a recommendation to do justice to the petitioner. The lords give judgment for Skinner, and fine the company 500*l.* The company petition the House of Commons, and say that the lords, in taking cognizance of an original complaint, relievable in the ordinary courts of law, had acted illegally. The commons take the same view of the matter, the lords maintaining that they had the right. Two conferences take place between the houses without any result, and the commons voted Skinner into custody for breach of privilege. The lords in return imprisoned Sir S. Barnardiston, chairman of the company, and a member of the House of Commons. The dispute grew so hot, that the king (Charles II.) had to interfere by repeated adjournments and prorogations. Finally the king ordered an erasure from the journals of all that had passed on the subject and an entire cessation. Both houses gladly adopted this alternative, and from this time all claim on the part of the lords to an original jurisdiction in civil suits was abandoned. They have, however, been more successful in establishing a branch of their ultimate jurisdiction, that of hearing appeals from courts of equity. The lords did not entertain

petitions of appeal before the reign of Charles I., but they became very common from that time, though hardly more so than original suits; and as they bear no analogy, except at first sight, to writs of error which come to the House of Lords by the king's express commission under the great seal, they could not well be defended on legal ground. But on the other hand it was reasonable that the vast power of the Court of Chancery should be subject to some control.

House of Lords establish their right to freedom from arrest—temp. Car. I. *The Earl of Arundel's case.*

In the reign of Charles I. the lords established their right to freedom from arrest. The king had broken in upon the privileges of the House of Lords by committing the Earl of Arundel to the Tower during the session; not upon any political charge, but, as was commonly surmised, on account of a marriage which his son had made with a lady of royal blood. Such private offences were sufficient in those arbitrary reigns to expose the subject to indefinite imprisonment, if not to an actual sentence in the Star Chamber. The lords took up this detention of one of their body; and, after formal examination of precedents by a committee, came to a resolution, "that no lord of parliament, the parliament sitting, or within the usual times of privilege of parliament, is to be imprisoned or restrained without sentence or order of the house, unless it be for treason, or felony, or for refusing to give surety for the peace." This assertion of privilege was manifestly warranted by the co-

extensive liberties of the commons. After various messages between the king and the lords, Arundel was ultimately set at liberty.

Refusal of a writ of summons to the Earl of Bristol.

This infringement of the rights of the peerage was accompanied by another not less injurious, the refusal of a writ of summons to the Earl of Bristol. The lords were justly tenacious of this unquestionable privilege of their order, without which its constitutional dignity and independence could never be maintained. Whatever irregularities or uncertainty of legal principle might be found in earlier times as to persons summoned only by writ without patents of creation, concerning whose hereditary peerage there is much reason to doubt, it was beyond all controversy that an Earl of Bristol, holding his dignity by patent, was entitled of right to attend parliament. The house necessarily insisted upon Bristol's receiving his summons, which was sent him with an injunction not to comply with it by taking his place. But the spirited earl knew that the king's constitutional will expressed in the writ ought to outweigh his private command, and laid the secretary's letter before the House of Lords. The king prevented any further interference in his behalf by causing articles of charge to be exhibited against him by the attorney-general, whereon he was committed to the Tower. These assaults on the pride and consequence of an aristocratic assembly, from whom alone the king could expect

effectual support, displayed his unfitness not only for the government of England, but of any other nation.

Bristol's case established as a fundamental principle that every peer of full age is entitled to his writ of summons at the beginning of a parliament, and that the house will not proceed to business if any peer is denied it.

Voting by proxy.

During the 16th and 17th centuries the privilege of voting by proxy (recently abolished), which was originally by special permission of the king, became absolute, subject to such limitation as the house itself might impose. They obtained also another important privilege; first, of recording their dissent in the journals of the house, and afterwards of inserting the grounds of it. Instances of the former occur not unfrequently at the Reformation; but the latter practice was little known before the Long Parliament.

Recording dissent in journals of the house.

Attempt to limit the number of peers.

A great constitutional question, in connection with the House of Lords, arose under George I. Lord Sunderland persuaded the king to renounce his important prerogative of making peers; and a bill was supported by the ministry, limiting the House of Lords, after the creation of a few more, to its actual numbers. This measure was carried with no difficulty through the upper house, whose interests were so manifestly concerned in it. Fortunately, it was rejected by the commons. Those who maintained the expediency of limiting the

peerage had recourse to uncertain theories as to the ancient constitution, and denied this prerogative to have been originally vested in the crown. A more plausible argument was derived from the abuse, as it was then generally accounted, of creating twelve peers in the late reign, for the sole end of establishing a majority for the court—a resource which would always be at the command of successive factions, and the British nobility be thus in danger of becoming as numerous and venal as that of some European states. On the other hand, the arguments against any legal limitation seem more decisive. The power of the crown has been carefully restrained by statutes, and by the responsibility of its advisers; the commons, if they transgress their boundaries, are annihilated by a proclamation; but against the ambition, or, what is much more likely, the perverse haughtiness of the aristocracy, the constitution has not furnished such direct securities, and this would be prodigiously enhanced by a consciousness of their power, and by the sense of self-importance which every peer would derive from it after the limitation of their numbers. It is true that the resource of subduing an aristocratical faction by the creation of new peers could never be constitutionally employed, except in the case of a nearly equal balance; but it usefully hangs over the heads of the whole body, and deters them from any gross excesses of faction or oligarchical spirit. The nature of our govern-

ment requires a general harmony between the two houses of parliament. This harmony would not be increased if the country gentlemen and leaders of the commons should come to look on the nobility as a class into which they could not enter, and the peers would be likely to forget more and more in their inaccessible dignity the near approach of that gentry to themselves in respectability of birth and extent of possessions.

Constant additions to the house.

Sir Erskine May says: "The continual additions which have been made to the number of temporal peers sitting in parliament has been so remarkable as to change the very constitution and character of the House of Lords. As we have seen, no more than twenty-nine temporal peers received writs of summons to the first parliament of Henry VII.; and this number had increased at the death of Queen Elizabeth to fifty-nine. The Stuarts were profuse in their creations, and raised the number of the peerage to about one hundred and fifty; which William III. and Queen Anne further increased to one hundred and sixty-eight.

Representative peers of Scotland.

In the same reign were also added, on the union with Scotland, sixteen representative peers,—a number scarcely adequate to represent an ancient peerage, little less numerous than that of England, in a House of Lords, in which sat twenty-six bishops to make laws for Presbyterian Scotland. . . .

Representative peers of Ireland.

The peerage of Ireland, on the union of that country, was dealt with, in some measure, upon different principles

from that of Scotland. The principle of representation was followed; twenty-eight representative peers being admitted to seats in the parliament of the United Kingdom. But they were elected, not for the parliament only, as in Scotland, but for life. Again, no Scottish peers could be created after the Union, and thus the peerage of Scotland was perpetuated as an ancient and exclusive aristocracy. It was otherwise with Ireland. It was admitted that the peerage of that country was too numerous, and ought gradually to be diminished; and with this view, the royal prerogative was so far restricted, that one Irish peer only can be created, whenever three Irish peerages,—in existence at the time of the Union,—have become extinct. But the object of this provision being ultimately to reduce the number of Irish peers,—not having hereditary seats in parliament,—to one hundred, it was also provided that when such reduction had been effected, one new Irish peerage may be created as often as a peerage becomes extinct, or as often as an Irish peer is entitled, by descent or creation, to a peerage of the United Kingdom. Another peculiar arrangement, made on the union with Ireland, was the permission granted to Irish peers of sitting in the House of Commons for any place in Great Britain,—a privilege of which they have extensively availed themselves. . . . Since the Union, further additions have continually been made to the peerage of the United Kingdom;

Permission to Irish peers to sit in the House of Commons.

Peerages of United Kingdom.

Summary of creations.

and an analysis of the existing peerage presents some singular results. In 1860, the House of Lords consisted of four hundred and sixty lords, spiritual and temporal. The number of hereditary peers of the United Kingdom had risen to three hundred and eighty-five, exclusive of the peers of the blood royal. Of these peerages, one hundred and twenty-eight were created in the long reign of George III.; forty-two in the reign of George IV.; and one hundred and seventeen since the accession of William IV. Thus two hundred and eighty-seven peerages were created, or raised to their present rank, since the accession of George III.; or very nearly three-fourths of the entire number. But this increase is exhibited by the existing peerage alone,—notwithstanding the extinction or merger of numerous titles, in the interval. The actual number of creations during the reign of George III. amounted to three hundred and eighty-eight; or more than the entire present number of the peerage. No more than ninety-eight of the peerage existing in 1860 could claim an earlier creation than the reign of George III.; but this fact is an imperfect criterion of the antiquity of the peerage. When the possessor of an ancient dignity is promoted to a higher grade in the peerage, his lesser dignity becomes merged in the greater, but more recent title. An earl of the fifteenth century, is transformed into a marquess of the nineteenth. Many

Antiquity of peerage.

of the families from which existing peers are descended, are of great antiquity; and were noble before their admission to the peerage. Nor must the ancient nobility of the Scottish peerage be forgotten in the persons of those high-born men, who now figure on the roll, as peers of the United Kingdom, of comparatively recent creation. . . .

Changes in the composition of the peerage.

With this large increase of numbers, the peerage has undergone further changes, no less remarkable in its character and composition. It is no longer a council of the magnates of the land,—the territorial aristocracy, the descendants or representatives of the barons of the olden times; but in each successive age, it has assumed a more popular and representative character. Men who have attained the first eminence in war and diplomacy, at the bar or in the senate,—men wisest in council and most eloquent in debate,—have taken their place on its distinguished roll; and their historical names represent the glories of the age from which they sprung. Men who have amassed fortunes in commerce, or whose ancestors have enriched themselves by their own industry, have also been admitted to the privileged circle of the peerage. Men of the highest intellects, achievements, and wealth, the peerage has adopted and appropriated to itself: men of secondary pretensions, it has still left to the people. A body so constantly changed, and recruited from all classes of society, loses much of its distinctive hereditary character. Peers

Its representative character.

sitting in parliament by virtue of a hereditary right, share their privilege with so many who by personal pretensions have recently been placed beside them, that the hereditary principle becomes divested of exclusive power, and invidious distinction.

Extension of the representative principle.

"At the same time the principle of representation has been largely introduced into the constitution of the House of Lords. The sixteen representative peers of Scotland elected only for a parliament,—the twenty-eight representative peers of Ireland, elected for life,—form a body as numerous as the entire peerage in the time of Henry VIII. And when to these are added the twenty-six English bishops, holding their seats for life,—the total number of lords not sitting by virtue of hereditary right, becomes a considerable element in the constitution of the upper house. In analysing these numbers, however, the growing disproportion between the representative lords and the hereditary peers cannot fail to be apparent. If sixteen Scottish peers were deemed an inadequate representation of the ancient peerage of Scotland in the reign of Anne,—what are they now when the peerage of the United Kingdom has been trebled in numbers? But this inequality, apparently excessive, has been corrected by the admission of Scottish peers to hereditary seats in the British House of Lords. In 1860, there were seventy-eight Scottish peers, of whom no less than

Disproportion between hereditary and representative peers.

Scottish peers created peers of Great Britain.

forty, or more than half, sat in parliament by virtue of British peerages created in their favour since the Union. Great was the jealousy with which the House of Lords at first regarded the admission of Scottish peers to the peerage of Great Britain. In 1711, the Duke of Hamilton was created Duke of Brandon, of the peerage of Great Britain, when the lords declared by a majority of five, that no patent of honour granted to any peer of Great Britain, who was a peer of Scotland at the time of the Union, entitled such peer to sit and vote in parliament, or to sit upon the trial of peers. The undoubted prerogative of the Queen was thus boldly set aside for a time by an adverse determination of the House of Lords. At the time of this decision the Duke of Queensberry was sitting by virtue of a British peerage, created since the Union. The determination of the lords prevented for many years the direct admission of any other Scottish peers to the peerage of Great Britain; but this restriction was cleverly evaded by frequent creations of their eldest sons, who, having obtained seats in the House of Lords, succeeded on the death of their fathers to their Scottish peerages. At length, in 1782, the question of the disability of Scottish peers to receive patents of peerage in Great Britain was referred to the judges, who were unanimously of opinion that no such disability had been created by the Act of Union. The lords

Their right to sit denied.

Rights of Scottish peers admitted.

therefore reversed the decision of 1711; and henceforth Scottish peers were freely admitted to the ranks of the British peerage . . . .

Present position of Scottish peerage.

"Meanwhile the admission of Scottish peers to hereditary seats in the House of Lords is tending to a singular result. At no distant period the Scottish peerage will probably become absorbed in that of the United Kingdom. One half their number have already been absorbed, more may hereafter be admitted to the House of Lords; and, as no new creations can be made, we may foresee the ultimate extinction of all but sixteen Scottish peers not embraced in the British peerage. These sixteen peers, instead of continuing a system of self-election, will then probably be created hereditary peers of parliament. The Act of Union will have worked itself out, and a parliamentary incorporation of the two countries will be consummated, more complete than any which the most sanguine promoters of the Union could, in their visions of the future, have foreshadowed.

Present position of peerage of Ireland.

A similar absorption of the Irish peerage into the peerage of the United Kingdom has also been observable, though, by the terms of the Act of the Union, the full number of one hundred Irish peers will continue to be maintained. In 1860, there were one hundred and ninety-three Irish peers, of whom seventy-one had seats in parliament as peers of the United Kingdom. Thus, the peers of Ireland sitting in parliament, including the

representative peers, amounted to ninety-nine. By this fusion of the peerage of the three kingdoms, the House of Lords has grown at once more national and more representative in its character. As different classes of society have become represented there, so different nationalities have also acquired a wider representation. Nor ought it to be overlooked that Scotland and Ireland are further represented in the House of Lords by numerous commoners of Scottish and Irish birth, who have been raised to the dignity of the peerage for distinguished services or other eminent qualifications. But all temporal peers,—whether English, Scottish or Irish, and whether sitting by hereditary right or by election,—have been ennobled in blood and transmit their dignities to their heirs. Hereditary descent has been the characteristic of the peerage, and, with the exception of the bishops, of the constitution of the House of Lords."

Fusion of the peerage of the three kingdoms.

Hereditary character of peerage.

We have quoted at great length from Sir Erskine May's splendid history of the constitution, as to the present composition and character of the House of Lords, and we have done so not without an object. There are those at the present day who talk lightly of the upper house, and seem to point to its extinction as a branch of the legislature at no distant date; and so rapid have been the changes during the past half cen-

tury, that it is more than possible that it may at least become one of the questions of the day during the lifetime of the present generation. We have quoted from the highest living authority upon constitutional law, hoping that the information conveyed may be of some service in convincing those who are ever advocating radical changes, that the House of Lords is one of the institutions of our country of which we have every reason to be most proud.

Reform Bill of 1832.

A great change was made in the representation of the people in the House of Commons by the Reform Bill of 1832; and it is now time to advert to the provisions of this famous statute. The following summary is the best with which we are acquainted: "The main evil had been the number of nomination or rotten boroughs enjoying the franchise. Fifty-six of these, having less than two thousand inhabitants, and returning one hundred and eleven members, were swept away. Thirty boroughs having less than four thousand inhabitants lost each a member. Weymouth and Melcombe Regis lost two. This disfranchisement extended to one hundred and forty-three members. The next evil had been that large populations were unrepresented, and this was now redressed. Twenty-two large towns, including metropolitan districts, received the privilege of returning two members; and twenty more

of returning one. The larger county populations were also regarded in the distribution of seats, the number of county members being increased from ninety-four to one hundred and fifty-nine. The larger counties were divided; and the number of members adjusted with reference to the importance of the constituencies. Another evil was the restricted and unequal franchise. This, too, was corrected. All narrow rights of election were set aside in boroughs; and a 10*l.* household franchise was established. The freemen of corporate towns were the only class of electors whose rights were reserved; but residence within the borough was attached as a condition to their right of voting. Those freemen, however, who had been created since March, 1831, were excepted from the electoral privilege. Crowds had received their freedom in order to vote against the reform candidates at the general election; they had served their purpose, and were now disfranchised. Birth or servitude were henceforth to be the sole claims to the freedom of any city entitling freemen to vote. The county constituency was enlarged by the addition of copyholders and leaseholders for terms of years, and of tenants-at-will paying a rent of 50*l.* a-year. . . . . Another evil of the representative system had been the excessive expenses at elections. This, too, was sought to be mitigated by the registration of electors, the division of counties and boroughs into convenient

polling districts, and the reduction of the days of polling."

The Reform Bill of 1867.

As is well known, a considerable extension of the franchise took place in the year 1867, by the introduction of household suffrage into boroughs, the admission of lodgers under certain restrictions, and the lowering of the qualifications for county electors. An alteration in the manner of election was also subsequently brought about by the passing of the Ballot Act, by which secret was substituted for open voting.

The Ballot Act.

The privileges of parliament tabulated.

The following table of the privileges of parliament may be found useful:—

I. House of Lords.

I. House of Lords.

A. Privileges of members individually:

(*a*) Freedom from arrest.

(*b*) Freedom of speech: *Earl of Arundel's case* (Car. I.).

(*c*) Right to enter dissent on journals of house.

(*d*) Every peer of full age entitled to a writ of summons to parliament: *Bristol's case* (Car. I.).

B. Privileges of members collectively:

(*a*) Right to the services of the law officers of the crown.

(*b*) Right to originate bills affecting the peerage.

II. House of Commons.

II. House of Commons.

A. Privileges of members individually:
   (*a*) Freedom from arrest: Thorpe (Hen. VI.); Ferrers (Hen. VIII.); Smalley (Eliz.); Shirley (Jac. I.).
   (*b*) Freedom of speech: Haxey (Rich. II.); Young (Hen. VI.); Strode (Hen. VIII.).
   (*c*) Right of any member to exclude strangers.

B. Privileges of members collectively:
   (*a*) Right to punish their own members: Storey (Hen. VI.); Hall (Eliz.).
   (*b*) Right to impeach: Lord Latimer (Edw. III.); Suffolk (Hen. VI.); Mompesson (Jac. I.).
   (*c*) Right to originate money bills.
   (*d*) Right to inquire into contested elections: Norfolk (Eliz.); Goodwin and Fortescue (Jac. I.).

Election petitions must formerly have been tried by select committees specially nominated; afterwards by the committee of privileges in elections. This latter committee had been nominated by the house itself, being composed of privy councillors and eminent lawyers; being irresponsible, it became arbitrary. In the year 1770 an act was passed, known as "Grenville's Act," and by it the judicature in election cases was trans-

Election petitions.

Grenville's Act.

ferred from the house itself to a committee of thirteen members, selected by the sitting members and petitioners from a list of forty-nine chosen by ballot, to whom each party could add a nominee to advocate their respective interests. In 1774 this act was made perpetual, and the result was, that a Whig petitioner had scant justice from a Tory committee, and *vice versâ*.

Sir R. Peel's Act.

This system continued till 1839, when it was superseded by Sir Robert Peel's Act, by which the committees were reduced to six members, nominated by an impartial body, that is, the general committee on elections. The evils resulting from the old state of things were thus considerably modified.

The Act of 1868.

Finally, in 1868, the trial of election petitions was transferred to the judges of the superior courts, who report to the house.

Government by party.

The government of England is known as a government by what is called "party."

Party is a body of men united for promoting, by their joint endeavours, the national interests upon some particular system upon which they are all agreed. When national are sacrificed to personal interests we get faction. The divisions, conspiracies and civil wars by which England was convulsed until late in the sixteenth century must not be confounded with party. Rarely founded on distinctive principles, their ends were sought by resort to arms. Neither can we trace the

origin of party in those earlier contentions, sometimes with the nobles, sometimes with the commons and the crown; they marked the spirit of freedom, the assertion by classes of their rights, but parliamentary parties were unknown. The germ of party first became discernible in the reign of Elizabeth, in the person of the Puritans. In 1601 they showed their strength by resisting monopolies. Under James I. the assertions of prerogative were met by bolder remonstrances, and Sandys, Coke, Elliot, Selden and Pym may be regarded as the first leaders of a regular parliamentary opposition. The terms Whig and Tory were introduced during the contests upon the Exclusion Bill in 1680; and soon after the Reform Bill of 1832 the Tories began to call themselves Conservatives.

Publication of debates.

Hallam says: "The two houses are supposed to deliberate with closed doors. It is always competent for any member to insist that strangers be excluded; not on any special ground, but by merely enforcing the standing order for that purpose. It has been several times resolved that it is a high breach of privilege to publish any speeches or proceedings of the commons, though they have since directed their own votes and resolutions to be printed. Many persons have been punished by commitment for this offence; and it is still highly irregular, in any debate, to allude to the reports in newspapers, except for

the purpose of animadverting on the breach of privilege. Notwithstanding this pretended strictness, notices of the more interesting discussions were frequently made public, and entire speeches were sometimes circulated by those who had sought popularity in delivering them. After the accession of George I. we find pretty regular accounts of debates in an annual publication, Boyer's Historical Register, which was continued to the year 1737. They were afterwards published monthly, and much more at length, in the London and the Gentleman's Magazines; the latter, as is well known, improved by the pen of Johnson, yet not so as to lose by any means the leading scope of the arguments. It follows, of course, that the restriction upon the presence of strangers had been almost entirely dispensed with. A transparent veil was thrown over this innovation by disguising the names of the speakers, or more commonly by printing only initial and final letters. This ridiculous affectation of concealment was extended to many other words in political writings, and had not wholly ceased in the American war. It is almost impossible to overrate the value of this regular publication of proceedings in parliament, carried as it has been in our own time to nearly as great copiousness and accuracy as is probably attainable. It tends manifestly and powerfully to keep within bounds the supineness and negligence, the par-

tiality and corruption, to which every parliament, either from the nature of its composition or the frailty of mankind, must more or less be liable. Perhaps the constitution would not have stood so long, or rather would have stood like a useless and untenanted mansion, if this unlawful means had not kept up a perpetual intercourse, a reciprocity of influence, between the parliament and the people. A stream of fresh air, boisterous perhaps sometimes as the winds of the north, yet as healthy and invigorating, flows in to renovate the stagnant atmosphere, and to prevent that *malaria* which self-interest and oligarchical exclusiveness are always tending to generate. Nor has its importance been less perceptible in affording the means of vindicating the measures of government, and securing to them, when just and reasonable, the approbation of the majority among the middle ranks, whose weight in the scale has been gradually enhanced during the last and present centuries."

PART III.

Constitutional Law in its relation to Parliament, and the Prerogatives of the Crown.

Privileges of Parliament, how far controllable by Courts of Law —*Stockdale* v. *Hansard*—Case of the Sheriff of Middlesex —3 & 4 Vict. c. 9—Summary—the Royal Prerogative—Writ *ne exeat regno.*

Stockdale v. *Hansard.*

An important case in Constitutional Law, that of *Stockdale* v. *Hansard,* was tried in the year 1839, and is the leading authority upon the question as to how far the privileges of the House of Commons are controllable by courts of law. This was an action for a publication defaming the plaintiff's character, by imputing that he had published an obscene libel. The plea was, that the inspectors of prisons made a report to the secretary of state, in which improper books were said to be permitted in the prison of Newgate; that the court of aldermen wrote an answer to that part of the report, and the inspectors replied repeating the statements, and adding that the improper books were published by the plaintiff. That all these documents were printed by and under orders from the House of Commons, who had come to a resolution to publish and sell all the papers they should print for the use of the members, and who also resolved, declared and adjudged that the power of publishing such of their reports, votes and proceedings as they thought conducive to the

public interest, is an essential incident to the due performance of the functions of parliament, more especially to the Commons' House.

The points insisted on by the defendants were:—

I. That the alleged grievance arose from an act done by the House of Commons in the exercise of a privilege claimed by it. That the question of privilege therefore arose directly, and that a court of law cannot inquire into the existence of a privilege, but must give judgment for the defendants.

II. Even if the question arose incidentally, still on this record the court could not inquire into the existence of the privilege, but must give judgment for the defendants.

III. The privilege (assuming that a court of law could inquire into its existence) does exist.

Lord Denman, C. J., after stating the nature of the case, said: "One defence involved in this plea is, that the defendants committed the grievance by order of the House of Commons in a case of privilege, and that each House of Parliament is the sole judge of its own privileges. That parliament enjoys privileges of the most important character no person capable of the least reflection can doubt for a moment. Thus the privilege of

having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess, and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in parliament by a member to the prejudice of any other person, that member enjoys complete immunity. For any paper signed by the speaker by order of the house, though to the last degree calumnious, the speaker cannot be arraigned in a court of justice. *But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher.* The privilege of committing for contempt is inherent in every deliberative body invested with authority by the constitution. But, however flagrant the contempt, the House of Commons can only commit to the close of the existing session. If the offence were committed the day before the prorogation, and if the house ordered imprisonment, but for a week, every judge of all the courts would be bound to discharge by *habeas corpus*. Nothing is more undoubted than the exclusive privilege of the people's representatives in respect to grants of money, and the imposition of taxes. But if a vote that their

messenger should forcibly enter, and inspect the cellars of all residents in London possessing more than a certain income, were come to, and an action of trespass brought, would the speaker's warrant justify the breaking and entering? I will speak of but one other privilege,—the privilege from personal arrest. The proceedings of parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor could restrain the liberty of its members. In early times their very horses and servants might require protection from seizure under legal process, as necessary to secure their own attendance; but when this privilege was strained to the intolerable length of preventing the service of legal process, or the progress of a cause once commenced against any member during the sitting of parliament, or of threatening any one who should commit the smallest trespass upon a member's land, though in assertion of a clear right, as breakers of the privileges of parliament, these monstrous abuses might have called for the interference of the law, and compelled the courts of justice to take a part.

"In *Burdett* v. *Abbot,* the plaintiff committed a breach of privilege by the publication of a libel. The defendant, the speaker, stating that fact on the face of his warrant, committed him by order of the house to prison; an action was brought for this assault and false imprisonment. Did the

14 East, 1.

House of Commons threaten the plaintiff, or his attorney or counsel, for a contempt of their privileges? On the contrary, by an express vote they directed their highest officer to plead and submit himself to the jurisdiction of this court. Their arguments were just, their conduct had been lawful in every respect, and the court therefore gave judgment in the speaker's favour. The grounds of the decision were, not that all acts done by their authority were beyond the reach of inquiry, or that all which they called privilege was privilege, and sacred from the intrusion of the law, but that they had acted in the exercise of a known and needful privilege, in strict conformity with the law.

2 Lord Raym. 938.

"We are informed that the case of *Ashby* v. *White* concerned not the privileges of parliament. If, however, the opinion of all the judges and of both houses, and of all historians and all lawyers, be correct, then that case decided that courts of law are not bound by the opinion of the Commons' House on matters of election, of which they claimed the sole right of judging, and had actually given judgment; but that the law must take its course. In the case commonly designated as 'The case of the Men of Aylesbury,' a question of the utmost difficulty and importance was brought before the Court of King's Bench. The House of Commons pronounced those persons guilty of breach of privilege, and sent them to

Newgate for a contempt in bringing their action. They sued out their *habeas corpus*, and Holt, C. J., in a judgment of the highest excellence, gave such reasons for restoring them to liberty as it is easier to outvote than answer; the other three judges, however, took an opposite view.

"Two admissions were made by the attorney-general in the course of his argument in this case. He first warned us that this being a question of privilege, we have no power to decide it; and told us that whenever either house claims to act in exercise of a power which it claims, the question of privilege arises. But, if the claim were to declare a general law, the attorney-general agrees that no weight could belong to it. Clearly, then, the court must inquire whether it be a matter of privilege, or a declaration of general law.

"The other concession to which I allude is, that when matters of privilege come before the courts, not directly, but incidentally, they may, because they must, decide it. Since, then, the courts may give judgment on matters of privilege incidentally, it is plain that they must have the means of arriving at a correct conclusion, and that they may differ from the House of Parliament.

"I come at length to consider whether this privilege of publication exists. Having convinced myself that the mere order of the house will not justify an act otherwise illegal, and that the simple declaration that that order is made in exercise of

a privilege does not prove the privilege, it is no longer optional with me to decline or accept the office of deciding whether this privilege exists in law. The proof of this privilege was grounded on three principles,—necessity—practice—universal acquiescence. If the necessity can be made out no more need be said; it is the foundation of every privilege of parliament. The supposed necessity soon dwindled down to a very dubious kind of expediency. I am of opinion, upon the whole case, that the defence pleaded is no defence in law, and that our judgment must be for the plaintiff on this demurrer." The other judges concurred.

Subsequent proceedings.

After this decision the plaintiff brought another action and obtained judgment in his favour.

A *fi. fa.* was issued, and the sheriff returned that the goods remained in his hands for want of buyers. A *venditioni exponas* was then sued out, to which the sheriff returned that he had the money in court. A rule was then served upon the sheriff, calling on him to show cause why this money should not be paid to the plaintiff.

Resolutions of the House of Commons.

On behalf of the sheriff it was stated that the House of Commons had passed the following resolutions:—

"That it appears to this house that execution has been levied by the sale of the property of Messrs. Hansard, in contempt of the privileges of this house, and that such money now remains in the hands of the sheriff of Middlesex.

"That the said sheriff be ordered to refund the said amount forthwith to Messrs. Hansard.

"And that the sheriffs were guilty of a contempt, in pursuance whereof they had been committed and still remained in custody."

The court nevertheless made the rule absolute, commanding the sheriff to pay over the money which had been levied.

Afterwards a rule *nisi* was obtained for an attachment against the sheriff for non-payment of the money. In answer the sheriffs made affidavit giving a history of the proceedings, and stating that they had no power, by reason of their imprisonment, to go and procure the money and pay it over, and could obey the rule only by desiring the under-sheriffs to pay it, whom they believed they should thereby expose to imprisonment.

The court, however, made the rule for an attachment against the sheriffs absolute.

Case of the sheriff of Middlesex.

From this case of the sheriff of Middlesex we gather that the House of Commons has the power to commit for contempt, and that a court of law will not release persons so committed because the warrant of commitment does not specify the grounds on which they had been adjudged guilty of contempt; nor can the court in such a case inquire into the merits of the commitment.

In giving judgment in this case, Lord Denman, C. J., said: "I think it necessary to declare that the judgment delivered in *Stockdale* v. *Han-*

sard appears to me in all respects correct. The only question upon the present return is whether the commitment is sustained by a legal warrant. The great objection is, that the facts which constitute the alleged contempt are not shown by the warrant. But we must presume that what any court, much more what either House of Parliament, acting on great legal authority, takes upon itself to pronounce a contempt, is so. In the present case I am obliged to say that I find no authority under which we are entitled to discharge these gentlemen from their imprisonment."

3 & 4 Vict. c. 9.

Consequent on these proceedings, an act was passed which declared that, in all cases in which a person was defendant by reason of proceedings commenced on account of the publication of any of the proceedings under the authority of either House of Parliament, that the said proceedings should be stayed on the production of a properly verified certificate, accompanied by an affidavit.

Further, that in any proceedings commenced for printing any extract from the reports of proceedings in parliament, the defendant can give in evidence under the general issue that such extract was published *bonâ fide*, and without malice; and if such shall be the opinion of the jury, a verdict of *not guilty* shall be entered for the defendant.

Summary.

To the following important questions:—

Can the known and established laws of the land be superseded, suspended or altered

by resolution or order of the House of Commons?

Can that house in parliament assembled, by any resolution or order, create any new privilege for themselves inconsistent with the known laws of the land?

If such power be assumed by them, is any reasonable security attainable for the life, liberty, property or character of the subjects of this realm?

The Constitutional lawyer will reply:—

(1) That a court of common law is authorized, and may sometimes *ex necessitate rei* be required, to weigh and test the validity of an asserted privilege of parliament.

(2) That the House of Commons cannot by resolution merely entitle itself to a new privilege.

(3) That those who carry out ministerially the orders of the house may, if those orders have proceeded under a misconception as to privilege, expose themselves to the censure of the law.

The royal prerogative.

Thus far we have traced the growth of the two Houses of Parliament, and inasmuch as ours is a government of king, lords and commons, it remains for us to treat of the prerogatives of the crown.

One of the principal bulwarks of the British Constitution is the limitation of the sovereign's

prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people through their representatives. Blackstone says: "By the word prerogative, we usually understand that special right or power which the sovereign hath over and above all other persons, in respect of his regal dignity, and which, though part of the common law of this country, is out of its ordinary course."

The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe, though gradually driven out in most of the kingdoms on the continent. The particular rights or liberties which have at various periods been found most liable to the invasions of the prerogative have been on various occasions of apprehended danger asserted in parliament.

First by the Great Charter in the reign of John, afterwards by the statute called Confirmatio Chartarum under Edward I., next by a multitude of corroborating statutes from the first Edward to Henry IV. Then, after a long interval, by the Petition of Right, which was a parliamentary declaration of the liberties of the people assented to by Charles I., in the beginning of his reign; this was closely followed by the still more ample concessions made by that unhappy prince to his parliament before the fatal rupture between them, and by the many other salutary

laws, particularly the Habeas Corpus Act, passed under Charles II. To these succeeded the Bill of Rights, and, lastly, these liberties were again asserted at the commencement of the 18th century in the Act of Settlement.

Prerogatives are either *direct* or by way of *exception*.

The direct are such positive substantial parts of the royal character and authority, as are rooted in and spring from the sovereign's political person, *e. g.*, right of sending ambassadors, creating peers, or making war and peace.

But there are other prerogatives, by way of exception only, in favour of the crown, to those general rules that are established for the rest of the community, *e. g.*, that no costs shall be recovered against the crown, that the crown can never be a joint-tenant, and that the sovereign's debt shall be preferred before a debt to any of his subjects.

The direct prerogatives may be sub-divided into three kinds:—

(1) Such as regard the royal character,

(2) or the royal authority,

(3) or the royal income.

(*a*) First, then, the law ascribes to the king or queen the attribute of sovereignty, or pre-eminence —"the king can do no wrong," *i. e.*, no crime or other misconduct must ever be imputed to the sovereign—"nullum tempus occurrit regi," *i. e.*,

no delay in resorting to his remedy is held to bar the king's right.

Again, the sovereign may reject what bills, make what treaties, create what peers, pardon what offences he pleases. Such is the *theory* of the constitution; but, as a matter of fact, we know that at the present day the queen never acts save by the advice of her ministers, who are responsible to parliament. In the time of Henry VIII. or Charles I., on the other hand, we know that a very different state of things existed.

Further, the sovereign has the sole prerogative of making war and peace, issuing letters of marque and reprisal, and granting safe-conducts, without which, by the law of nations, no member of one society has a right to intrude into another.

(*b*) In domestic affairs.

The sovereign is a constituent part of the supreme legislature, and, as such, has the prerogative of rejecting such provisions in parliament as he judges improper to be passed.

He is first in military command within the kingdom—has the sole power of regulating and raising fleets and armies—erecting beacons, light-houses and sea-marks—as *parens patriæ* is invested with a kind of guardianship over various classes of persons who from their legal disability stand in need of protection, *e. g.*, infants, idiots and lunatics. The sovereign is also the fountain of honour, office and privilege, disposes of offices,

titles, etc.,—is also the "arbiter of commerce," and solely concerned in the establishment of markets and fairs, regulation of weights and measures, and the coining of money—lastly, is head of the national church, and from this arises the right of nomination to vacant bishoprics.

There seems only one other matter which it is necessary to treat of under this head, that is, the right of the crown to prevent the departure of a subject from the realm, and with the consideration of this we shall close the present chapter.

Ne exeat regno.

By the old common law of England the crown at its pleasure might by a writ command a subject not to go beyond seas, or out of the realm, and the reason alleged was "because that every man is bound to defend the king and the realm." It appears that it was first used to restrain the clergy from going to Rome, and then extended to laymen plotting against the state. The writ *ne exeat regno* is now mainly applied to prevent a subterfuge from the justice of the nation, and is practically confined to private matters. The legality of the writ was settled in the time of Charles II. upon a usage first begun under James I.

CHAPTER IV.

PART I.

From the Accession of Henry VII. to the Restoration.

Limitations to the Royal Authority on the Accession of Henry VII.—Statute for the Security of a King *de facto*—*Vane's Case*—Statute of Fines—The Aula Regis—The Origin of the Court of Star Chamber—Poyning's Law—Henry VIII. —Powers of the Crown—How extended—In extorting Money—Extending Laws relating to Treason—Declaring the King's Proclamations equal to Laws—Despotic Power of Henry VIII.—To what due—Edward VI.—Repeal of Statutes—History of the Law of Treason—Mary—Elizabeth —The defective Security for the Liberty of the Subject—Illegal Proclamations—Martial Law—The Relations of the Crown with the House of Commons—Monopolies—Members imprisoned for discussing forbidden Matters—Strickland—Bell—Peter Wentworth—Cope—Sir E. Hobbey—Morice—Pretensions of the Crown—Case of Cavendish—First general Poor Law—Second great Poor Law Bill—James I.—*Bate's Case*—Grievances—Lord Coke—State Trials—Impeachments—House of Commons—Charles I.—First Parliament —Second Parliament—Charles endeavours to rule absolutely—*Darnel's Case*—Third Parliament—Petition of Right—Charles rules absolutely—Imports on Merchandise —Knighthood—Forest Laws—Monopolies—Ship Money—Fourth Parliament—The Long Parliament—First Period—Triennial Bill—The Septennial Act—Second Period—Historical Sketch of the History of the Military Force in England—Cromwell—His Powers—Barebone's Parliament —Navigation Laws—The Convention Parliament.

We take up the Constitutional History of England at the accession of Henry VII. Three subjects seem to claim our special attention:—

I. The limitations which had been set to royal authority.

II. The statute for the security of the subject under a king *de facto*.

III. The Statute of Fines.

Limitations to the royal authority on the accession of Henry VII.

I. The essential checks upon the royal authority at the accession of Henry were five in number:—

(*a*) The king could levy no new tax upon his people, except by grant of parliament.

(*b*) The assent of parliament was necessary for every new law, whether of a general or temporary nature.

(*c*) No man could be committed to prison but by a legal warrant specifying his offence.

(*d*) Criminal charges were disposed of in a public court, and in the county where the offence was alleged to have occurred, by a jury of twelve men.

(*e*) The officers and servants of the crown, violating the personal liberty or other right of the subject, might be sued in an action for damages to be assessed by a jury, or in some cases were liable to criminal process.

It is the opinion of Hallam that there had evidently been a retrograde tendency towards absolute monarchy between the reigns of Henry VI.

and Henry VIII., though he thinks that Henry VII. did not carry the authority of the crown much beyond the point at which Edward IV. had left it. But as the strength of the nobility had been grievously impaired by the civil wars, and the commons had much degenerated from their former spirit, the same writer admits that "the founder of the line of Tudor came, not certainly to an absolute, but a vigorous prerogative, which his cautious dissembling temper and close attention to business were well calculated to extend."

King *de facto*. II. Owing to the late civil wars and the still unsettled state of the kingdom, it was expedient that men's minds should be satisfied on the question, whether obedience to one king might not expose them to the danger of being considered traitors by the next. To remove this apprehension a statute was passed in this reign, which enacted that "no person attending upon the king and sovereign lord of this land for the time being, and doing him true and faithful service, shall be convicted of high treason, by act of parliament or other process of law, nor suffer any forfeiture or punishment; but that every act made contrary to this statute shall be void and of no effect." The endeavour to bind future parliaments was of course nugatory, but the statute supports the constitutional maxim that possession of the throne gives a sufficient title to the subject's allegiance,

and justifies his resistance of those who may pretend to a better title.

The most celebrated case on this statute is that of Sir H. Vane, in the reign of Charles II. This gentleman had been an officer in the army of the parliament, and at the Restoration was brought to trial for high treason. He pleaded that he had been merely faithful to rulers *de facto*, but his defence was overruled, as the words "*king and sovereign lord*" are used in the statute. *Vane's case.*

III. The laws of Henry VII. have been highly praised by Lord Bacon; but this praise seems ill-deserved. One instance of his sagacity has been particularly insisted on, viz.: the Statute of Fines, which is supposed to have given the power of alienating entailed lands. As a matter of fact it was almost a copy of an act passed under Richard III., and even before this entails could be barred by a common recovery (*Taltarum's case*, temp. Edw. IV.) The real object of the statute no doubt was to determine disputes about land, which were sure to arise after sixty years civil war, by fixing a short term of prescription. Statute of Fines.

Before we can understand the origin and constitution of the Court of Star Chamber, which is frequently, though erroneously, supposed to have been established in this reign, we must return and re-examine the component parts of the Aula Regis.

The Aula Regis.

The Aula Regis consisted of two parts:—

(1) Ordinarium: for carrying on the general business of the state.

(2) Secretum: for giving advice to the sovereign.

The *Ordinarium* had two functions:—

(*a*) Judicial.

(*b*) Legislative.

Its judicial functions should have ceased with the foundation of the law courts, but did not, and were continued up to the reign of Henry VII. That monarch instituted a court to supersede this court, which lasted from the beginning of his reign to the middle of that of Henry VIII., but was itself superseded by it, and under the name of the Star Chamber lasted until the reign of Charles I., when it was finally abolished.

The legislative functions should have ceased with the parliament but they did not, and proclamations and ordinances continued to be issued up to the Long Parliament.

By the *Secretum* is meant the body of men who advised the king on state affairs; this body always existed by the side of our kings, and gave rise to and exists in the privy council.

The origin of the Court of Star Chamber.

Through all the Plantagenet period the council of the king, in despite of several positive statutes, exercised an arbitrary jurisdiction in many criminal cases. The act of 3 Hen. VII. c. 1, appears to have been intended to place this juris-

diction on a lawful and permanent basis, and after reciting various frauds committed at elections and elsewhere, and various acts of violence done, it empowered certain members of the council to call offenders before them, and to punish them after examination in such manner as if they had been convicted in due course of law. Neither in this act nor in 21 Hen. VIII. c. 8, which adds a president to the court, is it styled by the name of Star Chamber. At what exact time its jurisdiction fell into the hands of the body of the council, and was extended by them beyond the boundaries assigned by law, under the appellation of the Court of Star Chamber, it is almost impossible to determine.

This court, amongst other things, took cognizance of offences by maintenance, liveries and retainers, untrue returns of sheriffs, taking money by juries, and great riots and unlawful assemblies.

The constitution of this court is not a matter of importance, but its procedure is, as it disregarded the rules of the common law in many respects, and thus gained an enormous and most oppressive power. The result of what has been said may be summed up in a few propositions:—

(*a*) The court erected under 3 Hen. VII. was not the Court of Star Chamber.

(*b*) The court of Henry VII. subsisted in full force till the middle of the next reign, but not long afterwards fell into disuse.

(*c*) The Court of Star Chamber was the old *concilium ordinarium*, against the jurisdiction of which many statutes had been passed from the time of Edward III.

(*d*) No part of the jurisdiction exercised by the Star Chamber could be maintained on the authority of the statute of Henry VII.

Poyning's law.

An important act relating to Ireland was passed in the year 1487, the famous statute of Drogheda, known by the name of Poyning's law, from the lord deputy, through whose vigour and prudence it was enacted. In the contest between the houses of York and Lancaster, most of the English colony in Ireland had attached themselves to the fortunes of the White Rose; they even espoused the two pretenders who put in jeopardy the crown of Henry VII., and thus became of course obnoxious to his jealousy, though he was politic enough to forgive in appearance their disaffection. But as Ireland had for a considerable time rather served the purposes of rebellious invaders than of the English monarchy, it was necessary to make her subjection more than a mere form.

The statute contains a variety of provisions to restrain the lawlessness of the Anglo-Irish, and to confirm the royal sovereignty, but its principal importance was in enacting that all statutes lately made in England should be deemed good and effectual in Ireland. In effect this enactment has made an epoch in Irish jurisprudence; all statutes

made in England prior to the eighteenth year of Henry VII. being held equally valid in Ireland, while none of later date have any operation, unless specially adopted by its parliament; so that the law of the two countries began to diverge from that time, and, after three centuries, has been in several respects differently modified. But even these articles of Poyning's law are less momentous than one by which it is peculiarly known, which provided, that no parliament should be held in Ireland until the lord-lieutenant had certified to the king, under the great seal, what were the motives for the holding of the parliament, and until the same was affirmed by the king and his council, and his licence to hold a parliament obtained.

Henry VIII. Power of the crown.

In the reign of Henry VIII. the power of the crown was much extended:—

I. In extorting money. II. By extending the laws relating to treason. III. By making the king's proclamation equal in certain cases to a statute.

Money.

I. Henry VII. had had recourse to the system of benevolences, or contributions apparently voluntary, though, in fact, extorted from his richer subjects. These having become an intolerable grievance under Edward IV., were abolished in the only parliament of Richard III. This statute, however, was badly framed, and did not clearly forbid the solicitation of voluntary gifts,

which, of course, rendered it almost nugatory. Benevolences continued to be levied not only under the Tudors, but in the time of the Stuarts, until they were finally abolished by the Bill of Rights. Under Henry VIII. exactions of money continued, and we find Wolsey borrowing 20,000*l.* from the city of London; commissioners were appointed throughout the kingdom to swear every man to the value of his possessions, and deduct a rateable proportion for the use of the king according to such declaration. In spite of the general feeling of apprehension and uneasiness caused by these proceedings, we find Wolsey demanding money from the city of London in person, with a warning that a remonstrance "might fortune to cost some their heads." Fresh commissioners were appointed who, however, met with forcible opposition, and an insurrection broke out in Suffolk, which induced the king to abandon this method of raising money, and fall back on the system of benevolences. A striking instance of the servility of parliament under this sovereign is to be found in the act which they passed, releasing the king from his debts. Henry had once more recourse, about 1545, to a general exaction miscalled a benevolence. The council's instructions to the commissioners employed in levying it leave no doubt as to its compulsory character. Reed, a citizen of London, refused to contribute, and was sent down as a soldier, at his own charge, to serve

against the Scotch in a war which was then going on, instructions being given to his general to treat him as harshly as possible, and send him on the most dangerous duty. This cruel example seems to have had its effect, for when commissioners were appointed two years after they had not to complain of many peremptory denials.

II. Severe and unjust executions for treasons were not uncommon; the most noted instances being those of the Earl of Warwick, the Earl of Suffolk, and the Duke of Buckingham. It was made high treason to deny the ecclesiastical supremacy of the crown, and Bishop Fisher and Sir Thomas More were executed for doing so. On pressure from the king, and his minister Cromwell, parliament declared that an attainder in parliament could never be reversed in a court of law, whether the party had been heard in his defence or not; and to this system of sentencing men unheard Cromwell himself fell a victim. The Earl of Surrey was executed for quartering the royal arms on his escutcheon, and his father, the Duke of Norfolk, only escaped a similar fate by the timely death of the king. New treasons were created; at one time it would have been treason to deny the legitimacy of the Princess Mary, at another to affirm it; afterwards it would have been treason to say the Princess Elizabeth was illegitimate, then to say she was not. Treasons.

III. Parliament seems to have given Henry Proclama-

tions—devise of crown.

the power of doing almost what he liked with the crown, and he actually devised it, upon failure of the issue of his children, to the heirs of the body of Mary, Duchess of Suffolk, the younger of his two sisters; postponing, if not excluding, the royal family of Scotland, descended from his elder sister Margaret. In surrendering the regular laws of the monarchy to one man's caprice, the parliament were very nearly the means of bringing about the horrors of civil war. They also went so far as to enact that a king, after he should have attained the age of twenty-four, might repeal any statute made since his accession; thus tending to completely annihilate the authority of a regency, and seeming to prepare the way for a more absolute power of abrogating all acts of the legislature. Three years afterwards it was enacted that proclamations made by the king and council should have the force of statutes, subject to certain conditions.

Despotic power of Henry VIII. —to what due.

The almost despotic power wielded by Henry formed a marked feature of his reign. Several circumstances tended to bring about this result:—

(*a*) The Wars of the Roses had greatly reduced the peerage, and the new creations would necessarily be for the court:

(*b*) The dissolution of the monasteries deprived thirty-four abbots and two priors of their seats in the house of peers; that is, the peerage was lessened by about one-third,

and these perhaps the most independent personages in the house:

(*c*) The Reformation made Henry the head of the English church:

(*d*) The commons, no longer supported by the upper house, showed themselves in nearly everything obsequious to the king's will. Such was the servility of his parliaments that, as we have seen, they allowed his proclamations to have the force of laws; granted him, by the plunder of the church, an amount of wealth which no former king had possessed; twice cancelled his debts; enforced all his changing opinions by the penalties of treason; and lastly, enabled him to dispose of the succession to the throne at his uncontrolled will and pleasure.

Edward VI

Repeal of statutes.

The first act of the regency in the succeeding reign of Edward VI. was at once to abrogate the new treasons and felonies which his father had introduced. The same act also repealed the statute giving validity to the king's proclamations, yet we find several of these enforced during Edward's reign by fine and imprisonment. From matters connected with the bills of attainder against Lords Seymour and Somerset we may gather the following:—

(*a*) That the commons were not allowed to hear the accused, but that those who had

given their depositions before the lords might repeat their evidence before the lower house:

(*b*) That the accused was not allowed to be confronted with the witnesses:

(*c*) That three lords against whom Somerset was charged to have conspired sat upon his trial.

History of the law of treason.

The reign of Edward VI. is memorable for the passing of an important act in relation to the law of treason, and this would seem, therefore, a convenient opportunity for reviewing the whole subject.

In order to understand the history of the law of treason the following points must be kept in mind:—

(A) In the earliest ages of our law the crime of high treason was of a vague and indefinite nature, determined by the circumstances of each particular case.

(B) In the reign of Edward III. a statute was passed limiting treason to seven offences, of which the three principal were—compassing the death of the king; levying war within the realm; and aiding the king's foreign enemies. So great a boon was this improvement deemed to be that the parliament which passed it obtained the name of the "blessed parliament," and worthily so, seeing that no people can

enjoy a free constitution, unless an adequate security is furnished by their laws against the discretion of the judges in a matter so closely connected with the mutual relation between the government and its subjects.

(C) Under Henry VIII. the law of treason was largely extended.

(D) These new treasons were abolished early in the reign of Edward VI., and also an important constitutional provision inserted in a later statute, requiring TWO witnesses to an act of treason.

(E) In the year 1696, in the reign of William and Mary, was passed the *Treason Bill*, with the object of defining more strictly than had been done what was treason, and to provide for the accused better opportunities of defending himself—it enacts:—

(1) That the accused may have a copy of the indictment.

(2) The use of counsel for his defence.

(3) That there must be two witnesses to each act of treason, and not one to one act and one to another.

(4) That indictments must be laid within three years of the alleged treason, except in the case of the attempted assassination of the king.

(F) In the reign of Anne, another statute

relating to treason was passed, which provided that the accused should be furnished with a list of the witnesses to be brought against him, and their names and addresses.

Mary.

Even in temporal, as well as spiritual, matters the stretches of prerogative were more violent and alarming in the reign of Mary than in her brother's reign. She is said to have extorted loans from the citizens of London and others, and certainly a duty upon foreign cloth was imposed without assent of parliament. If proof were needed of the increased weight of the House of Commons, it would be afforded by the anxiety of the court to obtain favourable elections. New boroughs were consequently created, and the sheriffs directed to return those persons recommended by the privy council.

Elizabeth.

In connection with the civil government of Elizabeth, two subjects particularly demand our attention:—

(1) The defective security for the liberty of the subject:

(2) The relation of the crown to the House of Commons.

With respect to the first head, we find trials for political offences were unjustly instituted:—

The defective security for the liberty of the subject.

(*a*) The judges conducted them improperly by laying down bad law, as in not requiring two witnesses (*Habington's case*), or by denying the right to challenge the jury.

In *Campion's case* torture was administered, although its legality has never been admitted by the laws of England:

(*b*) The jury were passive and afraid to return any verdict displeasing to the crown:

(*c*) The sheriff always took care that juries should be more or less *packed*.

We find, also, that illegal commitments were common, and even, in one case mentioned in Anderson's Reports, gave rise to a remonstrance on the part of the judges.

Illegal proclamations.

Proclamations unwarranted by law were issued, *e. g.*, the Anabaptists are banished the realm, Irishmen commanded to depart into Ireland, and the erection of houses prohibited within three miles of London.

A free press must always be a subject of great terror to a sovereign who aims at being absolute, and the Star Chamber therefore issued ordinances for the regulation of it.

Martial law.

Lastly, martial law was made use of illegally. There may be times of pressing danger, when the conservation of all demands the sacrifice of the legal rights of a few; there may be circumstances which not only justify, but compel, the temporary abandonment of constitutional forms. It has been usual for all governments, during an actual rebellion, to proclaim martial law, or the suspension of civil jurisdiction. As to whether martial law is legal or illegal must therefore depend on the

circumstances of the particular case, *e. g.*, should a rebellion break out it may be lawful to shoot a man a day, or even a week after it has been quelled, but should a month pass by it would probably be an illegal act, as there would have been time for the civil courts to resume their jurisdiction. A person proclaiming martial law and shooting another person must be prepared to prove to the jury, who try him for his act, that it was *necessary*. In the 14th and 15th centuries the court of the constable and marshal, whose jurisdiction was considered as of a military nature, and whose proceedings were not according to the course of the common law, sometimes tried offenders by what was called martial law, but only, probably, either during, or not long after, a serious rebellion. This tribunal fell into disuse under the Tudors, but Mary had executed some of those taken in Wyatt's insurrection without regular process, and Elizabeth was with difficulty restrained from ordering one Burchell, who had wounded a famous sea-captain, to be tried instantly by court-martial. In the year 1595 Sir Thomas Wilford was made provost-marshal and directed to execute persons guilty of "sundry notable riotous rebellions" according to the justice of martial law. This peremptory style of superseding the common law was a stretch of prerogative without an adequate parallel in any former period, as it is to be remarked that no tumults had

taken place of any political character or of serious importance, some riotous apprentices only having committed a few disorders.

The relation of the crown to the House of Commons.

We now turn our attention to the second important feature of this reign—the relation of the crown to the House of Commons. Elizabeth exhibited great jealousy of the growing influence and importance of the lower house, and she endeavoured to prevent the commons from entering on the following subjects:—(*a*) her succession; (*b*) ecclesiastical matters; (*c*) abuses committed by persons in office. We find she prohibited the commons from entering on such matters, and held the speaker responsible for the doings of his house, at the same time committing to the Tower those who disobeyed the order.

Monopolies.

Perhaps the most striking case of the abuse of persons in office occurred in the case of monopolies. Patents to deal exclusively in particular articles were granted to the courtiers, and they sold them to companies of merchants. A storm of indignation arose in the commons, and the queen wisely gave way, and repealed the obnoxious patents.

Members imprisoned for discussing forbidden matters.

The most important occasions on which persons were imprisoned for discussing forbidden matters in the house are:—

Strickland.

(1) The case of Strickland, who brought in a bill to revise the prayer book, and was restrained from appearing again in his place:

Bell. (2) A member named Bell said that licences granted by the crown, and other abuses galled the people, intimating at the same time that the subsidy then required should be accompanied by a redress of grievances. He was sent for by the council, and severely reprimanded:

Peter Wentworth. (3) Peter Wentworth inveighed against the restraint imposed upon the discussion of religious matters, and was committed to the Tower for his pains:

Cope. (4) Cope also meddled with ecclesiastical affairs, and he too was committed:

Sir E. Hobbey. (5) Sir E. Hobbey brought in a bill to restrain abuses in the Exchequer, and was severely reprimanded by one of the ministers:

Morice. (6) Morice presented a bill for reforming the ecclesiastical courts, and was likewise committed.

Pretensions of the crown. There was unfortunately a notion very prevalent in the cabinet of Elizabeth, though it was not quite so broadly or so frequently promulgated as in the following reigns, that, besides the common prerogatives of the English crown, which were admitted to have legal bounds, there was a kind of paramount sovereignty, which they denominated her absolute power, incident, as they pretended, to the abstract nature of sovereignty, and arising out of its primary office of preserving the state from destruction. We must all admit

that self-preservation is the first necessity of commonwealths as well as persons, and justifies many acts which would otherwise be illegal. Thus martial law is proclaimed during an invasion, and houses are destroyed in expectation of a siege. But few governments are to be trusted with this insidious plea of necessity, which more often means their own security than that of the people, and certainly the ministers of Elizabeth did not, even in theory, confine this pretended absolute power to such cases of overbearing exigency.

Case of Cavendish.

Perhaps, however, there is no more decisive testimony to the established principle of limited monarchy in the age of Elizabeth than that furnished by the case of Cavendish. The queen granted him the profits of an office for the issuing of writs, but the judges neglected to admit him "because those who claimed a right to issue the writs would be disseised of their freehold." When pressed they said the queen was bound to keep the laws as well as they. Nothing more was heard of the matter.

First general Poor Law.

As long as the monasteries existed there seems to have been no pressing necessity for a general poor law, but on their dissolution, in the reign of Henry VIII., the needs of the pauper population began to occupy the attention of statesmen. We find, at the close of the reign of Edward VI., that the Statutes of Vagrancy were amended, and

provision made for the support of needy persons, but it was not till the year 1601 that the first general poor law was passed. This act directed the overseers of the poor in every parish to set to work the children of such persons as could not maintain them. A tax was to be levied on the inhabitants to provide hemp, flax, etc., for the children to work with, and also money to provide for the lame, blind, old and impotent. Power was given to the overseers to send to the house of correction all who would not work. Poor-houses were erected, at the expense of the parish, for the impotent only.

Second great Poor Law Bill.

In the year 1834, in the reign of William IV., there was passed a poor law bill, which swept away the old system of granting relief to paupers; nor was the change made any too soon, for the poor rate had grown to an annual charge of more than 7,000,000*l.* A royal commission, appointed in 1832, reported that the then existing administration of the poor laws tended to the destruction of all property, and that nothing could be more fatal to the labouring classes than their continued operation. The then existing law empowered the magistrates to order relief to the poor at their own dwellings, and the result was that the industrious labourer was no better off than the idle and dissolute; improvident marriages took place between boys and girls, from which it followed that the parish had to support both them and their chil-

dren; and that by thus offering a premium to indolence and vice the existing system had done much to destroy all habits of thrift and forethought in the peasantry, besides demoralizing them to an extent scarcely credible. By the new poor law, out-door relief was nearly stopped, the inmates of poor-houses classified, husbands and wives separated from each other and from their children, smaller parishes formed into unions, with a central poor-house common to the union, and the local overseers and other officers concerned kept to their proper duties by a central board of commissioners in London.

Within five years from the passing of this bill, the cost of maintaining the pauper population had fallen from seven to four millions, and the decrease of illegitimate births was given as thirteen per cent.

James I. ascended the throne without opposition, though if we admit the testament of Henry VIII. to have been duly executed, the claim of the house of Suffolk was legally indisputable. No point in the reign of James I. is so important as the growing power of the commons, for it was really the commencement of that struggle which ended in the death of Charles I. During the time of the Tudors, the House of Commons appeared as though it had lost its ancient spirit, and this for various reasons which we have already enumerated. It is true, however, that

James I.

towards the close of the reign of Elizabeth, the lower house began to show signs of returning life, and it is also true that James, by his pretensions to absolute sovereignty, tended to provoke resistance. Thus he told his parliament, "that as it was blasphemy to question what the Almighty could do by his power, so it was sedition to inquire what a king could do by virtue of his prerogative." But the day had gone by when language like this could be listened to in England, for the Reformation was telling in its results on the political institutions of the country, as it had already done on its religious. The Reformation had taught men to think, to investigate, and then to deny the value of many things, which for centuries had been objects of veneration. After overthrowing a religious government, the foremost rank of reformers directed their attention to the secular powers, claiming for themselves the same right to investigate and reform as well one kind of government as the other. This spirit, which had been held in check in the reign of Elizabeth, was destined now to become supreme.

Bates's case. In the fourth year of James' reign a decision was given in the Court of Exchequer which threatened the entire overthrow of our constitution. Magna Charta and the Confirmatio Chartarum show, that impositions on merchandise at the ports can no more be levied by the royal prerogative than internal taxes. The king, however, imposed

a duty of five shillings on foreign currants, and on payment being refused by a Levant merchant named Bates, an information was exhibited against him in the Exchequer and judgment given for the crown. It seems that although the charters above alluded to had forbidden taxes on imports without consent of parliament, yet as the machinery was always ready, the sovereign was continually tempted to impose them. During the whole of the reign of Edward III. we meet with continual remonstrances against this method of raising money; and under Richard II. the commons became strong enough to enforce its discontinuance. The grant of tonnage and poundage made to Henry V. and succeeding kings may be considered as a tacit abandonment by the crown of these irregular impositions. Neither of the first two sovereigns of the House of Tudor, arbitrary as was their government, attempted to violate the law in this respect, but Mary, in 1557, set a duty on the export of cloth, and one on the import of French wines. The merchants hoped to be released from this burthen under Elizabeth, and the judges seem to have supported them; but we nevertheless find the queen imposing one tax on sweet wines. The arguments urged on behalf of the crown were four:—

(1) That the king's power was of a double nature, ordinary and absolute: that the matter in question was matter of state, to

be ruled according to the king's extraordinary power:

(2) All customs are the effects of foreign commerce; and that all affairs of commerce, and all treaties with foreign nations, belong to the king's absolute power:

(3) The seaports are the king's gates, which he may open or shut as he pleases:

(4) That the precedents were in favour of the crown.

The illegality of these impositions was elaborately pointed out to the House of Commons by Hakewell and Yelverton, and they succeeded in passing a bill through the house doing away with them; the upper house, however, refused to concur, and the matter dropped for a time.

Grievances.

The grievances of which we find the commons about this time complaining, and which were seven in number, seem to have been the ultimate cause of the Civil War. They were:—

(*a*) The illegal impositions on merchandise:

(*b*) That the ecclesiastical court of high commission took upon itself to interfere with civil rights and to fine and imprison:

(*c*) Proclamations assuming the character of laws:

(*d*) The delay of the courts of law in granting prohibitions and writs of habeas corpus:

(*e*) Patents of monopoly and a tax under the name of a licence:

(*f*) The incidents of feudal tenures:

(*g*) Purveyance.

The remaining subjects which claim our attention in the present reign may be conveniently classified under four heads:—

I. The opposition of Lord Coke to the crown.

II. Trials.

III. Impeachments.

IV. Continuation of struggle between the crown and the commons.

I. Lord Coke.

Lord Coke was consulted as to the validity of some of the king's proclamations, and in reply stated that he must confer with the judges, who made answer that the king could not alter the law, but only admonish his subjects to keep it.

A gentleman of the name of Peacham was prosecuted for high treason, for having in his study an unpreached sermon, containing sharp censures on the king and government. Peacham was put to the rack but nothing elicited from him, and consequently his prosecution became a matter of difficulty, and the king desired to take the extra-judicial opinion of the judges. Lord Coke refused to give any opinion for some time, and only at last gave some evasive answers in writing.

A case happened to be tried in the King's Bench, concerning the validity of a grant of a benefice to a bishop to be held *in commendam*, and counsel disputed the king's prerogative to

make such a grant. James sent letters to Coke and the other judges commanding them not to proceed with the matter until he had spoken with them. These letters the judges declared to be contrary to law, but on being summoned before the council speedily recanted and acknowledged their fault, with the single exception of Coke, who persisted that the delay required was against the law and their oath.

II. State trials.

The case of Sir Walter Raleigh throws some light on the law of treason, the attitude of the court towards the prisoner, and the great licence allowed to Coke, the attorney-general, being particularly noteworthy. We find he took upon himself to call Raleigh "the absolutest traitor that ever was," and "viper and traitor." In the course of the trial, one of the judges remarked that the statute requiring two witnesses in the case of treason *was found inconvenient.* Raleigh remarked that "the common trial of England is by jury and witnesses," to which the Lord Chief Justice replied, "No, by examination." There seems to have been no actual evidence in this case, the only *so-called proof* being that Lord Cobham, said to be an accomplice, had confessed his guilt; this was held to be sufficient, although Cobham had afterwards retracted his confession.

Among the smaller trials in the Star Chamber we may notice that of Fuller, a barrister, who

was committed to prison for moving for the habeas corpus of two Puritans who had been committed by the court of high commission.

Another barrister, named Whitelock, was brought before the Star Chamber for having given an opinion to a client that a certain commission issued by the crown was illegal; he was discharged on making humble submission.

Selden wrote a book which was said indirectly to weaken the theory of divine right, and was summoned before the council, and had to apologize.

III. Impeachments.

Parliamentary impeachment, which had lain idle since the reign of Henry VI., was now revived. Popular odium fell on Sir Giles Mompesson, the holder of a patent of monopoly, and the commons proceeded to investigate his offences, and to search for precedents; they came to the conclusion that they must join with the lords in punishing him, it being no offence against their particular house. The commons forthwith held a conference with the upper house, the lords take up the inquiry, become convinced of his guilt, and judgment is demanded and pronounced at the bar.

Lord Chancellor Bacon was impeached for taking bribes, and sentenced to pay an enormous fine.

The Earl of Middlesex, Lord Treasurer, was impeached for bribery and other misdemeanours,

and the trial conducted by the commons in a very regular manner. The earl had laid a duty on French wines, and then taken it off again on receiving a gratuity, and was in consequence unanimously convicted by the peers. This impeachment was of the highest moment to the commons, as it restored for ever that salutary constitutional right which the single precedent of Lord Bacon might have been insufficient to establish against the ministers of the crown.

IV. House of Commons.

The continuation of the struggle between the crown and the commons may be traced in the following disputes:—

(*a*) After an abrupt dissolution of parliament, James availed himself of the usual resource by applying to merchants for *loans of money*—the merchants refused the accommodation; but we find the judges altogether ignoring the statute of Richard III.:

(*b*) James sold peerages, and created baronets at a fixed rate:

(*c*) Neville and others, who professed to understand the temper of the House of Commons, endeavoured to facilitate the king's dealings with it—they were called *undertakers:*

(*d*) The commons still complain of illegal impositions, and also of interference with their debates; and we find Sir E. Sandys was imprisoned for words spoken in par-

liament. In 1621 the commons entered in their journals a protestation declaratory of their rights; and James promptly dissolved parliament, imprisoned Coke, Phillips and Pym, and sent Sir Dudley Digges and others, as a kind of honourable punishment, to Ireland.

"The commons," says Hallam, "had now been engaged for more than twenty years in a struggle to restore and to fortify their own and their fellow-subjects' liberties. They had obtained in this period but one legislative measure of importance—the late declaratory act against monopolies. But they had rescued from disuse their ancient right of impeachment. They had placed on record a protestation of their claim to debate all matters of public concern. They had remonstrated against the usurped prerogatives of binding the subject by proclamation, and of levying customs at the out-ports. They had secured, beyond controversy, their exclusive privilege of determining contested elections of their members. Of these advantages some were evidently incomplete, and it would require the most vigorous exertions of future parliaments to realize them. But such exertions the increased energy of the nation gave abundant cause to anticipate. A deep and lasting love of freedom had taken hold of every class—except perhaps the clergy—from which, when viewed together with the rash pride of the court,

and the uncertainty of constitutional principles and precedents collected through our long and various history, a calm bystander might presage that the ensuing reign would not pass without disturbance, nor perhaps without confusion."

Charles I.

In the commons during the preceding reign, two great parties had become clearly developed—the *court party*, in favour of the kingly prerogatives, and the *country party*, in favour of the liberties of the people; nor was it long after the accession of Charles before occasion offered to try their strength.

First parliament.

Charles' first parliament met only a few days after his marriage, the secret articles of which were partly known. The parliament was further displeased that the queen had brought with her more than a score of popish priests, and that mass was being said in the king's palace. A "pious petition" was therefore presented, praying his majesty to put into immediate execution all the existing laws against Catholic recusants and missionaries. Instead of 700,000*l.*, which the king demanded, the commons voted only 140,000*l.*, together with a grant of tonnage and poundage for one year only, instead of for the king's life, as had been usual during the last two centuries. The lords rejected this irregular grant; and parliament was suddenly dissolved.

Second parliament.

Some of those members who had been most active in opposing the crown in the last parlia-

ment were made sheriffs for the next year, with the view of excluding them from their seats. The king also tampered with the privileges of the House of Lords by committing the Earl of Arundel to the Tower, and refusing a writ of summons to the Earl of Bristol. This parliament was soon dissolved, in order to protect Buckingham, who had been impeached.

Charles endeavours to rule absolutely.

Charles now endeavoured to do without parliaments, and raise money by means of loans, which led to *Darnel's case.*

Darnel's case.

Sir T. Darnel, and five others, having refused to subscribe to a loan, were committed to prison, and sued out their writs of habeas corpus. The warden of the Fleet made return *that he was committed by the special command of the king.* It was argued, that the return was bad for setting out the cause of detention only, not that of caption: it was further argued, that the return was bad in substance, and Magna Charta was cited.

Sir N. Hyde gave judgment for the crown, and the prisoners were remanded. They were shortly afterwards released by the king, and writs issued for a new parliament, which at once began to discuss grievances: certain resolutions were passed, and submitted to the House of Lords, which resulted in a conference, managed, on behalf of the commons, by four distinguished members:—

Third parliament.

(1) To Sir Dudley Digges was assigned the task of introducing the matter, and show-

ing that the liberty of the subject is founded on the common law:

(2) To Mr. Littleton that of citing acts of parliament, and expounding out of them the right of personal liberty:

(3) To Mr. Selden that of vindicating the right of personal liberty by reference to precedents and records:

(4) To Sir E. Coke that of adducing reasons in affirmance of statutes and precedents for the liberty of the subject without cause expressed.

This conference resulted in the Petition of Right, which at length was answered in the usual form, "*soit droit fait come est desiré.*"

Petition of Right.

The Petition of Right complained of four matters:—

(1) The exaction of money under the name of loans:

(2) The commitment of those who refused compliance:

(3) The billeting of soldiers on private persons:

(4) Martial law.

Within a week a bill was passed for granting five subsidies, about 350,000*l.* The session, however, ended in a bad temper; for the commons proposing to remind the king that, by the Petition of Right, it was no longer lawful to levy tonnage and poundage without previous consent of parliament, the houses were instantly prorogued.

When the parliament met again, in 1629, the commons were found more disposed than ever to quarrel with the court, by reason of the failure at Rochelle, and the defection of Wentworth and others of their party, who had been won to the king's side. Complaint was made that Arminianism—little removed, as they thought, from popery—was patronized by the court; that Laud, already famous for his devotion to the principle of high power in church and state, was promoted to the see of London; and that idolatrous ceremonies had of late been introduced into the church. It was in these debates, on the tendency of the court to Romanism, that Cromwell addressed the house for the first time. Attention was called to the fact that copies of the Petition of Right had been distributed, with the king's first and evasive answer,—an artifice which branded the king's character with the stigma of duplicity. Indignant at the government, Hollis submitted three resolutions to the house,—that whosoever should seek to bring in popery, Arminianism, or other innovations in religion—or advise or aid the taking of tonnage and poundage, not being granted by parliament—or pay the same,—shall be reputed a capital enemy of the kingdom. During the passing of these resolutions the speaker had to be held in his chair. Hollis and several others were imprisoned and put to heavy fines. Charles now dissolved his third parliament, and announced his

intention to govern alone, which he did for eleven years.

Charles rules absolutely.

Two matters claim our attention in connection with the period which intervened between the dissolution of the third parliament, and the meeting of the Long Parliament in 1640.

(1) How did the king endeavour to put down disaffection?

(2) How did he attempt to raise money?

The first query may be briefly answered, by stating that he proceeded to punish many members of the late parliament after it had been dissolved, and extended the legal powers of the Court of Star Chamber, which began to issue proclamations and to punish those who disobeyed them.

The second question, as to the means resorted to by the king for raising money, requires more careful consideration.

Imports on merchandise.

(*a*) The customs on imported merchandise were now rigorously enforced. Richard Chambers refused to pay any further duty on silks than might be required by law, and was promptly summoned before the council. While there he remarked that not even in Turkey were the merchants so screwed and wrung as in England. He was sentenced to pay a fine of 2,000*l.* and make a humble submission.

Knighthood.

(*b*) The early kings had introduced the practice of summoning their military tenants, holding

20*l.* per annum, to receive knighthood, and fining those who declined. The king's ministers availed themselves of this obsolete practice.

(*c*) Attempts were made to revive the ancient laws of the forests, and many persons who had estates on the borders of the royal forests were declared to have appropriated them, and were made to pay heavy fines—the Earl of Southampton was in this way nearly ruined. Forests' laws.

(*d*) A greater profit was derived from a still more pernicious and indefensible measure, the establishment of a chartered company with exclusive privilege of making soap. Noy, the attorney-general, endeavoured to evade the letter of the recent law against monopolies, *by permitting every manufacturer to become a member of the company.* They agreed to pay 8*l.* for every ton of soap made, as well as 10,000*l.* for their charter. For this they were empowered to appoint searchers, and exercise a sort of inquisition over the trade. Those dealers who resisted this interference were severely fined by the Star Chamber. Monopolies.

This precedent was followed in the erection of a similar company of starch-makers, and in a great variety of other grants, till monopolies in transgression, or evasion of the late statute, became as common as they had been under James or Elizabeth.

(*e*) Ship-money was levied first at the ports, and then on inland counties. Mr. Hampden, a Ship-money.

gentleman of Buckinghamshire, refused to pay it, and the case was tried in the Exchequer Chamber. The question was, whether the king had a right, on his own allegation of public danger, to require an inland county to furnish ships, or a prescribed sum of money by way of commutation, for the defence of the kingdom?

The arguments in favour of the crown certainly seem to us stronger than they are considered by Hallam.

(1) Let us consider, was there any authority for such a writ? Yes, certainly there was; similar writs having been issued by our early kings. Hampden's counsel contended that at this time they were illegal on account of Magna Charta, Confirmatio Chartarum, De tallagio non concedendo, some statutes of Edward III., and the Petition of Right. But, said the crown lawyers, these statutes *were extorted* from the king, and the king's prerogative is so inherent in him that it cannot be destroyed even by act of parliament.

(2) The king possesses some sort of power of levying taxes, and ship-money comes under this head.

(3) It is the duty of the king to defend the country, and for this purpose he must obtain ships and money; but, say the other side, he must go to parliament for it. Not at all, say the crown party; how can the king wait for forty days until parliament is assembled when the kingdom is in

danger? Hampden's friends are now driven to make two concessions; first, that it was not a time of danger; second, that during the forty days the king must get loans. As to the objection about danger, it is obvious that a court of law cannot inquire whether danger actually exists or not, and surely loans are as objectionable as ship-money.

(4) The crown lawyers maintained that the precedents were in their favour, and they relied on Dangelt, and referred to precedents of writs issued to levy *a tax similar to this* on inland counties.

However, putting on one side legal subtleties, our main inquiry must be, whether the method adopted was in conformity with our law and constitution. Now the methods provided by law for the defence of the realm, whether by sea or land, were:—

(*a*) By tenure of land:

(*b*) By certain prerogatives vested in the crown, and the profits and emoluments, such as marriage, escheat, and forfeiture thence resulting:

(*c*) By particular supplies of money for defence of the sea in time of danger, *e. g.*, the great and petty customs, aids, subsidies, tonnage and poundage, and the service of the cinque ports. In extraordinary emergencies our kings have had recourse to

parliament, or have obtained supplies of money, by loans and benevolences, or by anticipating their revenues, but prior to the time of Charles I. had on no occasion asserted a prerogative claim to ship-money.

Other arguments against the crown are founded:—

(1) On various statutes expressly providing for the defence of the realm:

(2) On the constitutional principle that the king cannot take away the property of his subject without his consent.

The asserted right of the crown to levy ship-money was finally extinguished by the statute 16 Car. I. c. 14, and is likewise refuted by the language of the Bill of Rights.

Fourth parliament.

Charles' fourth parliament met in April, 1640. In the commons were the leading members of the country party, Hampden, Hollis, St. John, Pym, and others, men who, distrusting the king, turned their attention first to the redress of grievances, which they divided into innovations in religion, invasions of private property, and breaches of privileges of parliament. As the king wanted immediate supplies and not the discussion of grievances, he dissolved the parliament before it had sat three weeks; this led to its being called the "Short Parliament." When it was too late he regretted his precipitation; for, by the admission of Clarendon, this parliament "had managed

all their debates, and their whole behaviour, with wonderful order and sobriety."

The celebrated parliament, known in history as the "Long Parliament," met in November, 1640, and was not finally dissolved till March, 1660,—hence its name. The Long Parliament.

The Long Parliament may be divided into two periods; the first extending from its meeting until August, 1641, the second from that time till the civil war. In the first a series of remedial acts were passed, in the second the approaching struggle becomes more and more apparent.

The reforms introduced may be thus summarized:— First period.

(1) Ship-money was declared illegal, and the judgment against Hampden annulled:
(2) The levying of customs on merchandise was done away with:
(3) The Court of Star Chamber was abolished:
(4) The Court of High Commission, established under Elizabeth for the correction of ecclesiastical offences, was also swept away:
(5) Other statutes retrenched the vexatious prerogative of purveyance, and took away that of compulsory knighthood;

The prerogative of purveyance and pre-emption was a right asserted and jealously insisted on by the crown of buying up provisions and other necessaries without the

consent of the owners, through the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, and in preference to all others. These purveyors, in course of time, greatly abused their authority, and caused great oppression to the subject. To repress such abuses, and to regulate the king's prerogative of purveyance, statutes were from time to time enacted. Lord Coke observes, that by the laws and statutes of the realm five restrictions were imposed upon the king's purveyors: (*a*) That they should take only for the king's household; (*b*) with the consent of the owner; (*c*) at the market price; (*d*) no more than might be necessary; (*e*) where it might be best spared. Statutory regulations, however, would seem to have been unavailing, and notwithstanding the urgent language of the commons, the crown continued in the enjoyment of this peculiar privilege until relinquished by the statute 12 Car. II. c. 4:

(6) Lastly, a fruitful source of oppression and complaint was put an end to, by determining for ever the extent of the royal forests, according to their boundaries in the twentieth year of James.

Triennial Bill.

The only measure of a novel character was the Triennial Bill.

A statute of Edward III. had already provided that parliament should be held "every year, or oftener if need be;" but it had been generally disregarded, as we have seen. It was now provided that the chancellor was to be sworn to issue writs for a new parliament within three years from the dissolution of the last; if he failed to do this the same powers were given to the peers; in default of the peers acting similar powers were conferred on the sheriff; and if he, too, failed, the electors themselves were to choose their representatives. It was further provided, that no parliament should be dissolved within fifty days of its meeting.

There have in all been three acts with respect to triennial parliaments; but the word triennial is not always used in the same sense.

(1) The Triennial Bill of 1640 was triennial in two senses; that parliament could not be intermitted more than three years, and could not last more than three years:

(2) The bill passed in 1664 was triennial only in the first sense:

(3) Finally, that in 1694, in the reign of William III., only in the second sense.

The Act of 1694 continued in force until the year 1716, when the "Septennial Bill" was passed, extending the duration of parliament to seven years, and this still continues to be the law of the land, in spite of many attempts to return to

The Septennial Act.

triennial parliaments. With respect to the advantages of the Septennial Act Lord Mahon writes: "If we look to the practical effects of the change, the most obvious and the most important is the increased power of the popular branch of the legislature. Speaker Onslow, a very high authority on this subject, was frequently heard to say that the Septennial Bill formed the era of the emancipation of the British House of Commons from its former dependence on the crown and the House of Lords. As a confirmation of this statement, I consider it very remarkable that, referring to the period immediately preceding, or immediately subsequent, before the Septennial Bill could have time to work this gradual change, no government of those days appears to have felt the necessity of retaining in the House of Commons some of their principal statesmen as its leaders. On the contrary, we find the most active and able party chiefs—such as Harley and St. John on the one side, or Montague and Stanhope on the other—promoted to the peerage whenever their services were thought to deserve that distinction, without any reference to the gap which their presence would leave in St. Stephen's Chapel, and apparently without any public inconvenience. Walpole is probably the first since the Revolution who, on system, confined himself to the House of Commons as his proper, or the principal, sphere. In fact a House of Commons

elected for three years could not have that degree of stability or combination which would enable it to enter into any successful competition either with the peers or with the king. Bound fast by the fears of their approaching elections, they could seldom either exert the power or obtain the reputation which belongs to independence. We may also observe, that the same short tenure which, in one state of public feeling, renders the House of Commons too weak as towards the king and the peers, would, in another state of public feeling, make it too weak as towards the violent democracy. Combined with a system of pledges, and with the choice of needy adventurers, we may conceive how triennial elections might utterly degrade the dignity of a representative, and turn him into a mere tool and puppet of popular caprice."

Second period.

We have now reached August, 1641, and have to enter on the consideration of the second period into which the Long Parliament may be conveniently divided. We now find the signs of the coming strife more and more apparent, constant collisions take place between Charles and the parliament, and the House of Commons, thinking that the king had been trying to obtain troops to put down the opposition by force, embarked on two very strong measures:—

(*a*) The impeachment of Strafford:

(*b*) The attempt to obtain the command of the army.

Early in January, 1642, the commons, by vote, secured possession of the Tower, Portsmouth, and Hull, and ordered the kingdom to be put in a state of defence. On the 20th, the king invited a complete statement of grievances, promising redress without delay. In reply he was called upon to give up the forts, and the command of the militia to persons possessing the confidence of the parliament. This he refused, but consented to two bills, one excluding the bishops from the parliament, the other authorizing the impressment of men for service in Ireland. After sending off his queen to Holland, to dispose of the crown jewels for the purchase of military stores, the king again refused to give up the command of the militia, or, in other words, the armed forces of the kingdom. The rupture between the king and the parliament was now complete, and Charles at once withdrew to York.

Historical sketch of the military force in England.

The dispute between Charles and the parliament, relative to the militia, leads us necessarily to a historical survey of the nature of the military force which our ancient constitution had placed in the hands of its chief magistrate.

The military force in England seems to have been of two kinds; one principally designed to maintain the king's and the nation's rights abroad, the other to protect them at home from attack or disturbance.

(*a*) As to that designed to maintain the rights of the nation abroad.

This comprehends the tenures by knights' service, which, according to the constant principles of a feudal monarchy, bound the owners of lands, then held from the crown, to attend the king in war. Their service was, however, limited to forty days, beyond which period they could be retained only by their own consent, and at the king's expense. What was the extent of the king's lawful prerogative for two centuries or more after the Conquest as to compelling any of his subjects to serve him in foreign war, independently of the obligations of tenure, is a question scarcely to be answered. A statute passed under Edward III. prevented the king from calling his subjects to arms except in the case of foreign invasion, and another statute of the same reign prevented his ordering towns and counties to furnish troops, and both were confirmed by Henry IV. Consequently Edward III. and other kings who waged foreign wars recruited their forces by contracts with men of high rank or military estimation, whose influence was greater probably than that of the crown towards procuring voluntary enlistments. Under the Tudors the salutary enactments of former times came to be disregarded, and we find both Henry VIII. and Elizabeth compelling the counties to furnish soldiers. A statute of Mary, without repealing those of

Edward III. and Henry IV. seems to recognize the right of the crown to levy men for service in war. It is clear there had never been any regular army, the yeomen of the guard established by Henry VII. being merely for the defence of his own person. A kind of regular troops, however, chiefly accustomed to the use of artillery, was maintained in the very few fortified places where it was thought necessary or practicable to keep up the show of defence, *e. g.* the Tower, Portsmouth, Dover Castle, Tilbury Fort. But their whole number must have been insignificant, and probably at no time equal to resist any serious attack.

(*b*) As to the force designed for protection against invasion.

The strictly military force mentioned above, serving whether by tenure or engagement, must not be confounded with that of a more domestic and defensive character, to which alone the name of militia was usually applied. By the Anglo-Saxon laws every freeman was bound to defend his country against foreign invasion, and it appears that the earl was the proper commander of this militia. Henry II., in order to render it more effective in cases of emergency, enacted that every freeman should hold himself constantly furnished with suitable arms and equipments. Under James I. the people were relieved from this burthen, but magazines of arms were formed in

different places, and generally in each county. The power of calling to arms in case of any rebellion or tumultuous rising had formerly vested in the sheriff or justice of the peace, but was entrusted in the reign of Mary to a new officer, entitled the lord lieutenant. He was usually a peer, or at least a gentleman of large estate within the county, whose office gave him the command of the militia, and rendered him the chief vicegerent of his sovereign, responsible for the maintenance of public order. From an attentive consideration of this sketch of our military law, we find the principal question to be determined was whether, in time of peace, without pretext of danger of invasion, the militia could be called out by any one. If it rested with any one it rested with the king, and that either or both Houses of Parliament, who possess no portion of executive authority, could take on themselves one of its most peculiar and important functions, was so preposterous that we can scarcely give credit to the sincerity of any reasonable person who advanced it.

To give an account of wars and intrigues is no part of the purpose of this volume, and the period intervening between the commencement of the Civil War, and the restoration of Charles II., may therefore be very briefly dismissed.

Four subjects, however, claim our attention:—

I. The Powers of Cromwell. Cromwell.

II. Barebones' Parliament.

III. The Navigation Laws.

IV. The Convention Parliament.

His Powers.

I. With respect to the first subject, the sovereignty still resided in the parliament, and Cromwell had no negative voice on its laws. He had, however, the command of the army and navy, the power of making war and peace with the consent of his council, and also that of appointing the great officers of state; the successors of the Protector were to be named by the council. Such were the powers of Cromwell, as regulated by the "Instrument of Government." On his refusing the crown the instrument was amended, and power given him of naming his successor.

Barebones' Parliament.

II. After the dissolution of the Rump, a new parliament was called together known as Barebones' parliament, so called from one of the members for London, Praise-God Barebones, a leather-seller of Fleet Street. It met on July 4th, 1653, and proved itself far more capable than some writers are disposed to allow. We find its members introducing revised regulations for the excise, abolishing unnecessary offices and reducing salaries, subjecting the public accounts to rigid scrutiny, making facilities for the sale of lands, and providing for the future registration of births, deaths and marriages. But there were other measures which procured for them the hatred of the most powerful classes in the state—the army, lawyers, gentry, and clergy. It was, therefore, determined to put an end to it. Cromwell met his friends,

and on the day following, the 13th of December, Colonel Sydenham, an independent, proposed, in a thin house, that they should resign their power into the hands of the lord-general. This was at once done, and the house again locked up. Three days after the resignation of Barebones' parliament a new constitution was published, embodied in the document known as the "Instrument of Government." The actual author of the "Instrument" is not known, but it is said to have originated with Lambert and a council of officers. Cromwell proceeded in state to Westminster Hall, and when the lord-general had taken his place, Lambert prayed him, in the name of the army and the three nations, to accept the office of Lord Protector of the Commonwealth. Thereupon the "Instrument" was read, and Cromwell sworn to the observance of its Articles.

Navigation Laws.

III. In the year 1651 was passed the Navigation Act, which had a double object. It was intended not only to promote our own navigation, but also to strike a decisive blow at the marine power of the Dutch, who then engrossed almost the whole carrying trade of the world. The act declared that no goods from Asia, Africa or America should be imported into England save by English ships, and of which the master and the greater part of the crew were Englishmen; further, that no goods should be imported into England from Europe except in English ships, or at least such ships as were the *bonâ fide* property of the country from

which the goods came. This latter provision was entirely levelled against the Dutch, who had but little native produce to export, and whose ships were principally employed in carrying the produce of other countries to foreign markets. This act was the foundation of the Navigation Laws, the principle being considered so sound that it was confirmed by parliament after the Restoration, and to it many writers attribute the great growth of English shipping. The Navigation Laws were first modified in favour of the United States in 1815, and finally repealed in 1849.

The Convention Parliament.

IV. The "Convention Parliament" met on the 25th of April, 1660, and proved to be strong in Presbyterians and Cavaliers. The peers, notwithstanding the defect of summons by writ, took their seats, with the exception of those who sat in Charles' parliament at Oxford.

Four subjects of great importance occupied the Convention Parliament from the time of the king's return till its dissolution in the following December.

(*a*) A general indemnity and legal oblivion of all that had been done amiss in the late interruption of government:

(*b*) An adjustment of the claims for reparation which the crown, the church, and the private Royalists had to prefer:

(*c*) The abolition of the old feudal revenue derived from tenure by knights' service, and the substitution of the *excise* as a per-

manent tax. This, it is almost needless to add, was a most important change, and it is from 1660 that we date the commencement of our modern system of taxation:

(*d*) The fourth and last subject which occupied them was the settlement of the church.

PART II.

From the Restoration to the Revolution.

Charles II.—Acts of Uniformity—The Conventicle Act—The Five Mile Act—Acts of Supremacy—The Test Act—The Parliamentary Test Act—Summary—Penal Laws relating to Religion classified—The Restraints put on the Press—The Licensing Acts—History of the Law relating to the Press summarized—The Attack on the Corporations—Corporations after the Revolution—The Municipal Corporations Act—The Corporation of London exempted—The Habeas Corpus Act—Proclamations—James II.—Creasy's Account of this Reign—The Case of the Seven Bishops—The Dispensing Power—The Right of the Subject to petition—The Kentish Petition—Lord George Gordon's Petition—The Chartist Petition—Nature of a Seditious Libel—Important Trials for Seditious Libel—The Crisis in 1688—Constitutional Difficulties at the Revolution—William III.—Bill of Rights—Act of Settlement—The Fifth Section considered—The Privy Council—The Cabinet Council—The Sixth Section—Placemen—The Seventh Section—The Difficulties of William's Position—Completion of the Revolution—The Non-jurors—The Proceedings of Parliament—The Mutiny Act—The Civil List—The Toleration Act—Religious Toleration not extended to Papists till Reign of George III.—The Roman Catholic Relief Act of 1788—Catholic Emancipation, 1829—Conclusion.

THE reign of Charles II. is important constitutionally for the passing of several acts, both of Charles II.

Acts of Uniformity.

Uniformity and Supremacy. The first Act of Uniformity was passed in the year 1558, in the reign of Elizabeth, and that of Charles II. in 1662. It required that all ministers should be ordained by bishops, use the amended Book of Common Prayer, and also sign a declaration abjuring the "Solemn league and covenant," and the lawfulness of taking up arms on any pretence whatever against the king.

The Conventicle Act.

This act was followed up by the Conventicle Act, in 1664, which rendered all persons attending Nonconformist places of worship liable to fines. A second act, in 1670, fined the preachers.

The Five Mile Act.

In 1665 was passed the "Five Mile Act," which forbade non-conforming ministers coming within five miles of any town sending members to parliament, or of any village in which they had ever ministered, under penalty of 40*l.*, and six months' imprisonment if they refused to take the oath of non-resistance. The act also forbade their keeping a school.

Acts of Supremacy.

An Act of Supremacy had been passed under Elizabeth in 1562; and in this reign several acts of a similar character became law. In 1661 was passed the Corporation Act, designed to break the power of dissenters in cities and boroughs. It provided, that no person could be legally elected to any office relating to the government of any city or corporation, unless within twelve months he had received the sacrament according to the

rites of the Church of England, subscribed a declaration abjuring the solemn league and covenant, and the lawfulness of taking up arms upon any pretext whatever against the king, and taken the oaths of allegiance and supremacy.

The Test Act.

In 1673 was passed the Test Act, which provided, that the same formalities should be gone through by all persons holding public office, civil or military.

The Parliamentary Test Act.

In 1678 the Parliamentary Test Act, or "Papists' Disabling Bill," extended the provisions of the Test Act to members of both Houses of Parliament.

Summary.

The various Acts of Supremacy and Uniformity may be thus briefly enumerated:—

(*a*) *Acts of Supremacy.*

Provisors, 1344.
Præmunire, 1393.
Act of Elizabeth, 1562.
Corporation Act, 1662.
Test Act, 1673.
Parliamentary Test Act, 1678.

(*b*) *Acts of Uniformity.*

Act of Elizabeth, 1558.
Act of Charles II., 1662.
Conventicle Act, 1664.
Five Mile Act, 1665.
Second Conventicle Act, 1673.

Penal laws—how classified.

The penal laws concerning religion have been thus classified by Hallam:—

(1) Those requiring a test of conformity to the established religion, as the condition of exercising office of civil trust:

(2) Those designed to restrain the free promulgation of opinions, especially through the press:

(3) Prohibiting the open exercise of religious worship:

(4) Prohibiting secret worship:

(5) Enforcing conformity to the established church by legal penalties.

We have now to turn our attention to four matters of great importance in connection with the reign of Charles II.:

(*a*) The restraints put on the press:

(*b*) The attack on the corporations:

(*c*) The Habeas Corpus Act:

(*d*) Proclamations.

The restraints put on the press.

I. *The Restraints put on the Press.*

It may be said there are four ways of restraining the press—by not letting the matter disapproved of appear at all; by destroying the papers containing it when it does appear; by taking penal bonds from the proprietors of newspapers; and by letting those who are injured by a newspaper libel file a criminal information or bring an action. The liberty of the press means nothing

more than that newspapers may publish what they like, but will be held responsible for libellous matter. In the reign of Henry VIII. it was considered expedient to exercise an absolute control over the press; and it became usual to grant by letters patent the exclusive right of printing. The privilege of keeping printing-presses was limited to the Stationers' Company, who were subject to regulations issued by the Star Chamber. In the time of Charles II. publications were subjected to the inspection of a licenser.

The Licensing Acts.

The "Licensing Acts" (1661) prohibited every private person from printing any book or pamphlet unless entered with the Stationers' Company, and duly licensed as follows: books of law, by the chancellor or one of the chief justices; history and politics, by the secretary of state; heraldry, by the king-at-arms; divinity, physics, or philosophy, by the Archbishop of Canterbury or the Bishop of London, or, if printed at either university, by its chancellor. The number of master printers was limited to twenty; the king's messengers by warrant were empowered to seize unlicensed copies wherever they should think fit to search; and no books were allowed to be printed out of London, except at York and the universities; lastly, the penalties for printing without licence were very heavy. These acts, having been twice renewed, expired in 1679.

The law on the subject before us may be thus conveniently summarized:—

History of the law relating to the press summarised.

(1) It is a matter of doubt whether the courts of law originally took notice of libel; it would rather seem to be a creature of the Star Chamber:

(2) When the latter was abolished by the Long Parliament, the jurisdiction in cases of libel fell into the hands of the courts of common law:

(3) The rules by which the courts were governed in this matter were laid down in the time of Henry VIII., and by the Licensing Acts of Charles II.:

(4) In the reign of the same sovereign, after the acts above mentioned had expired, Scroggs and his brethren stated extra-judicially that to write anything against the government was a libel:

(5) After the Revolution both parties begin to make use of the press, and it was allowed that the public character of public men was a fit matter for comment:

(6) In *Franklin's case* (1731), it was first held that truth was no justification of libel in a criminal case:

(7) Before Fox's Libel Act it was held that the question *of publication only* was for the jury, that of "libel or no libel" was for the judge:

(8) Fox's bill allowed the jury to return a general verdict.

II. *The Attack on the Corporations.*

The attack on the corporations.

It may be said that every parish is the image and reflexion of the state, and the common law recognized the right of all the rated parishioners to assemble in vestry and administer parochial affairs. This popular principle, however, fell into disuse, and a few inhabitants, self-elected and irresponsible, claimed the right of managing local matters. This usurpation grew into a custom, which the courts recognized as an exception from the common law, and so absolute did this kind of select vestry become, that its members could assemble without notice, and bind the inhabitants by their vote. This abuse was corrected by Sturges' Act (1818), which also introduced the cumulative vote.

With respect to municipal corporations, we find that under the Saxons all the settled inhabitants and traders of corporate towns, who contributed to the local taxes, had a voice in the management of their own municipal affairs, and for some centuries afterwards these burgesses assembled in person for the transaction of business and the election of a mayor. There was originally no such thing as a town council; but as the towns increased, the principle of representation was introduced, and we find the wealthy inhabitants assuming all municipal authority, and substituting

self-election for the suffrages of the burgesses. This usurpation seems not to have been submitted to without a struggle, but is, nevertheless, generally established before the close of the fifteenth century. Up to the time of Henry VII. these encroachments had been merely local; the people had submitted to them, but the law had not enforced them, but from this time popular rights began to be set aside in a new form. The crown began to grant charters to boroughs, vesting all the powers of municipal government in the mayor and town councillors, nominated in the first instance by the crown, and afterwards self-elected, and in some cases also giving the governing body the exclusive right of returning members to parliament. It was, however, under Charles II. and James II. that the most open and flagrant attack on corporations was made, and of this attack Hallam gives the following account:—"The hostility of the city of London, and of several other towns, towards the court, degenerating no doubt into a factious and indecent violence, gave a pretext for the most dangerous aggression on public liberty that occurred in the present reign. The power of the democracy in that age resided chiefly in the corporations. These returned, exclusively or principally, a majority of the representatives of the commons. So long as they should be actuated by that ardent spirit of Protestantism and liberty which prevailed in the middle classes, there was

little prospect of obtaining a parliament that would co-operate with the Stuart scheme of government. The administration of justice was very much in the hands of their magistrates, especially in Middlesex, where all juries are returned by the city sheriffs. It was suggested, therefore, by some crafty lawyers, that a judgment of forfeiture obtained against the corporation of London would not only demolish that citadel of insolent rebels, but intimidate the rest of England by so striking an example. True it was that no precedent could be found for the forfeiture of corporate privileges. But general reasoning was to serve instead of precedents, and there was a considerable analogy in the surrenders of the abbeys under Henry VIII., if much authority could be allowed to that transaction. An information, as it is called, *quo warranto*, was accordingly brought into the Court of King's Bench against the corporation. Two acts of the common council were alleged as sufficient misdemeanours to warrant a judgment of forfeiture; one the imposition of certain tolls on goods brought into the city markets by an ordinance or bye-law of their own; the other, their petition to the king in December, 1679, for the sitting of parliament, and its publication throughout the country. It would be foreign to the purpose of this work to inquire whether a corporation be in any case subject to forfeiture, the affirmative of which seems to have been held by courts of justice since the Revolu-

tion; or whether the exaction of tolls in their markets, in consideration of erecting stalls and standings, were within the competence of the city of London; or, if not so, whether it were such an offence as could legally incur the penalty of a total forfeiture and disfranchisement; since it was manifest that the crown made use only of this additional pretext in order to punish the corporation for its address to the king. The language, indeed, of their petition had been uncourtly, and what the adherents of the prerogative would call insolent; but it was at the worst rather a misdemeanour, for which the persons concerned might be responsible, than a breach of the trust reposed in the corporation. We are not, however, so much concerned to argue the matter of law in this question, as to remark the spirit in which the attack on this stronghold of popular liberty was conceived. The Court of King's Bench pronounced judgment of forfeiture against the corporation; but this judgment, at the request of the attorney-general, was only recorded; the city continued in appearance to possess its corporate franchises, but upon submission to certain regulations: namely, that no mayor, sheriff, recorder, or other chief officer, should be admitted until approved by the king; that, in the event of his twice disapproving their choice of a mayor, he should himself nominate a fit person, and the same in case of sheriffs, without waiting for a

second election; that the court of aldermen, with the king's permission, might remove any one of their body: that they should have a negative on the elections of common councilmen, and, in case of disapproving a second choice, have themselves the nomination. The corporation submitted thus to purchase the continued enjoyment of its estates at the expense of its municipal independence; yet even in the prostrate condition of the Whig party, the question to admit these regulations was carried by no great majority in the common councils. The city was, of course, absolutely subservient to the court from this time to the Revolution. After the fall of the capital it was not to be expected that towns less capable of defence should stand out. Informations *quo warranto* were brought against several corporations, and a far greater number hastened to anticipate the assault by voluntary surrenders. It seemed to be recognized as law by the judgment against London that any irregularity or misuse of power in a corporation might incur a sentence of forfeiture, and few could boast that they were invulnerable at every point. The judges of assize in their circuits prostituted their influence and authority to forward this and every other encroachment of the crown. Jefferies, on the Northern Circuit, in 1684, to use the language of Charles II.'s most unblushing advocate, 'made

all the charters, like the walls of Jericho, fall down before him, and returned laden with surrenders, the spoils of towns.' They received instead new charters, framing the constitution of these municipalities in a more oligarchical model, and reserving to the crown the first appointment of those who were to form the governing part of the corporation. These changes were gradually brought about in the last three years of Charles's reign, and in the beginning of the next."

Corporations after the Revolution.

After the Revolution, corporations were free from the intrusion of the prerogative: but the policy of municipal freedom was as little respected as in former times. A corporation had come to be regarded as a close governing body, with peculiar privileges. The old model was followed; and the charters of George III. favoured the municipal rights of burgesses no more than the charters of Elizabeth or James I. Even where they did not expressly limit the local authority to a small body of persons,—custom and usurpation restricted it either to the town council, or to that body and its own nominees, the freemen. And while this close form of municipal government was maintained, towns were growing in wealth and population, whose inhabitants had no voice in the management of their own affairs. Two millions of people were denied the constitutional privilege of self-government. The corporations necessarily became

a mass of corruption, but were destined to have a long dominion, and it was not till 1835 that the much-needed reform was carried out.

The Municipal Corporations Act vested the municipal franchise in the rated inhabitants who had paid poor-rates for three years, introduced a property qualification for town-councillors, enacted that aldermen should be elected for six years instead of for life, and restrained the further creation of freemen.

The Municipal Corporations Act.

"One ancient institution alone was omitted from this general measure of reform,—the corporation of the city of London. It was a municipal principality,—of great antiquity, of wide jurisdiction, of ample property and revenues,—and of composite organization. Distinguished for its public spirit, its independent influence had often been the bulwark of popular rights. Its magistrates had braved the resentment of kings and parliaments: its citizens had been foremost in the cause of civil and religious liberty. Its traditions were associated with the history and glories of England. Its civic potentates had entertained, with princely splendour, kings, conquerors, ambassadors, and statesmen. Its wealth and stateliness, its noble Guildhall and antique pageantry, were famous throughout Europe. It united, like an ancient monarchy, the memories of a past age with the pride and powers of a living institution. Such a corporation as this could not be lightly

The corporation of London exempted.

touched. The constitution of its governing body; its powerful companies or guilds; its courts of civil and criminal jurisdiction; its varied municipal functions; its peculiar customs; its extended powers of local taxation,—all these demanded careful inquiry and consideration. It was not until 1837 that the commissioners were able to prepare their report; and it was long before any scheme for the reconstitution of the municipality was proposed. However superior to the close corporations which parliament had recently condemned, many defects and abuses needed correction. Some of these the corporation itself proceeded to correct, and others it sought to remedy, in 1852, by means of a private bill. In 1853 another commission of eminent men was appointed, whose able report formed the basis of a government measure in 1856. The bill, however, was not proceeded with; nor have later measures for the same purpose hitherto been accepted by parliament. Yet it cannot be doubted that this great institution will be eventually brought into harmony with the recognized principles of free municipal government."

The *Habeas Corpus Act.*

III. *The Habeas Corpus Act.*

From a remote period there had been a writ of *habeas corpus*, as a remedy against illegal imprisonment; yet it is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that the statute

of Charles II. enlarged in a great degree our liberties, and formed a sort of epoch in our history. From the earliest records of the English law, no freemen could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided in Magna Charta (if indeed it were not much more ancient), that the statute of Charles II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of crown lawyers, had impaired so fundamental a privilege.

There had been previously some doubts whether the Court of Common Pleas could issue a writ of *habeas corpus*, and the Court of Exchequer seems never to have done so. It was also a question whether a *single judge* of the Court of King's Bench could do so during vacation.

It was now provided that the party charged may during vacation complain to the chancellor, or any of the judges, who upon sight of a copy of the warrant, or an affidavit that a copy is denied, may award a *habeas corpus* directed to the officer in whose custody the party shall be, commanding him to bring up the body of his prisoner within a time limited according to the distance, but in no case exceeding twenty days; and that the judges shall have power to discharge the party from imprisonment, taking surety for his

appearance in the court wherein his offence is cognizable.

Bail, which can be claimed as a matter of right in cases of misdemeanour, is at the discretion of the judge when the offence is treason or felony.

A gaoler refusing a copy of the warrant of commitment, or not obeying the writ, is subjected to a penalty of 100*l.*; and a judge denying a *habeas corpus*, is made liable to a penalty of 500*l.* at suit of the injured party.

It is further provided, that every person committed for treason or felony must be brought up for trial at the next sessions of general gaol delivery after his commitment, unless it shall appear that the witnesses for the crown cannot be produced at that time; and if he shall not be indicted and tried in the second term or sessions of gaol delivery, he shall be discharged.

This statute, aided by the Bill of Rights, which enacts, that "excessive bail ought not to be required," has secured our right of personal liberty. The act of Charles II. was restricted to "criminal or supposed criminal matters;" to remedy this defect and enable the judge to inquire into the truth of the return, 56 Geo. III. c. 100, was passed. This writ does not issue to a colony having a court of justice capable of granting it. (25 & 26 Vict. c. 100.)

Proclamations.

IV. *Proclamations.*

A proclamation is a notice publicly given of

anything whereof the king thinks fit to advertise his subjects. They are binding upon the subject when they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. In early times the sovereign frequently infringed by proclamations the rights and liberties of the subject. During the reign of Henry VII. royal proclamations enjoyed higher consideration than at any former period, and in 31 Hen. VIII. a statute enacted, that the king might set forth proclamations with pains and penalties, to which obedience should be given as to an act of parliament; but it declared that no man should by virtue thereof suffer in his estate, liberty or person, and that the laws and liberties of the realm should not be subverted thereby. This statute, as we have already pointed out, was repealed in the first year of Edward VI.

In the time of Mary, proclamations of an arbitrary and illegal import were often issued, and those put forth by Elizabeth seem to show that the crown then claimed a sort of supplemental right of legislation to perfect and carry out what the spirit of existing laws might require. During the reign of James I. proclamations were very frequently issued, and divers questions referred to the officers of the crown, *e. g.*, whether the king might by his proclamations prohibit the erection

of new buildings, in or near London. The petition of grievances presented by the commons in 1610 makes reference to illegal proclamations. During the succeeding reigns the sovereign frequently addressed proclamations to his subjects, sometimes affecting to dispense with existing laws, sometimes assuming to dictate to the people in respect of matters *per se* indifferent. We only meet with three instances of illegal proclamations under Charles II.—one in 1665, requiring all officers and soldiers who had served in the parliamentary army to depart from London and Westminster; another after the Fire of London, directing how houses should be built; a third in 1675, shutting up coffee-houses.

In this essential matter of proclamations, and also considering at the same time the entire cessation of impositions of money without consent of parliament, the reign of Charles II. compares favourably with that of his father. Since the Revolution the legality of royal proclamations has on various occasions given rise to parliamentary discussion, and enactments have sometimes been deemed necessary to indemnify those who had advised, or acted under them.

James II. Immediately after the death of his brother, James met the council and made a speech: the following sentences have great importance when compared with subsequent events. "I shall make it my endeavour to preserve the government,

both in Church and State, as it is now by law established. I know the principles of the Church of England are for monarchy, and the members of it have shown themselves good and loyal subjects; therefore I shall always take care to defend and support it. I know, too, that the laws of England are sufficient to make the king as great a monarch as I can wish; and as I shall never depart from the just rights and prerogatives of the crown, so I shall never invade any man's property."

Creasy's account of this reign.

Commenting on this reign, Creasy says:— "James II. came to the throne in 1685, and found, in the circumstances of that period, peculiar facilities for the advancement of arbitrary power. During the last years of his predecessor's reign, the crown had succeeded in humbling the popular party, and in destroying many of its chiefs. The attempts which Charles II.'s last parliament had made to assert the power of the House of Commons, had been successfully punished by dissolution; and much had been done to render any future House of Commons as subservient to the crown as had been the case in the worst years of Henry VIII. This had been effected by a daring, but crafty, attack on the charters of the corporate boroughs, which were the strongholds of the popular party. The crown lawyers, in 1683, filed an information against the corporation of the city of London,

alleging that its charter had been forfeited for certain imputed misdemeanours; and the packed judges of the Court of King's Bench gave, as a matter of course, judgment in favour of the crown. The corporation of the capital was then remodelled, so as to make it subservient to the royal will. The same course was taken against other corporate places; and very many more were intimidated into surrendering their charters to the crown, and receiving new ones, which were framed on a more oligarchical plan, and which gave to the crown the right of appointing the first members. This course was steadily pursued during the last years of Charles II.'s reign, and the first of that of James; and its effect was to place in the hands of the crown the nomination of a large proportion of the members of the House of Commons, and also to give its adherents the power of domineering in all the daily detail of local municipal politics over their Whig fellow-townsmen. The great mass of the nation, weary of the turbulent struggles of recent years, was now almost blindly zealous in its devotion to the royal will. Abroad, James could reckon on the ready support of Louis XIV., the most powerful monarch of the age. James defeated easily, in the beginning of his reign, two insurrections, which, under Argyle in Scotland and Monmouth in England, were attempted against him by the violent part of the enemies of his House; and

the truth of the adage, that an unsuccessful revolt strengthens the force against which it is directed, was seemingly exemplified in the passive submission of the nation to the cruelties with which those revolts were visited by the military and judicial ministers of the royal will. King James established and maintained a disciplined army of 20,000 men, though in profound peace, and though, so far from having transmarine possessions of his crown to coerce or protect, he had in Ireland an apparently inexhaustible supply of fanatic and devoted followers, to repress any possible movements that England might attempt in defence of Protestantism and Constitutional Law. Providentially for this country, James was too violent to be crafty, or even prudent, in the execution of his schemes. He was as ostentatious in the premature display of his designs against the people's Church and State, as he was pusillanimous when those designs called forth resistance, though at an earlier period of his life, when admiral of our fleets in battle, he had exhibited courage of the highest order. He commenced his reign by a violation of the cardinal principle of the Constitution, which forbids the taking of the subjects' money by the crown, save by consent of Parliament. James showed of how little value the safeguards of the Great Charter, or the Petition of Right, and of the numerous other statutes in confirmation of them, would be to the people who

endured his reign, by arbitrarily levying, at his accession, the customs and excise duties, the parliamentary grant of which to the crown had been limited to the life of the late king. James, however, was not averse to parliaments, provided they would appoint his revenue as he desired, and would register his edicts with the same submissive facility which his royal brother of France found in the parliaments of Paris. He called a parliament which met May 19th, 1685. Not content with relying on the effect of the royal war against the corporations, which has already been alluded to, the court put in force every artifice; and used injustice and violence of the grossest kind throughout England, to manage the elections. An eminently servile House of Commons was the result, which granted to James, for his life, a revenue of two millions a-year. This was an ampler income than any former king of England had enjoyed; and aided by the subsidies which James received from Louis XIV., made him independent of parliament for the rest of his reign, so far as regarded the important point of pecuniary supplies. But James dismissed even this compliant assembly, because they hesitated at carrying into effect his projects in favour of the Roman Catholic against the Protestant Church. James now 'showed plainly that, with a bench of judges to pronounce his commands, and an army to enforce them, he would not suffer the mockery of constitutional

limitations to stand any longer in his way.' He openly carried into execution his assumed right to dispense, by royal prerogative, with the observance of the laws of the land; and eleven out of the twelve judges pronounced a judgment in favour of that right, in a case which the king caused to be brought before them, having first carefully weeded the bench of those members who retained any scruples of conscience, and having appointed new judges in their stead. Under the same claim of possessing a kingly prerogative superior to all law, James, in 1686, set up a high court of ecclesiastical commission, in direct defiance of the act of parliament passed in Charles I.'s reign, which put down the high commission court then existing, and provided that no new court should be erected with the like power, jurisdiction, and authority. Among other acts of flagrant tyranny committed by this infatuated prince, are his expulsion of the fellows of Magdalen College, Oxford, for refusing to elect as their president, in obedience to royal mandate, and in violation of the law of the land and their oaths, a Roman Catholic nominee of the crown; his command to all clergymen to read publicly in their churches the royal declaration of indulgence, by which the king abrogated a large number of statutes; and his prosecution of the seven bishops as seditious libellers, for presenting to him a petition, wherein

they respectfully stated their unwillingness to put into execution an illegal order.

"There was for a time an apparent submissiveness in England to this royal overthrow of the Constitution. But the heart of the nation was sound and true; and as men became gradually aware of the real nature of the crisis which the rashness of the king had hurried on, all parties laid aside their animosities against each other, and a public feeling was created for the rescue of the national faith and the public liberty. It was evident that such a government, as James was setting up, was a despotism, unmitigated by any effectual check; and the savage cruelty of Jefferies, and of the other judicial wretches, whom James delighted to honour, had taught the people that such a despotism would be as oppressive in practice as it was degrading in theory. Nor could Englishmen of that age, when they looked to the foreign policy of England, feel that consolation for the loss of domestic freedom, which the subjects of an absolute monarch sometimes derive from the increased power and glory of the state. James was the paid vassal of Louis XIV.; and England, under James, was forced to stand tamely by, while the king of France wrought his ambitious schemes against the independence of the rest of Europe."

The case of

We have now to consider in detail the case of

the "Seven Bishops," which is one of the most important state trials of the Stuart period. the Seven Bishops.

In the reign of James II. various statutes of an oppressive character, affecting such as were not members of the Church of England, were in operation; and on the 4th of April, 1687, the king issued a declaration, to the effect that none of these laws were to be put in execution. It was ordered by his majesty in council that the bishops should cause the above declaration to be distributed and read throughout their respective dioceses. A meeting of eminent divines took place at Lambeth, and a petition was prepared by the archbishop, setting forth the great averseness they had to distributing and publishing his majesty's late declaration for liberty of conscience; especially because it was founded upon such a dispensing power, as had often been declared illegal in parliament.

The king was greatly wroth at this conduct on the part of the bishops, and they were tried in the Queen's Bench for seditious libel.

The jury returned a verdict of "Not guilty."

This well-known case may be looked upon as a leading authority concerning:—(*a*) The dispensing power of the crown. (*b*) The right of the subject to petition. (*c*) The nature of a seditious libel.

Not only has the crown assumed to add to existing laws,—it has also ventured to dispense I. The dispensing power.

with them. The Church of Rome at a very early period affected to dispense with the law of the land, and our monarchs were not slow to follow the example thus set them. They soon began to issue proclamations, and make grants or decrees "*non obstante.*"

Upon the whole the current of authority serves to show that the prerogative of dispensing by "*non obstante*" with acts of parliament was, subject to certain restrictions, recognized in former times as vested in the crown; certainly it was repeatedly exercised during the 16th and 17th centuries, was grossly abused, and finally cost James II. his crown. Hallam observes, that "this high and dangerous prerogative, nevertheless, was subject to several limitations, which none but the grossest flatterers of monarchy could deny. It was agreed among lawyers that the king could not dispense with the common law, nor with any statute prohibiting what was *malum in se*, nor with any right or interest of any private person or corporation. The rules, however, were still rather complicated, the boundaries indefinite, and therefore varying according to the political character of the judges."

This asserted branch of the prerogative was annihilated by the "Bill of Rights," which declared "that the pretended power of suspending laws, by regal authority, without consent of parliament, is illegal;" and that "the pretended power of dispensing with laws by regal authority,

as it hath been assumed and exercised of late, is illegal." Since this time no one has presumed to advocate the existence of a dispensing power.

In 1766, in consequence of apprehended famine, the crown laid an embargo on corn. It was, however, held in parliament that though the measure was expedient and proper, it was illegal, and that an act of indemnity was necessary.

II. The right of the subject to petition.

The right of the subject to petition has in the next place to be considered. One of the most valuable privileges possessed by the subject is that of petitioning the crown and parliament. It seems to have been exercised from the very earliest times and to be recognized in Magna Charta. These early petitions, however, seem to have been for the redress of private grievances, and the practice of petitioning on political subjects does not appear to have come into vogue till the time of the Great Rebellion. Many petitions were presented both to Charles I. and the Long Parliament, and that assembly reproved and punished several who were bold enough to present petitions of which it did not approve. Petitions were not looked upon with favour at the time of the Restoration, and an act was early passed against tumultuous petitioning. Thereby it was enacted that not more than twenty names should be signed to any petition to the king, or either house of parliament, for any alteration of matters established by law, unless the contents

thereof were previously approved, in the country, by three justices, or the grand jury; and in London by the lord mayor, aldermen and common council, and that no petition should be delivered by a company of more than ten persons, on pain of a penalty not exceeding 100*l.* and three months' imprisonment. Notwithstanding this discouragement some few petitions continued to be presented, and great endeavours were used to get numerous signatures to petitions praying that parliament might really meet on the day to which it had been previously prorogued. A royal proclamation was issued forbidding all persons to sign such petitions, under pain of punishment. Notwithstanding, petitions continued to be presented, which gave rise to counter-addresses to the throne. In the reign of James II. we do not hear much of petitions, but on the accession of William and Mary, this valuable privilege was expressly sanctioned and secured in the "Bill of Rights," which declares "that it is the right of the subject to petition the king, and all commitments and prosecutions for such petitioning are illegal."

Not only, however, is the right to petition now recognized, but the act of petitioning is free to all, and the statute of Charles II. has nearly become a dead letter.

Before leaving this subject, it may be right to notice the three most celebrated petitions pre-

sented to parliament during the preceding and present centuries, viz.: the Kentish petition in 1701, Lord George Gordon's petition in 1780, and that of the Chartists in 1848.

The Kentish petition.

In the year 1701, there was a serious misunderstanding between the lords and commons caused by the impeachment of the peers concerned in the Partition treaty. In the county of Kent especially considerable disapprobation was expressed at the conduct of the commons, and at the quarter sessions a petition to that house was drawn up by the chairman at the request of the grand jury, and signed by twenty-three justices and very many other persons. The petition was presented by five of the justices in the names of the rest. They were called into the house and asked if they owned it; on answering that they did, they were ordered into the custody of the serjeant-at-arms. The commitment of the five Kentish justices caused great dissatisfaction throughout the kingdom, nevertheless they were not released until the prorogation of parliament.

Lord George Gordon's petition.

In 1778, an act was passed mitigating some of the penalties imposed on the Roman Catholics by previous legislation. This act gave great offence to many, and a petition was drawn up, which Lord George Gordon promised to present to the House of Commons on condition that at least 20,000 persons should accompany him. The condition was complied with, and the crowd

accompanied his lordship, who demanded that the petition should be taken into instant consideration. The house had the spirit to reject the motion. The mob continued to besiege the house until dispersed by the military, when they went to other parts of the metropolis, and for many days committed outrages of the grossest character, the rising being known as "The Gordon Riots." The following year his lordship was tried for high treason. It was contended that there was nothing illegal in his presenting the petition, as the statute of Charles II. had been repealed by the Bill of Rights, but this proposition was expressly negatived by Lord Mansfield. The prisoner was acquitted, though many persons were convicted and punished who had participated in the riots.

The Chartists' petition.

The next petition calling for remark is that of the Chartists, A.D. 1848, in favour of the five points of the Charter, viz.:—Annual Parliaments, Universal Suffrage, Equal Electoral Districts, No Property Qualification, and Payment of Members. The Chartists, with Fergus O'Connor at their head, convened a monster meeting to be held on Kennington Common, to be followed by a procession to Westminster to present the petition. The affair passed off peaceably, and the great petition, said to contain upwards of 5,000,000 signatures, was presented to the house.

III. Nature of a seditious libel.

A libel has been defined to be "any writing, picture, or other sign, which immediately tends

to injure the character of an individual, or to occasion mischief to the public."

Sedition is understood to comprise within its meaning all offences against the king and the government which are not capital, and do not amount to the crime of treason. The crown, when strong enough, has been in the habit of punishing almost every obnoxious criticism on the acts of the government as constituting a seditious libel; indeed, out of parliament, it was during long periods of our history unsafe for anyone to venture to assert that the system of government was imperfect. It would be wearying to recite the comparatively innocent speeches that were stigmatized as seditious in the reign of George III. The judges were at one time in the habit of directing juries that the only point for them to consider in a trial for libel was whether the defendant published the letter, or paper in question, and whether the innuendoes, imputing a particular meaning to particular words, were correct; but that whether the publication was libellous or innocent was a pure question of law, on which the opinion of the court might be taken, but with which the jury had nothing to do. This doctrine was for a long time both assailed and maintained till the dispute was set at rest by Fox's Libel Act, which declares and enacts, that the jury may give a general verdict of "guilty" or "not guilty" upon the whole matter put in issue upon the in-

dictment or information, and shall not be required, or directed by the court or judge, to find the defendant "guilty" merely on proof of the publication of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information.

Important trials for seditious libel.

The following are the three most important trials for seditious libel:—

(1) The "Seven Bishops:"

(2) Dr. Sacheverell (1710), in the reign of Anne:

(3) Wilkes (1764), in the reign of George III.

The crisis in 1688.

No better account of the great crisis in 1688 than that given by Creasy exists in our language; he says: "I have already alluded to the important influence which the general abhorrence and dread of Popish ascendancy exercised in extending and animating the national resistance to King James. Many were roused into action by that feeling, who might have regarded with apathy any amount of royal encroachment upon merely civil rights. And both by the well-known character of James himself, and by the conduct of the fanatic priests and confessors who were his favourite councillors, it was made manifest that the declarations of general toleration, which James put forward, were mere pretences. Even the dissenters from the Anglican Church saw clearly that the king's ultimate object was to restore the compulsory domination of Roman Catholicism in

England; and that he would not scruple, when he thought that a convenient time had arrived, to employ for that purpose means as savage and unsparing as those by which his patron and model, King Louis XIV., was striving to extirpate Protestantism and all liberty of conscience in France. A good and brave man, in the beginning of 1688, might have felt all this; and yet might have shrunk from that tremendous remedy of armed opposition to established government, which can never be rightly attempted, while there is any rational hope of deliverance by other means. Before that memorable year was over, no such hope remained. There was no longer any prospect that if the nation were patient for a few years under James, it might recover its liberties without strife or peril under a wiser and more temperate successor to the throne. This idea might have been entertained during the first years of James's reign, while the Protestant Princess Mary, the wife of William of Orange, was immediate heir to the English crown. But the birth (June 10th, 1688) of James, son by his second queen, Mary of Modena, put an end to all such hopes, and deprived even the most timid conspirators among the patriotic party of all pretexts for delay.

"William, Prince of Orange, Stadtholder and Captain-General of the Dutch Commonwealth, was naturally the chief to whom the leading men of the English popular party looked in their need.

To attempt a rising without the aid of some regular troops and a competent commander would have been to expose themselves and their untrained followers to certain destruction by the disciplined army of the king. An auxiliary force was needed, not large enough to conquer a great country like England against the country's will, but sufficient to form a nucleus, round which the national levies might be raised, and organized in the country's cause. It was all-important that the commander of that force should be a man trustworthy, not only in respect of military and political ability, but also in respect of personal integrity, and of deep devotion to the general cause of civil and religious freedom. Such a man had William proved himself from his youth up. His own close relationship with the royal family of England, and his marriage with the Princess Mary, gave him a natural interest in the political well-being of England, and diminished the repugnance which must be always felt at calling in the sword of the stranger to turn the scale in civil disputes. Moreover the inferior strength of Holland relatively to this country, and the deep need which the Dutch nation had that England should be free and great, in order to aid them in opposing effectively the grasping ambition of Louis XIV., were safeguards in 1688, against the peril, which a wronged people too often incurs, when it employs foreign aid against its home-oppressors;—

the peril of becoming the slaves of their allies, and of purchasing a party-triumph by the sacrifice of their country's independence. On the last day of June, 1688, the celebrated invitation signed by Lords Danby, Devonshire, Shrewsbury and Lumley, Admiral Russell, Henry Sidney and the Bishop of London, was sent to William, on which he determined to commence the great enterprise of his life. The chief of the English Whigs had, for some time previously, been in communication with him, and now the English Tories and High Churchmen also had gradually been goaded by the aggressions of James to treat the then present crisis of Church and State as an exceptional case to their favourite maxims of passive obedience and unlimited non-resistance. On the other hand, the Whigs throughout the great national movement that ensued, abated the violence with which they had previously sought to carry out the opposite doctrines. Men of all ranks and of all party-denominations coalesced, not to introduce new forms of government, but to restore the English constitutional monarchy, on sure foundations, and with new safeguards for its old principles. William landed at Torbay in Devonshire on the 5th of November. There were soon risings in his favour throughout England, and after an almost bloodless march, he on the 18th of December entered London, amid the rejoicings of the population. Nearly all James's followers had deserted him,

many under circumstances of disgraceful perfidy and meanness; James himself fled in despair from Whitehall to Faversham on the 10th of December; he was accidentally discovered there and brought back; but on the 18th he again left Whitehall, and lingered for a few days at Rochester. But on the 23rd he finally left England, and fled to France, where he landed on the last day of the year. On taking possession of the capital, William assembled the lords spiritual and temporal then in London, and also all gentlemen who had been members of any parliament in Charles II.'s reign, together with the municipal authorities of London. By their advice and at their request, he assumed the provisional government of the country, and issued letters summoning a convention of the estates of the realm. Under these writs the House of Lords, consisting of about ninety peers and bishops, and a House of Commons regularly elected by the various counties and boroughs, assembled on the 22nd of January, 1689. On the 28th the House of Commons passed their great vote, that King James had abdicated, and that the throne was thereby vacant. The House of Lords at first were less resolute, and many of that body were in favour of appointing a regent, but continuing the title of James as nominal king. After long and interesting discussions on this and several other important points, the House of Commons pre-

vailed, and their vote was assented to by the lords. The upper house forthwith passed a resolution that the Prince and Princess of Orange should be declared King and Queen of England, and all the dominions thereunto belonging. The commons wisely interposed a solemn declaration of the people's rights, which was subsequently embodied in the Bill of Rights."

Constitutional difficulties at Revolution.

Speaking of the Revolution of 1688 Blackstone says: "The true ground and principle upon which that memorable event proceeded was an entirely new case in politics, which had never before happened in our history,—the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeasance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament: it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses came to this resolution: 'That King James II., having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people; and by the advice of Jesuits and other wicked persons, having violated the fundamental laws and having withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant.' Thus ended at once, by this sudden and unexpected

vacancy of the throne, the old line of succession; which from the Conquest had lasted above six hundred years, and from the union of the heptarchy in King Egbert, almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious; and the consequences drawn from these facts (namely, that they amounted to an abdication of the government, which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant), it belonged to our ancestors to determine. For whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society. . . . . This single postulate, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For if the throne be at any time vacant (which may happen by other means besides that of abdication; as if all the blood royal should fail, without any successor

appointed by parliament); if, we say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be entrusted; and there is a necessity of its being entrusted somewhere, else the whole fabric of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner as they judged most proper."

William III.

The first point which claims our attention in the reign of William III. is the "Bill of Rights."

It was passed in pursuance of the Declaration of Rights, and may be said to contain the conditions on which the king and queen came to the throne; the preamble is of some length and states the recent grievances. The enacting part declares:—

Bill of Rights.

(1) Suspending power, illegal:
(2) Dispensing power, as of late exercised, illegal:
(3) Ecclesiastical courts, illegal:
(4) Levying money by pretence of the prerogative, illegal:
(5) That it is the right of the subject to petition the king:

(6) Standing army in time of peace, without consent of parliament, illegal:

(7) Protestants may have arms for their defence:

(8) Elections to be free:

(9) Freedom of speech in parliament:

(10) Excessive bail not to be required, nor excessive fines levied:

(11) Parliament to be frequently summoned.

Act of Settlement.

In the twelfth year of William's reign it became necessary to pass another very important act, known as the "Act of Settlement." It was due to the death of the Duke of Gloucester, the only child of the Princess Anne, which of course, in order to exclude the Stuarts, necessitated some settlement of the crown. The throne was therefore entailed upon the heirs of the body of the Princess Sophia, being Protestants. This act contains the following provisions:—

(1) The possessor of the crown shall be in communion with the Church of England:

(2) That, in case the crown do come to a person not a native of England, the nation shall not be obliged to enter into a war for the defence of territories not belonging to the crown of England, without consent of parliament:

(3) That the sovereign shall not go out of the kingdom (repealed, 1 Geo. II.):

(4) No person born out of the kingdom, and not

of English parents, shall be capable of being a privy councillor, or a member of either house of parliament, or of enjoying any office or place of trust, or of taking a grant of lands from the crown:

(5) That matters of government cognizable in the privy council shall be transacted there, and signed by such members as advise and consent to the same (repealed, 4 Anne, c. 8):

(6) That no person who has an office or place of profit under the king, or receives a pension from the crown, shall be capable of serving as a member of the House of Commons:

(7) That judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained; but upon the address of both houses of parliament it may be lawful to remove them:

(8) That no pardon under the great seal be pleadable to an impeachment by the commons in parliament.

The 5th section considered. 'The privy council.'

Commenting on the fifth, sixth and seventh sections, Creasy says: "It has been pointed out that our sovereigns had their regular councils, consisting of the chief officers of state, and of such persons as the king thought fit to summon. They took an oath of fidelity and secrecy, and these were the king's privy councillors. The obnoxious

judicial power which was practised first by the council, and afterwards by a portion of it organized as the Court of Star Chamber, has also been referred to. The abolition of this tribunal did not interfere with the existence of the privy council in its natural and legitimate capacity. The number of privy councillors was gradually found inconvenient for practical government, and the custom grew up of a few members of it, who really were the active and confidential ministers of the crown, deliberating apart. This select body acquired the name of the 'cabinet council,' with which we are all practically familiar, though the the term 'cabinet minister' is unknown in constitutional forms. For some time it appears to have been usual for the cabinet council, when they had resolved upon a measure, to lay it before the privy council for their assent and adoption, but no further discussion took place, and the ratification was a mere formality. Out of desire to ascertain more easily the main individual promoters and advisers of state measures, it was endeavoured in the Act of Settlement to revive the old system, to compel the discussion of all state affairs in full privy council, and to discriminate between those who promoted and those who dissuaded each resolution, by making all who voted for it sign their names to it. It was, however, soon perceived that this system would cause infinite delay and embarrassment in governing the

'The cabinet council.'

kingdom, and the clause was repealed by a statute in Queen Anne's reign, before the time when its provisions were to have come into operation. The practice above referred to, of summoning all the privy council to adopt and ratify the previously-arranged measures of the cabinet, has also long become obsolete. And it is correctly stated that 'the office of privy councillor, as distinct from cabinet minister, is now little more than a titular distinction, conferring the title of right honourable on the bearer of it.' Royal proclamations and orders still emanate, as the law requires, from the privy council, but by long-established usage no privy councillor attends unless specially summoned. Each, however, though he be not a cabinet minister, and though he be in actual opposition to the ministry of the day, has the right of attending, and that right was exercised in a very memorable and important crisis in our constitutional history, when Queen Anne was on her deathbed, and when the Dukes of Argyll and Somerset suddenly appeared in the council-chamber at Kensington Palace, and disconcerted all the measures of Bolingbroke, and his coadjutors, for bringing in the Pretender after the queen's decease.

"The sixth article in the Act of Settlement was designed to put a stop to the rapidly-increasing influence which the crown was acquiring over the House of Commons, by being able to confer

The sixth section.

places and pensions on its members. This power had been made an engine of extensive and grievous corruption during the last bad reigns, and had excited just popular indignation. But the framers of the Act of Settlement, though laudably anxious to check this abuse, went into the opposite extreme, which Hallam truly calls 'the preposterous extremity of banishing all servants of the crown from the House of Commons.' This sweeping clause of the Act of Settlement never came into operation. It was repealed in the fourth year of Anne's reign. Another act on the subject was passed in the same reign, by which every member of the House of Commons, accepting an office under the crown, except a higher commission in the army, must vacate his seat, but may be re-elected; and by which, also, persons holding offices created since 25th of October, 1705, were incapacitated from being elected or re-elected members of parliament. The statute excluded at the same time all such as held pensions during the pleasure of the crown; and to check the multiplication of placemen, it was enacted, that no greater number of commissioners should be appointed to execute any office, than had been employed in its execution at some time before that parliament.

Placemen.

"The seventh article of the Act of Settlement, that which provides for the independence of the judges, is the most important of all. The Stuart

The seventh section.

kings had been in the habit of systematically packing the bench, in order to secure decisions favourable to the crown, on all points of law; and in order, also, that unscrupulous partisans of the court should preside at all state trials, and work out the royal partialities and hatreds. Men who showed any independence in such matters, or who were known to be opposed to the views of the court, were summarily dismissed from the bench, and more obsequious tools of the government were appointed on the eve of any important judicial proceeding. While this could be done, the liberties of the subject were never safe. There was not one that might not be brought in some form before a court of law, to be upheld or nullified; and the sovereign, who could garble at his will the administration of the laws, had little need to care who made them. Without open violence, it was always in his power 'constitutionally to ruin the constitution.' The Act of Settlement gave the remaining necessary bulwark to our national freedom, when it made the judges irremovable, except on the joint requirement of both Houses of Parliament; and when, also, by requiring their salaries to be fixed and ascertained, instead of depending on the caprice of the crown, it freed them from all influence, and from all suspicion of being under the influence of corruption or intimidation."

A common danger which threatened to over- The difficul-

ties of William's position.

turn both Church and State had, in the preceding reign, united all parties; but no sooner was the storm passed by, than the coalition dissolved, and each party resumed its former position. William III. was scarcely seated on the throne of England ere he found himself the king of rival factions, rather than of a united people; and what aggravated the distastefulness of his position was the fact, that the statesmen who had betrayed the counsels of his predecessor, and sought him as their deliverer from popery and despotism, were the first to open treasonable communications with the exiled prince he had supplanted.

Completion of the Revolution.

To venture upon a new election being deemed hazardous, the king declared the convention a parliament. In the commons an inquiry arose whether it could be a legal parliament, not having been summoned by the king's writ. To this it was replied that the essence of a parliament consists in the co-operation of king, lords, and commons, and not in the manner of its being convoked, whether by writ or by letter. An act followed, declaring the lords and commons assembled at Westminster to be the two houses of parliament to all intents and purposes. When the new oaths came to be taken, the following prelates absented themselves:—Sancroft, Turner, Lake, Ken, White, Lloyd, Thomas, and Frampton; also the Duke of Newcastle, the Earl of Clarendon, and other temporal peers. These non-

The non-jurors.

juring peers, as, indeed, did many of the clergy and others, held the doctrine of the divine indefeasible rights of sovereigns without limitation.

The proceedings of parliament.

The first measure pressed upon the attention of parliament related to the army. The provisions in the Bill of Rights, which declare it is illegal to raise or keep a standing army within the kingdom in time of peace, unless with consent of parliament, deserves particular attention; not only because they take away the ordinary instrument of despotism against freedom, but because they ensure the observance of the great constitutional rule which the statute afterwards ordains—the rule that parliaments ought to be held frequently. The maintenance of a regular-disciplined force has long been indispensable for the defence of the transmarine possessions of England, and of England herself, from the hostility of foreigners, and also to enable her to maintain her due degree of power and importance in the commonwealth of nations. The consequence has been, that ever since the Bill of Rights, an annual act of parliament has been passed authorizing the keeping on foot of a defined number of troops, and giving the crown the power of exercising martial law over them. This annual act is called the Mutiny Act. It endures only for a single year; so that there must be a session of parliament every year, and a new Mutiny Act passed, or the army would be disbanded.

(a) The Mutiny Act.

(*b*) The civil list.

In addition to this important guarantee for the regular meeting of parliament, a system of settling the royal revenue was established in William's reign, which necessitates the observance of the same constitutional principle. The House of Commons then determined no longer to vote to the crown certain general large sums of revenue, to be applied to particular purposes according to the royal discretion, but they appropriated specific parts of the revenue to specific purposes of government. This principle had, as we have seen, been previously attempted, but it is only since 1688 that it has been steadily enforced. Hallam says, "the Lords of the Treasury, by a clause annually repeated in the Appropriation Act of every session, are forbidden under severe penalties, to order by their warrant any monies in the Exchequer so appropriated to be issued for any other purpose, and the officer of the Exchequer to obey any such warrant. This has given the House of Commons so effectual a control over the executive power,—or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence; nor can the session of parliament be intermitted for an entire year without leaving both the naval and military force of the kingdom unprovided for."

The "Civil List" was formerly the name given to the list of all the expenses of the civil govern-

ment, for originally all the expenses of government were comprehended in one general list, and defrayed out of what were called the royal revenues. It is clear the sovereign exists in two capacities, and incurs expenses under each:

(A) As an individual:

(B) As the representative of the state.

The expenses of these two have become gradually separated, but the old name (meaning all taken together) has been still continued. The term civil list is now confined to the personal expenses of the sovereign, and the support of the royal household, and is voted at the beginning of every reign. The national expenses thus no longer fall upon the civil list, but in return the crown lands now form one of the sources of the public revenue.

(c) The Toleration Act.

The question of religious toleration began to claim the attention of the legislature very early in this reign. Writing on this subject, Hallam says:—"The Revolution is justly entitled to honour as the era of religious, in a far greater degree than of civil, liberty; the privileges of conscience having had no earlier Magna Charta and Petition of Right whereto they could appeal against encroachment. Civil, indeed, and religious liberty had appeared, not as twin sisters and co-heirs, but rather in jealous and selfish rivalry; it was in despite of the law, it was through infringement of the constitution, by the court's connivance, by the dispensing prerogative,

by the declarations of indulgence under Charles and James, that some respite had been obtained from the tyranny which those who proclaimed their attachment to civil rights had always exercised against one class of separatists, and frequently against another. . . . The Act of Toleration was passed with little difficulty, though not without murmurs of the bigoted churchmen. It exempts from the penalties of existing statutes against separate conventicles, or absence from the established worship, such as should take the oath of allegiance, and subscribe the declaration against popery, and such ministers of separate congregations as should subscribe the Thirty-nine Articles of the Church of England, except three, and part of a fourth. It gives also an indulgence to Quakers without this condition. Meeting-houses are required to be registered, and are protected from insult by a penalty. No part of this toleration is extended to Papists, or to such as deny the Trinity. We may justly deem this act a very scanty measure of religious liberty; yet it proved more effectual through the lenient and liberal policy of the eighteenth century; the subscription to articles of faith, which soon became as obnoxious as that to matters of a more indifferent nature, having been practically dispensed with, though such a genuine toleration as Christianity and philosophy alike demand had no place in our statute book before the reign of George III."

Such was the measure of toleration extended to the Nonconformists at the Revolution, but more than a century was yet to elapse before full civil and religious liberty was extended to members of the Roman Catholic faith. In the reign of George III. an address from the principal members of the Catholic body led to the introduction of a bill, in 1788, proposing to relieve Roman Catholics from certain penalties. Such were,— "The punishment of priests or jesuits who should be found to teach or officiate in the services of their church; such acts being felonies in foreigners and high treason in natives of the realm. The forfeiture of popish heirs who had received their education abroad, and whose estates went to the next Protestant heir. The power given to the son, or nearest relative, being a Protestant, to take possession of his father's or kinsman's estate during the life of the rightful owner. And the debarring of Roman Catholics from the power of acquiring legal property by any other means than by descent." The bill was passed, but gave great offence to the violent Protestants, and the "Gordon Riots" were the immediate result of this piece of legislation.

Religious toleration not extended to Papists till reign of George III.

The Relief Act of 1788.

Notwithstanding this measure of relief, the Roman Catholics still laboured under many disabilities, and the subsequent reign of George IV. witnessed a growing anxiety for complete emanci-

pation, and a disposition on the part of some persons of influence to grant it. Canning was favourable to their claims, and the subject had been occasionally before parliament, though nothing was done. It was not until 1829 that an act was passed abolishing altogether the disabilities under which the Roman Catholics laboured, and thus admitting them to equal civil rights. Certain exceptional clauses disqualified them from holding the offices of lord lieutenant, lord chancellor, or keeper of the great seal; from appointments in Protestant universities or colleges; and from exercising any right of presentation, as lay patrons, to the benefices and dignities of the Church of England.

Catholic emancipation not till 1829.

Conclusion.

It is not our intention to trace the history of our constitution directly beyond the reign of William III.,—indirectly, however, matters, have been treated of which belong to a subsequent period. By the Revolution and the Bill of Rights, no doubt, the liberty of the country received a most important improvement. But the constitution was settling, not settled; and questions of great consequence to its interests were agitated during the whole of the reign of William. We have the Civil List, the Place Bill, the Triennial Bill, the Treason Bill, the question of the liberty of the press, the question of standing armies, of the responsibility of mi-

nisters, and finally we have the veto of the king more than once exercised, and even a sort of debate in the commons on this assertion of prerogative. We cannot close the present chapter more fitly than by laying before our readers one last extract from Creasy's work on the Constitution, to which we have so often previously referred:—"With the expulsion of the Stuarts, the long struggle between the king and the people ended: and the substitution on the English throne of a line of princes, who derived their title confessedly through the nation's will, extinguished all those absurd dogmas as to the right divine of kings, the patriarchal principle of government, the duty of the subject to submit to all royal orders, and the like, which had been previously never-failing pretexts for sanctioning or excusing violations of constitutional right, and graspings after absolute power. Indeed, since the reign of William, the royal heads of our limited monarchy have exercised comparatively little personal interference in state affairs. Our kings and queens have carried on the government of the country through ministers, who have been, and necessarily must be, dependent on parliament for their tenure of office. Not that the personal opinions or character of the sovereign of this country ever can be unimportant. His habits and tastes are always matter of notoriety, and often of imitation. Access

to his society is always coveted. He may give that access in a manner useful, or mischievous, or absolutely indifferent. He may call to his court those who are most distinguished by genius or by knowledge; or those whose only merit is their birth or their station; or parasites, buffoons, or profligates."

CHAPTER V.

LEADING CASES IN CONSTITUTIONAL LAW.

The Provinces of Constitutional Law and History compared—*Calvin's Case*—Allegiance defined—Allegiance how severed—Denizen—Colonies—Law relating to—Alien friend—Alien enemy—The *Bankers' Case*—*Leach* v. *Money*—*Wilkes* v. *Wood*—*Entick* v. *Carrington*—Law as to General Warrants epitomised—Cases seemingly in opposition to above—*Hill* v. *Bigge*—Civil Liability of a Governor—Governor not a Viceroy—Criminal Liability of a Governor—*General Picton's Case*—*Governor Wall's Case*—Summary—*Sutton* v. *Johnstone*—*Kemp* v. *Neville*.

The provinces of constitutional law and history compared.

It becomes our duty in this our last chapter to discuss the points involved in certain leading cases in constitutional law. Constitutional history traces the development of our constitution, the gradual changes and growth of custom, and shows how the rules and laws which now fix the constitution have been evolved; it gives us the facts of the past, and shows us the relation of the past to the present. On the other hand, constitutional law only gives us the present; it explains the duties of subjects towards the state, and the state towards its subjects.

Calvin's case.

I. *Calvin's case,* 6 Jac. I.

Allegiance—what is it? by whom, and to whom it is due.

The question here was whether the Scotch *postnati,* after James' accession, were to be deemed

natives or aliens in England. All seem to have agreed that *antenati* remained aliens, but as to *postnati* there was a difference of opinion. Two suits were instituted in the name of Robert Calvin, a postnatus of Scotland, and an infant; one in the King's Bench for the freehold of certain land, the other in Chancery for detaining title deeds. In each suit the defendants pleaded in abatement that plaintiff was an alien born in Scotland since the king's accession to the English crown. A demurrer raised the intended question about the postnati, for if Calvin was an alien he could not maintain either suit. These causes were adjourned into the Exchequer Chamber, in order that the solemn opinion of the judges upon the question raised might be obtained.

Held, that persons born in Scotland, after the accession of James I. to the crown of England, were not aliens, but capable of inheriting land in England.

Allegiance defined.

Allegiance is a true and faithful obedience of the subject due to his sovereign.

There are four kinds of allegiance:—

(*a*) Natural:

(*b*) Local:

(*c*) By acquisition or denization:

(*d*) Legal.

Allegiance is due of every natural-born subject to the crown; it is due to the natural person of the king, not to his politic capacity only; it is due

to him from the time the crown descends on him, not from his coronation merely; it is due to a king *de facto*, that is, it must be paid to that prince who for the time being is in actual and full possession of the regal dignity; it remains due to him and follows him everywhere: every one born within the dominions of the king of England owes allegiance to him; the duty of a subject to the crown is not released by attainder, though his right of demanding protection from the crown is annulled and forfeited.

Allegiance—how severed.

The tie of allegiance may be severed:—

I. By abdication and re-settlement of the crown.

II. By dismemberment of the empire.

III. By cession and treaty.

Denizen—what.

A denizen is one who being alien born has obtained *ex donatione regis* the status of an English subject.

Upon a conquest all the inhabitants of a conquered country become denizens of the conquering country, and the conquered ones received into the conquerors' protection become subjects.

Colonies.

Colonies are acquired in two ways:—

(1) By conquest or cession:

(2) By right of occupancy only.

In colonies of the first class, where the countries conquered or ceded have already laws of their own, these laws remain in force until altered by com-

petent authority, and the common law of England has no force there.

In colonies of the second class, that is, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being are immediately in force there, *i. e.*, as far as they are applicable to the infant colony, *e. g.*, general rules of inheritance, and protection from personal injuries.

In respect to all colonies the sovereign has the right of appointing governors, and of issuing warrants for the appointment of all other officers.

Again, in colonies of the first class the right of legislation is vested in the crown, for they become subject to all such laws as the king in council may enact, or such as may be imposed by a legislative council established there under the royal authority. The crown, however, may at any time direct the governor to summon a legislative assembly, and when he has ever done so power of legislation by the crown is at an end.

On the other hand, in colonies of the second class no such right of legislation by the crown exists at all. Under all circumstances, and whatever be their political constitution, all colonies are subject to the legislative control of the British parliament. A colony, however, is not affected by acts of parliament passed *after its acquisition.*

In the case of colonies acquired by occupancy, acts passed before their acquisition come into

force immediately on that event; but colonies conquered, or ceded, are not affected by statutes passed before their acquisition.

An alien whose sovereign is in amity with the crown of England, residing here and receiving the protection of the law, owes a local allegiance to the crown during his residence. If during that time he commits an offence which, in the case of a natural-born subject, would amount to treason, he may be dealt with as a traitor, for his person and personal estate are as much under the protection of the law as the natural-born subject's, and if he is injured in either he has the same remedy at law for such injury. Alien friend.

Likewise an alien whose sovereign is at enmity with us, living here under the king's protection, and committing offences amounting to treason, may likewise be dealt with as a traitor, for he owes a temporary local allegiance founded on the share of protection he receives. Alien enemy.

II. *The Bankers' case,* 2 Will. & M. *Bankers' case.*

The crown having granted annuities to various persons in consideration of moneys advanced to it, it was held that a remedy by petition to the barons of the Exchequer was available to compel payment of such annuities by the crown.

III. *Leach* v. *Money,* 19 St. Tr. 1001, 6 Geo. III., A.D. 1765. *Leach v. Money.*

Seizure of the Person.

A general warrant issued by a secretary of state

to search for and seize the author (not named) of a seditious libel is illegal.

Wilkes v. *Wood.*

IV. *Wilkes* v. *Wood,* 19 St. Tr. 1153, 3 Geo. III., A.D. 1763.

Seizure of Papers.

A general warrant issued by a secretary of state to search for and seize the papers of the author (not named) of a seditious libel is illegal.

Entick v. *Carrington.*

V. *Entick* v. *Carrington,* 19 St. Tr. 1030, 6 Geo. III., A.D. 1765.

Seizure of Papers.

A warrant issued by a secretary of state to seize the papers of the author (named) of a seditious libel is illegal.

Law as to general warrants epitomised.

The law upon the subject before us may be thus epitomised: — The sovereign cannot personally arrest a man, or commit a man by word of mouth, though he may do so by matter of record, or warrant setting forth the offence charged in order that the court may determine whether it is known to our law, and if so whether it be bailable or not. The power thus inherent in the sovereign has by him in practice been delegated to his privy council, or to his secretary of state. His power does not extend to authorize the seizure of papers of an accused.

Cases seemingly in opposition to the prin-

ciples laid down in *Wilkes* v. *Wood* and *Entick* v. *Carrington*:—

(A) The secretary of state has the right to open letters. Cases seemingly in opposition to above.

(*a*) Because a carrier is not bound to carry dangerous matter:

(*b*) Because he might by so doing make himself liable as an accomplice.

(B) Search Warrants.

VI. *Hill* v. *Bigge*, 5 Moo. P. C. C. 465; 5 Vict. A.D. 1841. *Hill* v. *Bigge*.

Liability of a Governor of a Dependency.

An action of debt is maintainable in the court of first instance in the Island of Trinidad against the governor of the island.

(*a*) *Civil Liability of a Governor.* Civil liability of a governor.

It is now clearly established that the governor of a dependency is liable both civilly and criminally for his conduct in such government. Lord Mansfield's well-known judgment in *Mostyn* v. *Fabrigas* (*a*) has reference to the question, since clearly established, that an action is maintainable here for an assault committed abroad.

In *Cameron* v. *Kyte* (*b*), it was held that the governor of a colony has not, by virtue of his appointment, the sovereign authority delegated to him, and that an act done by him, unauthorized Governor not a viceroy.

(*a*) S. C., 20 St. Tr. 81. (*b*) Knapp, P. C. C. 332.

either by his commission, or expressly or impliedly by his instructions, is not equivalent to such an act done by the crown itself, and is consequently invalid.

Criminal liability of a governor.

(*b*) *Criminal Liability of a Governor.*

As regards the criminal responsibility of the governor of a colony for an act done by him whilst discharging the functions of his office, reference must be made to the stat. 11 & 12 Will. III. c. 12: "An Act to punish Governors of Plantations for Crimes by them committed in such Plantations." The preamble of that statute is remarkable; it recites that a due punishment is not provided for several crimes and offences committed out of this realm of England, whereof divers governors of plantations and colonies have taken advantage, and have committed crimes and offences, not deeming themselves punishable for the same here, nor accountable for such their crimes and offences to any person within their respective governments; and for remedy thereof, it is enacted that such offences shall be tried in the Court of King's Bench in England.

The two most celebrated cases showing the criminal liability of the governor of a dependency are those of General Picton and Governor Wall.

General Picton's case.

General Picton was indicted for having, while governor of Trinidad, illegally inflicted torture on one Louisa Calderon, to compel her to confess a crime of which she was accused. This fact

having been proved in evidence, it was argued for the defence that after Trinidad had been ceded to the English crown, the pre-existing Spanish law remained in force, and that what the defendant had done was authorized under such law.

Lord Ellenborough, C. J., in summing up, left to the jury the question whether the application of torture formed part of the law of Trinidad at the time of the cession of that island. They found "that there was no such law as this existing at the time of the cession;" on which finding a verdict of "guilty" was recorded.

A rule for a new trial was afterwards moved for, on the grounds that the law of Spain had been misrepresented at the trial, and that the defendant had been acting in a judicial capacity at the time when the misdemeanour charged was alleged to have been committed.

In showing cause against the rule, it was contended that, even if torture had been lawful when Trinidad was ceded, it was nevertheless unlawful so soon as the island became British territory, by analogy to the principle that a slave becomes free directly he sets foot in this country. The rule was made absolute, Lord Ellenborough saying that this was a case of great importance, and that, if possible, it would be desirable to have a special verdict in order that the question might be argued whether the application of torture could be consistent with the law of Great Britain.

On the second trial, the jury found a special

verdict setting out the facts of the case, and expressing their inability to decide whether the defendant was guilty or not.

Mr. Nolan, arguing for the crown on the special verdict, contended that the Spanish law authorizing torture could not have continued to exist, as being contrary to the fundamental principles of the British Constitution; and citing the statute 11 & 12 Will. III. c. 12, he argued that every colonial governor was bound to conform himself to the law of this country in the administration of his government, under the penalty of being here responsible for his misbehaviour. In Hilary Term, 1812, the defendant's recognizances were ordered to be respited till the court should further order, and after this no other proceedings were taken in the above case.

Governor Wall's case.

In *Governor Wall's case*, it was decided that a governor might be guilty of murder, but that allowance must be made for the position of affairs.

Summary.

Summary of the Law as to Liability of a Governor.

(A) For acts done as governor.

(1) Not liable in his own courts during his term of office.

(2) He can, however, be sued or prosecuted in England *after* his time of office, and *semble during* time of office.

(B) For acts done before appointment as governor.

(1) Is liable in his own courts for debts con-

tracted before appointment. Vide *Hill* v. *Bigge*.

(2) *Semble*, he is liable in his own courts for debts contracted during office, if unconnected with office; *à fortiori* in England.

VII. *Sutton* v. *Johnstone*, T. R. 493; 24 Geo. III., A.D. 1784. *Sutton v. Johnstone.*

Liability of Officer in Service of the Crown.

The commander of a squadron who, maliciously and without reasonable and probable cause, brings before a court-martial the captain of a vessel under his orders for an alleged breach of duty, is not for so doing liable to an action at suit of his subordinate.

VIII. *Kemp* v. *Neville*, 10 C. B., N. S. 523, A.D. 1861. *Kemp v. Neville.*

Liability of a Judicial Officer.

(1) The judges of the superior courts not liable for any acts done as such, on the ground that their jurisdiction is universal.

(2) Judges of the inferior courts not liable if they act within their jurisdiction, even if *malâ fide*.

(3) If judges of courts not of record, not liable if they act *bonâ fide*.

FINIS.

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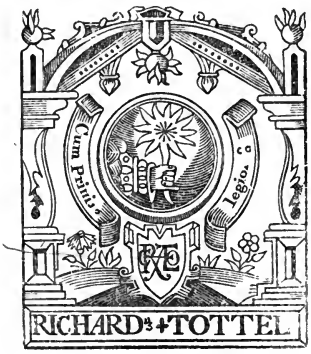

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